# Ethical and Professionalism Challenges Related to Providing Legal Advice to Employees With Disabilities and Accommodation Needs

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When a client is retaining legal counsel to assist them with an employment law issue (or with any type of litigation, for that matter), they are often experiencing one of the most challenging moments of their professional lives. Providing instructions to legal counsel can be challenging for clients who have an underlying illness or disability which is exacerbated by stress. As such, it is imperative that lawyers take reasonable steps to ensure that their clients are able to access competent and comprehensive legal advice in manner that fully addresses their unique circumstances and accommodation needs.

Employment law counsel must carefully consider whether an employee has any underlying disabilities or health issues that could impact his or her potential claims as against an employer, as these individuals are in a particularly vulnerable position both in the workplace and as parties to a legal proceeding.

## *Legal Capacity and Practical Implications of a Disability on the Lawyer and Client Relationship*

Generally, the law requires a party to a legal proceeding to possess a threshold level of mental capacity. The Ontario *Rules of Civil Procedure* (the "*Rules*") expressly require that individuals have the requisite capacity to manage their own legal affairs if they are named as a party to litigation. Under the *Rules,* a party will be deemed to be under a legal disability if they are, among other things, deemed "mentally incapable" as that term is defined by Section 6 or 45 Ontario's *Substitute Decisions Act*[1] (the "*Act*")[2]. The courts have considered the following

[1] *Substitute Decisions Act, 1992,* SO 1992, c 30 at s 1(1). Online at https://canlii.ca/t/552rm.
[2] *Rules of Civil Procedure,* RRO 1990, Reg 194 at s 1.03(1) [the "*Rules*"]. Online at https://canlii.ca/t/55281.

factors to determine whether a party is under a legal disability within the meaning of the *Act* and must therefore appoint a litigation guardian:

> (a) A person's ability to know or understand the minimum choices or decisions required and to make them;
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> (b) An appreciation of the consequences and effects of his or her choices or decision;
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> (c) An appreciation of the nature of the proceedings;
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> (d) A person's inability to choose and keep counsel;
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> (e) A person's inability to represent himself or herself;
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> (f) A person's inability to distinguish between relevant and irrelevant issues; and
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> (g) A person's mistaken beliefs regarding the law or court procedures.[3]

While it is not difficult to understand why it may sometimes be necessary or in a client's best interests to appoint a litigation guardian, taking these steps can have serious and meaningful consequences in terms of a client's ability to exercise their autonomy in a legal proceeding. If a party is found to be "mentally incapable" by a court, they will not be permitted to pursue a legal claim except by or through a litigation guardian unless the court orders or a specific statute provides otherwise.[4] In addition, no settlement, whether or not a proceeding has been commenced, is binding on a person under legal disability without the approval of a judge.[5] Unless a judge orders otherwise, any money payable to a person under legal disability pursuant to an order or a settlement shall automatically be paid into court[6]. In light of these significant implications, it is imperative that lawyers make a concerted effort to accommodate

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[3] *Huang v Pan,* 2016 ONSC 6306 at paras 17-19. Online at https://canlii.ca/t/gv313.
[4] *Rules* at s 7.01.
[5] *Rules* at s 7.08.
[6] *Rules* at s 7.09.

clients with disabilities and to ensure that they remain as involved as possible in the legal process.

Although a client may have disabilities or mental health issues that present unique challenges in terms of providing instructions or communicating with his or her legal counsel, there is a clear distinction between clients who are "mentally incapable" within the meaning of the *Act* and those who may merely require additional accommodations. Given the serious consequences of a finding of legal disability, it is a lawyer's professional obligation to exercise due diligence in determining a client's capacity and to take reasonable steps to ensure that his or her legal interests are fully protected. The *Rules of Professional Conduct* provide that, "[w]hen a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer a client relationship."[7] The courts have also confirmed that they will generally set a "low threshold" for determining capacity, and that the presumption is that a person does in fact have the capacity to make legal decisions unless proven otherwise.[8] Although the commentary under the *Rules of Professional Conduct* does not provide much clarity on this issue, presumably the underlying public policy consideration is the desire to give clients as much agency as possible and to avoid circumstances where individuals are unfairly precluded from fully exercising their legal autonomy.

