Chapter 3: Solicitor and Client Issues

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I. Introduction

Throughout the course of a criminal investigation and trial, a mentally disabled accused[1] may face challenges that relate to her illness or condition. In several contexts, the accused's mental capacity may affect his/her ability to understand the charges he/she is facing, to understand his/her legal rights, to properly retain and instruct counsel in the matter, to stand trial, to testify at his/her trial and to be sentenced after pleading or being found guilty.

To complicate matters further, an accused person may have the capacity to perform in some areas, but not in others. For example, an accused may have the capacity to retain a lawyer, but not to stand trial. Further, the accused's ability to perform any one task may wax and wane through the course of the criminal investigation and trial. Some accused may be treated with medication so as to be fit to stand trial, but may become unfit over the course of the trial.

Because of the extent to which the accused's mental condition may affect several important areas, the issues surrounding capacity are discussed in three chapters in this report. Chapter Four, Confessions and Statements, deals with the effect of an accused's mental condition on his ability to confess. It also examines the use of interrogation techniques on mentally disabled accused. Chapter Five, Fitness to Stand Trial and Appeals, deals with the procedures and legal issues respecting psychiatric assessments and the accused's ability to stand trial. Additionally, because it is so pervasive, the accused's capacity arises throughout the manual and is discussed in the context of various issues.

This chapter discusses several related capacity issues and their impact upon the solicitor-client relationship. It examines some of the legal, ethical and practical problems that arise because the accused has capacity problems.

First, this chapter outlines some situations where the accused's capacity or lack thereof may be troublesome. These include: retaining a lawyer; the lawyer-

[1] In the Canadian context, "insanity" has been replaced by "mental disorder". Please refer to our discussion on "mental disability" in Chapter One.

client relationship before trial; taking instructions before trial; deciding upon and entering a plea; entering a plea over the objections of the client; competency to represent oneself at trial; competency to testify and competency to be sentenced.

Second, this chapter outlines some of the confidentiality issues that arise because of the inevitable involvement of third parties. The accused usually has been in contact with a variety of agencies or professionals before needing a lawyer. Additionally, family members and friends may be quite involved in the accused's daily affairs. Although these professionals and family members may be of great assistance to the lawyer, their involvement may also cause some complications in the criminal case. The confidentiality section also examines some aspects of expert privilege. Professionals retained to assess or assist the accused may be able to argue that they are protected from testifying about the accused on the basis of the lawyer-client privilege.

II. Capacity

A. General

When a mentally disabled person is charged with a criminal offence, several capacity and competency issues arise. The issue of mental capacity arises at various stages in criminal proceedings. The terms capacity and competency are frequently used interchangeably and this causes some confusion among advocates and others. In its general sense, competency may be used to mean the same thing as capacity. However, there is also a strict legal meaning for mental incompetence that refers to a formal process involving a declaration that the person is not able to handle his/her affairs. The following definitions may be of assistance:

Capacity: Capacity involves the ability to understand and appreciate the nature of an action and its consequences.[2]

Mental Incompetence: A mentally incompetent person is one who has a condition of the mind, such as a developmental disability or a mental disorder,

[2] DA Dukelow & B Nuse, *Dictionary of Canadian Law* (Toronto: Carswell, 2011) (hereinafter Dukelow and Nuse).

which requires that the person be cared for or supervised for the protection of the person and her property.[3]

Mental Competence: A mentally competent person is one who has the ability to understand an act or appreciate its consequences.[4] This sounds very similar to the definition for capacity.

Legal Competence: The Canadian law requires that a person be competent in order to be able to give evidence or testify. This means that there must not be any legal impediment to the person providing evidence.[5] A person may be capable of giving evidence, but may not be competent to give evidence because of some legal impediment.

Incompetent to take an Oath: This generally means that the person would not feel morally bound by an oath and therefore would have to solemnly affirm.

Wherever possible, we will refer to capacity or competency when discussing ability, understanding and appreciation in a particular context. If we are dealing with incompetence in the strict legal sense, we will use the term "mentally incompetent".[6] If there is a legal impediment to someone taking an oath, we will refer to "incompetent to take an oath".

The representation of a mentally disabled person involves issues of both criminal and civil capacity and competency. Civil capacity refers to one's ability to perform acts that fall within the ambit of civil law: the ability to contract; to make a will; to marry; to testify; or to consent to treatment.[7] Criminal capacity involves a person's ability to perform various acts within the criminal justice system.[8] Because the adversarial approach is used in our legal system, it is important that accused

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[3] Dukelow and Nuse.
[4] Dukelow and Nuse.
[5] Dukelow and Nuse.
[6] See *R v Chaulk,* [1990] 3 SCR 1303 where capacity was construed in the sense of ability to commit crime, *i.e.* incapacity for criminal intent. For example, an accused could claim that his or her mental condition is such that when the alleged crime took place, he or she was not acting consciously.
[7] James Ogloff, D Wallace & R Otto, "Competencies in the Criminal Process" in DK Kagehiro and WS Laufer, eds, *Handbook of Psychology and Law* (New York: Springer-Verlag, 1991) at 343 (hereinafter Ogloff, Wallace and Otto).
[8] Ogloff, Wallace and Otto, at 343.

persons be able to competently participate in criminal justice proceedings.[9]

When a mentally disabled person is charged with a criminal offence, various civil and criminal capacity and competency issues arise. The civil capacity issues include: whether the client is capable of retaining and instructing counsel; whether or not she/he is capable of testifying or of taking an oath; and whether the client is able to choose between options and able to understand the consequences of various actions (for example choosing to be voluntarily committed in order to avoid possible criminal conviction). Once a mentally disabled person is in prison, other civil capacity issues arise, such as the ability to consent to treatment.

Criminal capacity issues address: whether a person is capable of confessing; whether he/she is capable of waiving certain legal rights (e.g., the right to retain and instruct counsel); whether a person has the capacity to choose to plead guilty; whether she/he is able to stand trial; whether she/he is capable of representing herself; whether she/he is able to refuse the defence of not criminally responsible on account of mental disorder (and other defences) and whether she/he is capable of being sentenced.

The competency issues that arise in a criminal trial include whether the person is legally competent to take an oath or to testify. This issue is separate from the issue of whether the accused has the capacity to testify or to take an oath. Therefore, a person may be capable of testifying or of taking an oath, but may not be competent to do so.

Mental disability may affect a person's capacity in some areas but not in others. Thus, a person with a mental disability may be capable of retaining a lawyer, but may not be capable of choosing to enter a plea of not criminally responsible on account of mental disorder. In order to determine whether a person is capable in any given situation, one must look at the person's ability to function in certain circumstances.[10] Therefore the steps involved in performing a particular transaction

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[9] Ogloff, Wallace and Otto, at 343 - 344.

[10] GB Robertson, *Mental Disability and the Law in Canada*, 2nd ed (Toronto: Carswell, 1994) at 304 (hereinafter Robertson). See also: GW Clements, *Incapacity* (Vancouver: The Continuing Legal

or decision become important.[11]

Further, a person's capacity or competence may not be static. A mentally disabled person may appear quite capable at the beginning of trial, but because of his/her mental condition, could become less capable as the trial progresses. A person's capacity could largely depend on his/her reaction to the medication that he/she is taking and its effectiveness at the time. Thus, not only will the person have various degrees of ability to perform the functions required in the criminal justice system, the ability to perform a particular function could change throughout the course of the trial.

B. Retaining a Lawyer

A preliminary issue is whether the mentally disabled person has the capacity to properly retain a lawyer. There are contractual, agency and professional elements to the relationship between a client and a lawyer. Although there is little guidance in the way of legal precedent in the area, it would seem that the client should possess the basic cognitive skills necessary in order to engage a lawyer to act on her behalf.

McDonald suggests that there are four cognitive elements that must be present in order for a client to be able to retain a lawyer.[12] First, the client must understand that the person he is dealing with is a lawyer. Second, he/she should be able to understand the advice provided. Third, the client should understand that a lawyer acts as the client's agent. This means that the lawyer will act on the client's instructions and that the actions of the lawyer bind the client. Finally, the client must comprehend that he/she has entered into a contractual relationship with the lawyer and that this involves the paying of professional fees and disbursements.[13] Similarly, if the client is a legal aid client, he should be aware of the nature of legal aid services.

Education Society of British Columbia, 1988) at 1.1.01 (hereinafter Continuing Legal Education Society of British Columbia).

[11] Robertson, at 304.

[12] Continuing Legal Education Society of British Columbia, at 1.1.07.

[13] Continuing Legal Education Society of British Columbia, at 1.1.07.

The Federation of Canadian Law Societies' *Model Code of Professional Conduct*[14] and the Law Society of Alberta's *Code of Conduct*[15] provide some specific guidance in Rule 23.2-15, for a lawyer who finds himself/herself dealing with a client who may not have the capacity to retain the lawyer. The commentary to the rule states that persons who are legally incompetent may be competent to instruct lawyers in certain matters. Further, a person who is apparently competent may lack the capacity to instruct counsel in other circumstances.[16] Once the lawyer becomes aware that the client lacks the capacity to instruct counsel, the lawyer is advised to decline to act or to apply to have a legal representative appointed for the client.[17]

The Law Society of Alberta's *Code of Conduct* (2018), under 3.2-15 *Clients with Diminished Capacity*, and its accompanying Commentary state:[18]

> **Clients with Diminished Capacity**
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> **3.2-15 When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.**
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> [1] 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 depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a

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[14] Federation of Canadian Law Societies, *Model Code of Professional Conduct* (March 14, 2017) online: https://flsc.ca/national-initiatives/model-code-of-professional-conduct/federation-model-code-of-professional-conduct/ (hereinafter FLSC, Model Code).
[15] Law Society of Alberta, *Code of Conduct* (Law Society of Alberta, 2018), online: Law Society of Alberta < https://dvbat5idxh7ib.cloudfront.net/wp-content/uploads/2017/01/14211909/Code.pdf> (hereinafter Law Society of Alberta, *Code of Conduct*).
[16] Law Society of Alberta, *Code of Conduct,* Rule 3.2-15 and commentary.
[17] Law Society of Alberta, *Code of Conduct,* Rule 3.2-15 and commentary.
[18] Law Society of Alberta, *Code of Conduct.* See also: FLSC, *Model Code*.

> client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

This rule and its accompanying commentaries demonstrate that right from the beginning a client with diminished capacity clearly places his or her lawyer in a challenging situation.

C. Pre-Trial Issues

Several significant capacity issues arise before a mentally disabled client goes to trial. Most of the issues revolve around the dilemma of whether the lawyer should act in the best interests of his/her client or whether he/she should follow his/her client's instructions. These issues include whether the lawyer should enter a plea over the objections of his client, plea-bargaining and taking instructions from the client. Another pre-trial issue is that of whether a client was competent to make a confession or statement. This issue is discussed separately in the chapter entitled "Confessions and Statements".

1. General Ethical Considerations

There are numerous ethical considerations that arise throughout the period that a lawyer is representing a client with a mental disability. This discussion does not provide the "answers", as these will be left to the individual lawyer to resolve for herself/himself. This section will highlight some of the difficulties.

At times, the expected ethical role of a defence lawyer is complicated by the nature of the client's mental disability. Although the lawyer is ethically bound to proceed in a fashion that is in the best interests of the client, she/he also has to take instructions from the client. When the client has a mental disability, the lawyer's ethical duties sometimes conflict with the client's wishes and the lawyer may be forced to choose between them.

The Alberta Law Society's *Code of Professional Conduct* contains some rules

that provide guidance as to effective representation of mentally disabled clients generally.[19] Additionally, the FCLS sets out general requirements for the defence bar. These are of some assistance where the lawyer has a mentally disabled client, but they may also contribute to the lawyer's ethical dilemma.

The defence lawyer is not an agent of the client, but an advisor.[20] As Martin states, "the function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his professional skill and judgment in the conduct of the case and not allow himself to be a mere mouthpiece for the client".[21] The FLSC *Model Code of Professional Conduct* Chapter 5.1, "The Lawyer as Advocate" states:

> Advocacy
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> 5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.
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> *Commentaries*
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> ...
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> [9] Duty as Defence Counsel – When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so called technicalities, not known to be false or fraudulent.

Thus, the functions of the defence counsel include zealously defending his client. The lawyer's private opinions on the accused's guilt or innocence are not to

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[19] See for example Rule 3.2-15 of the Law Society of Alberta, *Code of Conduct* on representing 'Clients with Diminished Capacity'. The Rule states that: "[w]hen a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship."

[20] A Martin, "The Role and Responsibility of the Defence Advocate" (1970) 12 Crim LQ 376 (hereinafter Martin), as cited in R Delisle and D Stuart, *Learning Canadian Criminal Procedure,* 7th ed, (Toronto: Thompson Canada, 2004) at 548-551, (hereinafter *Delisle and Stuart*). See also Roberta K Flowers**,** "The Role of the Defense Attorney: Not Just an Advocate" (2010) 7 Ohio St J Crim L 647.

[21] Martin, in Delisle and Stuart, at 548.

enter into his/her acting as an advocate.[22] The lawyer has an ethical duty to protect his/her client from being convicted and may rely upon all available evidence and defences in so doing. Where the client has a mental disability, he/she may be able to rely upon the exemption from criminal responsibility on account of mental disorder (section 16, *Criminal Code*).[23] If the lawyer decides that there is a good basis for raising this defence (or exemption), he/she may be ethically bound to do so. However, his/her client, for a variety of reasons, may instruct the lawyer not to enter a plea of not criminally responsible on account of mental disorder. Once again, the lawyer's duty to act in the client's best interest may conflict with the client's instructions.[24]

Conversely, the lawyer may be aware of facts that point to the client's guilt, yet the client wishes to plead not guilty. This does not mean that he/she cannot represent the client in court; it does, however, limit the conduct of the defence and the accused should be made aware of this. The *FLSC* Model *Code of Professional Conduct* specifically outlines what a lawyer may or may not do in court under these circumstances:

> [10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to

22 BG Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989) at 175.
23 RSC 1985, c C-46 (hereinafter Criminal Code). All references are to this legislation unless otherwise specified.
24 This is discussed further below.

> test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.[25]

Thus, where the lawyer is made aware of certain facts, her/his conduct of the defence may be limited. This is especially so where the client chooses to continue to plead not guilty.

However, while the client may have committed the act for which he/she is accused, he may not have formed the relevant intent or mental element. Further, he/she may have formed the required mental element, but may be entitled to the exemption outlined in section 16 because of a mental disorder. Under these circumstances, the lawyer may well choose to allow the prosecution to prove the elements of the offence without attempting to disprove that the client committed the act or made the omission in question. He/She may, however, seek to first rely upon the argument that the Crown has not proved that the accused had the required mental element and second to argue that he/she is exempt from criminal responsibility under section 16.

A third possible ethical dilemma arises when a lawyer must decide whether to raise the issue of the client's fitness to stand trial.[26] The course of action selected by a lawyer may depend upon the mental capacity of her/his client. First, the lawyer may decide that the client would likely be found unfit to stand trial. In the past, some lawyers may have chosen to avoid raising the issue of fitness because they believed that this was in the client's best interest. However, if the lawyer had a reason to believe that the client was not mentally fit, proceeding to trial without canvassing the fitness issue may have been dangerously close to behaving unethically. In this situation, if counsel was silent when a plea of not guilty was entered, if she/he requested a jury trial (where an election is available) or if she/he stated that her/his client did not wish to testify, the lawyer was impliedly

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[25] See also: Law Society of Alberta, *Code of Conduct,* Chapter IV, "The Lawyer as Advocate", Rule 5.1 and *Commentary* [12].

[26] This issue is also canvassed in Chapter Five, Fitness to Stand Trial.

representing to the court that the client wished to proceed in this manner.[27] If a client was incompetent, she/he could not knowingly or voluntarily make these decisions.

Under the legislative regime that existed until the 1990s, a lawyer might not have wanted his/her client to be found unfit to stand trial, because of possible long term confinement in a mental institution or treatment facility. However, with the 1991 amendments to the *Criminal Code*, time limits are placed on such confinement. Consequently, fewer situations are likely to arise in which counsel elects not to raise the issue of fitness and therefore be faced with the ethical dilemma of proceeding to trial with a client who is not able to instruct him properly.

Another potential problem area arises when a lawyer decides that it is necessary to consult others about the mental condition of her/his client. On the one hand, the lawyer has a duty to her/his client to retain confidentiality. On the other hand, the lawyer has a duty to obtain all of the pertinent facts about the client. If the lawyer decides to consult with the client's psychiatrist, for example, an issue arises as to what use may be made of the resulting report. Other confidentiality issues arise when the lawyer decides to consult with the client's family or relatives.[28]

The foregoing examples illustrate the tension between the lawyer's obligation to perform in the best interest of his/her client and his/her obligation to follow the client's instructions. Some of the following discussion may be of assistance in dealing with this dilemma.

2. Taking Instructions and Improving Communication with Mentally Disabled Clients

(a) Taking Instructions

Ethical issues may arise where a mentally disabled client who has been found fit to stand trial has difficulty instructing the lawyer as to what course to take. A client who has been found fit to stand trial usually decides (with the advice of his

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[27] PA Chernoff & WG Schaffer, "Defending the Mentally Ill: Ethical Quicksand" (1972) 10 Amer Crim Law Rev 505 at 521 (hereinafter Chernoff and Schaffer).
[28] This issue is discussed further below, under "Confidentiality".

lawyer) what plea to enter, whether to testify and whether to select trial by jury.[29] However, in some cases, even though the client has been found fit to stand trial, the lawyer is uncertain that the client understands all of the implications of various courses of action because the client does not appear capable of making difficult choices.

