At the core of the lawyer-client relationship is the lawyer’s obligation to put their client’s interests above their own personal or professional interests. What, however, happens to this obligation when a client’s ability to make decisions in his or her own interest is compromised? This paper explores certain ethical issues that arise when lawyers represent incapacitated clients, including their obligation to avoid conflicts of interest, to preserve lawyer-client privilege and to maintain professional integrity.

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Issues of professional responsibility and the appropriate conduct of lawyers are closely related to concepts of justice, loyalty and integrity in our legal system. When the public is provided with legal services it is extremely important that these concepts be put in practice.\(^1\) While certain actions by lawyers clearly interfere with the proper operation of the legal system, such as fraud, other professional situations raise more complex ethical issues.

The core of the lawyer-client relationship is the lawyer’s obligation to put their client’s interests above their own personal or professional interests.\(^2\) This principle helps increase public confidence in the legal system and prevents lawyers and other interested parties from taking advantage of vulnerable clients. What, however, happens to this obligation when a client’s ability to make decisions on their own behalf is compromised?

Although Canadian law societies provide ethical rules for lawyers dealing with clients with poor or diminished mental capacities,\(^3\) the competing interests of the client, spouses, family members and the legal system makes these rules difficult to apply in practice. In such circumstances, a lawyer representing a client may be faced with a variety of problems posed by three major ethical obligations of the profession: the protection of a client’s interests, confidentiality and professional integrity.

One of the greatest difficulties faced by the lawyer of an incapacitated client is to ensure that the client’s best interests are always protected. Undoubtedly, it is a challenge when a client cannot convey his or her interests effectively and in these situations the lawyer’s professional obligation is to act as representative and vigorously defend the

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client. In other words, a lawyer must always act loyally and be faithful to the client’s interests. A lawyer must also be vigilant and ensure that other interested parties – for example, other family members – do not make decisions for the client, unless expressly allowed by law to do so.

In terms of lawyer-client privilege, the ethical rules in Ontario are a double-edged sword. Professional confidentiality is extremely important and ensures open communication between lawyer and client. That being said, it is also important that lawyers ensure that guardians are appointed to protect the interests of clients who can no longer make decisions on their own behalf. The problem, however, arises when a client’s competence is questioned. It may then be extremely difficult for the lawyer to ensure that an appropriate diagnosis is reached, while still keeping the client’s personal information strictly confidential. Unfortunately, there is no hard and fast solution to help lawyers strike a balance between these competing interests. That said, recommending the appointment of a disinterested administrator may be a good initial strategy for lawyers representing incapacitated clients.

Finally, in addition to the well known principles of loyalty and confidentiality, the Ontario Rules of Professional Conduct impose a general obligation on lawyers to act honourably and with integrity. In applying this principle, it is essential that lawyers respect not only the letter, but the spirit of the Rules. To do so may require a lawyer to refuse a client’s request under certain circumstances – for example, a request that he or she cease acting for the client – if it is obvious that the client is no longer capable of making their own decisions due to an incapacity and therefore of protecting their own best interests.
It is important to note that there are many different diagnostic approaches to determining mental capacity. This paper does not aim to examine the options available to lawyers and health professionals for identifying mental incapacity or the legal threshold required for determining mental incapacity. The paper will instead address the issue of the professional responsibility of lawyers who provide legal services to a potentially incapacitated client, the possible major ethical challenges when doing so, and finally, effective strategies that can be adopted in such cases.

Mental incapacity and the Ontario legal framework

One of the greatest challenges when providing legal services to potentially incapacitated clients is the need to reconcile the contradictory interests of the various parties involved in a case. The spouses, the children and even the lawyer may find that a client is no longer capable of independent decision-making and be tempted to make decisions in his or her stead. In such situations, how can a lawyer definitively confirm his or her suspicion that a client may be incapacitated, and what is the appropriate course of action?

