FAMILY LAW:
AVOIDING CLAIMS OF MISCONDUCT AND NEGLIGENCE AND DEALING WITH QUESTIONABLE CAPACITY OR INTEGRITY OF CLIENTS

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PART I

Before addressing issues of stress, capacity, and integrity of our clients I want to turn the focus on our role as lawyers in the practise of family law. Family law can be one of the most rewarding but challenging areas of the law in which to practice. It is vital that we regularly take time out to recharge, reflect and remind ourselves of the key "tools of trade" of the lawyer. We must carry our foundational tools every day. We will fail our clients, ourselves as lawyers, the legal profession to which we belong and the public if we do not.

The analogy is really like a carpenter with her tool box, the doctor with her medical kit or even the Pilates student working on her core strength.

Why start here?

If we know our foundational tools we are well equipped to provide a competent diligent and professional service to all clients whether difficult or not. This also ensures we will avoid any claims of unprofessional conduct or negligence**.**

So what are the key tools that we as lawyers must carry and remind ourselves of daily?

I. **To maintain our own mental and physical health**
II. **To maintain a sense of humour, collegiality, enjoyment and preferably a passion for what we do.**
III. **To know and use our key support people**
IV. **To maintain our own knowledge of the law and the processes.**

V. **To remember our oath at our admission to the bar of our Supreme Court**

VI. **To know relevant parts of SA Legal Practitioners Act 1981 & Regs. 2014**

VII. **To know our Australian Solicitor's Conduct Rules**

VIII. **To know our family law professional obligations as set out in R1.08 Family Law Rules**

IX. **To be guided by Best Practice Guidelines for Family Lawyers (from Family Law Council and Family Law Section of the Law Council of Australia).**

X. **To use Law Society Support services for ethical, professional and potential negligence issues at an early stage.**

Our own Mental and Physical Health

I do not need to remind you of the emphasis now being placed on this area by Law Societies throughout Australia due to the alarming increase in mental and physical ill health of lawyers. Family law is one of the most stressful areas of law to practice in. You are dealing with highly emotional and often irrational clients and must know how to destress and debrief regularly. Your health, proper eating and exercise are vital. Work-life balance is essential. No matter how pressing client's matters are, it should be rarely the case you work longer than a 10 hour day, 5 times a week. Make evenings and weekends your time. It is essential in this area of law.

To maintain a sense of humour, collegiality, enjoyment and preferably a passion for what we do and to know

Integral to the maintenance of our health is doing all we can to surround ourselves with key support people to 'bounce off' for light relief, for advice and collegiality. Time out to destress is even possible in the workplace and should occur daily. Do you have a social event with fellow office workers at least once a quarter? Do you insist your manager gives you regular feedback and support? Don't wait for it to be offered.

Use our key support people

We must surround ourselves with counsellors, psychologists, psychiatrists, financial advisers and senior legal practitioners, as a source of referral for clients but also as a source of support for ourselves and as a 'sounding board' for difficult matters. The collaborative approach to dealing with family law matters is gaining some interest in Australia and is certainly very popular in the United States. There is a collaborative

team in South Australia. You may be interested in exploring this integrated approach to practice.

To maintain our own knowledge of the law and the processes

Maintaining our own knowledge of the *Family Law Act (1975)* and other relevant legislation and case law is essential for us to provide accurate and timely legal advice. It will also avoid negligence claims. Do you build into your working day time to keep abreast of the latest in our jurisdiction?

To remember our oath or affirmation given at our admission to the Bar of our Supreme Court…

> *"That I will diligently and honestly perform the duties of a practitioner of this Court and will faithfully serve and uphold the administration of justice under the Constitution of the Commonwealth of Australia and the laws of this State and the other States and the Territories of Australia."*

Martin Bartfeld QC of the Victorian Bar in his paper '*Ethics for Family Lawyers, The Duty to the Court'*[1] says the right to call yourself a barrister and solicitor and to be a member of an honourable profession includes the obligation to:-

(a) act diligently in the interests of the client to the extent permitted by the law and ethical considerations
(b) To behave ethically in all dealings with clients, other practitioners, the Court and the public;
(c) To ensure that the profession, or the Court, is not brought into disrepute
(d) To discharge the various duties to the Court.