Under these circumstances, the lawyer has the difficult ethical responsibility of ensuring that the client fully understands all of her/his options and the possible consequences of any choices that she/he might make. In some cases, this obligation is quite onerous because it is impossible for a lawyer to determine whether the client fully appreciates the implications of her/his decisions. It may be necessary for the lawyer to consult with psychiatric experts for medical assessment of the client's comprehension of the options and their consequences.[30]

There are several potential difficulties that may occur when discussing the nature of and the consequences of a particular course of action. First, the client may have cognitive or psychological difficulties that render effective reciprocal communication difficult. The client may be denying that he/she has a problem and will therefore resist the lawyer's suggestions or may indicate that he/she understands a strategy or procedure when in reality, he/she does not. Second, the mental disability may prevent effective understanding of the nature of the adversarial process and the roles of the different parties: defence, prosecution, or judge. Third, the mental disability may make it more difficult for the client to follow through on suggestions made by his/her lawyer. Fourth, the mental disability may

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[29] The American Bar Association specifies that the accused makes the ultimate decision as to what plea to enter, whether to waive jury trial and whether to testify on his or her own behalf. See: N Redlich, ed, *Standards of Professional Conduct for Lawyers and Judges* (Boston: Little, Brown and Company, 1984) at 206 (hereinafter *ABA Standards for Criminal Justice*). The issue of electing trial by jury is discussed under Jury Trials.

[30] See also: Norma Schrock, "Defense Counsel's role in Determining Competency to Stand Trial" (1996) 9 Geo J Leg Ethics 639-664 at 649 (hereinafter Schrock) where Rule 1.14 of ABA's Model Rules of Professional Conduct states that a lawyer should maintain as normal a client-lawyer relationship as possible when a client's ability to make decisions is impaired. Protective action should only be taken when the lawyer reasonably believes that the client cannot adequately act in the client's own interest. The rule also advises counsel to seek advice from an appropriate diagnostician. This, however, is almost impossible to do without getting the client's cooperation or violating the client's confidentiality.

prevent the client from remembering names of people and places and of assisting in the conduct of his/her defence during trial. For example, a memory problem may prevent the client from pointing out an inconsistency in another's testimony. Fifth, the mental disability may affect the way the mentally disabled person presents in court. He/She may have problems expressing himself/herself, he/she may have speech or voice difficulties or he/she may suffer from hearing problems. He/She may ramble or proceed to discuss irrelevant matters. While many of these potential difficulties are present in clients without mental disabilities, they are probably more prevalent where the client is mentally disabled.

Another potential difficulty may occur if the client is suffering from a mental illness that involves paranoia. Because of the nature of the illness, the client may have difficulty following recommendations or instructions because she/he considers the lawyer to be part of the overall system that is persecuting the client. This barrier may have a detrimental effect on establishing confidence in the lawyer's advice and experience.

The Law Society of Alberta's *Code of Professional Conduct* touches on the issue of acting for a client who is unable to provide proper instructions because of incapacity.[31] It advises that a lawyer has a duty to provide informed and competent advice and to obtain and implement the client's proper instructions. The Commentary to Rule 3.2-15 explains that when a client is unable to provide proper instructions in a matter due to incapacity, the lawyer must make reasonable efforts to cause the appointment of a legal representative for the client. Pending such appointment, the lawyer must continue to act in the best interests of the client to the extent that instructions are implied or as otherwise permitted by law.[32] The applicable commentary states:[33]

> [2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a

[31] Law Society of Alberta, *Code of Conduct*, 2017, Rule 3.2-15.
[32] Law Society of Alberta, *Code of Conduct*, 2017, commentary to Rule 3.2-15.
[33] Law Society of Alberta, *Code of Conduct,* 3.2-15. See also: FLSC, *Model Code*.

> failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.
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> [3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

Additionally there is some guidance for lawyers on how to deal with a legal representative's assessment on what is in the client's best interest. The applicable commentary states:[34]

> [4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

Thus, if the client does not appear to possess the skills necessary to properly instruct his/her lawyer, the lawyer is advised to ensure that there is a legal representative appointed for the client. In the meantime, the lawyer should continue to act in the best interests of the client.[35]

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[34] Law Society of Alberta, *Code of Conduct,* 3.2-15. See also: FLSC, *Model Code*.
[35] Law Society of Alberta, *Code of Conduct*, 2018, Rule 3.2-15 and commentary.

However, where the client is charged with a criminal offence, some of this advice must be tempered with the provisions of the *Criminal Code.*[36] These provide for an assessment to assist the court in determining whether the accused is unfit to stand trial because he/she is unable due to mental disorder to understand the nature of the proceedings or their consequences or cannot communicate with counsel. Thus, the lawyer who has doubts about her/his client's ability to provide proper instructions may be able to rely upon these provisions.

Sometimes a lawyer might consider turning to a third party for assistance with an apparently incapable client. Alternatively, a relative may attempt to become involved in instructing the lawyer as to the mentally disabled client's defence. Rule 3.2-6 of the Law Society of Alberta *Code of Conduct* provides that "when receiving instructions from a third party on behalf of a client, a lawyer must ensure that the instructions accurately reflect the wishes of the client."[37] Further, the commentary to Rule 3.2-15 requires the lawyer "to assess whether the impairment [of the client] is minor or whether it prevents the client from giving instructions…"[38] If the lawyer is relying upon the instructions of third parties, these obligations would be difficult to fulfill as the client may be incapable of independently communicating her/his wishes. It would probably be necessary to meet with the client alone to assess her/his capacity to give instructions.

The presence of other parties during lawyer-client interviews in which various strategies are planned may assist or may complicate matters further. This may assist in reinforcing the lawyer's discussions and instructions, provided the family member agrees with the lawyer and is not denying the client's illness or situation, but it may also lead to difficulties because the family member is not the lawyer's client. The other person may feel, however, that he/she knows what is in the client's best interest and may interfere with the lawyer's planned strategies. Further, there may be concerns about confidentiality. Although consulting with

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[36] *Criminal Code*, s 672.12.
[37] Law Society of Alberta, *Code of Conduct*, Rule 2.02(5).
[38] Law Society of Alberta, *Code of Conduct*, commentary to Rule 3.2-15.

family members may assist more during the trial preparation stage, it is the client who ultimately has to take the stand to testify about the events in question.

(b) Complaint to the Law Society or Assessment Officer

Some mentally disabled clients may become frustrated or angry with their lawyers. They may threaten to report or may even report the lawyer to the Law Society (or other professional body) or may proceed to have the lawyer's account assessed or reviewed.[39] Most lawyers regard the threat of being reported to the Law Society as a very serious matter. The client's apparent dissatisfaction may cause the lawyer to consider whether a continued relationship is desirable. However, many mentally disabled (and other) individuals have accumulated a great deal of anger over real or seemingly real injustices that they have suffered. The process of writing a letter of complaint to the Law Society or of having the account assessed may serve to diffuse a much more serious manifestation of the stored up anger and frustration.

In order to protect oneself from the possibility that one may be reported to the Law Society, it may be advisable to keep copious notes of all encounters with the client. These notes may include comments about the advice given to the client as well as the client's demeanour during the meeting. After meeting with the client, many lawyers send the client a letter that summarizes the discussion and advice that was provided at the meeting. Further, although a lawyer may perceive that a complaint to the Law Society is the result of the client's mental disability or is ill founded, the lawyer has a duty to reply promptly to any communication from his/her governing body.[40]

The complaints process against a lawyer is initiated when the complainants contact the Law Society of Alberta's Complaints Intake Officers by phone, mail, fax

[39] When an account is assessed, the lawyer and client appear before a review officer in order to determine if the lawyer's fees and disbursements were excessive or improper. See, for example, *Alberta Rules of Court* Rules 10-9-10.25.
[40] Law Society of Alberta, *Code of Conduct,* Rule 7.1.

or email.[41] The Law Society complaints officer will try to resolve the complaint through mediation if appropriate. If the matter does not get resolved through this process, is inappropriate or the complainant (i.e., the person with the complaint) does not wish to pursue this method of settlement, he/she retains the right to file a formal complaint under the conduct process. The conduct process is initiated by a written complaint sent to the Law Society. The Complaints Manager reviews the complaint and may ask the lawyer involved to make a written response. The complaint may be formally investigated with the interview of witnesses and obtaining additional documents.[42] Following the review, the Complaints Manager will either dismiss the complaint or refer the matter to the Conduct Committee Panel.[43]

The Conduct Committee Panel is composed of three lawyers who are members of the Law Society's Conduct Committee. The panel reviews the Complaints Manager's report and all the evidence. The panel decides whether or not the complaint should be dismissed. If it is dismissed, a letter explaining the reasons for the dismissal is sent to the complainant and the lawyer.

If the panel finds that the lawyer acted improperly, but decides that a hearing is unnecessary, the panel may direct a mandatory conduct advisory in which the lawyer meets with a lawyer who is a Board director (Bencher) to discuss the misconduct and ensure that the lawyer "understands that the conduct was inappropriate, will not repeat the behavior, and is apologetic."[44] If those objectives are satisfied, the complaint is dismissed. The mandatory conduct advisory is not disclosed to the public.[45]

When a conduct committee panel confirms that the lawyer breached the

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[41] Edmonton Community Legal Centre "Filing a Complaint and/or Making a Claim Against a Lawyer", online: <http://www.eclc.ca/file-complaint-make-financial-claim-lawyer/> (Filing a Complaint Against a Lawyer).
[42] Edmonton Community Legal Centre "Filing a Complaint Against a Lawyer".
[43] Edmonton Community Legal Centre "What Happens After Submitting A Complaint" <http://www.eclc.ca/file-complaint-make-financial-claim-lawyer/> .
[44] Edmonton Community Legal Centre "Filing a Complaint Against a Lawyer".
[45] Edmonton Community Legal Centre "Filing a Complaint Against a Lawyer".

Code of Conduct and adequate evidence exists to send the matter forward, the panel will call for a hearing and recommend the charges or 'citations' that the lawyer will face at the hearing.

The hearing in front of a committee of three Directors (Benchers) is conducted like a trial with similar rules of evidence, disclosure, and burden of proof. It may include the following:

- witness testimony,
- submissions from legal counsel representing the Law Society, and
- submissions from legal counsel for the lawyer, or the lawyer if not represented.[46]

The hearing committee determines the lawyer's guilt or innocence. If the lawyer is found guilty, penalties may include a reprimand, fine, suspension, disbarment and costs of the hearing. The lawyer can appeal the conviction.[47]

Although the prospect of being reported to the Law Society is not taken lightly by lawyers, if a mentally disabled client suggests that he/she is going to report the lawyer, it may be advisable to provide the client with the Law Society's contact information or other pertinent information. Indeed, if the dissatisfaction is the result of the client's mental disability, providing information on the complaint procedure may serve to diffuse a difficult situation.

(c) Improving Communication

The John Howard Society developed several recommendations for communicating with a mentally handicapped offender.[48] Some of the recommendations would be equally applicable to a mentally ill or brain injured offender. They include:

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[46] Edmonton Community Legal Centre "Filing a Complaint Against a Lawyer".
[47] Edmonton Community Legal Centre "Filing a Complaint Against a Lawyer".
[48] The Calgary John Howard Society, *The Mentally Handicapped Offender: A Guide to Understanding,* 1983 (hereinafter John Howard Society).

1. Ensure You Have Eye Contact.

A study by Clarke and Clarke (1965), found that there is a higher incidence of hearing loss among mentally disabled individuals than among a random sample of normal population.[49] Therefore, by ensuring eye contact, you will be better able to detect whether or not the individual is hearing you. It may be necessary to first get the attention of the mentally retarded offender so that he will listen to what is said. The reason for this is that the mentally disabled have attention difficulties and are easily distracted. Establishing eye contact is, therefore, one of the first steps in communication.

2. Use Clear, Simple and Non-Complicated Language.

The mentally disabled tend to use short and simple sentences. In addition, their syntax is inferior to that of 'normals of comparable age'.

Avoiding the use of abstract references is a significant factor in communicating with mentally disabled persons whose ability to abstract and intellectualize is below average. The lack of abstraction and ability means, for instance, that it will be necessary to omit such abstract phrases as 'put yourself in the other person's shoes', etc.

3. Be Specific.

If explaining the rules of probation or parole, be very specific. Rather than stating, 'Be responsible', 'Keep the peace', etc., make the rules definite. For instance, state instead, 'Stay away from Jim', 'Don't break beer bottles outside the Hilton Hotel', etc.

4. Clearly Explain Who You Are.

Explain why you are there and your purpose. Clarify your relationship with the mentally disabled offender. That is, say that you are lawyer, a police officer, a probation officer, etc.

5. It May Be Necessary To Repeat Instructions and/or

[49] In quoting the authors, 'Mentally retarded' is replaced with 'mentally disabled', as used all through this text.

Questions.

Repetition may be necessary due to the fact that mentally disabled persons have memory deficits. Studies indicate that mentally disabled clients remember only 26% of all information presented to them in an interview. They also tend to be quite passive when instructed to remember a list of objects and do not employ memory strategies that might assist them (Vernon). Repeating instructions and/or questions ensures that the information is implanted in their memory.

6. Keep Interviews Short and Cover Few Details.

McLeod's study found that mentally disabled clients remember more details if there are fewer ideas presented. This is a particularly important point to remember when giving a mentally disabled person instructions to carry out, such as terms of parole, or probation. McLeod further concluded that a mentally disabled client's highest recall of information occurred in interviews lasting 12 minutes or less.

7. Wait for a Response.

Some people who are anxious or uncertain may take longer to respond to questions or statements. The mentally disabled offender who has neurological deficits may also take longer to respond. Also, be aware that someone may have hearing or visual impairments. It may be appropriate to check to see if they need their glasses or if their hearing aide is working. The mentally disabled frequently show deficits in motor performance. They may, for instance, take longer to stand up in the courtroom when instructed by counsel to do so. There are also additional reasons why mentally disabled persons may take longer to respond to questions or statement. Karaz quotes some of these reasons:

> The listener must be able to anticipate what the speaker is going to say and what his own response, in turn will be. Most adults have developed sets or expectancies relating to language, and given they have an understanding of the general context of what is said, they can anticipate a missing word (Savin,

> 1963). Since the skills of planning and anticipation rely largely on general intelligence (Mittler, 1974), the mentally disabled person will again be at a disadvantage in acquiring these skills. Mentally disabled individuals often lack the behavioural and social skills which indicate to a speaker that he was not understood. This in turn, deprives the speaker of cues necessary for modifying his utterances. The mentally disabled person may also experience difficulty in comprehension because he may be less aware of the subtle cues, which are part of the communication process. He may not, for instance, realize the significance of raised eyebrows, or a quizzical expression on the part of the listener.

8. It May Be Necessary To Speak More Slowly.

9. Be Explicit With Instructions.

Most mentally disabled persons cope best with one or two-step instructions.

10. Have The Person Repeat Instructions Back To You.

To ensure comprehension, do not ask: 'Do you understand what I just said?' The individual will probably answer with an automatic, 'yes'. Therefore, it would be better to say: 'What was it we just talked about?' or 'What did you agree to do?' This makes him translate it to his own perspective. Then, go on further and ask him to explain how he will do that and what it is going to mean, etc.

11. Be Aware of Tendency towards Compliance with Authority.

Some mentally disabled persons can be very compliant or acquiescent when confronted with authority. This is especially true of the mentally disabled person who has led a sheltered life and has been over-protected by his family or an agency. In cases of over-protection, the mentally disabled person generally has little control over his life and is told by those in

authority where he can go, what he is to do, who he is to socialize with, etc. Persons who are treated in such a manner often tend to be less assertive. Be aware that some people will say 'yes' to everything because they feel they have to. Avoid wording questions such that only a 'yes' or 'no' response will suffice.

12. Inappropriate Responses Often Indicate Tension.

When some people are anxious or uncertain, they may giggle, laugh inappropriately, or withdraw completely. This is not because they do not appreciate the seriousness of a situation, but are so tense that they handle it inappropriately.

13. Explain Clearly the Offender's Rights and Responsibilities.

It may be necessary to clearly explain the system they have entered into and to explain their rights regarding whom they should talk to about their circumstances. This may mean identifying people and phone numbers. Most mentally disabled persons do not know their rights and sometimes do not know their responsibilities. Therefore, you may need to identify sources of help such as Citizen's Advocacy, Legal Aid Service, etc. Legal language and terms should be explained as clearly as possible. For instance, rather than using the word 'recognizance', one should say instead: 'promise to return to court on such and such a date'.

14. Give Clear, Consistent Instructions for Meeting Arrangements.

Mentally disabled persons tend to have poor concepts of time and direction. Therefore, when scheduling appointments, meetings, etc., one should link the meeting to a regularly recurring routine. For instance, if the mentally disabled offender is reporting for a parole or probation meeting, schedule it every Friday when he receives his paycheque. If at all possible, try to arrange to see him at the same time and place on all occasions. Due to a poor sense of direction, he may not understand the directions to your office. It is therefore prudent to ask him which bus he takes to get there or how he will arrive.