The basic common law principle is as follows: it is presumed that every person has the legal capacity to make decisions in their own interest. Mental incapacity must be proven before a person is deprived of this decision-making power. Consequently,

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5 In Ontario, this common law principle is codified in s. 2(1) of the 1992 Substitute Decisions Act, S.O. 1992, c. 30.
parties in a legal matter can never replace a client’s decision-making power without the consent of the law.

In Canada, there is no single legal definition of incapacity. Definitions of incapacity depend on the context in which the term is used, as well as the goals and intentions of the relevant laws and regulations. There is therefore no rule that applies under all circumstances to support a conclusive finding that an individual is incapacitated.

For Ontario lawyers, the 1992 Substitute Decisions Act (the “Act”) establishes the general legal test for when a person is considered incapacitated. Section 6 of the Act defines incapacity to manage property as a situation in which an individual is not able to:

\[\text{[U]nderstand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.}\]

In terms of personal care, section 45 of the Act provides that:

\[A \text{ person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.}\]

A person who cannot meet the standards of these two sections is often considered legally incapacitated and thus incapable of independent decision-making. In such circumstances, a guardian or a person exercising power of attorney is normally appointed to make

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9 Ibid., s. 6.
10 Ibid., s. 45.
decisions on behalf of the individual so long as he or she cannot demonstrate the required
degree of competence.\footnote{11}

That said, in Ontario only the Consent and Capacity Board (the “Board”) can
determine that a person is legally incapacitated, and a person’s decision-making power
may not be withdrawn without an order from the Board.\footnote{12} Thus, lawyers do not have to
determine whether a client is incapacitated, but they are still responsible for providing
effective legal services.

The \textit{Rules of Professional Conduct} of the Law Society of Upper Canada (the
“Rules”) establish, among other things, the relevant professional requirements for
lawyers.\footnote{13} Rule 2.02(6) obliges lawyers to maintain a normal lawyer-client relationship
with clients whose capacity to make decisions is diminished, especially due to a mental
disability. This Rule is discussed in the following Commentary:

\textit{A lawyer and client relationship presupposes that the client has the requisite
mental ability to make decisions about his or her legal affairs and to give the
lawyer instructions. A client’s ability to make decisions, however, depends on
such factors as his or her age, intelligence, experience, and mental and physical
health, and on the advice, guidance, and support of others. [...]}

\textit{In any event, the lawyer has an ethical obligation to ensure that the client’s
interests are not abandoned.}\footnote{14}

The basic rule for a lawyer representing an incapacitated client is as follows: if the
incapacity is such that the client no longer has the legal capacity to exercise control over

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\begin{itemize}
\item \footnote{11} Ibid., s. 9(3).
\item \footnote{12} The Consent and Capacity Board is an independent institution appointed by the provincial Government of Ontario under the \textit{Health Care Consent Act}, S.O. 1996, c. 2, Sch. A., s. 10(2).
\item \footnote{13} \textit{Supra} note 2.
\item \footnote{14} \textit{Supra} note 2, Comment on Rule 2.02(6).
\end{itemize}
his or her legal affairs, the lawyer may have to take action to have a legally authorized representative appointed.\(^{15}\)

According to the Law Society of Upper Canada, professional malpractice clearly occurs when a lawyer acts for a client who does not have the necessary mental capacity to provide instructions. Such conduct may therefore result in disciplinary action.\(^{16}\)

Although this basic rule provides a good framework for the provision of legal services to potentially incapacitated clients, it leaves unanswered several questions related to potential conflicts, which are more subtle or hidden. How can a lawyer ensure that the client’s interests are always protected when the client cannot convey them effectively? What is the lawyer’s responsibility in cases where he or she suspects that a third party may be taking advantage of an incapacitated client? Must lawyers go beyond the call of legal duty in such cases?