[1] Martin Bartfeld QC 'Ethics for Family Lawyers – The Duty to the Court' Family Law Section (December 2007)

Bartfeld says that *'in endeavouring to ensure that a level playing field is maintained, the Court looks to its officers, barristers and solicitors, to ensure that cases are presented fairly and the system of justice can operate effectively'*.

Lord Reid in *Rondel v Worsley*[2] at 227

> *"Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession and to the public, which may and often does lead to conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court."*

This applies equally to solicitors.

Section 68 of the South Australian *Legal Practitioners Act* (1981) (amended in 2014) defines unsatisfactory professional conduct as:- Conduct of a legal practitioner occurring in connection with a practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

Section 69 of the Act[3] defines professional misconduct as:-

(a) Unsatisfactory professional conduct of a legal practitioner where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
(b) Conduct of a legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to practice the profession of the law.

Section 70 of the Act defines conduct capable of constituting unsatisfactory professional conduct or professional misconduct. It includes conduct consisting of a

[2] [1969] 1 AC 191 at 227
[3] *Legal Practitioners Act 1981 (SA)*

contravention of the Act, the Regulations[4] or the Legal Profession Rules, amongst other prescribed areas.

Since 2014, we have had a Legal Profession Conduct Commissioner whose functions are set out in Section 72 of the Legal Practitioners Act, including; to investigate suspect unsatisfactory professional conduct or professional misconduct by legal practitioners.

Following an investigation, they have the power to conciliate, take action and to lay charges before the disciplinary Tribunal. The powers are set out clearly in the *Legal Practitioners Act* (1981).

The Legal Profession Conduct Commissioner is an agency of the Crown. An interesting addition to the disciplining of legal practitioners is now the maintenance of a Register of Disciplinary Action on their website. A finding of unprofessional conduct or professional misconduct against a practitioner, whether made by the Supreme Court, the Tribunal or the Commissioner, must be displayed on the Register. You can now go online and the public can see whether a practitioner has been struck off, suspended from practice, reprimanded, fined or similar.

I am sure you are also all aware of Law Claims who manage the operation of the SA Professional Indemnity Insurance Scheme. Claims against legal practitioners for professional negligence are unfortunately increasing. It is essential that you communicate with Law Claims at the earliest opportunity as they provide proactive support and advice on claims and potential claims management. Keeping a focus on best practice and risk management to avoid and reduce the incidence of claims is also a major part of law claims. Don't be afraid to communicate regularly with Law Claims for any issue in relation to potential professional negligence.

To know our Australian Solicitor's Conduct Rules

How many of you have read the Australian Solicitors Conduct Rules? Breach them and you can expect a complaint via the Legal Professional Conduct Commissioner.

They set out the fundamental duties of solicitors.

[4] *Legal Practitioners Regulations 2014*

For example:-

Rule 3 – Paramount Duty to the Court and to the Administration of Justice

A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

Rule 4 Other Fundamental Ethical Duties of Solicitors

A solicitor must also:

(a) Act in the best interests of a client in any matter in which the solicitor represents the client;

(b) Be honest and courteous in all dealings in the course of legal practice;

(c) Deliver legal services completely, diligently and as promptly as reasonably possible;

(d) Avoid any compromise to their integrity and professional independence and

(e) Comply with these Rules and the law.

We are not in a position to act in our client's best interests unless we understand the circumstances of that particular client and their ability and/or capacity to be honest and straightforward with us.

The idea that we must deliver our services competently, diligently and as promptly as possible exists to ensure that we are diligently looking into the capacity of our clients at all stages of the instruction taking as well as the continued correspondence we have with clients throughout the process of their matter.

Rule 7 – Communication of Advice

A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the court of the matter, consistent with the terms of the engagement.

A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client. Unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

We are not mouth pieces for our clients but we are there to ensure their instructions are interpreted correctly. As such, we need to ensure we have explained the process to our clients, scenarios and given the correct advice to ensure they have been informed and can make informed decisions about their matters.

Rule 8 – Client Instructions

A solicitor must follow a client's lawful, proper and competent instructions.

We are required to follow client's instructions when they are lawful, proper and competent instructions. How do we know when instructions are no longer competent and unable to be followed?