15. Review the Information Covered in the Interview.

> Be sure to summarize and repeat the important points of the interview and have the other person repeat what they have understood of the conversation before terminating the interview. Have him repeat it in his own words. If he is able to read and write, make sure he writes down the points he is to remember before he leaves the office.[50]

McLellan suggests that when acting for a competent mentally disabled client, extra sensitivity and effort may be required.[51] He outlines several suggestions for more effective advocacy and communication. First, the lawyer should be prepared to take extra time to ensure that the legal problem is understood. She/He may have to tailor language for the client, to repeat explanations and to deal with repetitive questions. Second, the lawyer should work with lay advocates and family members. She/He may have to exercise caution to ensure that these parties play a supportive role rather than trying to impose their views on the client.[52] The lawyer must remember that she/he takes her/his instructions from the client. Third, the lawyer should acquire knowledge of the client's disability and personal history. This information will assist in understanding any effects that the mental disability may have on the person's behaviour, self-esteem and interpersonal skills. It could also improve communication between the lawyer and client. Finally, the lawyer must be careful not to impose her/his views upon the wishes of the mentally disabled client. Because institutionalization may have taught mentally disabled persons to defer to others, the lawyer must make an effort to ensure that the client is not merely acquiescing in his/her views of the case.[53]

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[50] John Howard Society, at 29 - 33.
[51] H. McLellan, "Incapacity: Litigation Issues" in *Continuing Legal Education Society of British Columbia* (2011) at 7.2.02 (hereinafter McLellan).
[52] This suggestion has to be tempered with a consideration of privilege and confidentiality issues that may be quite different in a criminal matter.
[53] McLellan, at 7.2.03.

3. What Plea to Enter? Explaining the s 16 Exemption to the Client

(a) General

Where the client has a mental disability and is charged with a crime, he/she has the choice of three pleas: guilty, not guilty or not criminally responsible on account of mental disorder. The latter plea is only available if the client was suffering from a mental disorder under section 16 of the *Criminal Code* at the time of the offence. Usually, the client makes the ultimate decision as to what plea to enter. Hopefully, he/she will make an informed decision based upon a thorough investigation undertaken by the lawyer to ascertain what the probable outcome of the case is likely to be.[54] There may be some situations where the lawyer feels that the client is not really competent to select an appropriate plea based on the facts of the case. This can cause some ethical and practical problems for the lawyer.

There is not much Canadian case law that deals directly with the expected standard for lawyers who may be required to explain the various plea options to his/her client. The FLSC *Model Code of Professional Conduct* makes it clear that the lawyer must be both "honest and candid" when advising clients.[55] Further, the FCLS requires that the lawyer has a duty to the client to give a competent opinion based on "sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results."[56]

If the client is considering entering a plea of not criminally responsible on account of mental disorder, the lawyer has the onerous duty of ensuring that the client fully appreciates the implications of entering this plea. This may include information about the chances of success and the duration and type of disposition that the client is likely to receive.[57] The chances of success may be affected by the

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[54] Martin, in Delisle and Stuart, at 550.
[55] Standard 3.2-2 Honesty and Candour .
[56] Standard 3.2-2 Commentary [1].
[57] Chernoff and Schaffer, at 525.

nature of the offence (e.g., was it a particularly heinous crime?) and whether the jury will accept that the crime was the product of a mental illness or mental handicap. Also, the client would have to be fully apprised of the nature of a "mental disorder" trial. This may mean that painful private aspects of the client's past, including possible embarrassing or humiliating information, will be discussed in open court. Further, he/she will hear psychiatric testimony as to his/her mental condition.[58] This may also be quite uncomfortable for the client.

(b) Law on Entering an Plea of Mental Non-responsibility (Insanity Plea) in the United States

There is a fairly extensive body of American law and professional materials that deals with the issue of adequate explanation of the option and effects of entering a plea of mental non-responsibility. First, the American Bar Association, concerned with the number of persons with mental disorders in the criminal justice system and with the difficulties in the interrelationship between mental health issues and the administration of the criminal law, prepared a lengthy chapter in 1984 (which was updated in 2016), *ABA Criminal Justice Standards on Mental Health*,[59] which deals with many aspects of the mentally disordered in the criminal justice system. The chapter sets out standards and recommendations for the area and will be highly influential on the United States practice.

Second, the *ABA Criminal Justice Standards*[60] sets out expected procedures for lawyers in much the same way as does the FLSC *Model Code of Professional*

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[58] Chernoff and Schaffer, at 525.

[59] *ABA Criminal Justice Standards on Mental Health* (August 8, 2016). Online: http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf (hereinafter *ABA Criminal Justice Standards on Mental Health*).

[60] *ABA Criminal Justice Standards on Mental Health*, 4th ed, online: <http://www.americanbar.org/groups/criminal_justice/standards.html> (hereinafter *ABA Criminal Justice Standards)*. Note: The commentary accompanying these new standards has not yet been published. Where necessary we will cite to the former standards and commentary: *ABA Criminal Justice Mental Health Standards (3d)* August 1984 Online: <http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html> (hereinafter *Criminal Justice Mental Health Standards, 1984*).

Conduct.[61] The American defence lawyer has a duty to investigate the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case, even if the accused has admitted facts that constitute guilt or if the accused states that he/she wishes to plead guilty.[62] The defendant's belief that he/she is guilty in fact may often not coincide with the elements that must be proved in order to establish guilt under the law. In fact, if the client has a mental illness that has substantially impaired his/her ability to make a reasoned choice among the alternatives presented to him/her and to understand the nature of his/her plea, that defendant is not competent to plead guilty.[63]

In many criminal cases, the real issue is not whether the defendant performed the act in question, but whether he/she had the required intent or capacity.[64] The defendant may not be aware of the significance of certain facts to a mental disorder defence; if the lawyer remains unaware of the pertinent facts, he/she might not argue for a lesser sentence or for a finding of insanity (mental non-responsibility). It may be that the client cannot supply the essential facts because of some aspect of her/his mental disability; therefore the lawyer must be very thorough in her/his pre-trial preparation.[65] There are numerous decisions in the United States where lawyers were found negligent for failing to adequately explain the insanity defence or for failing to adequately investigate the possibility of an

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[61] *ABA Criminal Justice Standards on Mental Health,* at 5 - 50.

[62] *ABA Criminal Justice Standards on Mental Health,* Standard 4-4.1, Duty to Investigate.

[63] *Schoeller v Dunbar*, 423 F 2d 1183 (9th Cir 1970). See also: John D Buretta, "Twenty-fourth Annual Review of Criminal Procedure: USSC and Courts of Appeal 1993-1994" (1995) 83 *Geo LJ* 1027-37 where the writer notes that courts have held that due process will be violated if a competency hearing is not held when there is sufficient doubt as to the defendant's competency. What is meant by "sufficient doubt" has not been determined by the Supreme Court because of the difficulty in attempting to articulate the exact nature and amount of evidence necessary to establish requisite doubt. Characteristics that the finder of fact will consider are the defendant's irrational behavior, demeanor at trial and any prior medical opinion. When a circuit court finds that a defendant was denied a competency hearing, it may remand the case for a retrospective hearing to determine the defendant's competency at the time of trial, or may order a new trial.

[64] G.G. Sarno, "Annotation: Adequacy of Defense Counsel's Representation of Criminal Client Regarding Incompetency, Insanity, and Related Issues", 17 ALR 4th 575, s 3, at 589 (hereinafter ALR Annotation).

[65] ALR Annotation, §3, at 589.

insanity defence.[66] This argument is often raised after defendants are convicted and wish to have the case re-heard during a post-conviction motion to vacate the conviction.

4. Entering a Plea of Not Criminally Responsible over the Objections of the Client

(a) Defence Counsel

A lawyer may be faced with the situation of a client who objects to raising a defence of not criminally responsible on account of mental disorder, even though the lawyer is convinced that the client would have a good defence on that ground. Is the lawyer permitted to raise this defence in some fashion despite the client's objection?

As Singer notes, there are a number of reasons why a client may be unwilling to avail himself of this defence.[67] First, one of the symptoms of several conditions is denial that anything is wrong. A client who denies that he has a mental disability may become very angry at any suggestion that he has a mental disorder that provides a defence. Second, a client may object to the use of the defence because of the implied admission that he committed the offence. A client who considers herself/himself innocent may insist on seeking an acquittal. Third, even if the client is aware that he/she has some disability, he/she may prefer prison to a mental health facility.[68] Finally, a client who has committed an offence as an expression of political protest may reject a defence based on mental disorder because the client's message will be diminished by the defence.

The Supreme Court of Canada assayed the question of who decides whether to raise the defence of insanity in *R v Swain.*[69] The focus there was on the question

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[66] For example, see: *Mendenhall v Hopper,* 453 F Supp 977 (1978 SD Ga), *aff'd without op* 591 F 2d 1342 (CA5 Ga); *Profitt v United States,* 582 F 2d 854 (1978, CA4 Va), *certiorari denied* 447 US 910, *rehearing denied* 448 US 913; *Brennan v Blankenship,* 472 F Supp 149 (1979, WD Va), *aff'd without opinion* 624 F 2d 1092 (CA4 Va). See also: ALR Annotation, § 13 - §16, at 628 - 663.

[67] AC Singer, "The Imposition of the Insanity Defense on an Unwilling Defendant" (1980) 41 Ohio State L J 637 at 639 (hereinafter Singer).

[68] See, for example: "Hostage-taker Decides Guilt Better than Insanity" *The Calgary Herald* (20 February 1991) B5.

[69] *R v Swain*, [1991] 1 SCR 933, 63 CCC (3d) 481 (SCC).

of whether the Crown was entitled to raise this issue, even if the defence did not. While the accused's right to control his/her defence is not absolute, it does include the decision as to whether to raise the defence of mental disorder. However, if the accused chooses to conduct the defence in such a way that his/her mental capacity for criminal intent is put into question, the Crown will be entitled to raise its own evidence of mental disorder and the trial judge will be able to instruct the jury on section 16 of the *Criminal Code*:

> **16.** (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
>
> (2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> (3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

This case is instructive insofar as it squarely places the choice to raise the insanity defence on the accused. However, it does not deal with the issue of a disagreement between the accused and counsel as to raising the exemption for mental disorder, nor does it discuss whether it would be considered appropriate for the court to raise the issue of mental disorder on its own motion. More recent jurisprudence, discussed below, addresses the role of the court in raising mental disorder on its own motion.

Can counsel raise the issue of mental disorder over the objections of the accused? Where the client has been found fit to stand trial, it is generally presumed that he/she is capable of instructing counsel. However, counsel may disagree with the instructions he/she is given with regard to plea. Even where the accused is fit and capable of providing clear instructions and appears not to be dangerous,

counsel and accused may still differ as to what is in the accused's best interests.[70] Especially where the accused is facing a lengthy term of imprisonment if found guilty, or seems less capable of giving instructions, counsel may feel compelled to subordinate his/her duty to follow the accused's instructions to the lawyer's views of the accused's "best interests".[71]

Manson suggests that since the accused is entitled not to follow counsel's advice and to follow a course that counsel feels is not prudent, the "appropriate test [for deciding whether to override the accused's instructions] is not based on the prudence of the choice but rather on the reasonableness of the consideration".[72] Thus, if the accused and counsel have carefully canvassed all of the possibilities, and the accused appears to have reasonably considered all of them in arriving at his/her decision not to rely upon the section 16 defence, he/she is entitled to make that choice. This view is supported by the discussion of the right of the accused to control his/her defence in *Swain*. Manson also suggests that if counsel feels that the accused's instructions are unreasonable under these circumstances, counsel should withdraw in order to focus the client's attention on his responsibility.[73]

The law is most clear when discussing counsel's ability to raise the issue of fitness to stand trial (as opposed to raising the exemption for mental disorder) over the objections of the accused. A fairly recent decision, *R v Szostak,*[74] provides some guidance about when it is appropriate for defence counsel to raise the issue of the accused's mental state. The accused raised the issue of ineffective counsel on appeal, arguing counsel raised the accused's mental state without instructions both before the trial began and after the trial, when counsel sought an assessment under Criminal Code s 672.11. The Ontario Court of Appeal held that the defence counsel was entitled, even bound, to raise the fitness to stand trial issue. The ONCA held

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[70] AS Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality" (1982) 27 McGill LJ 196 at 235 (hereinafter Manson).
[71] Manson, at 235.
[72] Manson, at 235.
[73] Manson, at 236.
[74] 2012 ONCA 503, 111 OR (3d) 241 (hereinafter *Szostak*). See also: *R v Stilla*, 2013 ONSC 2197 at para 29; *R v Michael*, 2016 ONSC 2342 at para 24.

that when counsel "has a good faith basis for doubting his client's fitness to stand trial, he is entitled to raise that issue with the court."[75] When, however, an accused person has been found fit to stand trial, counsel is not entitled to raise the defence of not criminally responsible on account of mental disorder without the consent of the accused.[76]

Where the client has been fount fit to stand trial, but still appears to be subject to a mental disability, psychiatric reports may help the lawyer assess the extent to which the client's mental disability might affect the instructions given to the lawyer.[77] These reports might indicate that the accused does not have particularly well developed insight into her/his mental disability.

Psychiatric reports may also assist the lawyer in making other difficult decisions regarding a mentally disabled client. These reports may indicate the psychiatrist's view of the dangerousness and the possibility of treatment for the accused's mental disability.[78] Also, the psychiatric experts may report that there is a complete lack of appropriate treatment facilities in the penitentiary to which the accused may be sent if she pleads or is found guilty.[79]

The lawyer who is faced with a decision whether to enter a plea of not criminally responsible on account of mental disorder over the objections of his/her client has three choices:

(1) The lawyer can accede to her/his client's wishes and run a defence without mentioning the client's mental disability. However, if the offence is a serious one, the client could face long term incarceration.[80]

(2) Counsel could inform the court (or the Crown) of the client's mental condition, hoping that the court or the Crown (in limited circumstances) will raise the issue. However, to proceed in this fashion shows a clear disregard for the client's

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[75] *Szostak*, at para 70.
[76] *Szostak*, at para 77.
[77] Manson, at 237.
[78] Manson, at 237.
[79] Manson, at 237.
[80] Chernoff and Schaffer, at 526.

wishes and may violate solicitor-client privilege.[81]

(3) If the lawyer concludes that his/her client is so irrational as to be unable to make a competent decision, counsel can apply for a remand for observation and argue that the client is not fit to stand trial because his/her refusal to follow the lawyer's advice demonstrates he/she is unfit. There are difficulties with this approach, too. First, the client's rationality is being judged by a lawyer's subjective assessment that the client must be irrational not to follow counsel's advice. Second, the matter is merely being postponed. The client, if found unfit, will be able to stand trial once he/she changes her mind about the plea of not criminally responsible on account of mental disorder.[82]

Some authors suggest that under these circumstances, it might be a reasonable decision to raise the defence of insanity (now the defence of not criminally responsible) over the objections of the accused.[83] However, if counsel decides to follow this course of action, she/he then has to decide how best to raise the issue. If the lawyer informs the accused that he intends to raise the issue before they are at the courthouse, the accused may discharge the lawyer and proceed to engage a different lawyer who will also be faced with the same ethical dilemma.[84] If the lawyer decides to wait until trial has commenced, the accused may decide to immediately discharge the lawyer. At this time, the accused may proceed to represent herself/himself or the judge may declare a mistrial.[85] If a second trial is necessary, a newly engaged lawyer will be faced with the same dilemma.

Generally, the court will only rarely grant permission to counsel to withdraw from a case at the outset of the trial and usually only where counsel and client are

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[81] Chernoff and Schaffer, at 526.
[82] Chernoff and Schaffer, at 527.
[83] Manson, at 238 and authors cited at note 163 therein.
[84] Manson, at 238.
[85] Manson, at 238, citing *R v Spataro* (1971), 4 CCC (2d) 215 (Ont CA), affirmed [1974] SCR 253. See also: *R v George,* [2005] NJ No 127 in which the court allowed the withdrawal of counsel from the case when it became evident that the accused dismissed counsel owing to a genuine belief that his lawyer was part of a conspiracy against the accused.

irreconcilable.[86] An example of an uncomfortable situation occurred in *Steele.* Mr. Steele discharged his lawyer on the day of his murder trial. At the opening of trial, counsel sought leave to withdraw from the record. The trial judge gave permission to withdraw but ordered that counsel remain in attendance to advise the accused. At first, counsel took an active role in the proceedings, including cross-examination, but the accused eventually took over. During the trial, counsel applied for the court to consider whether the accused was fit to stand trial. When the judge refused to conduct an inquiry into the accused's fitness and ordered that the trial proceed, counsel asked to be relieved of the order to assist the accused with legal advice as they had lost the accused's confidence, had been misled by him and had been unable to assist him. This application was granted and the accused then proceeded to act on his/her own behalf. The accused was convicted of first degree murder and appealed.

One issue discussed by the Quebec Court of Appeal was the correct procedure regarding withdrawal from the record. The Court of Appeal held that it will be a rare occasion when the court will allow counsel to withdraw from the record at the outset of trial. However, if there is a fundamental disagreement and counsel is permitted to withdraw, she/he should not be then forced to act as a legal advisor to a client whom she/he can no longer represent.[87] Once the lawyer is permitted to withdraw, the mentally disabled client is then faced with acting on his/her own behalf—unless the court grants an adjournment for her/his to obtain replacement counsel.