To answer these questions, it is helpful to analyze three fundamental professional obligations related to client representation: loyalty, lawyer-client privilege and integrity.\(^{17}\)

Conflicts of interest and the lawyer’s role

When a client’s mental capacity is in doubt, it may be difficult to separate the interests of the parties involved from those of the client. Spouses, children or even lawyers themselves may believe that they are capable of making better decisions on behalf of the client. This approach, however, may result in significant breaches of professional responsibility in regard to conflicts of interest.

\(^{15}\) Supra note 7 on p. 202.
\(^{16}\) Ibid. on p. 203.
\(^{17}\) Christine Parker and Adrian Evans, Inside Lawyers’ Ethics, Cambridge, Cambridge University Press, 2007 on p. 151.
The lawyer-client relationship is based on a lawyer’s obligation of loyalty to his or her client. This principle is one of the most fundamental commitments a lawyer has to his or her clients, and it sets the expectation for a lawyer’s conduct. Such conduct should be – and should appear to be – beyond reproach.\(^\text{18}\) In Ontario, the principle of loyalty is set out in two Rules: 2.02(2), which requires the client’s interests to be paramount, and 2.04(3), which obliges lawyers to withdraw from possible conflict of interest situations with a client unless there has been adequate disclosure before the case is taken on.

The prohibition on conflicts of interest is based on the assumed disinterestedness of the lawyer, who is able to exercise his or her independent professional judgment.\(^\text{19}\) The rules dealing with conflicts of interest exist to strengthen lawyers’ loyalty to their clients. Thus, a lawyer’s personal or professional interests must generally not be in conflict with those of the client.\(^\text{20}\)

Although it is not a lawyer’s role to determine legal capacity – this is up to the Board – lawyers are obliged to ensure that a client’s best interests are always protected. Through their professional interactions, lawyers may be involved in a preliminary assessment of a client’s legal capacity and they may therefore have to refer a client to a physician for a cognitive capacity examination.\(^\text{21}\)

The general protection of a client’s best interests is based on a lawyer’s fiduciary duty, which is derived from general principles of loyalty and transparency.\(^\text{22}\) Lawyers

\(^\text{18}\) *Supra* note 1 on p. 290.
have a special fiduciary duty to incapacitated clients, which exceeds their general professional commitment because they have to ensure that their actions always focus on their client’s best interests.\textsuperscript{23} But how can a lawyer defend his or her client’s interests when the client is unable to convey them effectively?

In the case of a person who clearly cannot make decisions, a guardian can usually be appointed through a power of attorney.\textsuperscript{24} The real challenge for a lawyer, however, is when a client’s competence gradually declines or the client loses the ability to make decisions in some situations but not in others.\textsuperscript{25}

Lawyers can never be certain when a client can no longer make decisions independently, and they should therefore act on a case by case basis to ensure that their clients are protected. In such situations, the lawyer’s role as an agent and defender is undoubtedly one of the profession’s most important functions.

The study materials for the bar admission exam distributed by the Law Society of Upper Canada contain very sound advice to assist lawyers to understand the needs of incapacitated clients and provide appropriate legal services. In case of doubt, lawyers should ask their client what he or she needs.\textsuperscript{26} If lawyers are uncertain which legal services are most appropriate for a client, the best approach is often to ask the client themselves.

While a client’s mental capacity is a sensitive topic to discuss, discussing the most appropriate legal services with the client, such as the possibility of appointing an

\textsuperscript{23} Allan Hutchison, \textit{Legal Ethics and Professional Responsibility}, Toronto, Irwin Law, 2006 on p. 100.
\textsuperscript{24} \textit{Supra} note 8, s. 16(1).
\textsuperscript{26} \textit{Supra} note 7 on p. 198.
administrator, ensures a lawyer demonstrates an effort to uphold the obligation to be loyal.

It should also be noted that when a lawyer is uncertain whether a client understands all the consequences of his or her actions there is a risk that a third party may exploit the client, especially when the client’s interests conflict with those of family members, spouses or other parties involved, particularly when the client does not pay the lawyer’s bill.

