

The background of the slide features a soft-focus landscape with a mountain range in the distance and a willow tree branch with dark, drooping catkins on the right side. The overall color palette is muted, consisting of various shades of beige, tan, and light brown.

# *Ethical Issues with Traumatic Brain Injury*

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# *What does “ethics” mean?*

- ❖ “The word ‘ethics’ is derived from the Greek word *ethos* (character), and from the Latin word *mores* (customs). Together, they combine to define how individuals choose to interact with one another. In philosophy, ethics defines what is good for the individual and for society and establishes the nature of duties that people owe themselves and one another.”

(taken from WEX, a collaboratively built, free dictionary and encyclopedia sponsored by the Legal Information Institute at the Cornell Law School – see

"[http://www.law.cornell.edu/wex/index.php/Main\\_Page](http://www.law.cornell.edu/wex/index.php/Main_Page)")

# *What are you looking for?*

The same issue can give rise to different perspectives, different experiences...

The logo for 'Teach Learn' is displayed on a blue rectangular background. The word 'Teach' is written in a bold, yellow, 3D-style font. Below it, the word 'Learn' is written in a white, 3D-style font. Both words are set against a light blue oval shadow.

Teach  
Learn

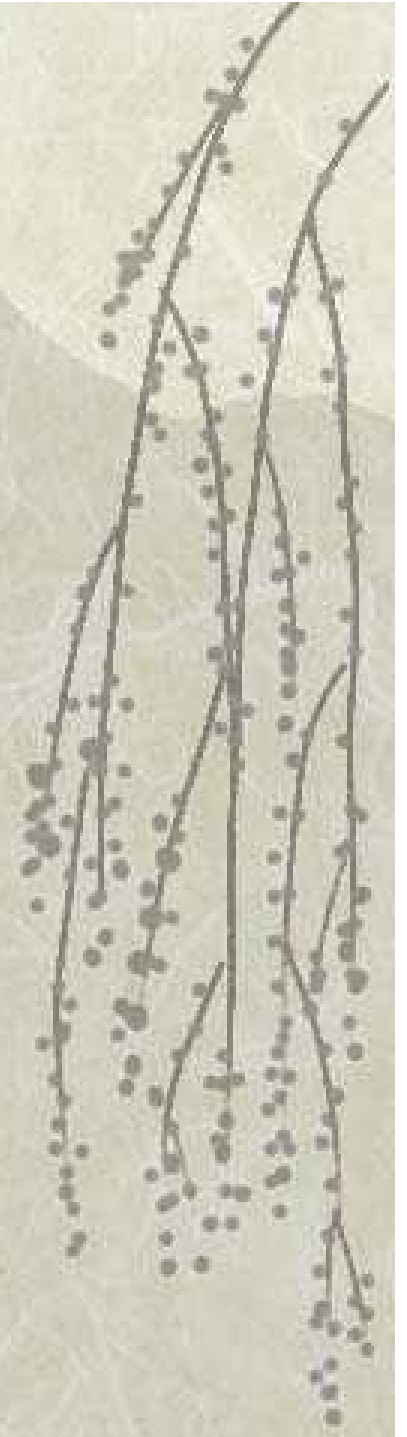
# *Ethical decision-making*

- ❖ Ethical issues often arise where there is a conflict between competing values
- ❖ In this setting, ethical decision-making involves open, honest communication and mutual respect. This requires the lawyer to understand the client's values, needs, abilities, and desires and to communicate the legal issues facing the client.

# *Different perspectives..*



The best decisions are made when the lawyer and client see all sides of the picture...



## *Ethical decision-making*

- ❖ ethical issues in TBI cases confront everyone – the plaintiff, his/her family, the experts and the lawyer
- ❖ It's not about dictating the “right answer” – it's more about finding the best path for the client in the circumstances he or she is in

# *Ethical decision-making*

The conflicts often center around the interaction of certain dynamics such as:

- \* the vulnerability of individuals with TBI trying to deal with a complex legal system; and
- \* the nature of the tort system which requires plaintiffs to do their best to recover and also to prove the full extent of their injuries.

## *Ethical decision-making*

- ❖ Many of the ethical issues in TBI cases fall “below the radar.” They are not generally brought before the courts. They may not even be articulated or clearly understood. They occur in the homes and law offices of the parties involved.
- ❖ Hopefully this presentation will help people involved in the decision-making process to understand the ethical issues they face and proceed through the litigation in a way that honours the values and needs of the plaintiff.



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*Law Society of B.C.*  
*Professional Conduct Handbook*

**CHAPTER 1**  
**CANONS OF LEGAL ETHICS**

[In force January 1, 1992]

These Canons of Legal Ethics are a general guide, and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned.

# *Professional Conduct Handbook*

## **3. [The lawyer's duty] to the client**

- (1) A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem*\* is a safe rule to follow.

- (2) \* An injunction to the court to achieve fairness by listening to both sides of a case.

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## *When do ethical issues come up in TBI cases?*

1. When the action is commenced – is it necessary to appoint a *litigation guardian*? What does this mean?
2. During litigation – communicating with the plaintiff, interviewing witnesses, getting reports.

*When do ethical issues come up  
in TBI cases? (continued)*

3. At the end of the claim – do we settle or go to trial?
4. After the claim is resolved – who decides what is to be done with the funds?