Where the accused is considered fit to stand trial but his/her mental disability may be affecting his/her ability to make a reasoned choice between alternatives, the withdrawal of one lawyer to be replaced by another does not solve this problem—it merely transfers it. As Manson states, "[i]f the accused is still subject at the time of trial to the same defective reasoning, withdrawing from the case achieves no more than the smooth extrication of one lawyer and the thorny

[86] *R v Steele* (1991), 63 CCC (3d) 149 (Que CA) (hereinafter *Steele*).
[87] *Steele,* at 160.

entrapment of another."[88]

In addition, this situation may also pose a dilemma for the court, as the accused may choose not to appoint counsel and to proceed as self-represented. Berg notes that: "there is something profoundly disturbing about allowing a mentally-ill person to proceed to trial as her own counsel."[89] At the same time, even those who are ill-equipped to represent themselves have the right to do so.[90] The approaches available to the court in this situation are set out immediately below.

(b) The Court

Although defence counsel may be faced with the ethical dilemma of whether to raise the issue of her client's mental capacity over the objections of the client, the dilemma may be resolved if the court raises the issue of mental disorder of its own motion. *Criminal Code* s 672.12(1) gives the court the ability to raise this issue. It states:

> 672.12 (1) The court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.

The ability of the court to raise the issue of capacity where the accused is not in favour of having this issue canvassed would seem at odds with the spirit of the *Swain* decision. Although *Swain* dealt with the ability of the prosecutor to raise the issue of insanity over the accused's objection, it may be broadly interpreted to support the idea that an accused should be able to control his/her own defence. There are a number of earlier cases, decided before the *Criminal Code* was amended, however, that would seem to support the idea that the court, either directly or indirectly, has the jurisdiction to raise the issue of capacity even where defence counsel or Crown has not raised it. Further, the amendments to the

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[88] Manson, at 239.
[89] David Berg, "An Inconvenient Right: An overview of the Self-Represented Accused's Autonomy" (2015) 62 Criminal Law Quarterly 503 at 509 (hereinafter Berg).
[90] Berg, at 510.

Criminal Code clearly support the jurisdiction of the court to raise the issue of capacity of its own motion.

In *R v Trecroce,*[91] the appellant was convicted at trial for murdering his wife. Although several defences were raised, there was no mention of mental illness at trial, despite a psychiatric report obtained through a court-ordered remand that stated that Trecroce may have been insane at the time of the offence. On appeal, counsel for Trecroce applied for and obtained an order under then section 608.2 that the accused be given a psychiatric assessment. Counsel for the appellant made it clear that he was not asking for the order in order to assert an insanity defence; rather, it was so that the court could consider psychiatric reports.[92] After considering the reports, the Ontario Court of Appeal decided to hear oral evidence from the psychiatrists and the matter was adjourned.

When the matter reconvened, the Court was advised that Trecroce had discharged his lawyer because he did not want to be considered mentally ill and did not want the issue of insanity to be raised.[93] Counsel was prepared to continue in order to assist the Court. The Court requested that the appellant be assessed by psychiatrists to see if he was competent to discharge his counsel. The psychiatrists testified that the appellant was capable of understanding the proceedings and their possible outcome. The Ontario Court of Appeal concluded that the accused was competent to discharge his counsel and after another adjournment, another counsel was retained who was prepared to follow the appellant's instructions and therefore challenge the issue of insanity. Later, a different conflict arose and the appellant also discharged this counsel. After several adjournments, appellant proceeded without counsel.[94]

The Court of Appeal concluded that the psychiatric evidence was not strong or cogent enough to justify substituting a verdict of not guilty by reason of insanity

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[91] (1980), 55 CCC (2d) 202 (Ont CA) (hereinafter *Trecroce)*.
[92] *Trecroce,* at 216.
[93] *Trecroce*, at 216.
[94] Manson, at 244.

or to order a new trial. The Court did order that all evidence relating to the accused's mental state be transmitted to the penitentiary authorities. This judgment also illustrates how the issue of mental disorder may be raised despite the accused's objections.

In *R v Talbot (No 2),*[95] psychiatric evidence was adduced by the Crown that tended to show that at the time of the offence (shooting), the accused may have had a disease of the mind under s 16. The accused specifically instructed counsel neither to raise the issue of insanity nor to call any evidence in support of it.[96] The defence counsel did inform the court that testimony was available from three experts that would be relevant to the issue of insanity and would likely support the Crown's psychiatric evidence. It appears that Crown did not choose to call these witnesses. The trial judge concluded that it would not be appropriate in these circumstances to compel the Crown to call the three experts as witnesses. Instead, he determined that the interests of justice required the court to call the experts to testify. These witnesses were called after the Crown had closed its case and before the defence evidence. Both Crown and defence were permitted to cross-examine the witnesses.

In *R v Irwin,*[97] the appellant had been convicted of the murder of her infant son. The defence at trial was that the child had been murdered by a stranger who asked to use the telephone. The defence did not raise the issue of mental disorder at trial. The trial court concluded that the child had not been murdered by a stranger and convicted the accused.

The Ontario Court of Appeal stated in its judgment that it was concerned about the mental condition of the appellant and ordered that she be examined at a mental facility (under then s 608.2 of the *Criminal Code*). The judgment made it clear

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[95] [1977] OJ No 2611, 38 CCC (2d) 560 (Ont H Ct J) (hereinafter *Talbot*). Note that the decision in *Talbot* was cited with approval more recently in *R v Michael*, 2016 ONSC 2342 at para 24 (though the issue there was fitness to stand trial).

[96] Manson, at 245. Note: in light of *Swain,* the Crown would be much more limited in its ability to proceed to raise the insanity issue.

[97] (1977), 36 CCC (2d) 1 (Ont CA) (hereinafter *Irwin).*

that counsel stated that he was not relying upon the insanity defence. The resulting psychiatric opinion indicated that the appellant was suffering from a combination of character disorder, the ingestion of alcohol and drugs and post-partum depression that rendered her unable to appreciate the nature and quality of her act when she killed her child. The court then proceeded to exercise its powers under s 686 and entered a verdict of not guilty by reason of insanity. Thus, although the court did not directly raise the issue of insanity, when the court ordered a psychiatric assessment, the issue became relevant.

In some cases where the accused has fired his/her counsel, the court may decide it is necessary to appoint counsel for the accused. In *R v Ryan(D)*,[98] three people were charged with and later convicted for murder or manslaughter. Mr. Ryan represented himself at trial, and, on appeal, it was submitted that he had "limited formal education" and was "'out of his depth' and could not properly conduct his own defence."[99] Following the preliminary inquiry, Ryan had dismissed his legal aid counsel, and had unsuccessfully applied for an order appointing counsel from the private bar.[100] The Newfoundland and Labrador court addressed the issue of whether in light of Ryan's wish to proceed without counsel, the trial judge should have taken other steps, such as declaring a mistrial or appointing an *amicus curiae* to assist. The court held that "the fundamental duty of a trial judge to see that the accused receives a fair trial means that the judge must take steps to provide assistance to an unrepresented accused to enable his or defence…is brought to the attention of the jury with full force and effect."[101] However, "the trial judge's duty does not go as far as providing the same degree of assistance as would be provided by counsel if the accused were represented."[102] Further, the court set out guidance as to what a judge must consider and what steps should be considered when the

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[98] 2012 NLCA 9, 318 Nfld & PEIR 15 (SC) (hereinafter *Ryan*).
[99] *Ryan*, at para 4.
[100] *Ryan*, at paras 11-12.
[101] *Ryan*, at para 128 (citations omitted).
[102] *Ryan*, at para 129 (citations omitted).

accused is self-representing:[103]

> [156]..[W]here in the course of a trial, the presiding judge comes to the conclusion, based on the seriousness and complexity of the charges, the circumstances of the accused and his or her actual performance at trial, that,
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> (a) the level of the accused's advocacy is so deficient that it is analogous to the type of actions or inaction of incompetent counsel that could be regarded as a miscarriage of justice;
>
> (b) the judge is not able to assist the accused further in making full answer and defence in a manner consistent with the judge's obligation of impartiality;
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> (c) there is a realistic possibility that the reliability of the trial's result will be compromised if nothing further is done; and
>
> (d) the accused is acting in good faith and has not placed him or herself in the position he or she is in as a result of engaging in tactics calculated to obstruct or delay the trial or otherwise abuse court process,
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> the judge should consider whether other steps, such as, (i) appointing counsel for the remainder of the trial (if the accused does not oppose it); (ii) appointing *amicus curiae* (even if the accused does oppose appointment of counsel); (iii) adjourning or slowing down the trial to enable the accused to prepare properly; or (iv) declaring a mistrial, could prevent a miscarriage of justice and, if so, then grant an appropriate remedy. Failure to do so constitutes error.

In *Ryan*, the appeal court ruled that Ryan did not receive a fair trial because he was not able to represent himself properly and his ability to make full answer and defence was thus compromised. The court ordered that a mistrial should have been ordered by the trial judge and ordered a new trial under s 686(2)(b) of the *Criminal Code*.[104]

As referenced in *Ryan(D)*, one technique used by some courts to assist with cases involving mental disorder (and other cases where necessary) is to appoint an

[103] *Ryan*, at para 156.
[104] *Ryan*, at paras 160-182.

amicus curiae, particularly if the accused dismisses his/her counsel, or refuses to hire counsel. The role of the *amicus curiae* is not to represent the accused, but rather to assist the court to properly administer justice.[105] In *R v Lee*,[106] the Court set out a non-exhaustive list of factors to consider when deciding whether to appoint *amicus* in a case involving an unrepresented accused (e.g., when the accused has dismissed counsel): "the complexity of the case; the seriousness of the potential penalties; the accused's age and ability to understand the proceedings and to express himself; and the accused's familiarity with the trial process."[107]

An example of the use of an *amicus curiae* to assist the court may be found in *R v Hart*, a legal decision that eventually ended up before the SCC.[108] However, there were many interlocutory decisions in the lower courts involving mental illness and the appointment of an *amicus curiae*. The police had used an investigatory technique called "Mr. Big".[109] After learning he had been completely duped by his new "friends", Hart developed paranoia, believing everyone was part of the "sting" against him, and became unable to trust his lawyers or his own wife.[110] Hart was eventually committed to a psychiatric facility and the court appointed an *amicus curiae* to make submissions on behalf of Hart at the appeal.[111]

Thus, despite the *Swain* decision that provided a new common law rule that the prosecution was limited in when it could raise the issue of insanity to the sentencing stage or if the accused had put mental capacity into issue, Parliament has since drafted legislation that does not seem to adhere to the spirit of the

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[105] *R v Imona-Russel,* 2011 ONCA 303 at paras 1-3, 37-43, 56, and 75.
[106] (1998), 125 CCC (3d) 363 at 365 (NWTSC) (hereinafter *Lee*).
[107] *Lee*, at para 6.
[108] *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544 (hereinafter *Hart,* SCC).
[109] "Mr. Big" is an investigation procedure used by undercover police to obtain confessions (usually about serious unsolved crimes). Police officers create a fictitious criminal organization and seduce the suspect into joining it. They gain his or her confidence and get him or her to assist in several criminal acts (e.g., credit card scams). They then persuade the suspect to divulge information about the unsolved crime. In *Hart*, the SCC describes the nature of the particular undercover investigation as being very manipulative and destructive (at paras 234-237).
[110] *Hart* SCC, at para 233.
[111] See: *R v Hart*, 2011 NLCA 64, 312 Nfld & PEIR 44; 2011 NLCA 37; 2011 NLCA 29; 2010 NLCA 33, 298 Nfld & PEIR 152; 2009 NLCA 10, 282 Nfld & PEIR 346.

requirements of this case. Although the 1991 amendment does not appear to address the process for raising the issue of mental disorder, it provides a procedure for ordering assessments to determine various aspects of the accused's mental state.

Section 672.12 of the *Criminal Code* provides that the court may make an assessment order at any stage or proceedings of its own motion, on application of the accused or on application of the prosecutor. The prosecutor is somewhat limited in when he/she might apply for an assessment. If the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence, the court may only order the assessment if the accused puts his/her mental capacity for criminal intent into issue or if the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.[112] The latter provision would appear to be broader than the common law rule from *Swain* that requires that the prosecutor wait until the sentencing stage to raise the mental capacity of the accused.

In any event, the court would appear to be able to raise the issue of capacity at any stage of the proceedings, at least indirectly, by ordering an assessment of the accused's mental condition on its own motion.[113]

(c) The Situation in the United States

In the United States, the *American Bar Association's Criminal Justice Standards on Mental Health,* state that neither the court nor the prosecution should assert the defence of abnormal mental condition over the objection of the accused who is competent to make a decision about the defence.[114] In the U. S. case law, two conflicting lines of authority evolved on this issue, with one line of authority gaining

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[112] *Criminal Code* s 672.12(3).

[113] "Court" is broadly defined in section 672.1 to include a summary conviction court, a judge, a justice and a judge of the court of appeal. Consequently, a judge of the court of appeal would also seem to have jurisdiction to raise the issue of mental capacity of its own motion.

[114] *ABA Criminal Justice Standards on Mental Health,* Standard 7-6.3, 7-6.4.

more favour with the American Bar Association.

One line of cases held that justice is not served if mentally disabled defendants are convicted, even if the defendants have competently decided that the consequences of a conviction are less onerous than those from a finding of not guilty by reason of insanity.[115] In these cases, the trial court was permitted to raise the insanity defence over the defendant's objection after the court assessed the defendant's objection to the defence, the quality of the defendant's reasoning, the viability of the defence and the court's personal observation of the defendant.[116]

The opposing line of cases held that "the trial judge may not force an insanity defence on a defendant found competent to stand trial *if* the individual intelligently and voluntarily decides to forego that defence".[117] The court further held that the "finding of competency to stand trial is not, in itself, sufficient to show that the defendant is capable of rejecting an insanity defence; the trial judge must make further inquiry into whether the defendant has made an intelligent and voluntary decision."[118]

The American Bar Association favours the second approach because it argues that a competent defendant may have good reason for choosing not to rely upon the insanity defence. If a court is permitted to raise the insanity defence, all of the defendant's considerations are overridden. Second, defendants have control over whether to plead guilty, to assert a defence of nonresponsibility or to waive their

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[115] *Whalem v United States,* 346 F 2d 812 (DC Cir 1965), *certiorari denied* 382 US 862, *rehearing denied* 382 US 912. Overruled: *United States v Marble*, 920 F2D 1543 (DC Cir 1991).

[116] See: Singer; David S Cohn, "Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection" (1988) 15 Hastings Const Law Quarterly 295. See also: Brian R Boch, "Fourteenth Amendment - The Standard of Mental Competency To Waive Constitutional Rights Versus The Competency Standard To Stand Trial", (1994) 84(4) Journal of Crime and Criminology 883-914 where the writer examines the court's ruling in *Dusky v United States*, (1960) 362 US 402 which held that the test for mental capacity must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.

[117] *Frendak v United States*, 408 A 2d 364 (DC 1979), at 367 (hereinafter *Frendak*).

[118] *Frendak*, at 367 See also: *State v Chesire* 313 SE 2d 61, 65, 1984 where the court held that mental retardation may be important regarding the issue of voluntariness even where it is determined that the person's capacity and information were acceptable; and *Zant v Stevens* 462 US 862 (1983) it was held that the prosecutor cannot turn what is considered a mitigating factor (i.e., mental retardation) into an aggravating factor.

rights to a jury trial to testify or to appeal.[119] The ABA recommends that a defendant must be "competent to make a decision about raising the defense".[120] Although some clients have the rudimentary knowledge of procedural matters, they may find it difficult to understand the strategic aspects of alleging a particular defence. Therefore the level of competency envisioned by the ABA is "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision or decisions under consideration."[121] This would seem to require a level of competency or capacity that is higher than being fit to stand trial. However, the precise level required is not specified. If a lawyer has a good faith doubt about the defendant's competence to make decisions within the defendant's sphere of control (see 7.5.2(a)), the defense attorney may make a motion to determine the defendant's competence to proceed, even if the defendant has previously been found competent to proceed in the case.[122]

5. Plea Bargaining (or Entering a Guilty Plea)

After his/her investigation of the facts, and analysis of the other circumstances of the case, the defence lawyer may agree with the prosecutor to enter a plea of guilty, which may also include a plea bargain, on behalf of the client. *Black's Law Dictionary* (10th ed) defines a plea bargain as, "a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, usu. a more lenient sentence or a dismissal of the other charges".[123] For many accused, plea-bargaining is the only real hope of reducing their sentence. However, by pleading guilty, the accused is waiving all of

[119] *ABA Criminal Justice Standards on Mental Health,* Standard 7.5.2 (a).
[120] *ABA Criminal Justice Standards on Mental Health,* Standard 7.5.2.
[121] *ABA Criminal Justice Standards on Mental Health,* Standard 7.5.2(b).
[122] *ABA Criminal Justice Standards on Mental Health,* Standard 7.5.2(c).
[123] *Black's Law Dictionary*, 10th ed (St. Paul, Minn: West, a Thompson Business, 2014) at 1338.

his/her rights and the guilty plea will have the full effect of a conviction.