Where a third party is responsible for the fees for work done on behalf of an incapacitated client, lawyers must ensure that they are protecting their client’s interests to the exclusion of all other interests, including those of third parties who may pay their fees.\(^{27}\) In Ontario, if a client’s incapacity has not been legally determined, it is professional misconduct for a lawyer to act for the client, while at the same time following another person’s instructions.\(^{28}\)

**Lawyer-client privilege**

As well as the obligation to protect a client’s interests, lawyers also have a duty to maintain client confidentiality.\(^{29}\) This principle is known as lawyer-client privilege, and is one of the most important principles guiding the conduct of lawyers. Lawyers must treat client information with the strictest confidentiality. For lawyers in Ontario, this principle is set out in Rule 2.03(1):

\[
A \text{ lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client [...] and shall not divulge any such information}
\]

\(^{27}\) *Supra* note 23 on p. 155.

\(^{28}\) Ibid. on p. 203.

\(^{29}\) *Supra* note 1 on p. 241.
unless expressly or impliedly authorized by the client or required by law to do so.30

The profession vigorously defends the principle of lawyer-client privilege for many reasons, particularly to encourage open communication between lawyer and client.31 Although the obligation of confidentiality is incumbent on lawyers, the right belongs to the client because it is designed for the client’s protection.32 From the client’s perspective, lawyer-client privilege is crucial because it discourages the exploitation of vulnerable clients.33

In R. v. Derby Magistrates’ Court, Lord Taylor explained the usefulness of lawyer-client privilege and the responsibility of lawyers in these terms:

[...] a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent.

It is a fundamental condition on which the administration of justice as a whole rests.34

In other words, a lawyer cannot provide effective professional services if the client does not dare to communicate freely because the lawyer lacks discretion.35

In the absence of the client’s consent, the principle of lawyer-client privilege prevents the disclosure of a client’s information, with certain exceptions,36 which include a child’s well-being,37 criminal activity38 and money laundering.39 Apart from these exceptional cases, lawyers who violate their obligation of confidentiality towards a client

30 Supra note 2.
31 Supra note 1 on p. 241.
32 Supra note 19 on p. 32.
33 Ibid. on p. 32.
35 Supra note 2, Comment on Rule 2.03.
36 Supra note 1 on p. 36.
38 Supra note 2, Rule 2.02(5).
may be sued, as well as disciplined for their conduct; evidence that the lawyer-client relationship is a serious matter.\(^40\)

Although the purpose of lawyer-client privilege is to encourage an effective relationship between the lawyer and the client, many lawyers may feel that it acts as a constraint due to contradictory professional obligations.

Recalling the principle of the primacy of a client’s interests, lawyers are under an obligation to always ensure that their clients’ best interests are protected.\(^41\) But what happens when it is in a client’s best interest that a guardian be appointed because they are no longer capable of making their own decisions? Does lawyer-client privilege prevent a lawyer from questioning a client’s competence based on information obtained as part of their professional relationship? At what point do the rules that protect mentally incapacitated clients come into play?

The American Bar Association has developed model rules to help lawyers resolve these difficult questions. Rule 1.14 of the *Model Rules of Professional Conduct* is similar to Rule 2.02(6) of the *Rules of Professional Conduct* of the Law Society of Upper Canada in that it requires lawyers to try to maintain a normal lawyer-client relationship despite a client’s diminished capacities.\(^42\) Unlike Rule 2.02(6), however, the American Bar Association Rule also states that under certain circumstances a lawyer may apply for guardianship for an incapacitated client.\(^43\)

\(^{40}\) Supra note 17 on p. 152.
\(^{41}\) See Supra note 2, Rule 2.02(2).
\(^{43}\) Ibid.
Stephen Eugster, a Washington state lawyer, recently faced such a situation.\textsuperscript{44} Mr. Eugster was representing an elderly widow who had asked that her son be removed as administrator of her property because she thought he was not acting in her best interests.