Proper and competent instructions in family law matters can relate to the highly emotional issues surrounding the care of children, disclosure of all assets and liabilities, money and future financial security.

It can relate to the need to have all details of the bigger picture in order to put forth offers of settlement or disclosure of any facts that would be beneficial or would disadvantage our client in relation to children's matters, such as police records.

It is a lawyer's responsibility to reality check our clients to keep them grounded and focused on the real issues at hand. Otherwise, you will find yourself in a position where your client is losing faith in your ability to represent their interests when really you are trying to encourage them to participate in their own matter in a useful way.

Rule 19 – Frankness in Court

A solicitor must not deceive or knowingly or recklessly mislead the court.

A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.

A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

Rule 21 – Responsible use of Court Process

A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court is:

(a) Reasonably justified by the material then available to the solicitor

(b) appropriate for the robust advancement of the client's case on its merits

(c) not made principally in order to harass or embarrass a person; and

(d) not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor of the court.

A solicitor must not deceive or knowingly or recklessly mislead the court. As such, lawyers need to have confidence that their client has capacity to give instructions before they present their client's matter at court.

Misleading statements at Court can question the lawyer's professional integrity.

R1.08 Family law Rules

As family lawyers, we have the added assistance in our own Rules[5] of the *Family Law Act* (1975), Rule 1.08(1). This imposes a duty on parties, but it is also extended to lawyers by Sub rule 2.

Responsibility or parties and lawyers in achieving the main purpose - Rule 1.08

(1) Each party has a responsibility to promote and achieve the main purpose, including:

(a) Ensuring that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders;

(b) Complying with the duty of disclosure;

(c) Ensuring readiness for court events;

(d) Providing realistic estimates of the length of hearings or trials;

(e) Complying with time limits;

(f) Giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event;

(g) Assisting the just, timely and cost-effective disposal of cases;

(h) Identifying the issues genuinely in dispute in a case;

[5] *Family Law Rules 2004*

(i) Being satisfied that there is a reasonable basis for alleging, denying or not admitting a fact;
(j) Limiting evidence, including cross-examination, to that which is relevant and necessary;
(k) Being aware of, and abiding by, the requirements of any practice direction or guideline published by the court; and
(l) Complying with these Rules and any orders.

(2) A lawyer for a party has a responsibility to comply, as far as possible, with subrule (1).

This is an attempt by the Court to codify the duties to the Court but should be considered as only a minimal standard for a legal practitioner.

Best Practice Guidelines for Family Lawyers (from Family Law Council and Family Law section of the Law Council of Australia)

The Family Law Council has also prepared Best Practice Guidelines for Lawyers doing Family Law Work.[6] The Guidelines reflect the views of experienced family lawyers as to what constitutes best practice. As a new or less experienced practitioner, I would urge you to read these best practice guidelines to assist in your professional development in the practice of family law.

Law Society Support

Never underestimate the value of the Law Society resources. Were you aware that there is a Law Care that offers members of the profession the opportunity to discuss with a general practitioner, any problem that is interfering, or has the opportunity to interfere, with their work performance? There is a Lawyers Support Group, being a panel of experienced lawyers willing to assist colleagues with personal and professional problems. A Young Lawyers Support Group, a Wellbeing and Resilience Committee, a Lawyers Complaint Companion Service and plenty of mental and physical health resource links.

[6] Family Law Council and Family Law Section 'Best Practice Guidelines for Lawyers Doing Family Law Work' (October 2010)

PART II – ASSESSING CAPACITY AND INTEGRITY

First Interview with Our Client

Armed with our strong core values and understanding of our role as a lawyer, we move into the importance of the first interview with a prospective client. At the first interview, clients should be informed of what we as lawyers do and what we do not do. It is helpful to explain to a client that you will not lie on their behalf or break the law, that you have a discharge of duty to the Court, that you are not the mere mouthpiece for the client but that you determine independently how the client's case should be conducted. That you will provide them with legal advice and take instructions from them in the light of this advice. That you will not be acting on unreasonable demands from the client and that you can cease to act for them if their demands are unreasonable.

In children's matters, it is important to emphasise that the paramount consideration in children's matters is to advance a child's best interests and not to advance our client's case at any cost. Constant reality checking and firm advice early is particularly important in children's matters.

