

CAPACITY AND ACCESS TO LEGAL REPRESENTATION¹

ABSTRACT

Older adults residing in long-term care homes and retirement homes sometimes require legal advice that is obstructed by a substitute decision-maker. Frequently, the SDM will give instructions that are followed by the home or facility administration to the effect that legal counsel is not permitted to speak with the older adult whose rights are in issue, thereby preventing the person from having legitimate access to legal advice.

In Ontario the *Residents' Bill of Rights* partially addresses this issue for long-term care residents by affirming the resident's right to receive visitors of his or her choice. However, in all jurisdictions legislative reforms that would ensure non-interference with access to legal advice from a lawyer of the person's own choice, with clearly defined enforcement mechanisms would be desirable.

This essay explores some of the strategies that might be used to provide legal advice despite the contrary instruction of an SDM under existing law, and legislative reforms that might be undertaken to address this issue.

THE NEED FOR INDEPENDENT LEGAL ADVICE

Older adults living in long-term care facilities and retirement homes frequently have a need for independent legal advice. They may wish to make new powers of attorney for property or personal care, or to change their wills. They may have disputes with their substitute decision-makers, their caregivers, the management of the long-term care home or retirement home, or they may have any of the same legal problems that other adults of all ages encounter. In any of these situations it is highly advisable for the older adult to have independent legal advice and representation from a lawyer of his or her own choosing.

There is of course no legal restriction on adults of any age choosing their own legal counsel. Anyone in a free and democratic society may decide which lawyers they have confidence in and who they choose to represent them. The difficulty is that residents of long-term care homes and retirement homes often live under the control of another person, whether that is their own substitute decision-maker, or the home managers or their proxies. The people who exercise

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control over the older adult may also seek to exert control over that person's legal representation. This type of undue control would of course deprive the solicitor-client relationship of any independence.

The issue of an older adult's access to legal representation is often clouded by the issue of capacity to instruct counsel. Where the person has marginal mental capacity, the home management may find itself routinely accepting instructions on behalf of the marginally capable resident from his or her substitute decision-maker. In some cases, if a substitute decision-maker is not readily available, the home management itself may effectively assume the role of decision-maker on behalf of the marginally capable resident. In either case, the routine bypassing of the resident in the decision-making process does not promote a culture of autonomy and independence for the older adult. In these cases, it can be completely unexpected on the part of the substitute decision-maker or home management that the older adult should seek independent legal advice.

The need for independent legal advice is never higher than when an older adult's mental capacity is in issue. The more closely the issue of mental capacity corresponds to the substance of a dispute, the more likely it is that the interest of the older adult in exerting his or her personal autonomy will conflict with the interests of a substitute decision-maker or others who seek to exert financial control or to act in the older adult's best interests on personal-care decisions. These are precisely the cases in which an older adult who is marginally capable of some decision-making functions and marginally incapable of others may be further marginalized by the attempts of his or her substitute decision-maker or others to deprive him or her of independent legal advice and representation.

The need for independent legal advice is particularly acute than when a marginally capable older adult wishes to challenge the decision-making authority of his or her substitute decision-maker, or to call his or her decision-maker to account for the management of his or her finances or other

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decisions made on his or her behalf, or to challenge the power imbalances that are brought to bear upon the older adult by the home management or others in a position of trust and authority.

OBSTRUCTION OF LEGAL REPRESENTATION

The wide use of powers of attorney for property and personal care are probably the single most problematic mechanism for residents of long-term care homes and retirement homes when seeking independent legal advice. Although powers of attorney of any kind are always intended to be purely optional devices that should only be given freely and voluntarily, the opposite is often true. Many older adults are told by home management that they *must* have powers of attorney for property and personal care in place upon admission to a long-term care home or retirement home. They are regularly told that the home requires these documents to know who to contact to make decisions in the event of an emergency. Nothing could be further from the truth.

In fact, older adults are *not* required by law to give powers of attorney for property and personal care in any circumstance. If an emergency arises and substitute decision-making authority is required, that authority can usually be found under some other legal mechanism, such as a federal income security trusteeship, a statutory guardianship (for property), treatment decisions made by the highest ranked decision-maker under health-care consent legislation (with or without a power of attorney in place) and, as a last resort, a court-appointed guardianship of property or the person. Older adults frequently misunderstand their right to refuse to give a power of attorney for property and personal care, and fail to appreciate the pervasive decision-making powers conferred by the power of attorney document itself.