Mr. Eugster contacted the son to obtain information about a property transfer and, after a brief investigation, decided that the son was acting properly. He therefore wrote to his client, suggesting that she not change her property arrangements. The client asked for the opinion of another lawyer, who did not agree with Mr. Eugster’s evaluation and, in the end, the new lawyer took over the file.

Mr. Eugster was under the impression that it was highly likely that the client was no longer competent and that the new lawyer was exercising undue influence over her. As such, he filed a petition to have the client’s son appointed guardian.

A medical evaluation determined that the client was mentally competent, and the petition was set aside. The client then lodged a complaint with the Washington State Bar Association. After a disciplinary board hearing, the Bar ordered that Mr. Eugster be disbarred. The Washington Supreme Court later reduced the punishment to an eighteen-month suspension.\textsuperscript{45}

During his hearing, Mr. Eugster argued that Rule 1.14 obliged him to apply for guardianship because he truly believed that his former client’s interests were at risk. The disciplinary board responded, however, that Mr. Eugster did not verify the client’s mental capacity before his professional involvement with her was terminated. The board therefore found that Mr. Eugster had violated his ethical obligations and, ironically, that

\textsuperscript{45} Ibid.
he had acted against his former client’s interests by divulging confidential information to other people.46

The Supreme Court of Washington stated that in this situation the principle of lawyer-client privilege was more important than the need to protect the interests of a potentially mentally incapacitated client.47 But what then should lawyers in Ontario do to protect a client in a similar situation?

While the Rules do not directly refer to this issue, the commentary for Rule 1.14 of the Model Rules of Professional Conduct provides very good guidance. It suggests that a petition for guardianship, although permitted, should be a lawyer’s last resort.48

For many people with mental health problems, their medical information should naturally be considered personal and private. Lawyers must therefore always hold information concerning a client’s mental capacity in confidence, except with the client’s authorization or if there is an exception to the rule.49 Consequently, lawyers should always keep in mind the client’s wishes, interests and goals.

A particularly interesting point in the Eugster matter is that the lawyer who succeeded Mr. Eugster seems to have struck a better balance between his obligations to protect his client’s interests and to maintain lawyer-client privilege. As suggested in the commentary to Rule 1.14, this lawyer had the client sign a power of attorney agreement, which appointed a professional fiduciary administrator to control her affairs, thus

46 Ibid.
47 Ibid.
49 Supra note 7 on p. 204.
protecting her interests without compromising her wish not to extend her son’s powers over her personal or financial affairs.\(^50\)

Incapacity is not normally an exception to lawyer-client privilege, allowing disclosure by a lawyer. Therefore, when a lawyer thinks a client may be incapacitated it is essential that he or she avoid breaching the obligation to respect client confidentiality. Conversely, a lawyer is also responsible for ensuring that a client’s interests are always protected.

Undoubtedly it is difficult to achieve this balance between confidentiality and loyalty. A solution such as appointing a disinterested third party to act as an administrator may be a good initial strategy; this arrangement takes into account the interests of the potentially incapacitated client while maintaining the strictest confidentiality.

*Integrity and the principle of unjustified obedience*

While the *Rules of Professional Conduct* of the Law Society of Upper Canada are central to the efforts to create professional expectations regulating the conduct of lawyers across Ontario, their most important aspect, in my opinion, is also the least explicit.

When determining the scope of one’s general duty to a client, lawyers must recognize that there is a significant difference between legal and moral behaviour.\(^51\) In the Eugster matter the lawyer may have believed that his actions were in compliance with the professional rules of conduct, but from a moral point of view it was clear that he was trying to replace his client’s decision-making powers with his own. The following

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\(^50\) *Supra* note 44.  
\(^51\) *Supra* note 23 on page 100.
question is central to a lawyer’s professional responsibility: how can lawyers draw the line between ethical and legal principles?\textsuperscript{52}

The key to resolving the dilemma of a lawyer’s proper role can be found in Rule 1.03(1). This Rule states that lawyers have the duty to carry on the practice of law and discharge all their responsibilities to their clients honourably and with integrity.\textsuperscript{53} The scope of this Rule is very broad, but if it is read in conjunction with its objective it appears to suggest that lawyers must act responsibly, based on the principles and objectives of our legal system, not only towards clients but also towards the Law Society and the public in general.