The FLSC *Model Code of Professional Conduct* provides a commentary that specifies the conditions under which plea-bargaining is appropriate:

> 5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,
>
> (a) the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;
> (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;
> (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
> (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.[124]

The commentary to Rule 5.1-2 of the Law Society of Alberta's *Code of Conduct* also sets out the duty of the defence counsel. It provides that a lawyer representing an accused person may communicate with the complainant, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant.[125] When a client instructs a lawyer about a plea bargain the *Code* recommends that the lawyer receive the client's written instruction about the plea. The client must be given all relevant information about the ramifications of a guilty plea, including the fact that the court is under no obligation to accept it. If Rule 5.1-8 has been complied with, then the lawyer may enter into plea arrangements with the prosecutor.[126]

Ellis and Luckasson note that because the client is waiving several important rights by pleading guilty, the prospect of a mentally disabled client entering a plea of guilty without fully understanding its consequences "is most alarming, because

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[124] FLSC, Model Code, 5-1.8.
[125] Law Society of Alberta, *Code of Conduct*, Rule 5.1-2 and commentary.
[126] Law Society of Alberta, *Code of Conduct,* Rule 5.1-8.

those consequences are uniquely momentous for that defendant".[127]

Often the test for determining a person's competence to plead guilty is considered to be equivalent to that for her/his competence to stand trial. Indeed, the *Criminal Code* does not differentiate between the two competencies. The *Criminal Code* explicitly deals with unfitness to stand trial, but does not address the issue of competency to enter a plea of guilty.[128] However, Ellis and Luckasson assert that a person may be fit to stand trial, but not fit to enter a plea of guilty. They argue that the level of competence required for fitness to stand trial is lower than that for entering a guilty plea. In order to competently enter a plea of guilty, an accused must understand the consequences of that plea and assess its desirability in her/his case.[129]

A lawyer faced with a mentally disabled client who may not be competent to enter a guilty plea is faced with some difficult decisions. For example, where there is an indication that the client may have a defence or argument based on mental disability, it is more difficult for the lawyer to satisfy himself/herself that it is appropriate to enter a plea of guilty. If the client was suffering the effects of a mental disability at the time of the offence, there may be a lack of the required mental element for the crime. The client, however, may be unwilling to raise this defence. One symptom of several types of mental disabilities is the inability to recognize that one is suffering from a disease of the mind. The client may be adamant about wanting a plea bargain and therefore about admitting guilt. This poses the thorny ethical dilemma as to whether the lawyer can proceed to plead guilty on the client's behalf when he/she believes that the client has a possible defence. Does this client fully appreciate the consequences of entering a guilty plea?

Some authors argue that since the accused can waive a defence of not guilty,

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[127] J Ellis & R Luckasson, "Mentally Retarded Criminal Defendants" (1985) 53(3-4) Geo Wash L Rev 414 at 461 (hereinafter Ellis and Luckasson).
[128] See: s 2 ("unfit to stand trial").
[129] Ellis & Luckasson, at 462. In Canada, it may be argued that the fitness test is broad enough to encompass an understanding of the consequences of entering a guilty plea. See, Chapter Five, Fitness to Stand Trial.

he/she can also waive the affirmative defence of insanity (now not criminally responsible). Chernoff and Schaffer assert that "[a]lthough the judicial scheme rejects the concept of punishment where there is no blame, it also leaves to the accused the choice of whether to rely on the defense."[130]

Moreover, if the client instructs the lawyer to plead guilty, the lawyer cannot disclose the possibility of a defence of mental disorder to the court because that would have the effect of violating lawyer-client privilege. If, after entering a plea of guilty without mentioning the possibility of a disease of the mind, the lawyer then seeks to rely upon evidence of possible mental disability at the sentencing stage (e.g., through a pre-sentence report), the judge in charge of the case might question the guilty plea. Therefore, the lawyer who did not mention his/her client's mental disability at the time of entering the plea may be inhibited from referring to it at the sentencing stage.[131]

Therefore, on the one hand, a lawyer cannot enter into a plea bargain on behalf of his/her client unless the client admits that he/she is guilty of the offence. On the other hand, the client may be asserting that he/she is guilty even though the lawyer considers that he/she has a possible defence, such as not criminally responsible on account of mental disorder. However, where the client is competent to choose to plead guilty, the lawyer may have to subordinate his/her judgment to the client's wishes.

The *ABA Criminal Justice Standards on Mental Health,* Standard 7-4.1 requires that the defendant be competent to enter a plea of guilty. The ABA test for determining whether a defendant is competent to plead guilty is whether the defendant has sufficient present ability to consult with her/his lawyer with a reasonable degree of rational understanding, and "whether the defendant has a rational as well as factual understanding of the nature and consequences of the

[130] Chernoff and Schaffer, at 528. See also: *Swain.* As noted above under notes 86 to 110, sometimes the accused's choice to rely or not on the defence of not criminally responsible is not absolute.
[131] Chernoff and Schaffer, at 528.

decision or decisions under consideration".[132] In one federal case, *United States v Masthers,* the trial court had accepted a guilty plea from a mentally handicapped defendant who had an I.Q. of 57.[133] The court of appeals held that the trial court's observations of the defendant's demeanour and his responses to questions were not sufficient to justify a finding that the plea was voluntary and competent. During questioning, the defendant had usually just affirmed what he was asked, disguising his disability both from the trial judge and from his lawyer.

Ellis and Luckasson approve of the approach taken in *Masthers.*[134] They argue that there are a significant number of mentally handicapped defendants who "remember the events of the incident at issue, can communicate with counsel, and understand the proceedings of trial, but nevertheless are incapable of weighing the choice necessary to make a competent plea of guilty".[135] However, as Ellis and Luckasson point out, this may place a mentally handicapped person in an unfair position. He/She would be considered fit to stand trial, but would not be able to reduce his/her sentence through effective plea bargaining. Two possible solutions they suggest are first, to permit counsel to plea bargain on accused's behalf or second, to refuse to try accused who are unable to understand the nature and consequences of a plea bargain, although they could understand trial proceedings and assist counsel.[136]

D. Trial Issues

1. Introduction

There are numerous tactical and ethical considerations for the lawyer when advising his/her client whether or not to testify in criminal proceedings. A preliminary, yet important issue is whether the client is capable of standing trial. This issue is discussed separately in Chapter 5, Fitness to Stand Trial. Once the client

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[132] *ABA Criminal Justice Standards on Mental Health,* Standard 7-5.2(b).
[133] 539 F 2d 721 (DC Cir 1976) (hereinafter *Masthers*).
[134] Ellis and Luckasson, at 464.
[135] Ellis and Luckasson, at 464.
[136] Ellis and Luckasson, at 464.

is considered fit to stand trial, another possible issue is whether the client will be considered competent to take an oath or to make a solemn affirmation and therefore testify. A further issue is whether the client, although considered legally competent to take an oath (or make a solemn affirmation), will be found incompetent to testify. Further, if the client is competent to testify, should he/she testify? Which issues arise will depend on a variety of individual circumstances and the final course of action taken will be based largely on the professional judgment of the lawyer.

2. Competence to Testify

(a) Introduction

Mental disorder does not necessarily render a person incompetent to testify as a witness.[137] There are three general requirements to satisfy that one is competent to testify: a person must be able to understand the nature of an oath or solemn affirmation; he/she must be able to communicate the evidence; and he/she must be able to observe and recollect. The first two requirements are outlined in the *Canada Evidence Act.*[138] The third requirement was added by virtue of the common law.

The ability to communicate, observe and recollect were common law prerequisites to testifying. *Canada Evidence Act* section 16 deals with witnesses whose capacity is in question. Under s 16, a person whose mental capacity is in question may give evidence under certain circumstances. One requirement is an ability to communicate the evidence. The section does not mention an ability to observe or recollect. It is therefore not clear from the section whether the previous common law requirements that the person be able to observe and recollect, in addition to being able to communicate, remain.

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[137] See also: Schrock. To be found incompetent, the defendant must be incapable of assisting with the defense, not merely uncooperative.

[138] RSC 1985, c C-5, s 16(1) (hereinafter *Canada Evidence Act* or *CEA*).

(b) Presumption of Mental Capacity of Adult Witnesses

A witness, other than a child under the age of fourteen, is presumed to have the necessary mental capacity to satisfy the requirements of mental competence (capacity).[139] Persons over 14 years of age are presumed to understand the nature of an oath and a trial judge is not required to inquire into their understanding.[140] However, a party may challenge the mental capacity of a proposed witness who is fourteen years of age or more.[141]

(c) The *Canada Evidence Act*

The requirements for making an oath or solemn affirmation are outlined in the *Canada Evidence Act.* This Act permits some exceptions to the requirement that the witness must take an oath or make a solemn affirmation; these are discussed below.

The *Canada Evidence Act* provides:

> 16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> > (*a*) whether the person understands the nature of an oath or a solemn affirmation; and
> > (*b*) whether the person is able to communicate the evidence.

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[139] John H Wigmore, *Wigmore on Evidence,* vol. II (Chadbourn rev, 1979) para 497, *R v Allen* (1979), 46 CCC (2d) 477 (Ont HC); *R v Hawke* (1975), 7 OR (2d) 145 (CA) (hereinafter *Hawke*).

[140] *R v Farley* (1995), 23 OR (3d) 445 (CA) a severely mentally handicapped 26-year-old complainant was found competent to testify upon promising to tell the truth about an incident of sexual assault. The trial judge held that the complainant could not testify under oath or affirmation, but could testify upon promising to tell the truth as identified in section 16(3) of the *Canada Evidence Act*. The proposed witness does not have to make an actual commitment to tell the truth before being allowed to testify under section 16(3) of the *CEA*. Therefore, a witness who understands the duty to speak the truth, but nonetheless is prepared to ignore that duty, is not rendered an incompetent witness. See also *R v Caron*, (1994) 19 OR (3d) 323 (Ont CA) where the court held that to be "able to communicate the evidence" the witness must demonstrate some ability to decipher fact from fiction and have a capacity and willingness to relate to the court the essence of what happened. There must also be some evidence that the witness has the capacity to relate the evidence independently, without relying entirely on suggestive questions; *R v Armstrong* (1959), 125 CCC 56 (BCCA); *R v Dyer* (1971), 5 CCC (2d) 376 (BCCA), leave to appeal to SCC refused, 17 CRNS 233n (SCC). See also: PK McWilliams, *Canadian Criminal Evidence*, 3rd ed (Aurora, Ont: Canada Law Book, 1988) at 34-3 (hereinafter McWilliams).

[141] See: s 16(5) of the *Canada Evidence Act*.

> (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
>
> (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
>
> (3.1) A person referred to in subsection (3) shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
>
> (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
>
> (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation. [142]

Thus, section 16 has created three classes of persons who could provide evidence: those who understand the nature of an oath and are able to communicate evidence; those who understand the nature of a solemn affirmation and are able to communicate evidence; and those who do not understand the nature of an oath or a solemn affirmation but are able to communicate evidence. Persons in the last group must promise to tell the truth before they can give evidence in court. A 2015 amendment to s 16 added subsection 3.1 to the *Canada Evidence Act* to clarify that a person in this group cannot be questioned about their understanding of what promising to tell the truth means for the purpose determining whether to allow their testimony.[143] Finally, those who are unable to understand the nature of an oath or a solemn affirmation or who are unable to communicate the evidence are

[142] This section was proclaimed in force January 1, 1988.
[143] See *Victims Bill of Rights Act*, SA 2015, c 13, s 53.

prohibited from testifying or giving unsworn evidence.

(d) Ability to Understand the Nature of an Oath or Solemn Affirmation

There has been some jurisprudence on the standard of understanding required by paragraph 16(1)(a). It is clear that the witness does not have to believe in God or a supreme being in order to understand the nature of an oath—nor does he/she have to understand the spiritual consequences of an oath. The witness must understand that there is an obligation to tell the truth.

If a person is objected to as incompetent to take an oath because it is not binding on her/him, she/he may affirm under section 14 of the *Canada Evidence Act*. Further, section 14 allows for those who object to take an oath because of conscientious scruples to make a solemn affirmation. Section 14 reads:

> 14. (1) A person may, instead of taking an oath, make the following solemn affirmation:
>
> > I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.
>
> (2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

Evidence taken pursuant to a solemn affirmation has the same effect as if taken under oath.[144]

Section 14 allows for a person to be objected to as incompetent to take an oath. This person may make a solemn affirmation. The phrase "incompetent to take an oath" does not refer to mental incompetence but to incompetence to take an oath because it would not bind the conscience of the witness.[145]

A person who neither understands the nature of an oath or solemn

[144] *Canada Evidence Act*, s 14(2).
[145] *R v Walsh* (1978), 45 CCC (2d) 199 (ONCA).

affirmation nor is able to communicate the evidence cannot testify.[146] There are, however, some options open to a proposed witness who does not understand the nature of an oath or solemn affirmation but who is able to communicate the evidence. If a person whose mental capacity is challenged does not understand the nature of an oath or solemn affirmation but is able to communicate the evidence, she/he may testify on promising to tell the truth.[147]

The current leading decision on the issue of "obligation to tell the truth" and adults with mental disabilities was decided before the *Canada Evidence Act* was amended to add s 16(3.1) in 2015. In *R v DAI,*[148] a 26-year-old woman with the mental age of three to six, was called to testify about sexual assaults by her mother's partner. A trial judge determined that the witness had failed to demonstrate that she understood the duty to tell the truth. The accused was acquitted and the Ontario Court of Appeal affirmed this result. In overturning the acquittal and ordering a new trial, the Supreme Court of Canada (per Chief Justice McLachlin) stated that: "s. 16(3), on its plain words and in its context, reveals only two requirements for an adult with mental disabilities to have the capacity to testify: (1) that the witness be able to communicate the evidence, and (2) that the person promise to tell the truth."[149] She went on to reject the prior caselaw that appeared to require the judge to make an abstract inquiry into the witnesses' understanding of the obligation to tell the truth.[150] This rejection of prior caselaw removes the requirement for a mentally disabled person to articulate the nature of the truth itself and how it binds one's conscience in a court. Thus, mentally limited people need to understand the difference between true and false and know that they should tell the truth in court.[151] The wording in *Canada Evidence Act* s 16(3.1) appears to support the SCC's conclusion on the matter.

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[146] *Canada Evidence Act*, s 16(4).
[147] *Canada Evidence Act*, s 16(3).
[148] *R v DAI*, 2012 SCC 5, [2012] 1 SCR 149 (hereinafter *DAI*).
[149] *DAI*, at para 54.
[150] *DAI*, at para 63.
[151] *DAI*, at para 64.

(e) Ability to Communicate the Evidence

Once it is established that a person with a mental disability can take the oath or make a solemn affirmation, the court looks at whether the witness can communicate the evidence. There are two aspects to the ability to communicate. First, the person must be physically able to present his/her evidence. This may pose difficulties for the mentally disabled witness because he/she may have problems with communication. Many individuals with a mental handicap have communication deficits that may interfere with their speech. Their range of expression may be limited. The extent of their vocabulary and their ability to understand and answer questions may be affected by the disability. This difficulty may be overcome by using non-verbal communication techniques or by adjusting the language used in questions.[152] If a witness is unable to speak, s 6(1) of the *Canada Evidence Act* permits him/her to give his evidence in another intelligible manner. However, if none of these is a viable alternative, the witness may not be allowed to testify.

A second aspect of effective communication is whether or not the witness has the capacity to communicate the evidence. This means that he/she must be able not only to understand and answer simple questions, but also must have enough intelligence to understand reasonable questions to him/her in cross-examination.[153] In a Supreme Court of Canada decision, *R v Marquard,*[154] the Court dealt with the meaning of "communicate the evidence" in the context of paragraph 16(1)(b) that formerly dealt with witnesses under age 14.[155] The Supreme Court held that the phrase "communicate the evidence" indicates more than just verbal ability. The

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[152] CA Hass & L Brown, *Silent Victims: Canada's Criminal Justice System and Sexual Abuse of Persons with a Mental Handicap* (The Calgary Sexual Assault Committee, 1989) at 91 (hereinafter Hass and Brown). See also: Jamie P Morano, "Sexual Abuse of the Mentally Retarded Patient: Medical and Legal Analysis for the Primary Care Physician" (2001) 3:3 Prim Care Companion J Clin Psychiatry at 126-135.

[153] *Udy v Stewart* (1885), 10 OR 591 (Com Pleas Div), as cited in Robertson, at 338.

[154] [1993] 4 SCR 223 (hereinafter *Marquard)*.

[155] Note that witnesses under the age of 14 are now dealt with in the *Canada Evidence Act* under s 16.1 instead of s 16(1) and that the framework for witness under the age of 14 has changed from that which was considered in *Marquard*. However, s 16(1) continues to apply to persons who are not under the age of 14 where their capacity to give evidence is challenged.

witness must be able to testify about the matters before the court. The judge must explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court. However, the majority held that it is not necessary to determine in advance that the witness perceived and recollects the very events at issue at trial as a condition of ruling that her evidence be received.

While it is not a case particularly focused on communicating evidence, the SCC in *DAI* does provide some guidance on the ability to communicate. Chief Justice McLachlin states:[156]

> Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements.