Rule 15.55 of the *Family Law Rules*[7] indicates that legal professional privilege does not apply to any experts report obtained for a parenting case. The paramountcy of children's interests displaces any legal professional privilege.

The Importance of the Retainer Agreement

Discussing with a client the terms of a retainer agreement is another opportunity for setting up a very clear relationship between our client and ourselves. It is a place where we can highlight our right to cease acting. The Law Society of South Australia's Standard Retainer Agreement provides the provision:

> "*Upon good cause such as failure to comply with the terms of this agreement or if in our view the necessary relationship of confidence no longer exists between us we have a right upon reasonable notice to terminate our engagement and cease acting for you and in litigation matters apply to be removed from the Court file as your legal practitioners."*

[7] Above, n5.

The first interview also provides you with an opportunity to get to know your client and spend sufficient time in assessing whether there are likely to be issues of stress, dishonesty or diminished capacity.

I have found a presentation and article by Dr. Sandra Hacker AO Psychiatrist[8] extremely useful as a handy guide to recognising personality types and what to do if you encounter a difficult client. She states:

> "*When coupled with the stress of the immediacy of court appearances, counselling, mediation or trial, anxiety levels raise further and personality characteristics are even more pronounced. However, we must remember that we all have our own personality styles and past experiences to deal with, and we will inevitably find some people much easier to deal with than others."*

Whilst this article is extremely helpful in her definition of the various clusters of personality – paranoid, isolated, schizoid, anti-social, psychopathic, histrionic, narcissistic, borderline, avoidant, dependant, obsessive compulsive and passive aggressive people – it is not for us to diagnose or determine personality types. However, it is helpful to understand different personalities require different modes of connection with us as their legal practitioners. Part of providing your service to a client is knowing there is a disconnect and recognising that they have become difficult. If you have discovered a pattern which makes it difficult to ascertain clear instructions from a client, you need to be cautious not to put your client offside but at the same time recognise you are not a counsellor, a psychologist or a psychiatrist. You must constantly remind them of your professional duty and the nature of the services you can offer; a crucial aspect of continuing your legal work

If you have doubts as to your client's capacity before you enter into a Retainer, this should be explored as soon as possible to determine if they have capacity to act on their own behalf. If a Retainer has been signed by a client whose capacity has come into question, it is crucial to determine whether this mental incapacity terminates your

[8] Dr Sandra Hacker, 'Dealing with Difficult Clients' The 15th National Family Law Conference, Hobart Tasmania (October 2012)

Retainer. While the duty of confidentiality will survive any termination of the Retainer, if a client suffers mental incapacity, a contract is terminated.

I refer you to the Law Society of South Australia's Client Capacity Committee's Statement of Principles with Guidelines for Ethical Ground Rules.[9] The following principles will assist lawyers to resolve dilemmas:-

1. Doubt as to capacity is not to be expected or assumed.
2. There is a presumption of capacity at common law
3. The client is to be valued and listened to
4. Mental illness or disability is not to be equated with mental incapacity
5. Eccentricity or impudence is not to be equated with mental incapacity
6. Effective communication must be worked for.
7. Lawyers cannot substitute their own view of best interests.
8. Doubts about capacity does not equate with incapacity.

Section 40 of the *Legal Practitioners Act 1981* (SA) states:

(1) *The authority of a legal practitioner to act on behalf of a person is not abrogated by reason only of the fact that that person becomes of unsound mind.*

(2) *When the mental unsoundness of a person on behalf of whom a legal practitioner is acting comes to the knowledge of the practitioner, the authority to act for that person ceases (subject to subsection 3) and is determined.*

(3) *Where it is necessary for the purpose of protecting the interests of a person of unsound mind in any legal proceedings or other business, the authority of a legal practitioner, notwithstanding that the practitioner knows of the mental unsoundness of the person on behalf of whom the practitioner is acting, continues for the purpose of completing those proceedings or that business.*

While the above Act refers to a practitioner's authority to act, as was initially conferred in a Retainer, it expresses that while we are agents; we have a fiduciary duty to our clients and will need to balance the importance of our client's autonomy with what is in the best interests of the client.