Unfortunately, neither the *Rules of Professional Conduct* nor the applicable jurisprudence provide much meaningful guidance about how a lawyer should actually go about assessing a

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[7] *LSO Rules of Professional Conduct ["LSO Rules"],* at 3.2-9. Online at https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-3.
[8] *Carmichael v GlaxoSmithKline Inc,* 2020 ONCA 447 at para 85. Online at https://canlii.ca/t/j8kch.

client's capacity to make decisions about his or her case. Although assessing a client's capacity will often involve seeking the opinion of a medical professional, lawyers also have an obligation to assess their clients' ability to give instructions since they are precluded from acting on behalf of an incapable client who has not appointed a substitute decision maker. Moreover, a client's ability to make decisions may change, for better or worse, over the course of the professional relationship. Therefore, lawyers must be prepared to rely on their own judgment and to recognize that their client's capacity and accommodation needs may evolve over time.

*Addressing Your Clients' Accommodation Needs*

Under the *Rules of Professional Conduct,* lawyers have a professional obligation to accommodate their clients to the point of undue hardship, as required by Ontario's *Human Rights Code:*

> A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the *Ontario Human Rights Code*), marital status, family, status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.[9]

Regardless of a client's capacity or accommodation requirements, they should be made to feel like they are respected, understood, and that they are active participants in the solicitor and client relationship. More often than not, issues with respect to communication and file management can be easily resolved by providing clients with accommodations that are

[9] *LSO Rules* at 6.3.1-1.

tailored to their specific needs. While it would be prudent for lawyers to be proactive about researching the different types of accommodations that their clients may reasonably require and ensuring that their practice is equipped to provide such accommodations wherever possible, it is not always possible to predict whether a client would benefit from certain accommodations. At the outset of a file, lawyers should simply ask their clients about their specific accommodation needs – in most cases, your client knows their own situation best and will therefore be in the best position to articulate whether additional steps should be taken to accommodate their illness or disability. Examples of common accommodation requests are as follows:

- Providing clients with the option of attending meetings in-person or at home via teleconference;
- Ensure that all teleconference software is equipped with closed captioning and ASL interpreters where appropriate;
- Consider whether appointments or telephone calls should be scheduled in shorter increments as opposed to one lengthy meeting;
- Similarly, consider whether your client will require frequent breaks when scheduling other steps in the litigation process, including but not limited to examinations for discovery, cross-examinations, meditations, etc.;
- When a client requires more time with their lawyer than the scheduled length of the appointment because of their illness or disability, it may be appropriate to provide discounted fees in the circumstances;

- Communicating with clients – consider whether your client would benefit from communicating exclusively in writing or if verbal discussions are more appropriate in the circumstances;
- Provide clients with a brief summary of any discussions in writing so they have the opportunity to review and process the information on their own time; and
- Lawyers should aspire to provide all of their clients with regular updates on their files, but we all understand that lawyers can get busy. However, for certain clients it may be imperative to regularly communicate with them about the status of their file to avoid exacerbating their health issues.

*Specific Considerations for Employment Law Claims*

In an employment law case, a client's illness or disability could have significant implications for their claims against their employer. Often, employees will seek legal advice in circumstances where they are actively employed but the employer has engaged in conduct that amounts to a constructive dismissal. Employees may also seek legal advice in circumstances where they have been terminated by an employer and a discriminatory reason (whether on the basis of a disability or otherwise) was a factor in the decision to terminate his or her employment. Regardless of the circumstances, it is vital for employment law counsel to canvass whether an employee has any disabilities or mental health issues that could be impacted by the termination of his or her employment before taking any steps that could adversely impact the employee's entitlement to compensation or benefits. In some instances, it may also be appropriate to request that a client provide a Direction and Authorization permitting counsel to speak to his or her treating physician about any health issues that could impact his or her case. While this is certainly not an exhaustive list, below is a summary of

some of the key issues that can arise in the context of an employment law case involving an employee with a disability or illness.

At common law, where the employer has not specifically agreed to provide compensation during periods of illness or disability, in most cases the employee is not entitled to be paid when absent from work for that reason[10]. In most cases, however, full-time employees are entitled to disability benefits as part of their compensation. That is, an employer will provide health benefits and disability coverage to employees pursuant to the terms of an insurance policy. Both the federal and provincial employment standards legislation requires employers to continue to make whatever benefit plan contributions would be required to be made in order to maintain an employee's benefits during the statutory notice period.[11] The Ontario Court of Appeal has also firmly established that an employer will step into the shoes of an insurer where an employee has become disabled during the common law notice period and the employer discontinued disability benefits.[12] Notwithstanding the foregoing, most employers will not continue an employee's access to short and long-term disability benefits beyond the statutory notice period. Accordingly, at the outset of an employment law file, as a matter of course lawyers should be speaking to their clients about whether they have any underlying health issues or disabilities that would qualify them to receive disability benefits. In particular, employee-side counsel should be encouraging their clients to speak to a medical professional about their ability to qualify for disability benefits. Lawyers should also carefully review a copy of any applicable group benefits policies to ensure