Although it may be sufficient from a legal standpoint to carry out a client’s wishes, a lawyer doing this is clearly failing to adequately perform their moral duty to act with integrity.

In certain circumstances, such as the commission of a crime, a lawyer is obliged to refuse to carry out actions requested by the client if it conflicts with professional ethics.\textsuperscript{54} Similarly, with an incapacitated client lawyers are also responsible for ensuring that they act with integrity.

Where professional duties conflict, a lawyer’s ethical commitments may serve to determine the scope of his or her responsibilities. Lawyers must be sensitive to the fact that overzealous advocacy on behalf of clients is not always the priority.\textsuperscript{55} Moral conduct

\textsuperscript{52} Ibid. on p. 101.
\textsuperscript{53} Supra note 2, Rule 1.03(1).
\textsuperscript{54} Supra note 2, Rule 2.02(5).
\textsuperscript{55} Supra note 17 on p. 152.
may sometimes oblige a lawyer to refrain from certain actions that might be permitted in
the context of their legal responsibilities.\textsuperscript{56}

It is not difficult to imagine a scenario in which a lawyer should refrain from
carrying out an incapacitated client’s request because it is incompatible with the lawyer’s
professional obligation to act honourably and with integrity. For example, while lawyers
are obliged to withdraw from a case at the client’s request,\textsuperscript{57} if the client is incapacitated
such a withdrawal might prejudice the client’s interests – an outcome that could hardly be
described as honourable or a reflection of integrity.

The professional commitment of a lawyer representing an incapacitated client is
based on the concept that he or she should not blindly comply with the client’s wishes
regardless of circumstance. Conversely, a lawyer is responsible for conducting
themselves with integrity to ensure that justice is administered,\textsuperscript{58} even if this requires
opposing a client’s request.

Another reason why both moral and legal considerations must be taken into
account is that the delivery of legal services should not be restricted simply to avoiding
reprimand from the Law Society. Rather, it should include the ethical knowledge and
qualifications required for a lawyer to properly play a full role in society and in his or her
client relations.

An approach to client representation that includes and encourages integrity
provides a more complete view of what is expected of a lawyer and of a lawyer’s
professional conduct. This principle also ensures that lawyers will represent an
incapacitated or potentially incapacitated client in such a way as to not only protect the

\textsuperscript{56} \textit{Supra} note 23 on p. 101.
\textsuperscript{57} \textit{Supra} note 2, Rule 2.09(7).
\textsuperscript{58} \textit{Supra} note 2, Rule 4.06(1).
client, but also facilitates the proper operation of the legal system and the administration of justice.

Comments, observations and alternatives

In 1993, the United Kingdom Law Commission published a report entitled *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research.*\(^{59}\) The report makes three major recommendations: 1) people should be able to and encouraged to make what decisions they can; 2) intervention without third-party authorization should be kept to the minimum; and 3) appropriate protection should be put in place to prevent abuse.\(^{60}\) Although it focuses on medical issues, the report provides the legal profession with a good framework for reflection when similar issues arise, especially as the profession’s rules are often insufficient for this purpose.

The Law Society of Upper Canada *Rules* provide lawyers with advice that covers their general professional responsibilities, but they do not provide a great deal of certainty as to how these principles will be determined. The *Rules* should help lawyers decide whether a client can understand his or her legal situation, and what action they must take when they suspect mental incompetence. In other words, the *Rules* should try to elaborate on capacity issues to enable lawyers to better serve their clients.\(^{61}\)

\(^{59}\) *Supra* note 4 on p. 3.

\(^{60}\) Ibid. on p. 3.