[9] Client Capacity Committee (Law Society of South Australia) 'Statement of Principles with Guidelines' (2012)

Stress

It is likely that you will see your fair share of emotionally distressed clients who are unable to provide clear instructions or whose instructions are inconsistent. These inconsistencies need to be addressed with our clients and we need to ensure we are keeping comprehensive notes of all dealings with these clients.

A thought provoking seminar I attended in recent years was a seminar presented by Pauline Tesler of the Integrative Law Institute of California[10]. She is a family lawyer by background but now spends her days training lawyers in understanding a more integrated approach to the practice of law.

The Integrative Law Institute can be found at http://integrativelawinstitute.org/. Of particular note is the article "Healing What Ails a Legal Profession" found at http://integrativelawinstitute.org/2015/01/28/healing-ails-legal-profession/

> "*Adversarial law practice requires lawyers to focus clients resolutely on past injuries and pain without attending to recovery and possibilities for a better future. Add that to a distressed lawyer and we have a recipe for keeping clients mired in pain and suffering. Positive psychology research confirms that emotional states are transmitted to others remarkably easily and that the direction of contagion in a relationship is from the more powerful to the less. She advocates for teaching lawyers client centred service delivery models such as mediation and collaborative practice. By infusing lawyers with human compassion that invites client's stories to be heard and their pain to be seen. The 'take no prisoners' assault tactics are no longer the professional responsibility of a competent lawyer."*[11]

We must remember as lawyers that we act out of a legal culture that believes the human mind is entirely rational and that each client is a rational individual that we can take clear instructions from. In reality, the presence of strong emotions means that the rational brain will be switched offline, for perhaps hours at a time in times of high stress.

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[10] Pauline H. Tesler 'What is Neuro-Literacy and Why Should You Care?' Family Lawyer Magazine (April 2013)

[11] Pauline H Tesler 'Healing What Ails the Legal Profession' Collaborative Review Journal of International Academy of Collaborative Professionals (Winter 2014)

We need to become skilled at identifying those clients that are highly stressed and whether or not they are able to make rational decisions soon after experiencing an intense emotional state.

It is crucial that we as family lawyers understand the ebb and flow of emotions on the rational brain and we do not put pressure on our clients to make decisions when they are in a highly stressful and emotional state.

Family Violence

Many family law clients have been victims of family violence which has led to the breakdown of the relationship. We as a society and profession are becoming more and more skilled with our tools for assessment of different types of family violence. We as practitioners need to continue to take up training that will assist us in the identification of family violence, the stress impact on our clients and the need to refer these clients for support. Victims of family violence require very careful and supported representation preferably with a counsellor's support. The pattern of abuse can see them often present as resigned to defeat, avoidance of any conflict and wholly unsuitable to engage in an adversary system which plays to the hands of the perpetrators behaviour.

Relationships Australia South Australia has developed the Family Law Detection of Overall Risk Screen or 'DOORS' screening tool [12]. This allows us as legal practitioners to better enable identification of safety and wellbeing risks for clients across the family law system. This is an excellent tool that is now being utilised in all Relationship and Mediation Centres in South Australia. The risk assessment tool is available to legal practitioners and the training is online. Please look for more information at www.familylawdoors.com.au.

I have found that the Parent Self-Report Form[13] in cases where I suspect family violence is a major issue is a very helpful aid to supporting victims of family violence.

[12] J. E McIntosh and C. Ralfs, 'Handbook: Detection of Overall Risk Screen (DOORS)' The Family Law Doors (2012)
[13] Available on the DOORS website and in the Handbook

Mental Capacity

The general, common law presumption when you meet a new client, is that they have capacity.

You will at times become aware of a client who you believe is suffering from mental incapacity or diminished capacity. It will be crucial for you to understand the avenues that exist to assist you to deal with any incapacity that manifests in your clients and to advise your client's properly.

The *Family Law Rules*[14] define physical and mental disability as;

"*a person who because of physical or mental disability, does not understand the nature or possible consequences of the case or is not capable of adequately conducting or giving instruction for the conduct of the case."*

As lawyers, we are required to keep track of our client's emotional and mental health during the progress of their matter. In observing our clients, we are in a better position to notice their behavioural indicators and if they suddenly, or over time, change. Having said that, it is important to distinguish between a client who is suffering emotionally and whose behaviour suggests incapacity but who is not actually suffering incapacity in the sense that it affects their decision-making abilities long term.