In some cases, once a power of attorney for property and/or personal care is given, home management routinely looks to the resident's substitute decision-maker for all types of financial, treatment and personal-care decisions, whether or not the older adult continues to have the mental capacity to make those same decisions him or herself. In other cases, the home

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management may bypass informed decision-making entirely, seeking consent for routine decisions from neither the marginally capable resident nor his or her substitute decision-maker. These circumstances tend to isolate the older adult from the decision-making process, and exacerbate the power imbalances in respect of which the older adult may require independent legal advice.

Whether an older adult residing in a long-term care home or retirement home is unsatisfied with a lack of accounting from his or her attorney for property, the property or personal-care decisions that have been made by the attorney, the testamentary dispositions in their current last will and testament, or if they are unsatisfied with the meals, care and accommodation they receive in their current residence, they may, either independently or with the assistance of another person, arrange to meet with legal counsel.

If such a meeting is arranged off the premises (usually at the lawyer's office) and outside the knowledge of the home management or of the older adult's substitute decision-maker, there is little impediment to such a meeting other than the complications that may arise from the need to privately fund legal representation. However, where the home management or a substitute decision-maker suspects that a friend or family member visiting an older adult will take the person for independent legal advice off the premises, home management may, on the instructions of the substitute decision-maker, attempt to bar the older adult from leaving the premises without the permission of his or her substitute decision-maker.

Similarly, home management may on the same instructional authority attempt to prohibit certain friends and family members from visiting the older adult on-site, and to prohibit all visitors, including legal counsel, except for those specifically approved by the substitute decision-maker. In some cases, the instructions of the substitute decision-maker may be solicited by the home management, who may in fact have passed on information not otherwise known to the substitute decision-maker that an attempt to obtain independent legal advice is imminent. Although such practices are illegal, home management might even open mail directed to the older adult and

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divulge its contents to a substitute decision-maker or, in other cases, simply re-direct all mail to the substitute decision-maker.

Even where a power of attorney for property or personal care does not exist, and the older adult is not under any form of financial or personal guardianship, the older adult may have been evaluated as mentally incapable of his or her long-term care admission decision. In that case, substitute consent for the person's long-term care admission would normally have been given by the person's next-of-kin as the highest ranked decision-maker.² Although the specific substitute decision-making authority for the purposes of a long-term care admission would terminate once the admission is complete, the long-term care home may erroneously continue to treat the next-of-kin as though they were legally authorized substitute decision-makers for all other purposes as well. In those cases, it is not unusual to find the home management accepting instructions from a marginally capable resident's next-of-kin to restrict visitors or prohibit off-site visits that could impede access to legal representation for the older adult whose rights are in issue.

Finally, in some homes the management may view financial control as being tantamount to full decision-making authority on behalf of a marginally capable older adult. The person who controls the older adult's financial assets, whether through joint accounts, a trusteeship, powers of attorney or any other mechanism is mistakenly viewed as standing in the shoes of the older adult. The person with financial control may have entered into a lease or other tenancy agreement, and have authorized all financial dealings with the home in question. In those cases, it is not unusual for the home to view the person who pays the bills as the sole decision-making authority from whom they receive instructions on all matters. This, of course, is a highly incorrect view of the law.

The fundamental error that is common to all of these situations is a failure to differentiate between the different decision-making capacities of the older adult whose rights are in issue. The fact that a long-term care home or a retirement-home resident may be incapable of an

² See *Health Care Consent Act, 1996*, (being Schedule A to S.O. 1996, c. 2), ss. 20 and 41.

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admission decision, or of financial management or some other function, might only exacerbate the power imbalances that are at work in the older person's life and heighten the need for legal advice and representation. The critical capacity is the mental capacity to retain and instruct counsel on the legal matter in issue, which in most cases can only be properly evaluated by a lawyer whose advice and representation is sought. It is highly improper for home management or a substitute decision-maker to interfere with the older adult's right to obtain his or her own independent legal advice, particularly where such advice touches on matters of conflict between the older adult and his or her substitute decision-maker, home management, or others in a position of trust and authority. Rather than obstruct such advice, anyone in a position of trust and authority should make every effort to facilitate it.