Unlike the American Bar Association’s *Model Rules of Professional Conduct*, the *Rules* do not directly touch on the issue of clients who cannot instruct their lawyers because of a mental incapacity. 62

Without explicit benchmarks lawyers are on their own and left in an awkward situation when there is uncertainty surrounding a client’s mental competence. Rule 2.03(1) stresses confidentiality and prevents any disclosure whatsoever unless authorized by the client or required by law. The commentary on this Rule indicates that lawyers are not bound to reveal that they are acting for a client. This Rule therefore prevents lawyers from discussing a client’s mental competence with family members or friends, except with the client’s authorization.63

When a new client has been provided with legal services, it is unreasonable to expect the lawyer to be able to determine whether the client’s behaviour is abnormal and therefore a medical evaluation is called for. This then makes it more difficult for lawyers to strike a balance between the requirements of lawyer-client privilege and protection of the client’s interests.

Similarly, in contrast to Rule 2.03(1) of the *Rules of Professional Conduct*, Rule 1.14 establishes a test for incapacity that is solely based on the lawyer-client relationship. The Rule states that the test for incapacity is based on the client’s capacity “to make, with all the nuances that imposes, a decision in line with the representation provided.”64

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62 The context of much of the literature available on the relationship between a lawyer and an incapacitated client is criminal law and when a lawyer should bring up the defence of insanity.

63 *Supra* note 61 on p. 746.

64 *Supra* note 42 on p. 45.
other words, the lawyer should concentrate on how the decisions are reached rather than on their validity. \textsuperscript{65}

This approach is helpful in practice because it distinguishes decisions detrimental to the client from irrational decisions not based on the ability to understand foreseeable consequences. If a client can demonstrate that his or her thought rests on a sound understanding of the legal situation, the client’s instructions must be followed, even if they are detrimental to the client. \textsuperscript{66}

\textit{Conclusion}

Given their unique relationship with their clients, it is essential for lawyers to be aware of the challenges they may face when providing legal services to incapacitated clients. Being able to understand, foresee and take up the moral challenges posed by contradictory interests represents undoubtedly one of the most difficult aspects of a lawyer’s professional responsibility because the circumstances do not always present themselves in an orderly manner. \textsuperscript{67}

It is important for lawyers to be able to identify the interests of the parties involved, including their own interests, to ensure that they prioritize their client’s needs. Their judgment and actions must not be influenced by secondary interests. \textsuperscript{68}

Although the strict application of the ethical rules is the start and end for determining the appropriate conduct for lawyers, following them blindly may result in

\textsuperscript{65} \textit{Supra} note 61 on p. 747.  
\textsuperscript{66} Ibid.  
\textsuperscript{67} \textit{Supra} note 17 on p. 179.  
\textsuperscript{68} Ibid. on p. 157.
outcomes that run counter to ethical behaviour.\textsuperscript{69} Lawyer-client privilege is extremely important when providing effective legal services. Nevertheless, while this principle is basic to the lawyer-client relationship, where a lawyer suspects incapacity, situations may arise in which he or she has the ethical duty to protect the client. At the moment, the Ontario \textit{Rules} do not entirely address this challenge, which puts lawyers representing incapacitated clients in a difficult position.

To take up this challenge, lawyers can refer to general ethical principles to determine what course of action they should adopt in order to provide incapacitated clients with appropriate legal services.\textsuperscript{70}

Finally, it is striking that the ethical framework in Ontario lacks a guide setting out how to recognize the signs that a client may be incapacitated and what strategies to adopt in such situations. A number of law societies provide such guides, which certainly helps lawyers to adequately address the legal and moral dilemmas they face when providing incapacitated clients with services.\textsuperscript{71} Unless the \textit{Rules} become more detailed, such a guide would undoubtedly provide better direction for Ontario lawyers.

\textsuperscript{69} Ibid. on p. 246.
\textsuperscript{70} Ibid. on p. 171.
\textsuperscript{71} For an example of a very good resource to help lawyers determine a client’s poor mental capacity, see: \textit{Supra} note 6.