Marinos *et al* caution that "[u]nder extreme stress the individual with an intellectual disability may begin to demonstrate greater weakness in cognitive abilities than her or she would in non-stress conditions, therefore appearing more disabled or less capable. The is called cognitive disintegration."[157] It is suggested that an individual with an intellectual disability be familiarized with the court process to minimize stress and the potential accompanying cognitive disintegration.[158]

There are very few reported decisions where a person has been judged incompetent to testify because she does not have the capacity to communicate the evidence due to lack of mental ability. Presumably, this is because individuals who have such difficulties are not often put forward as prospective witnesses.[159] Further, although a person may be suffering from a mental disability, he/she may be

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[156] *DAI*, at para 82.

[157] Voula Marinos et al, "Victims and Witness with Intellectual Disability in the Criminal Justice System" (2014) 61 Crim LQ 517 at 524 (footnote omitted) (hereinafter Marinos et al). See also Table 1 at 525 for a list of potential behaviours and their meanings and the article as a whole for background as to factors that should be considered when a person with an intellectual disability is to testify as a witness.

[158] See Marinos et al, 524.

[159] Robertson, at 340.

competent to testify. As Robertson observes, "[m]ental disability may affect a person's legal capacity in some areas but not in others."[160]

Not every mental disability will render a witness incompetent. Therefore, merely because a person has been diagnosed with a mental disability, it does not necessarily follow that he/she will be found incompetent as a witness. In *R v Allen (No. 2),*[161] the impugned witness was only able to remember a conversation with the accused when the witness was administered sodium amytol. A psychiatrist testified that the witness was able to remember the conversation at trial because her memory had been released and not because she had been coached. Defence counsel sought a ruling as to the competency of the witness to testify. The Ontario High Court held that the witness was competent to testify and that the circumstances surrounding the retrieval of the evidence through the administration of a drug went to the issue of credibility.

Conversely, a sane individual may be an incompetent witness. For example, in *R v Harbuz,*[162] the Crown called a witness after two psychiatrists had assured the Crown that he was sane. After about one-half hour of testimony, it became apparent that the witness was incompetent because of a mental disorder or mental handicap that the judge said he was unable to diagnose or to define. The judge declared a mistrial because it was impossible for the jury to ignore the damaging evidence even though they would be cautioned that it was given by an incompetent person.

The witness should be found competent to testify unless the mental illness: "substantially negatives trustworthiness upon the specific subject of the testimony."[163] Therefore, when a witness who was a resident of a psychiatric facility and who believed that spirits were around him and talking to him wished to testify, he was found competent because this belief did not affect his memory and he was

[160] Robertson, at 304.
[161] (1979), 46 CCC (2d) 477 (ON HC), which was not overturned but has a negative treatment.
[162] (1978), 45 CCC (2d) 65 (SKQB).
[163] *Wigmore on Evidence* at 585.

otherwise rational.[164] On the other hand, a witness who appeared to be hallucinating on the stand was found on appeal not to have been a competent witness even though her testimony was independently corroborated.[165] In *R v CPR,*[166] a witness with a mental disability could not remember the name of the street she lived on and did not have a sense of time in terms of the date or month when an event occurred. The BC Provincial Court held that she could still relay the context of the event. Further, the concern that she would be suggestible and easily influenced would go to the weight of her evidence and could be explored on cross-examination or through other witnesses.[167]

(f) Ability to Observe and Recollect

A third requirement outlined in the case law that may overlap in some cases with the ability to communicate the evidence is the ability to observe and recollect. Currently, the weight of authority holds that if a person has the ability to answer questions and appears competent, his/her relative inability to recollect or observe events may go to weight or credibility.[168]

The issue of competency should be distinguished from credibility (believability). A witness may be quite competent yet his/her evidence or part of it is difficult to believe. This witness is able to testify. Even if a mental disability of a witness does not render him/her incompetent, his/her credibility may be impeached as with any witness.[169]

(g) Judge's Inquiry into the Ability to Understand and to Communicate

The party who raises the issue of a proposed witness' mental capacity has

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[164] *R v Hill* (1851), 5 Cox CC 259, as cited in H Savage and C McKague, *Mental Health Law in Canada* (Toronto: Butterworths, 1987) at 185 (hereinafter Savage and McKague).
[165] *Hawke*, as cited in Savage and McKague, at 186.
[166] *R v CPR*, 2015 BCPC 164 (hereinafter *CPR*).
[167] *CPR*, at para 44.
[168] *DAI*, at paras 72-3.
[169] McWilliams, at 34-19. See also *R v DAI*, 2012 SCC 5 at paras 72-73, [2012] 1 SCR 149.

the burden of satisfying the court that competency is an issue.[170] This prevents a party from raising competency as an issue to intimidate the proposed witness or put the witness on the defensive from the outset.[171]

Once the issue of mental capacity to testify is raised, the trial judge ascertains whether or not the witness understands the nature of an oath and can communicate the evidence by undertaking an inquiry. Generally, the nature of the questions relates to the religious understanding of the witness or her appreciation of the solemnity of the occasion and the comprehension of the duty to tell the truth. Courts usually hold a competency *voir dire*[172] when the mental capacity of a proposed witness is challenged. Where the impugned witness is a child, the inquiry is conducted in open court by the trial judge. If there is a jury, they will hear the child witness' answers and see his demeanour when questioned. Viewing the inquiry assists the jury in determining the weight that they should attach to the evidence.[173]

Where the impugned witness is an adult of questionable mental capacity, the case law (which existed both before and after section 16 was amended) indicates that the inquiry as to the witnesses' competence to testify should be conducted during a *voir dire*.[174] Expert evidence and testimony of laypersons who have observed the proposed witness may be used during the *voir dire* in order to assist in determining the witness' competence.[175] Further, during the *voir dire*, the witness may be cross-examined.[176]

It is usually safe to assume that there will be some type of inquiry made by the trial judge into the person's mental capacity and that the proposed witness will be questioned and may be subject to cross-examination.

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[170] *Canada Evidence Act*, s 16(5).
[171] Hass and Brown at 85.
[172] *Voir dire* refers to a trial held in the absence of the jury in order to determine the admissibility of evidence or other issues. As per Justice Craig in *R v Brydon*, 6 CCC (3d) 68 (1983): '... generally we refer to it as a *trial within a trial*. It is merely a descriptive phrase to describe a procedure which takes place, namely, to determine the admissibility of certain evidence. In the case of a jury trial, the determination is made in the absence of the jury..."
[173] McWilliams, at 34-11.
[174] *Hawke*. See also: *DAI,* at paras 75-83; *CPR,* at para 26.
[175] McWilliams, at 34-19. This issue is discussed under Experts below.
[176] *R v Hawke* (1975), 7 OR (2d) 145 (CA), [1974] OJ No 1856, at para 29.

3. Should the Client Testify?

If the matter proceeds to trial and the client elects to plead not guilty, the issue arises as to whether the client should take the stand to testify. The client makes the ultimate decision whether or not to testify on his/her own behalf. However, the client will look to the lawyer for advice on this issue.

Whether the accused has a mental disability or not, it is often a challenge to advise the accused as to whether or not he/she should testify. It is very difficult to determine what kind of witness the accused will make until he/she is actually on the stand.[177] Because the accused does not testify at the preliminary inquiry, the lawyer is not in a position to determine whether he/she will make a good witness until he/she has committed himself/herself to the stand.[178] Before trial, the lawyer is limited to guesswork in assessing whether or not the client will be credible.

Generally, when assessing whether to advise an accused to testify, O'Brien advises that defence counsel may look at the following: "How strong is the prosecution's case? What are the strengths of your defence without the accused's testimony? Does the accused have a criminal record? What are his/her appearance and attitude? Is he/she likely to withstand cross-examination well? How will the jury react to him/her?"[179]

It may be that the accused has admitted essential facts that establish the offence to his lawyer. Under these circumstances, if the accused does not have a mental disability and is not relying upon a defence related to his mental condition, the decision is quite elementary. He should not be called as a witness.[180] When the prosecution leads a weak case against the client, some lawyers also caution against testifying. Advising the accused to testify may run the risk of filling the needed gaps

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[177] P Martin, *Alberta Bar Admission Course 1989-90, Criminal Procedure*, Chapter VI "Trial Preparation and Examination of Witnesses" by N O'Brien at VI-12 (hereinafter O'Brien).
[178] O'Brien, at VI-12.
[179] FL Bailey & GB Rothblatt, *Investigation and Preparation of Criminal Cases* (Rochester, NY: The Lawyer's Co-operative Publishing Company, 1970).
[180] O'Brien, at VI-12.

in the Crown's case.[181]

Where the client is mentally disabled, the facts may be admitted in any event and the lawyer may find it advisable to present the client's version to the jury in order to argue the defence of mental disorder. The accused may wish to rely upon a defence related to her/his mental condition or to argue that she/he did not possess the required mental element because of a mental condition. It may be necessary to testify under these circumstances.

There are several factors that may enter into the lawyer's decision to advise a mentally disabled client to testify or not. Clients with mental disabilities sometimes do not present well in court.[182] They may have personality difficulties that are exacerbated by the stress of testifying. Mentally disabled persons may have personal hygiene or appearance problems that may affect how they are perceived by the trier of fact (judge or jury). On the other hand, the lawyer may very well want the client to testify so as to show the jury exactly how the disability manifests itself. Each situation will have to be decided based on its own merits. If the client is suffering from a mental disability, it may be necessary to consult a mental health expert to determine if the client is able to testify and to hold up to cross-examination.

Often the client and the lawyer will be faced with a jury trial or will have selected a jury trial. A jury usually wants to hear the accused's story.[183] This may make the situation difficult if the client has a mental disorder and one is uncertain as to how he/she will present to the jury. However, with appropriate explanation from defence counsel, the jury may be more understanding when the accused does not testify or testifies with some difficulty because he has a mental disorder.

The lawyer may determine that it is not in the best interest of the client to testify for any or all of the above reasons. However, the client may wish to testify in spite of all contrary advice. Clients sometimes feel that they have to explain their

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[181] O'Brien, at VI-12.

[182] For a discussion about victims and witnesses with mental disabilities in court, see Voula Marinos et al "Victims and Witnesses with Intellectual Disability in the Criminal Justice System" (2014), 61 Crim LQ 517.

[183] O'Brien, at VI-12.

side of events in court and do not feel that justice has been served unless they do. In that case, the lawyer may feel obligated to call the client to the stand, although he/she may not wish to actively direct the course of the testimony. Indeed, the advocate may be in a situation where she is bound by ethics not to do anything that might perpetuate a fraud on the court. If the advocate feels that the client's confidence in his/her is seriously undermined by the difference of opinion as to testifying, he/she may wish to withdraw from the case. This may be an option if the matter has not yet proceeded to trial and the date is far enough off in the future that the client could retain another lawyer without jeopardizing his defence. It should be noted, however, that a second lawyer may experience the same difficulty with the client and that the problem is not really solved by passing the person on to another lawyer. It may not be possible to withdraw if the matter has proceeded to trial and the client is not able to obtain adequate defence on short notice. In that case, the lawyer's role is limited to damage control.

An example of a situation where a mentally disabled client wished to testify occurred in *R v Brigham.*[184] In this case, the accused was tried and convicted of first-degree murder in the 1984 bombing deaths of three tourists. On appeal, counsel for the accused argued that Brigham had been deprived of his right to effective counsel since his previous counsel (the one who conducted the trial) did not allow him to testify. Upon hearing the guilty verdict, Brigham testified he had retained the trial counsel on the clear understanding that he would be called to testify in his own defence. However, counsel would not permit him to do so.

In a deposition, Brigham's trial lawyer testified that he did not have Brigham testify for several reasons. First, he thought that the client was unable to distinguish between fact and fantasy. Second, Brigham had been examined by two forensic psychiatrists who found him fit to stand trial but fragile and in a condition that could deteriorate over the course of the trial. Third, the trial lawyer felt that it was not the in client's best interest to testify.

[184] (1992), 79 CCC (3d) 365; [1992] AQ 2283 (Que CA) (hereinafter *Brigham*). For a recent decision on the accused's decision to testify see: *R v Shofman*, 2015 ONSC 6876, [2015] OJ No 5803.

The Quebec Court of Appeal stated that if Brigham's condition had indeed deteriorated over the course of the trial, his lawyer had a duty to point this out to the judge so that a new fitness examination could ensue. If, on the other hand, the client was able to make decisions, his lawyer should have respected his wishes to testify.

The Court of Appeal stated that counsel has the right and the duty to advise the accused on whether he should take the stand. If the accused disagrees with counsel's advice not to testify, "resulting in an irreconcilable conflict as to how the defence should be conducted, counsel may seek the court's leave to withdraw."[185] The Court of Appeal also quoted the Supreme Court of Canada's ruling in *Swain* that the accused had the right to control his own defence, including the right to decide whether to testify or not.[186]

In the end, the Quebec Court of Appeal quashed the accused's conviction and ordered a new trial.

4. Preparing a Mentally Disabled Client for Testifying

If the accused is going to testify, the lawyer must attempt to prepare him/her for testifying. This requires that the lawyer brief the client thoroughly as to what to expect. Usually, the lawyer advises the client as to what type of questions he/she will face during cross-examination. Often, lawyers will engage in a mock cross-examination so as to better prepare the client for cross-examination. Further, lawyers usually point out the various weaknesses in the accused's evidence, including any inconsistencies between the proposed testimony and statements made to police.[187] Other tactics discussed with the accused include how to react to the Crown's cross-examination (e.g., not displaying any form of belligerence towards Crown counsel and keeping one's answers simple so as to avoid providing

[185] *Brigham,* at 42 (Quicklaw). See also: *R v Irwin* (1987), Cr App 294 (CA); *R v Swain*, [1988] Crim LR 109 (CA).
[186] *R v Swain,* [1991] 1 SCR 933.
[187] O'Brien, at VI-12 to VI-13.

ammunition to the Crown).[188]

Because the client may be suffering from a mental disability at the time of trial (but still be considered fit to stand trial), it may be quite difficult for a lawyer to prepare the client to testify. Even if the person has been found fit to stand trial and is therefore considered able to instruct the lawyer, there may be barriers that cause difficulty. Although the lawyer may feel doubtful that the client truly understands the consequences of testifying, the lawyer will no doubt feel obligated to assume that the accused understands these consequences because of the finding that the client is fit. Additionally, communicating with a mentally disabled or mentally ill client about testifying and ensuring that he is fully aware of the possible consequences may be a challenge.

Some suggestions for improving communication with a mentally disabled client may be found in Chapter One, Recognizing that the Client Has a Mental Disability and in this Chapter, under 2. Taking Instructions and Improving Communication with a Mentally Disabled Client.

5. Taking Instructions during Trial

Some of the difficulties that lawyers encounter in taking instructions from mentally disabled clients before trial continue during trial. The lawyer has control of the case during trial—which witnesses to call, what order to call them, how to conduct her examination and cross-examination and so on. The mentally disabled client may not be able to assist the lawyer during trial. For example, the client's mental disability may cause memory problems that prevent her/him from noticing inconsistencies in other's testimony or that may prevent her/him from remembering possible mitigating circumstances. The client's disability may lead to the jury or the judge not having all of the facts that might have resulted in lesser punishment.[189]

Therefore, it is perhaps very important for a lawyer representing a mentally

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[188] O'Brien, at VI-13.

[189] M Field, "Executing Defendants with Mental Retardation" (1992), 96(6) Amer J on Mental Retardation 567 at 569.

disabled defendant to have spent extra time becoming familiar with his disability in order to anticipate some of these difficulties.

6. Competence to Represent Oneself

Because clients and lawyers do not always agree, sometimes clients discharge their lawyers and decide to proceed to trial unrepresented. In other circumstances, mentally disabled individuals may decide from the beginning to represent themselves. Do they have the capacity to do so?

Unlike in the United States where the accused has a constitutional right to counsel in criminal matters, even if she/he does not have sufficient funds, our *Charter of Rights* does not guarantee the right to counsel in criminal proceedings.[190] However, when a suspect is arrested or detained, she/he has the *Charter* "right to retain and instruct counsel without delay and to be informed of that right".[191] The issue of what constitutes a valid waiver of this right is discussed in Chapter Four, Confessions and Statements.

In Canada, the accused, therefore, may elect to proceed without counsel. This election may not cause any difficulty if the accused is competent to proceed. What if the accused is not competent to proceed? If the trial judge has reasonable grounds to believe that the unrepresented accused is unfit to stand trial, *Criminal Code* section 672.24 [formerly subsection 615(4)] provides that the judge must order the accused be represented by counsel. In other words, whenever the judge would have reason to direct a trial on the issue as to whether the accused is unfit to stand trial, the accused must have counsel.[192]

"Unfit to stand trial" is defined in section 2 of the *Criminal Code* as:

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[190] For a discussion of the United States jurisprudence and the American Bar Association's Standard for determining whether a person is competent to defend her/himself, see: *ABA Criminal Justice Standards on Mental Health,* Standard 7-5.2.

[191] Part I of the *Constitution Act,* 1982, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 (hereinafter *Charter of Rights*), s 10(b).

[192] Under *Criminal Code* s 672.11(a), a judge may order that an accused person's mental condition be assessed if the court has reasonable grounds to believe that such evidence is needed to determine whether the accused is fit to stand trial. This may effectively remove any discretion of the accused to refuse to raise the issue of fitness.