THE RIGHT TO RECEIVE VISITORS

Under the Ontario *Long-Term Care Homes Act, 2007*,³ long-term care home residents have the benefit of a *Residents' Bill of Rights* which states that "every resident has the right to communicate in confidence, receive visitors of his or her choice and consult in private with any person without interference."⁴ Every licensee of a long-term care home is required by law to ensure that this right is fully respected and promoted.⁵

A resident's right to receive visitors is not contingent upon the resident's mental capacity for any other purpose. If the resident is mentally capable of expressing a wish to meet with a visitor of his or her choice, then the resident's right to meet with that visitor is unqualified under the *Residents' Bill of Rights*. All that should be required is an expression of desire by the resident to meet with some other person who is presenting him or herself at the request of a long-term care home resident. It should not be necessary that the resident be able to identify the caller by name, or to disclose the purpose of the visit.

³ S.O. 2007, c. 8, as amended.

⁴ *Ibid.*, s. 3(1), item 14.

⁵ *Ibid.*, s. 3(1).

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The resident's right to receive visitors does not necessarily extend to a right to leave the facility with the visitor, which is dependent on the resident's mental capacity to make safety and accommodation decisions. A long-term care home resident with sufficient mental capacity would of course continue to enjoy the right to leave the facility as well, either for casual leaves of absence or permanently for the purposes of taking up other accommodation elsewhere. Normally, if the long-term care home resident is not under any form of guardianship of the person, then the person would not be under any legal disability from making his or her own safety and accommodation decisions. However, the statute right contained in the *Residents' Bill of Rights* with respect to visitors is simply confined to meeting in private at the long-term care home with visitors of his or her choice.

While the long-term care home resident's right to receive visitors is generic to all forms of visitors, it is particularly useful for a long-term care home resident who wishes to receive independent legal advice and representation. The long-term care home resident may initiate a request for independent legal advice, which might even be conveyed to a lawyer off the premises by a third person. If he or she merely confirms his or her wish to see a lawyer when the lawyer presents him or herself at the long-term care home, the resident's right to receive visitors under the *Residents' Bill of Rights* should be more than sufficient authority to allow a private visit to take place, with or without the approval of the long-term care resident's substitute decision-maker or the home management.

If the right to receive visitors is not respected, the lawyer should immediately contact the Ontario Ministry of Health and Long-Term Care and initiate a complaint against the long-term care home for a failure or refusal to respect the resident's right to receive visitors under the *Residents' Bill of Rights*. In most cases, the threat of such a complaint will be sufficient to ensure compliance with the *Residents' Bill of Rights*. If an actual complaint is necessary, the Ministry of Health and the Long-Term Care would ordinarily ensure compliance provided only that the resident is able to confirm his or her wish to meet privately with a lawyer.

THE NEED FOR LEGISLATIVE REFORM

The *Residents' Bill of Rights* is so effective in ensuring a long-term care resident's right to receive independent legal advice that its only drawback is that it only applies to long-term care homes in Ontario and other jurisdictions that have similar legislation.⁶ The same need for access to independent legal advice and representation also extends to older adults living in retirement homes/care homes and other situations in which they live under the power and control of a third person, and to nursing home and long-term care home residents in all other jurisdictions.

The new Ontario *Retirement Homes Act, 2010*⁷ has now been enacted but has not yet been fully proclaimed.⁸ This *Act* states that its fundamental principle is that “a retirement home is to be operated so that it is a place where residents live with dignity, respect, privacy and autonomy, in security, safety and comfort and can make informed choices about their care options.”⁹ It also contains a *Residents Bill of Rights*,¹⁰ and states the principle that “every licensee of a retirement home shall ensure that the rights set out in the *Residents' Bill of Rights* are fully respected and promoted in the home.”¹¹

However, the *Residents' Bill of Rights* contained in the new *Retirement Homes Act* does not contain an explicit right to receive visitors in any language similar to that found under the *Long-Term Care Homes Act*. It does contain general language as to the residents right to be treated “with courtesy and respect and in a way that fully recognizes the resident's individuality and respects the residents dignity,” and “to have his or her lifestyle and choices respected and to freely pursue his or her social, cultural, religious, spiritual and other interests as long as the

⁶ Anecdotally, the author has been told at previous similar sessions by elder-law lawyers working in the state of California that the right to receive visitors in nursing homes is also statute protected, and is highly effective in ensuring the right of California nursing home residents to freely receive independent legal advice and representation.