While we do track our client's capacity throughout a matter, it is NOT expected that we will be able to expertly assess capacity.

Warning Signs

There are some definite warning signs that you will see in your client's when you suspect they lack capacity, but it is important to be careful that you are not attributing their age or their disability to a lack of capacity.

[14] 2004

Signs to look out for can include (but is definitely not limited to) the following:-

- When your client has changed lawyers several times
- If your client is experiencing memory loss or recall issues
- If you have communication issues with your client or they are not interested in interacting with you, including not showing an interest in their own matter
- If your client is disorientated.
- If you notice your client's personal presentation or mood or physiological state has deteriorated
- If you meet with a client for instructions in hospital or Aged Care facilities
- If you see your client for appointments with support persons but they do not speak for themselves
- If your client is changing their story every time
- If your client is emotionally distressed
- If your client is under the influence of another
- If your client has unrealistic timeframes
- If your client is overpowering, rude or bullying you.

It has been suggested by Professor Paul Tremblay[15] if you find yourself faced with a questionably competent client, you have the following options available to you:-

1. Formal guardianship – seek to appoint a guardian through the Court
2. Third party instructions – speak to family members about your concerns of your client's capacity
3. Persuasion – discuss with your client to encourage better decision making
4. De facto guardianship – make choices for client without official consent
5. Withdraw – cease acting for your client

If you can address your concerns with your client in a productive way, you should refer them to a medical professional and request a formal capacity assessment. The need for this discussion with your client can create an ethical dilemma. If you express your concern to your client it is likely that they will not agree with you about their own

[15] Professor Paul Tremblay, 'On Persuasion and Paternalism: Lawyer decision-making and the Questionably Competent Client' (1987) as referred to in Jonathan Wells QC 'Lawyers' Doubts About Client Capacity' Law Society of South Australia (June 2014 Bulletin)

lack of capacity. This is a sensitive topic for anyone and how you approach this issue will need to be tailored to specific clients.
It is often suggested that you can explain to your client that from a legal standpoint, the Court needs to be convinced they have the requisite capacity for this type of ordeal and that a formal assessment is necessary.

As you would already know, it is fundamental that you take clear and comprehensive notes during any appointments or communications with your client while you are exploring the possibility of capacity. In some cases, a person can be incapable of making some decisions, for example managing their financial affairs, but will still be considered capable of making a will.[16]

Essentially, an assessment includes whether a client can understand facts involved in decision-making, weigh up consequences of those choices and how it affects them and communicate their decision.[17]

Ethical Dilemma

If your client does not give you permission to arrange for an expert assessment of mental capacity, can you continue to act for them?

The Client Capacity Committee's Statement of Principles with Guidelines states;

"The lawyer as agent for their client cannot, in the absence of the principal's consent, make decisions or take action as a principal….Accordingly, the lawyer will respect the autonomy and integrity of a client or intending client and their right to pursue their own lawful interests, including the choice of an option not preferred by other or of one which the advising lawyer considers unwise or otherwise 'not in the client's best interest'. Lawyers do not act on their own or anyone else's perception of a client's best interests. A family or community expectation cannot prevail over client autonomy[18]."

[16] New South Wales Law Society "When a client's capacity is in doubt: a practical guide for solicitors" (2009) p2
[17] Jenna MacNab "Capacity: a practical guide for lawyers" (2008) 46 No.5 LSJ 68 at 71
[18] Above n9, page 10.

"If the client's disability inhibits or prevents – or is reasonably thought to be inhibiting or preventing – critical reflection or reasoned choice, even about an assessment of their own condition, the lawyer cannot act contrary to, or without instructions, as that (it might be said) is a failure to respect client autonomy, and therefore a denial of essential human dignity[19]."

Further,

"People with disabilities – especially the mentally ill or disabled – are often patronised, ignored, unheard and dishonoured. The lawyer is there to show that they are valued as complete human beings, that they are to be listened to, and their wants and needs honoured[20]."