> [U]nable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> > (a) understand the nature or object of the proceedings
> >
> > (b) understand the possible consequences of the proceedings, or
> >
> > (c) communicate with counsel.

When will the court have reasonable grounds to believe that the unrepresented accused is unfit to stand trial and therefore be under an obligation to order that he be represented by counsel? In *R v Fairholm,*[193] the British Columbia Court of Appeal dealt with this issue. The accused was charged with uttering death threats. At trial, the accused appeared without representation. The Crown indicated that it was going to ask the court to consider whether the accused was insane within section 16 of the *Criminal Code.*[194]

A psychiatric report before the judge indicated that the accused was fit to stand trial. At the trial, a psychiatrist testified that the accused suffered from schizophrenia and was therefore unable to appreciate the nature and quality of his acts. The accused was found not guilty on account of insanity. He appealed this verdict.

The British Columbia Court of Appeal ordered a new trial. The court held that on the facts of this case, the trial judge should have ensured that the accused was represented by counsel. Further, although it is not generally the duty of a trial judge to force counsel on an accused, in the circumstances of this case, there were several reasons why the judge should have assigned counsel to him.[195]

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[193] (1990), 60 CCC (3d) 289 (BCCA) (hereinafter *Fairholm*).
[194] This decision took place before recent developments in the Supreme Court of Canada that limit the Crown's ability to raise the issue of insanity [now: mental disorder, per s 16 of the *Criminal Code*]. See: *Swain.*
[195] *Fairholm,* at 293 - 4.

First, there was no indication that the accused understood before deciding to represent himself the consequences of being found not guilty by reason of insanity (being kept in custody at the pleasure of the Lieutenant Governor).[196] There was no indication that accused became aware of these consequences at trial either. Second, there was evidence that the accused was mentally ill—both at the time of trial and at the time of the offence. This would indicate that the accused was not a person of ordinary understanding, despite the report that the accused was fit to stand trial.[197] Finally, a reading of the fitness provisions of the *Criminal Code* indicated that Parliament intended that the court must be extremely careful to ensure that those who may be mentally ill are not prejudiced in their defence because of their illness.[198]

Therefore, so long as the trial judge becomes aware of the accused's difficulties, the judge is mandated to order that the accused be represented by counsel.[199] It has also been held that "s. 672.24 requires the mandatory appointment of counsel for an accused prior to the hearing of an application for an assessment hearing."[200]

Counsel may also be assigned to act on behalf of an accused who is a party to appeal proceedings where it appears desirable in the interests of justice that the accused should have legal assistance.[201] Similar provisions are made for accused appearing before the Supreme Court of Canada.[202]

7. Competence to Be Sentenced

There are not many Canadian cases that directly address the accused's

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[196] *Fairholm,* at 294.
[197] *Fairholm,* at 294.
[198] *Fairholm,* at 295.
[199] *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, [1999] SCJ No 31 at para 88.
[200] *R v Waranuk*, 2010 YKCA 5 at para 46.
[201] *Criminal Code* s 684(1). For summary conviction appeals, see s 830.
[202] *Criminal Code* s 694.1.

competency to be sentenced.[203] However, this may be an issue, especially if the accused has entered a guilty plea. Even where the accused pleads not guilty, his/her competence to be sentenced may be an issue. Often an accused will be given treatment to enable him/her to be fit to stand trial. Unfortunately, this treatment or medication may not suffice to see the accused to the end of his/her trial and through the sentencing stage. Consequently, an accused who was considered fit to stand trial and who may have been quite capable throughout the trial may be no longer able to instruct counsel when it comes to making submissions regarding her sentence.

If the accused pleads or is found guilty, the court will often ask for a pre-sentence report under section 721 of the *Criminal Code*. This report is prepared by a probation officer in writing and is filed with the court. The Nova Scotia Court of Appeal summarized the purpose of a pre-sentence report as necessary to supply the court with "a picture of the accused as a person in society—his background, family, education, employment record, physical and mental health, associates and social activities, and potentialities and motivations".[204]

A mentally disabled person who has become less competent may not be able to provide the probation officer with appropriate information so that the court may make an appropriate disposition. Further, the accused may not be able to properly instruct her lawyer so that counsel may adequately speak on the accused's behalf.

Further, a decision of the Ontario Provincial Court indicates that s 672.11 of the *Criminal Code* (the provision which authorizes the making of assessment orders under certain circumstances) does not confer authority on the trial judge to order a psychiatric assessment of the accused for general sentencing purposes.[205] Section 672.11 provides for assessments to determine if the accused is unfit to stand trial or

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[203] See also: Chapter Five, Fitness to Stand Trial.

[204] *R v Bartkow* (1978), 1 CR (3d) S 36, [1978] NSJ No 35 (NSSC (AD)) at para 10. Note that *R v Bartkow* is cited with approval in *R v Donovan*, 2004 NBCA 55, [2004] NBJ No 273 at para 31.

[205] *R v Snow* (1992), 10 OR (3d) 109 (Gen Div) (hereinafter *Snow).*See also *R v Gray,* 2002 BCSC 1192, where the Court held that the assessment provisions did not apply to an accused with FASD; nor could such assessment occur at a private clinic and be funded by the province.

to determine the appropriate disposition where the accused has been found not criminally responsible on account of mental disorder (among others), but it does not provide for psychiatric assessment after an accused has been found or has plead guilty.

The Ontario court held that it may be possible to ask the trial court to order an assessment under subsection 24(1) of the *Charter of Rights.* An argument could be made that Parliament omitted to bestow jurisdiction upon a trial judge to order a psychiatric assessment for general sentencing purposes in section 672.11. This has the effect of denying an accused the opportunity to make full answer and defence in the presentation of evidence on the issue of sentence and therefore constitutes a breach of sections 7 and 11(d) of the *Charter of Rights.*[206]

In *R v Lenart*,[207] the Ontario Court of Appeal agreed with the holding in *Snow*, but also noted that *Criminal Code* s 721, which allows for a pre-sentence report, together with an assessment under the *Mental Health Act,* provide a means of providing assessment information to assist in the adjudication of criminal matters.

Thus, the accused may be in a position where he/she is not capable of instructing counsel (or a probation officer in a pre-sentence report) as to important sentencing factors.

It is very difficult to suggest what may be done if a mentally disabled client appears to have become incompetent at the sentencing stage. One possible strategy would be to anticipate that the accused may not remain capable and to obtain as much information as possible about her relative to sentencing issues while he/she is able to provide it.

The American Position on Competency to be Sentenced

The right to speak on one's behalf following conviction but before sentence is

[206] *Snow.*

[207] *R v Lenart* (1998), 39 OR (3d) 55 (CA). However, see *R v MB*, 2014 ABQB 683, [2014] AJ No 1274, where a forensic psychiatric report was ordered under s 723(3) and that was separate from the pre-sentence report.

recognized in most jurisdictions in the United States.[208] This right is not considered to be of constitutional weight.[209] However, numerous U.S. courts have held that incompetent defendants may not be sentenced while incompetent.[210] In *Chavez v United States,*[211] the Ninth Circuit held that to be sentenced, the offender must understand the nature of, and be able to participate intelligently in the proceedings. Further, in *Saddler v United States,* the Second Circuit required that the accused must also be able to speak on her own behalf in order to be sentenced.[212] In some jurisdictions, if the defendant is incompetent to be sentenced, the sentence may not be imposed until the defendant regains competence.[213]

The American Bar Association currently recommends a similar approach. The ABA *Criminal Justice Standards on Mental Health* deal with mental competence to participate in various aspects of criminal proceedings. These include: the ability to represent oneself, the competence to enter a plea of no contest or guilty, the competence to be sentenced in a non-capital matter and others.

Standard 7-8.7 provides that in non-capital cases, the court may not proceed to sentence an incompetent defendant. In this situation, the court should order treatment to restore competence as provided in Standards 4.10-4.12.[214] The ABA recommends that the test for determining competence at the time of sentence should be:

> [W]hether the defendant has the sufficient present ability to consult with the defendant's attorney with a reasonable degree of rational understanding and whether the defendant has a rational as well as a factual understanding of the sentence proceedings.[215]

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[208] *ABA Criminal Justice Mental Health Standards,1984,* at 270.
[209] *ABA Criminal Justice Mental Health Standards, 1984,* at 270.
[210] See, for example: *Cameron v Fisher,* 320 F.2d 731 (DC Cir 1963); *State v Hehman,* 520 P 2d 507 (1974); *State v Denton,* 420 P 2d 930 (1966); *People v Mitchell,* 57 Ill App 2d 238 (1965).
[211] 656 F 2d 512 (9th Cir 1981).
[212] 531 F 2d 83 (2d Cir 1976). *Chavez* and *Saddler* are discussed in Ogloff, Wallace and Otto, at 354 - 355.
[213] *ABA Criminal Justice Standards on Mental Health,* Standard 7-8.7.
[214] *ABA Criminal Justice Standards on Mental Health*.
[215] *ABA Criminal Justice Standards on Mental Health*, Standard 7-8.7(a)(1).

If a good faith doubt is raised as to the defendant's mental competence at the time of sentencing, the court is obligated to determine the defendant's competence and should order a pre-sentence mental evaluation of the defendant, similar to one given in order to determine competence to stand trial.[216]

Once the evaluation is complete, if the evaluators determine that the defendant is incompetent to be sentenced, the court is recommended to order treatment to restore competency.[217] Once a defendant is restored to competency, sentencing can proceed.[218] If the defendant is found to be non-restorable, and the defendant was convicted of an offence causing, threatening or creating a substantial risk of death or bodily harm, the court should initiate a special commitment proceeding, provided for under part VII of the Standards. Defendants convicted of other offences may be subject to general involuntary civil commitment procedures.[219]

III. Confidentiality

A. Involvement of Third Parties

1. Solicitor-Client Privilege and Confidentiality

Generally, because the client has a mental disability, there are other significant players in that person's life. These include social workers, family, medical personnel and other organizations that assist clients with disabilities. Sometimes, these individuals and agencies may be of invaluable assistance to the client and the lawyer. For example, an awareness of community resources may be extremely important in developing an alternate plan (e.g., sentence) for the mentally disabled offender.[220] Lawyers could draw on the support provided by these individuals and groups to make the most effective use of the resources available in the community.

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[216] *ABA Criminal Justice Standards on Mental Health,* Standard 7-8.7(a)(ii),
[217] *ABA Criminal Justice Standards on Mental Health,* Standard 7-8.7(b).
[218] *ABA Criminal Justice Standards on Mental Health,* Standard 7-8.7(b)(i).
[219] *ABA Criminal Justice Standards on Mental Health,* Standard 7-8.7(b)(ii).
[220] Chapter Fifteen contains a list of support agencies throughout the Province of Alberta.

Further, supportive individuals may be very helpful in explaining the nature and consequences of the person's mental disability.[221]

There are two possible concerns that may arise as a result of the interjection of third parties into the process. First, there is the lawyer's general ethical duty to maintain his/her client's confidentiality when discussing aspects of the case with others. Second, there are concerns that communications between the client and third parties are not protected from being disclosed in court. This means that they are not "privileged" and that family members could be called upon to testify as to the content of potentially damaging conversations.

The lawyer may have serious concerns about privilege because family members are not in a privileged relationship with the client. Although everything that the client discusses with his/her lawyer in preparation for a criminal case is protected from being disclosed, information shared with others is likely not protected, or privileged, even if the family member has paid the retainer for the lawyer.[222] This means that a family member could be asked to testify by the prosecution about anything relevant he/she has been told by the client. A mentally disabled accused person who derives support from a family member, yet is not able to discuss her/his case with that person, will find this particularly difficult. However, a lawyer might be able to conduct discreet inquiries of an accused's family, friends or others provided the inquiries do not breach solicitor-client privilege.[223]

2. Confidentiality

Apart from the separate issue of solicitor-client privilege, the lawyer has an ethical duty to her/his client to maintain confidentiality. The FLSC *Model Code of Professional Conduct* states that:

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[221] See: N Mickenberg, "The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals" (1979) 31 Stan L Rev 625 at 633.
[222] This would likely include information shared with an adult guardian, who has been appointed to make personal decisions for the accused.
[223] Manson, at 216.

> Confidential Information
> 3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
> (a) expressly or impliedly authorized by the client;
> (b) required by law or a court to do so;
> (c) required to deliver the information to the Law Society; or
> (d) otherwise permitted by this rule.[224]

If the client clearly authorizes the lawyer to discuss the case with third parties, the lawyer will not be breaching his ethical duty to maintain confidentiality. He/She may still be faced with some privilege problems if he/she discusses the case too freely with others, however. Unless the client authorizes disclosure, the lawyer has a duty not to discuss the client's case with others.

This ethical duty may cause difficulties for a lawyer who is attempting to build a case for her client's defence. If the client refuses to permit the lawyer to discuss the case with others, such as psychiatric personnel, it may be very difficult to build a defence. It may be that a lawyer is of the view that the client is not capable of making such a decision. The lawyer may feel that it is necessary to breach this ethical duty in order to best serve the client. However, this decision could have very serious consequences for the lawyer. Perhaps the only solution to such a dilemma is to withdraw from the case. In most situations, clients are quite willing to permit counsel to discuss their case with mental health professionals and this ethical dilemma does not arise.

B. Medical Experts, Privilege and Confidentiality[225]

Two issues that might arise with some frequency are whether psychiatric or other experts who are consulted by lawyers have any confidentiality obligations to the client and whether the information that they produce will be protected by solicitor-client privilege.

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[224] See also Rule 3.3-1 of the Law Society of Alberta, *Code of Conduct*.
[225] For a summary of the United States' law regarding psychiatrist-patient privilege, see: M.E. Phelan, "The Pitfalls of Presenting a Diminished Capacity Defense" (1990 Fall) Criminal Justice 8.

1. Confidentiality

Confidentiality must be differentiated from privilege.[226] Privilege is an evidence concept that will operate to protect documents and communications from being disclosed before or during criminal proceedings. On the other hand, in Canada, confidentiality is an ethical duty that is owed by certain professionals to their clients. There may exist a relationship between two parties (such as a doctor and his/her patient) that requires confidentiality in order to foster the relationship. In fact, a breach of confidence in a physician-patient relationship outside the courtroom may result in a civil law suit or discipline from a professional body.[227]

Because medical and other professionals have an ethical obligation to maintain the confidentiality of any communications that they have with their patients, they may be very reluctant to disclose any information about the client, especially in court. Lawyers who have clients with mental disabilities may enlist medical professionals to assist in the accused's case. It has long been a legal tradition that all client communications with third-party experts, such as psychiatrists retained by counsel to help with the defence, are protected by solicitor-client privilege.[228] However, in some circumstances, the mental health expert may have no choice. This is because when the patient is an accused person, information given to a psychiatrist may have to be the disclosed in the interest of public safety.[229]

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[226] See Alice Woolley et al, *Lawyers' Ethics and Professional Regulation,* 3d ed. (Toronto: LexisNexis Canada, 2017); Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis Canada, 2011). See also: Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (UBC Press, 2016) and Monroe H Freedman, Abbe Smith & Alice Woolley, eds, *Lawyers' Ethics* (NY: Routledge, 2017).

[227] Robertson, at 449. See also: ME Schiffer, *Psychiatry Behind Bars* (Toronto: Butterworths, 1982) at 57 - 67.

[228] *Smith v Jones,* 1999, [1999] 1 SCR 455, 169 DLR (4th) 385, at para 10 (per Major J dissenting on other grounds).

[229] In the criminal context see: *R v O'Connor*, [1995] 4 SCR 411; *R v Carosella*, [1997] 1 SCR 80. In the civil context see: *AM v Ryan*, [1997] 1 SCR 157; *McInerney v MacDonald*, [1992] 2 SCR 138. See also: Alberta Law Society, *Code of Conduct*, Rule 3.3-3.

2. Testimonial Privilege and Mental Health Professionals

A lawyer may decide that it is necessary to consult with a psychiatrist or other expert in order to advise the accused and to make some tactical decisions (e.g., should this accused testify?).[230] Where defence counsel wishes to raise his/her client's mental disorder as a defence, he/she usually enlists the support of one or more psychiatrists. In fact, it is unlikely that defence counsel would attempt to prove that the accused was suffering from a mental disorder without expert evidence.[231] Thus, it is probable that the lawyer will have his/her client examined before trial. It is also possible that the accused had already consulted a psychiatrist at some point before or since the alleged crime.