⁷ S.O. 2010, c. 11.

⁸ Parts I and II of the *Act*, which deal with interpretation and the establishment of a Retirement Home Authority, came into effect on June 8, 2010, when the *Act* received Royal assent. Parts III through IX of the *Act* will come into force on a date to be named by proclamation of the Lt. Gov., which has yet to be made. The proclaimed parts of the *Act* are largely dependent upon the implementation of regulations that are still being drafted.

⁹ *Supra* note 7, s. 1.

¹⁰ *Ibid.*, s. 51(1).

¹¹ *Ibid.*, s. 51(2).

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resident's lifestyle, choices and pursuits do not substantially interfere with the reasonable enjoyment of the home for all usual purposes by the licensee and other residents."¹² Perhaps these vaguely stated rights could be used to support the position that a retirement home resident would implicitly have the right to receive visitors of his or her choice in private, but it falls far short of the explicit statute right conferred by the *Long-Term Care Homes Act*.

Residents of other forms of accommodation in Ontario do not have even the vaguely worded statute rights of the new *Retirement Homes Act*. Despite that, even in the absence of any statute rights an adult person not under any form of guardianship of the person should still enjoy the legal right to receive independent legal advice and representation from a lawyer of his or her own choosing. Unfortunately, access to independent legal advice and representation may be difficult to obtain depending on the degree of power and control exerted over the older adult by a substitute decision-maker or other persons.

In Ontario, and in all other similarly situated jurisdictions, it would be beneficial for all adults, regardless of age or mental capacity, to have a clear statute-based right to receive independent legal advice from a lawyer of his or her choice. This right should apply across all residential settings, and regardless of whether or not the person has a legal guardian of property or of the person, or some other form of substitute decision-maker. It should not apply only to older adults, because the same power differentials that tend to marginalize older adults can also tend to marginalize other adults of any age with a cognitive impairment or developmental disability. It is precisely because of these power differentials that a clear statute-based right to receive independent legal advice and representation is required. A generic statute-based right to independent legal advice and representation would be instrumental in assisting marginalized adults in challenging the power imbalances between them and their substitute decision-makers, and other persons in a position of trust and authority, when the need arises.

One of the key factors of the *Residents' Bill of Rights* found in the Ontario *Long-Term Care Homes Act* is the availability of an enforcement mechanism by the Ontario Ministry of Health and Long-Term Care. Long-term care homes are licensed and funded by this Ministry, which

¹² *Ibid.*, s. 51(1), Items 8 and 9.

can normally be relied on to require compliance with the *Residents' Bill of Rights*, if necessary to ensure private access to independent legal counsel. One difficulty with a generic statute-based right to independent legal advice and representation is to find an enforcement mechanism that would apply outside of the long-term care homes system and in all other situations.

At minimum, such an enforcement mechanism would require the existence of a statutory authority with the power to compel compliance by means of investigations and, if necessary, the institution of administrative prosecutions for the imposition of fines and other penalties. More appropriately, the enforcement agency might also have authority to direct the facilitation of access to independent legal advice and by order to prohibit the interference with same by any other person. While the details of this type of legislation are difficult to conceive, a general template might follow the direction of the *Substitute Decisions Act*,¹³ which states that when a court-ordered assessment has been directed the court may also make an order “restraining a person other than the one whose capacity is in issue from hindering or obstructing the assessment.”¹⁴ Furthermore, the *Substitute Decisions Act* also makes it a provincial offence for any person to hinder or obstruct a person who is conducting a court-ordered assessment,¹⁵ or to violate a restraining order,¹⁶ both offences punishable on conviction by a fine of up to \$5,000.00.¹⁷

Surely, the scheme of enforcement would require much thought and nuanced development, but without any enforcement mechanisms a statute-based right of access to legal advice would be completely ineffective.

STRATEGIES FOR GAINING ACCESS TO INDEPENDENT LEGAL ADVICE

These comments are directed to lawyers, paralegals and other persons advocating for or on behalf of an older adult who is seeking to obtain independent legal advice while living under the

¹³ S.O. 1992, c. 30.