"*Some lawyers struggle with wanting to appear credible in the eyes of the judge and court personnel. If the client is behaving in a way that indicates severe mental illness, a lawyer advocating for the client's release may feel foolish. There is a temptation to dissociate him or herself from the client's craziness by adopting a compassionate but condescending manner towards the client, by stating the client's position, but in a tone that conveys a different message to the court. Lawyers may justify this in individual cases by saying they made a pragmatic assessment that the client would not win and by 'rolling over' in this case are gaining credibility for a future client with a stronger case[21].*

An emphasis must always be given to these clients of your professional duties of honesty, personal integrity, candour and frankness. Be wary of jumping to conclusions about capacity.

[19] Above n9, page 11
[20] Ibid.
[21] Deborah L Rhode & David Luban, *Legal Ethics,* Fifth Edition, Foundation Press, 2009, at p745, citing Costello, "Why would I need a lawyer?": Legal counsel and advocacy for people with mental disabilities", in *Law Mental Health and Mental Disorder*, Bruce D Sales & Daniel W Schuman eds, 1996

Other Capacity Issues

Language and cultural barriers are also an increasing issue in our multicultural society. Particularly for those clients who are not familiar with the Australian law and legal process.

It is important that a lawyer takes time to assist these clients in a clear, simple, step by step approach. The clients need time to reflect. Interpreters should be considered.

Third Party Support

Beware the intervention of a third party. While a third party can be useful in giving practical assistance as to lifestyle and health issues, it is not uncommon for third parties to overstep the mark and allow their own perceptions and experiences to affect the instructions that your client is seeking to give you. You need to be very careful that your client welcomes the support of a third party and does not cause increased anxiety. Be careful to distinguish from third party presence and support and a substituted decision maker. What if they have a Power of Attorney?

The build-up of that ongoing relationship with your client and the history you accumulate is going to be vital in your representing them.

Ceasing to Act

It is vital that if you believe that you are unable to act in circumstances due to the client's inability to provide clear instructions, that this is documented very clearly.

A dilemma will always be – should you be seeking the intervention by the Court of a case guardian or a litigation guardian under the Rules? The *Family Law Rules* provide for instances when a case guardian[22] or litigation guardian as terms in the *Federal Circuit Court Rules*[23], can be appointed to represent the interests of a person lacking capacity. These can be initiated by other parties, or by interested persons. There is significant delay in proceedings if there is no appropriate person to act as litigation guardian, particularly if the Attorney General's Department is requested to provide a nomination.

It is seen as not acceptable for the party's lawyer to act as a litigation guardian.

[22] Rule 6.08(1)
[23] *Federal Circuit Court Rules 2001,* Rule 11.08

Dishonesty

The lawyer must investigate the truthfulness or otherwise of their client at all stages of the relationship. The point at which this often becomes a difficulty is when a client is required to disclose all relevant facts and documents.

This process is counterintuitive. Many clients fail to appreciate their obligation to the Court of full and frank disclosure which may also include documents which support their adversary. It is a human tendency to conceal or destroy such material.

"*It seems to be necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issues, not only the duty of disclosure and its breadth but also the importance of not destroying documents which might by possibility have to be disclosed*[24]*"*

See also Rule 13.01 of the Family Law Rules 2004 on the duty of disclosure.

What is the duty of the solicitor where their client has been charged with dishonesty? A lawyer must explain the inconsistencies in information or the improbable nature of some of the information. Failure to look or ask questions or blind acceptance of an improbable story will need to a failure in discharge of the lawyers duty.

A lawyer has no choice but to cease acting if a client seeks to swear a statement that is false or to disclose documents that are knowingly in their possession. We would recommend that you speak to the relevant Law society support staff if you have any doubts in relation to cessation of acting.

Remember that the duty to the court is paramount. You are not the mere mouthpiece for the client and you have a professional obligation to ensure that this is carried out.

Consequences of failure to comply with your duties:-

1. Lawyers can be charged with contempt of court by the opposing party or the principal administrative officer of the court
2. There could be a complaint leading to a disciplinary charge for misconduct or unsatisfactory conduct.
3. A costs order could be made personally against the lawyer

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4. Your reputation will be diminished and you could not expect to be trusted by the court again for you have run the risk of there being media release of your conduct.
5. You could be the subject of a negligence claim.

Summary

While most of the issues raised in this paper will not be new to you the purpose of the paper is as a refresher and a reminder of not only our obligations as legal practitioners but also of the wonderful supports available when you practice in this profession. Enjoy.

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Case Law

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