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[10] D'Andrea, James A, *Illness and Disability in the Workplace* (Toronto: Thomson Reuters, 1995) at 5:2000.
[11] *Ontario Employment Standards Act, 2000,* SO 200, c 41 at s 60(1). Online at https://canlii.ca/t/552rz. See also *Canada Labour Code,* RSC 1985, c L-2 at s 231. Online at https://canlii.ca/t/54wgb.
[12] *Alcatel Canada Inc v Egan,* [2004] OJ No 2974 (CA); leave to appeal ref'd [2004] OJ No 2974 (SCC). Online at https://canlii.ca/t/1m9hq.

that, among other things, any relevant deadlines are diarized in a timely manner. It may also be necessary for counsel to take immediate steps to communicate with the employer and reserve a client's rights to apply for disability benefits where appropriate.

It is not uncommon for an employee who has been terminated without cause to be eligible for disability benefits at the time of termination, or to subsequently become eligible for disability benefits during the common law notice period. In those circumstances, it is imperative that a client is fully apprised of the potential impact of receiving short-term or long-term disability benefits on his or her entitlement to reasonable notice or compensation in lieu thereof. In *Sylvester v British Columbia,* the Supreme Court of Canada addressed the issue of whether the disability benefits received by an employee from a benefits plan established and funded by the employer should be deducted from damages for wrongful dismissal.[13] The Court ultimately held that the answer depends on the intention of the parties to the employment contract. Since the employer in that particular case paid the employee's disability benefits in full, and the employee who received benefits under the plan did not also receive a salary, the Court found that the parties did not intend that the employee receive both amounts concurrently and as a result the disability benefits should be deducted. However, the Court also recognized that "…there may be cases where an employee will seek benefits in addition to damages for wrongful dismissal on the basis that the disability benefits are akin to benefits from a private insurance plan for which the employee has provided consideration."[14] Accordingly, employees who contribute to the cost of their benefits premiums may be eligible for disability benefits in addition to any severance payments made.

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[13] *Sylvester v British Columbia,* [1997] 2 SCR 315. Online at https://canlii.ca/t/1fr0g.
[14] *Sylvester* at para 22.

Employees should also be warned about the possibility that an employer could argue that an employment contract is frustrated due to an employee's absence from work. The doctrine of frustration is applicable to employment contracts in cases where an emplo*y*ee is unable to work because of a prolonged illness or disability. Generally, failing to report to work because one has been unable to perform duties due to health problems does not by itself constitute an abandonment of one's employment.[15] However, in some circumstances, an extended medical leave of absence may justify an employer's claim that the employment contract is frustrated, as the circumstances make it impossible for the contractual relationship to continue. The courts have held that, while a prolonged illness will not frustrate an employment contract when the employee appears likely to return to work, the longer the illness persists, the more likely that a court will find that the employment relationship has been frustrated.[16] More recently, in *Katz et al. v Clarke*, the Ontario Divisional Court clarified an employer's duty to accommodate an employee where there is a frustration of contract. The Divisional Court confirmed that, in circumstances where an employee has been out of the workplace for a prolonged period due to illness or disability, an employer's duty to accommodate ends and the doctrine of frustration will be triggered if the employee's permanent disability renders performance of the employment contract impossible. However, if an employee indicates that they are able to return to work and has supporting medical evidence supporting his or her ability to do so, the employer's duty to accommodate is triggered and the employee may not be terminated due to frustration of contract.[17] In light of

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[15] *Koos v A & A Customs Brokers Ltd,* 2009 BCSC 563. Online at https://canlii.ca/t/23c22. Cited in Ball, Stacey Reginald, *Canadian Employment Law* at 8.20 (Toronto: Thomson Reuters, updated to 2021).

[16] *Duong v Linamar Corp,* 2010 ONSC 3159 at para 36. Online at https://canlii.ca/t/29zvl.

[17] *Katz et al v Clarke,* 2019 ONSC 2188 at para 30.

the recent jurisprudence clarifying the applicability of the doctrine of frustration in the context of an employment law case, clients should be warned of the implications of a prolonged absence from work due to an illness or a disability.

In summary, a client with a disability or illness may require additional support and accommodations, and lawyers should attempt to proactively address these issues whenever possible to ensure that their clients feel as though they are able to meaningfully participate in the legal process. Lawyers should also clearly explain to their clients any legal issues that may arise as a result of his or her disability or illness, so that clients can make fully informed decisions.