¹⁴ *Ibid.*, s. 80(1).

¹⁵ *Ibid.*, s. 89(1)(a) and (2).

¹⁶ *Ibid.*, s. 89(4).

¹⁷ *Ibid.*, s. 89(2) and (4).

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control of a substitute decision-maker or some other person. There is little if any existing literature on this topic, much less any comprehensive or authoritative instructions or advice that can be given when a lawyer, paralegal or other advocate receives a request for service in circumstances under which access to a private meeting with the older adult whose rights are in issue may be obstructed. However, experience points to a few suggestions that might make this sometimes difficult task a bit easier.

In these situations, it is of fundamental importance to protect the integrity of one's own retainer. Sometimes, the well-founded perception of substitute decision-makers and service providers who are attempting to obstruct access is that the legal-services provider is a proxy for some other person who has a conflict of interest with the older adult whose rights are in issue, or with the substitute decision-maker or service provider him or herself. The *Rules of Professional Conduct*¹⁸ indicate that a lawyer or paralegal should maintain a normal professional relationship, as far as reasonably possible with a client of marginal or impaired capacity.¹⁹ This means that a lawyer or paralegal should not under any circumstances be acting under the direction or on the instructions of anyone other than the older adult whose rights are in issue. Tainting the professional relationship by accepting third-party direction or instructions may undermine the entire professional relationship to the point it can be impossible to establish the "independence" of legal advice. In that case, it would also then be impractical to rely on the older adult's request for service to enforce the person's right to meet privately with legal counsel. Bluntly, the lawyer or paralegal must be fully prepared to exclude all others from the professional relationship, regardless of who is undertaking financial responsibility for professional fees, until such time as the professional relationship is fully established.

It should be abundantly clear at all times that the request for service originates with the older adult whose rights are in issue. This is important for two reasons:

- Firstly, it is necessary to protect the integrity of the professional relationship. If it is ever unclear or uncertain as to who has initiated the request for service, it may be persistently

¹⁸ Enacted by by-law of the Law Society of Upper Canada, Toronto, Ontario pursuant to the *Law Society Act*, R.S.O. 1990, c. L.8, s. 62 (0.1) Item 10., as amended.

¹⁹ *Ibid.*, R. 2.02 (6) and related commentary.

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unclear as to who is the recipient of legal advice. It should never happen that a lawyer or paralegal finds him or herself attempting to provide legal services to a person who has not asked for his or her advice and representation. In all cases, a request for advice from one's prospective client should clearly precede delivery of the advice itself. Where access to the person seeking such advice is problematic, the first step is to be able to clearly establish a request for service.

- Secondly, if the absence of a clear request for service does not undermine the attempts to gain access to the person for the delivery of legal advice, it will undoubtedly undermine the professional relationship itself. In order to be effective, it is essential that the person seeking legal advice should be in control of the professional relationship. Foisting oneself upon a person who is not seeking advice is bound to result in failure because of the underlying imbalance in the professional relationship. The provision of professional advice to a person who is not seeking it is seldom appreciated and never appropriate.

Once a request for legal advice has been properly established, even if the potential for interference or obstruction is high, a lawyer or paralegal should never be deceitful in gaining access to the person for the provision of such advice. On the other hand, it is not necessary to draw undue attention to a privileged and confidential professional relationship. For example, if the older adult resides in a hospital, long-term care home or retirement home it is not necessary for the lawyer or paralegal to seek or obtain anyone's permission to meet with the older adult, and it is usually best not to do so. The best avenue is to make arrangements directly by telephone with the older adult to meet at a specified time and place. If telephone communication is not available because of hearing impairments or lack of access to a telephone, it is quite acceptable to make those arrangements through a third-party, as long as it continues to be clear at all times that the request for service originates from the older adult him or herself.

When attending a hospital, long-term care home or retirement home a lawyer or paralegal carrying a large briefcase and dressed as though ready to appear in court will inevitably draw undue attention to him or herself. Doctors, hospital and home administrators, other service providers and visitors do not normally wear suits and ties, or other formal business attire in the

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course of their daily activities. While this form of attire may be helpful in identifying one's self as a legal professional, it is also unhelpful for the same reason. If access to the older adult whose rights are in issue is problematic, it is usually much better to "dress down" carrying only a note book or voice recorder, or a small bag, than it is to march through the corridors in a way that causes everyone to ask, "Whose lawyer is that?"

