

Tips for Good Practice for Legal Professionals: Vulnerability and Capacity

Should an adult whom you suspect has a capacity challenge consult you, consider the following:

Working with Clients with Capacity Issues

1. Always remember that there is a presumption of capability. Never assume that the adult is incapable.
2. Do not assume that because a family member, friend, doctor, health care professional, financial advisor or social worker etc. says an adult is incapable, that they are incapable, no matter how well intentioned third party is, or may seem.
3. Even if a medical assessment has been completed which shows some cognitive impairment of the adult, this does not necessarily mean that the adult cannot instruct a lawyer. Capacity is a “legal” definition based on the ability to understand and appreciate a specific task at a specific moment. Medical assessments are not determinative of an adult’s ability to instruct counsel or make legal decisions.
4. Memory impairment is not necessarily tied to lack of capacity. An adult may have a short or long-term memory impairment but may still be able to instruct a lawyer or make legal decisions.
5. When meeting with an adult who you suspect may have capacity challenges or social vulnerabilities, make sure that you have allotted more meeting time than usual and in a quiet, safe location. It may take longer to understand the full scope of the issue(s) at hand and the meeting should not be rushed.
6. Lawyers assisting or taking instructions from an adult with some degree of fluctuating cognitive challenge or difficulty understanding due to health or circumstances should consider scheduling a short series of appointments, rather than one or two long appointments.
7. If you suspect an adult may have some capability challenges or social vulnerability, try to accommodate that adult’s schedule to ensure that you meet them in a place where they are comfortable (such as their home, or a trusted third party location) and at their “best” time of day (E.g. - morning may be better than later in the day for some older adults).
8. Understand that capacity is on a continuum. It is a “rheostat” concept, rather than a binary “on / off” concept) – a person is not either “totally capable” or “totally incapable”. Even if an adult is incapable of giving some instructions or executing certain documents, this does not mean that they cannot give

- instructions or execute other documents, in another area. (E.g. – A client may not be capable of giving instructions on sale of a business or real estate, but may be capable of creating and executing a representation agreement)
9. Understand that dementia is not the same as delusion. A client may present with capacity challenges that are not inherent in the adult, but rather are an episode of delusion. A delusion is a short term capacity loss which can be brought on by a number of factors, including incorrect medication type or dosage, alcohol / drug use, a change in a person's physical health etc and is not continuing or persistent.
 10. If an older adult has experienced abuse, their symptoms may present as a lack of capability, but is rather a reaction to trauma and can be temporary.
 11. Do not confuse specific cultural behaviours or expresses of personal values with incapability. Just because a behaviour or reaction may not be what you expect, does not mean the person is incapable.
 12. The adult with capacity or vulnerability issues may not understand how a lawyer can help them and therefore they may not initially disclose information that would be critical to their case. When the adult raises a concern, find out why that issue is important to them and determine if the matter has any legal component. If it does have a legal component, ensure that you explain the benefits and limitations of legal proceedings.
 13. When receiving calls from people with hearing challenges, heavy accents or difficulty speaking, ensure that your speech is slow and clear. Do not assume that because you having trouble understanding them that they may have a capacity challenge.
 14. When assisting or taking instructions from persons with capacity challenges or social vulnerabilities, ensure that information is conveyed in a variety of ways. This may include printed documents (in large font), the use of charts, the use of a presentation with a projector to explain concepts in visual formats, and may also include providing clear "take home" handouts for the adult.
 15. Ensure that you know who your client is. If there is a "helper" or support person, be clear that you are not representing that helper. Meet with the adult alone. Explain to the "helper" or support person that this is a requirement and explain how privilege can be negatively affected
 16. After meeting with the client alone, if the adult wishes to have a "helper" or support person directly involved, and privilege is not an issue, then consider having the helper attend sessions to support the adult. (E.g – limited legal

advice with no court possibility, or an institutional care issue where you are negotiating with the care home but the case will not go to court.)

Safety and Security Considerations

1. Understand that capable adults can choose to live at risk. Just because they make “unwise” decisions, does not mean they are incapable. (E.g. Domestic violence may be occurring and they may not wish to leave the situation or financial spending which is imprudent)
2. Where safety and security is at risk due to suspected financial abuse, assist the adult in providing both legal and/or pragmatic options. This may include a legal revocation of a power of attorney or representation agreement, setting up of direct payments or automatic depositing of funds (including pension, disability, CPP etc.) cancelling cheques or a bank card, and/or reporting the matter to police and credit / financial institutions.
3. Never assume that the issue that the adult with capacity or social vulnerability presents with is the central or only issue to be considered. A legal professional should engage in thorough legal interviewing which includes empathetic listening. In particular, this may include: listening to issues which may not initially seem relevant, reflective listening and reframing, taking the time to summarize information and ensuring that you understand the client’s concern and issues accurately.
4. Be aware that adults with capability and/or vulnerability issues may be currently at risk of harm from their immediate caregivers or family and “friends”. They may be very reticent to report, or may not be fully aware, that this person is abusing them. The abuser may present as helpful, empathetic and caring and in some cases, may truly not believe that what they are doing is abusive.
5. When an adult comes in with a “helper” or supporter, ensure that you meet with the adult alone. The “helper” may, in fact, be an abuser and the adult may be afraid to speak freely in front of that person.
6. Help the adult at risk abuse make a safety plan which includes how to recognize they are unsafe, who to call to help and how to get out of the unsafe situation. This may include using “code words” with a trusted friend or professional to indicate that they are unsafe and need intervention; keeping money or taxi chits aside for emergency transportation at hand and keeping emergency numbers readily available but in a safe location.
7. Never assume that a capable adult needs to do what you say, or cannot make their own decisions. There may be many reasons why they may not want the abuser to leave the situation. Provide options and non-judgmental listening.

The time may not be at hand for the abused adult to leave the situation, but information and support may assist now and provide a pathway for future action. They may prefer to maintain the status quo rather face significant upheaval in their lives – this may be a personal “cost / benefit” analysis.

8. Conversely, the adult may wish to involve both the criminal and civil justice systems in their case. Ensure that you understand both the criminal and civil aspects to the case. Calling police may be an immediate step, particularly in cases of physical, sexual or financial abuse.
9. If the person is abused, do refer the adult, regardless of age, social vulnerability or fluctuating capacity, to other useful and appropriate community sources, such as housing providers, social services, transition houses, crisis lines, immigration services, community programs, support groups etc.