There are several potential sources of psychiatric information about the client. First, the client may have previously been treated in a psychiatric facility (either voluntarily or involuntarily) and there may be records available. Section 17 of the *Mental Health Act* sets out the conditions for disclosure of confidential patient records for persons who have received diagnostic and treatment services in Alberta centres.[232] Second, the client may have consulted a mental health expert privately. If the client so authorizes, the private expert may also release confidential client records. Third, the lawyer may privately retain a psychiatrist to assess the individual. Finally, the lawyer could apply to the court for an assessment order under section 672.12 of the *Criminal Code.* However, the resulting assessment report must be filed with the court and will be provided to all parties.[233]

Historically, in Canada, the law usually attached no privilege to the relationship between psychiatrist and patient or between physician and patient.[234] Confidential communications between a patient and a doctor were admissible in evidence,

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[230] Manson, at 220.
[231] M Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978) at 31 (hereinafter Schiffer).
[232] RSA 2000, c M-13.
[233] *Criminal Code,* s 672.2.
[234] See, for example: *R v Potvin* (1971), 16 CRNS 233 (Que. C.A.) (hereinafter *Potvin)*; *R v S(RJ)* (1985), 19 CCC (3d) 115 (Ont CA), leave to appeal to SCC refused (1985), 61 NR 266; *R v Burgess,* [1974] 4 WWR 310 (BC Co Ct) (hereinafter *Burgess*).

without the consent of the patient, even if the communication took place during a court-ordered assessment.[235] On occasion, judges had exercised their discretion and told psychiatrists that they did not have to answer certain questions.[236] However, the search for truth at trial generally outweighed the desirability of confidentiality. Defence counsel often advised their clients not to talk to psychiatrists during court-ordered assessments. A number of analysts recommended that this area of the law be reformed to extend privilege to assessing psychiatrists.[237]

The law in this area changed in 1991 with the Supreme Court of Canada's decision, *R v Fosty.*[238] In this case, the Supreme Court of Canada endorsed the common law privilege that attached to confidential communications if they satisfied the four principles enumerated by Wigmore. These four criteria provide:

> 1. The communication must have originated in a confidence that it will not be disclosed.
>
> 2. The element of confidentiality must be essential to the satisfactory maintenance of the relation between the parties.
>
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> 4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[239]

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235 The only time that this evidence could be excluded was if the psychiatrist was classified as a "person in authority" and the evidence was excluded under the confessions rule. However, this was an uphill argument. See Chapter Four for the discussion of the common law confessions rule and persons in authority.

236 See, for example: *Dembie v Dembie* (1963), 21 RFL 46 (Ont HC); *R v Hawke* (1974), 3 OR (2d) 210 (HC), rev'd on other grounds (1975), 29 CRNS 1 (Ont CA).

237 See, for example: ET Picard, *Legal Liability of Doctors and Hospitals in Canada,* 2nd ed (Toronto: Carswell, 1984); Law Reform Commission of Canada, *Report on Evidence Proposed Evidence Code* (1975), s 41, at 31.

238 (1991), 67 CCC (3d) 289 (SCC) (*sub nom Gruenke v The Queen)*.

239 John H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940). See also: *Slavutych v Baker* (1975), 55 DLR (3d) 224 (SCC).

The Supreme Court recognized that a privilege could exist in a priest-penitent relationship. The Court provided that a case-by-case analysis could be performed to see if such communications could be excluded, based on Wigmore's principles. (In this case, the first criterion was not met, so the claim of privilege failed.)

In light of this development in the law, it became possible to argue that communications between psychiatrists and patients could be privileged. However, the accused must prove that Wigmore's four principles have been satisfied before the common law privilege will be granted by the court. For example, the accused must show that the statements must have been intended to be confidential before the common law privilege will attach. In cases that have followed *Fosty,* although the privilege is asserted, the court usually finds that one or more of Wigmore's criteria have not been met.[240]

The *Criminal Code* currently contains a provision (section 672.21) that deals with the admissibility of statements made by the accused to psychiatrists and others during a court-ordered assessment. Section 672.21 deals with statements made by the accused during the course and for the purposes of a court ordered assessment. This provision is discussed in Chapter Four, under Court-ordered Assessments and Statements.

The privilege that exists between solicitors and clients differs from that afforded by Wigmore's criteria. From the earliest times, communications made between lawyers and clients were considered confidential and the lawyer was obligated to keep them secret.[241] Consequently, even at trial, a solicitor is permitted to maintain the secrecy of solicitor-client communications. This privilege belongs to the client, not the lawyer, and protects the client from the disclosure of any confidential communications made by her or communications made by the solicitor in response, while the client was in the process of seeking legal advice.[242] In some

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240 See, for example: *R v Walker* (1992), 74 CCC (3d) 97 (BCCA); *AM v Ryan,* [1997] 1 SCR 157.
241 R Delisle, D Stuart & D Tanovich, eds, *Evidence: Principles and Problems,* 2nd ed (Toronto: Thompson Canada, 2004) at 781 (hereinafter, *Delisle*).
242 Delisle, at 782.

circumstances, the lawyer can protect communications between his client and a psychiatrist from disclosure in court by relying upon litigation privilege.[243] Where the defence counsel has retained a psychiatrist to assist in the client's defence, it is quite likely that the communications between the psychiatrist and the client will fall under the umbrella of litigation privilege. Communications from medical advisors to the client's lawyer in anticipation of litigation can fall under the umbrella of litigation privilege.[244] If a privilege has attached to communications between lawyer and client or between lawyer and medical advisor, the content of the material will enjoy a testimonial privilege and will not have to be disclosed at trial, unless the client waives (gives up) the privilege.

Often, the lawyer will retain more than one psychiatrist to examine the accused. Where several psychiatrists are consulted, it is possible that they may disagree on the accused's state of mind. In that case, the lawyer may choose to only call those psychiatrists whose evidence would be the most beneficial for his client. Is the evidence obtained by the psychiatrist for the purposes of building a case for the accused privileged and does it remain privileged once the psychiatrist is no longer required to testify for the accused?

Developments in the case law indicate that privilege will attach to protect communications with psychiatrists under these circumstances. In *R v Perron,*[245] the Quebec Court of Appeal held that communications with experts and reports by those experts retained by counsel to prepare a defence are protected by privilege. The accused was on trial for first-degree murder and his defence was that he lacked the specific intent required for murder and first-degree murder. During his testimony, the accused stated that he did not remember some of the circumstances

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[243] See: *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at paras 28 and 49, where litigation privilege is explained as protection for communications between a solicitor and third parties.

[244] Delisle, at 784. See also: *R v Peruta* (1992), 78 CCC (3d) 350 (Qc CA)*; R v Brouillette* (1992), 78 CCC (3d) 350 (Que CA), where the Court held that documents prepared by a private investigator (hired by the defence) in contemplation of litigation where privileged and not subject to production to the Crown.

[245](1990), 54 CCC (3d) 108 (Que CA) (hereinafter *Perron).* See also: *R v Poslowsky,* [1996] BCJ No 2550 (hereinafter *Poslowsky*) and *R v Bennett,* [2002] NSJ No 385 (hereinafter *Bennett*), at para 6-7.

preceding or surrounding the incident that led to the victim's death. Crown counsel then decided to cross-examine the accused on statements that he had made to a psychiatrist. Crown counsel also called the psychiatrist to testify in reply as to his conversations with the accused. The psychiatrist had been retained by the defence counsel and had made a report, but counsel decided not to call him as a witness. At some point either before or during the trial, the defence counsel had given Crown counsel a copy of the psychiatrist's report.

The trial judge held that there was no privilege for communications between a psychiatrist and his patient and permitted the cross-examination and testimony. The accused was convicted of first-degree murder and appealed. The Quebec Court of Appeal allowed the appeal and ordered a new trial.

The Court of Appeal held that when a lawyer uses the services of an expert to prepare in the defence, communications with that expert are privileged as they fall within the framework of solicitor-client privilege. It does not matter that the lawyer is not present when the psychiatrist interviews the accused. It would not matter if he had consulted several experts and chosen only to call one as a witness—the defendant is not obliged to disclose what he had stated to the psychiatrists under these circumstances.[246]

The Crown tried unsuccessfully to argue that even though a privilege may have attached to the communications, it was waived when the psychiatrist's report was given to Crown counsel. The Quebec Court of Appeal acknowledged that there may be a waiver of the privilege by the client, but that it must be clear and done with complete awareness of the result. In this case, the circumstances surrounding the turning over of the report to Crown counsel did not allow the court to conclude that there was a waiver.[247]

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246 *Perron,* at 117.

247 See also: *Royal Bank v Lee* (1992), 127 AR 236 (Alta CA) where the court intimated that the implied authority that a client gives a lawyer will bind the client only if the lawyer has acted within the bounds of a professional, reasonable and competent manner. Where a lawyer has inadvertently given the other side privileged information, the court has held that the mistake will not bind the client.

Thus, it is clear that when counsel requires the services of an expert in order to assist her/him in preparing the defence, communications between the accused and the expert will fall under the umbrella of privilege, even where the defence chooses not to call the expert as a witness.[248]

Although communications between psychiatrists and clients are protected when the psychiatrist is retained by defence counsel, the accused will have to show that a psychiatric opinion obtained as a result of a previous treatment relationship meets Wigmore's criteria and should be privileged. This is because the communication would not fall under the umbrella of a solicitor-client relationship.[249]

As a final note, in cases where the accused has put his or her sanity in issue and has refused to be interviewed by a Crown appointed psychiatrist, an adverse inference may be drawn and will not infringe section 7 of the *Charter*.[250]

IV. Conclusion

The lawyer who is representing a mentally disabled client in a criminal matter has several tactical and ethical decisions. Several of the dilemmas faced by counsel have no definite answers. The mentally disabled client's mental capacity affects his representation in many ways. It is vital that a client possess the ability to understand and appreciate the nature of an action and its consequences. This ability must be present throughout the case. The client may be quite capable of making certain decisions but may not be able to make others. Further, in many cases, capacity is not static. The client's mental condition may fluctuate throughout the course of a criminal case. These factors pose several thorny ethical and tactical questions for the lawyer.

In addition to difficulties with the client's capacity, the lawyer may be faced with the participation of third parties, whether desired or undesired. The

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However, the court also noted that if the material was even glanced at by the other side, as it wasn't in this case, there may be enough to deny privilege. (Negative treatment on this case)

248 *Perron*. However, as noted in *Smith v Jones*, [1999] 1 SCR 455, there is an exception for disclosure of psychiatrists' reports that indicate that the accused poses a continuing danger to society.

249 *Potvin, Burgess, Poslowsky and Bennett.*

250 *R v Worth* (1995), 98 CCC (3d) 133 (Ont CA).

confidentiality and privilege issues that arise because of the involvement of third parties may render it difficult to provide effective representation of the client. However, the participation of these parties may be necessary to assist the client throughout a stressful period.

There are no easy answers to some of the representation issues raised in this chapter. Hopefully, awareness of some of the possible solicitor-client contingencies will assist the lawyer to resolve these difficult issues in an effective, ethical manner.

Bibliography

American Bar Association. *Criminal Justice Standards on Mental Health,* 2016 online: < http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html >.

Bailey, FL & GB Rothblatt. *Investigation and Preparation of Criminal Cases* Rochester, NY: Lawyer's Co-operative Publishing Company, 1970.

Berg, David. "An Inconvenient Right: An Overview of the Self-Represented Accused's Autonomy" (2015) 62 Crim LQ 503.

Black's Law Dictionary, 8th ed St. Paul, Minn: West, a Thompson Business, 2004.

Boch, Brian R "Fourteenth Amendment - The Standard of Mental Competency To Waive Constitutional Rights Versus The Competency Standard To Stand Trial", (1994) 84(4) Journal of Criminal Law and Criminology 83.

Buretta, John D. "Twenty-fourth Annual Review of Criminal Procedure: USSC and Courts of Appeal 1993-1994" (1995) 83 *Geo LJ* R16.

The Calgary John Howard Society. *The Mentally Handicapped Offender: A Guide to Understanding*, 1983.

Canadian Criminal Trial Lawyers Association. *"How to Demystify the Prosecutions/Crowns Efforts of Minimizing the Severity of Your Clients Mental Retardation/Intellectual Disability"*, May 23, 1998, Edmonton Alberta.

Chernoff, PA & WG Schaffer, "Defending the Mentally Ill: Ethical Quicksand" (1972) 10 Amer Crim Law Rev 505.

Cohn, DS. "Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection" (1988) 15 Hastings Const Law Quarterly 295.

Clements, WG. *Incapacity* Vancouver: The Continuing Legal Education Society of British Columbia, 1988.

Delisle, RJ & D Stuart. *Learning Canadian Criminal Procedure*, 7th ed Toronto: Thompson Canada, 2004.

Delisle, RJ; D Stuart & D Tanovich, eds. *Evidence: Principles and Problems,* 2nd ed Toronto: Thompson Canada, 2004.

Dodek, Adam & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* UBC Press, 2016.

Dukelow, DA & B Nuse, *Dictionary of Canadian Law* Toronto: Carswell, 2011.

Edmonton Community Legal Centre "Filing a Complaint and/or Making a Claim Against a Lawyer", online: Law Society of Alberta <http://www. http://www.eclc.ca/file-complaint-make-financial-claim-lawyer/>.

Edmonton Community Legal Centre "What Happens After Submitting a Complaint", online: Law Society of Alberta <http://www. http://www.eclc.ca/file-complaint-make-financial-claim-lawyer/>.

Ellis, J & R Luckasson. "Mentally Retarded Criminal Defendants" (1985) 53(3-4) Geo Wash L Rev 414.

Field, M. "Executing Defendants with Mental Retardation" (1992) 96(6) Amer J on Mental Retardation 567.

Finch, Mr. Justice L. "Expert Witnesses, Opinion Evidence and Privilege" (1989) 47 The Advocate 21.

Flowers**,** Roberta K. "The Role of the Defense Attorney: Not Just an Advocate" (2010) 7 Ohio St J Crim L 647.

Freedman, Monroe, Abbe Smith & Alice Woolley, eds, *Lawyers' Ethics* New York: Routledge, 2017.

Hass, CA & L Brown. *Silent Victims: Canada's Criminal Justice System and Sexual Abuse of Persons with a Mental Handicap* The Calgary Sexual Assault Committee, 1989.

"Hostage-taker Decides Guilt Better than Insanity" *The Calgary Herald* (20 February 1991) B5.

Law Reform Commission of Canada. *Report on Evidence Proposed Evidence Code* (1975).

Law Society of Alberta, *Code of Conduct*, 2018. Online: <https://dvbat5idxh7ib.cloudfront.net/wp-content/uploads/2017/01/14211909/Code.pdf>

Manson, AS. “Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality" (1982) 27 McGill LJ 196.

Marinos, Voula *et al*, “Victims and Witness with Intellectual Disability in the Criminal Justice System” (2014) 61 Crim LQ 517.

Martin, A. "The Role and Responsibility of the Defence Advocate" (1970) 12 Crim LQ 376.

Martin, P. *Alberta Bar Admission Course 1989-90*, Criminal Procedure, Chapter VI "Trial Preparation and Examination of Witnesses" by N O'Brien.

McLellan, H. "Incapacity: Litigation Issues" in *Materials Prepared for a Continuing Legal Education Seminar* Continuing Legal Education Society of BC, 2011.

McWilliams, PK. *Canadian Criminal Evidence*, 3rd ed Aurora, Ont: Canada Law Book, 1988.

Mickenberg, N. "The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals" (1979) 31 Stan L Rev 625.

Morano, Jamie P. “Sexual Abuse of the Mentally Retarded Patient: Medical and Legal Analysis for the Primary Care Physician” (2001) 3:3 Prim Care Companion J Clin Psychiatry 126.

Ogloff, J; D Wallace & R Otto. "Competencies in the Criminal Process" in DK Kagehiro and WS Laufer, eds, *Handbook of Psychology and Law* New York: Springer-Verlag, 1991.

Perlin, ML. "Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases" (1992) 16 Law and Human Behavior 39.

Phelan, ME. "The Pitfalls of Presenting a Diminished Capacity Defense" (1990 Fall) Criminal Justice 8.

Picard, ET. *Legal Liability of Doctors and Hospitals in Canada,* 2nd ed Toronto: Carswell, 1984.

Schiffer, Marc. *Psychiatry Behind Bars* Toronto: Butterworths, 1982.

Redlich, N, ed. *Standards of Professional Conduct for Lawyers and Judges* Boston: Little, Brown and Company, 1984.

Robertson, GB. *Mental Disability and the Law in Canada*, 2nd ed Toronto: Carswell, 1994.

Rocheleau, A. "Making Your Practice More Elder Friendly" (1993) 19(4) Law Practice Management 23.

Rogers, JL. "What is the Client's Best Interest? Professional Roles in the Criminal Justice System" (1985) 49(6) Journal of Personality Assessment 665.

GG Sarno, "Annotation: Adequacy of Defense Counsel's Representation of Criminal Client Regarding Incompetency, Insanity, and Related Issues", 17 ALR 4th 575, s 3.

Savage, H & C McKague. *Mental Health Law in Canada* Toronto: Butterworths, 1987.

Schiffer, ME. *Mental Disorder and the Criminal Trial Process* Toronto: Butterworths, 1978.

Schmitz, C. "Experts Can't Testify About Child Witness Credibility at Criminal Trials: SCC" (1993) 13(28) *Lawyer's Weekly* 1, 35.

Schrock, Norma. “Defense Counsel's role in Determining Competency to Stand Trial” (1996) 9 Geo J Leg Ethics 639.

Singer, AC. "The Imposition of the Insanity Defense on an Unwilling Defendant" (1980) 41 Ohio State L J 637.

Smith, BG. *Professional Conduct for Canadian Lawyers* Toronto: Butterworths, 1989.

Wigmore, JH. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1905).

Wigmore, John H. *Wigmore on Evidence,* vol. II Chadbourn rev, 1979.

Woolley, Alice. *Understanding Lawyers’ Ethics in Canada* Toronto: LexisNexis Canada, 2011.

Woolley, Alice *et al*, *Lawyers’ Ethics and Professional Regulation,* 3d ed Toronto: LexisNexis Canada, 2017.