If confronted by anyone who might impede access to the older adult, the lawyer or paralegal should always be candid and forthright in stating the purpose of one's visit. Hospitals, long-term care homes and retirement homes, and other service providers, have a legal duty to provide proper care for their patients and residents. They do have a legitimate interest in inquiring about the comings and goings of visitors to their healthcare facilities or homes. One should never assume that a service provider will necessarily be obstructive, and in the event that the obstruction should result it is always better to have clearly stated the professional purpose of one's visit from the outset. In this way, the first contact with a service provider may help to establish the need for independent legal advice.

If it is possible to do so without breaching privilege and confidentiality, or risking other repercussions to the older adult whose rights are in issue, it is helpful to give advance notice to the older adult's care providers of the nature, purpose, and the timing of one's visit, and to prearrange private visiting space. Invariably, a lawyer or paralegal should seek specific instructions before disclosing the visit to service providers or any other third parties. Failure to do so would from the outset breach privilege and confidentiality, and would undermine the client's control of the professional relationship. However, giving advance notice can avoid surprises that may otherwise create needless confrontations.

If there are concrete grounds to expect that obstruction will occur, it may be very useful to speak in advance with the local police, giving a "heads-up" by explaining the situation and asking for police co-operation in the event that the lawyer or paralegal needs to make a call on-site to police to enforce the right of access. Making this type of call several days in advance will usually allow enough time for police to review and, if necessary, investigate the situation and to plan their own response to any request for service. Having an assurance of police assistance, or at least a

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reasonable dialogue with police in advance of one's visit can be extremely important in knowing how the situation may unfold.

It is not unusual for an initial interview to be interrupted or stopped entirely without warning. With that in mind, a lawyer or paralegal should keep at the top of the agenda establishing a rapport and communication with the older adult whose rights are in issue, and confirming the request for legal advice and the establishment of a retainer. It is extremely difficult to take detailed notes while maintaining the appropriate eye contact and body language, and possibly overcoming sensory impairments, that is necessary to establish effective communication in these critical moments. At the same time, it may be necessary to document or otherwise record the person's request for service in the event the initial interview is truncated.

The use of a digital voice recorder may be effective in recording a request for service, but depending on the technology itself and the size of the room and the acoustics it may not be reliable. A simple one-page retainer identifying a lawyer, the client, and the nature of one's retainer is very useful if it can be signed early in the initial interview. In some cases, the lawyer or paralegal may bring a written agenda to the meeting, with room to make very brief point form notes under each topic that pertains to the establishment of one's own retainer. All of these steps are directed to potentially defending one's own retainer in the event the initial meeting is interrupted, or in the event further access to one's client is impeded.

CONCLUSIONS

There are no simple answers for any aspect of giving legal advice and representation to an older adult where mental capacity is in issue. It is important that the older adult whose rights are in issue in issue have access to independent legal advice and representation as the need arises. This will be extremely important where the matters in issue touch on conflict between the older adult and his or her substitute decision-makers or other persons in positions of trust and authority. Persons who wish to exert power and control over the older adult may attempt to obstruct or impede access to independent legal advice, and a lawyer or paralegal should always have in mind strategies to ensure unimpeded access.

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Where the older adult resides in an Ontario long-term care home, the long-term care home resident has the statute-based right to receive visitors of his or her choice in private. Outside of the long-term care home setting, the legal right to receive independent legal advice would still exist, but is not explicitly protected by statute. The lawyer or paralegal should always ensure the integrity and independence of the professional relationship by refusing to accept direction or instructions from persons other than the older adult whose rights are in issue. It should always be clear that the client is in charge of the professional relationship. It is best to avoid needless conflict by not drawing attention to oneself. On the other hand, where it is possible to do so on an instructed basis, it is highly desirable to iron out issues of access with home management, and if necessary with local police, in advance of one's visit.

In the course of the initial interview, it is essential to establish rapport and communication with the client and at the same time to take all the steps that are necessary and advisable to record or document the nature of the professional relationship and thereafter to be prepared to defend one's own retainer.