*Step 1 – ethical issues in deciding  
who will direct the litigation*

Tension / conflict between need to promote independence and need to protect person.

Rule 6(2)

“A person under legal disability shall commence or defend a proceeding by his or her litigation guardian.”

*What is a  
“person under disability”?*

There is no definition in the Rules of Practice

Joint Centre for Bioethics

“Capacity is the ability to understand information relevant to a decision and the ability to appreciate the reasonably foreseeable consequences of a decision (or lack of a decision).

# *Assessing capacity*

1. Questions to ask plaintiff:
  - What are your problems?
  - Are you managing your finances? How is that working out?
  - What do you want from this lawsuit?
  - Who do you trust? Who are you closest to?
2. Questions to ask family members?
  - What are the problems?
  - What was/is your relationship with the plaintiff like?
  - Who is handling the finances?
3. Has a committee been appointed?
4. What do treating doctors (GP, psychiatrist) say?

## *What happens if there is a litigation guardian?*

- ❖ the litigation guardian makes the decisions about the case (instructs the lawyer)
- ❖ the litigation guardian is responsible for legal costs, including costs that will be claimed by a defendant if the case is not successful



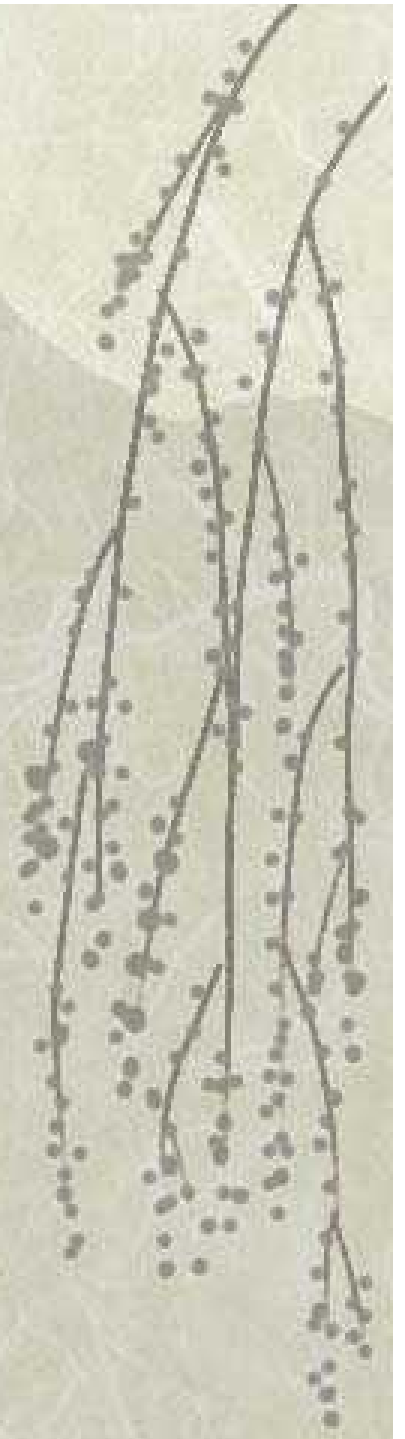
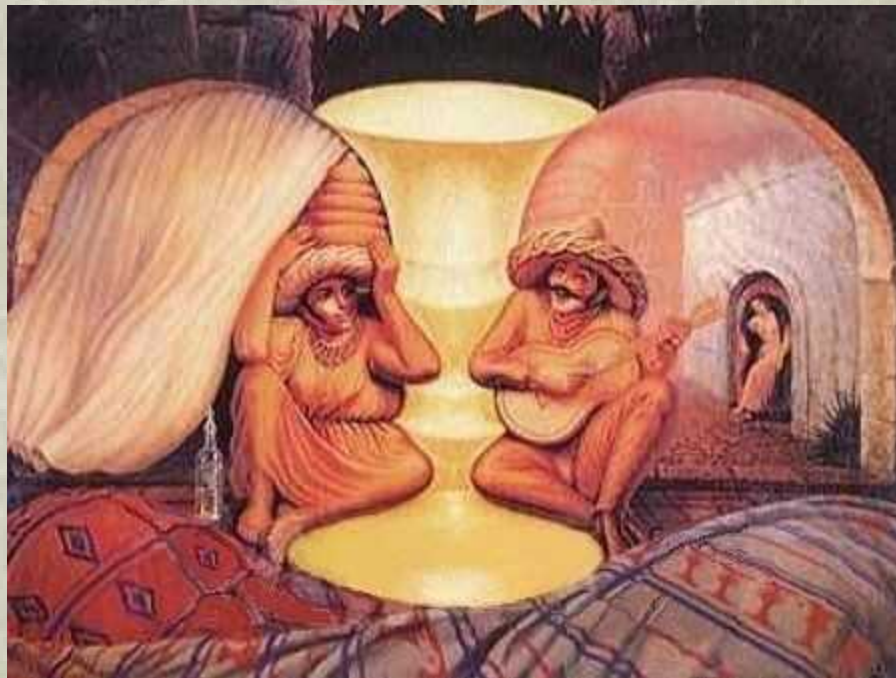
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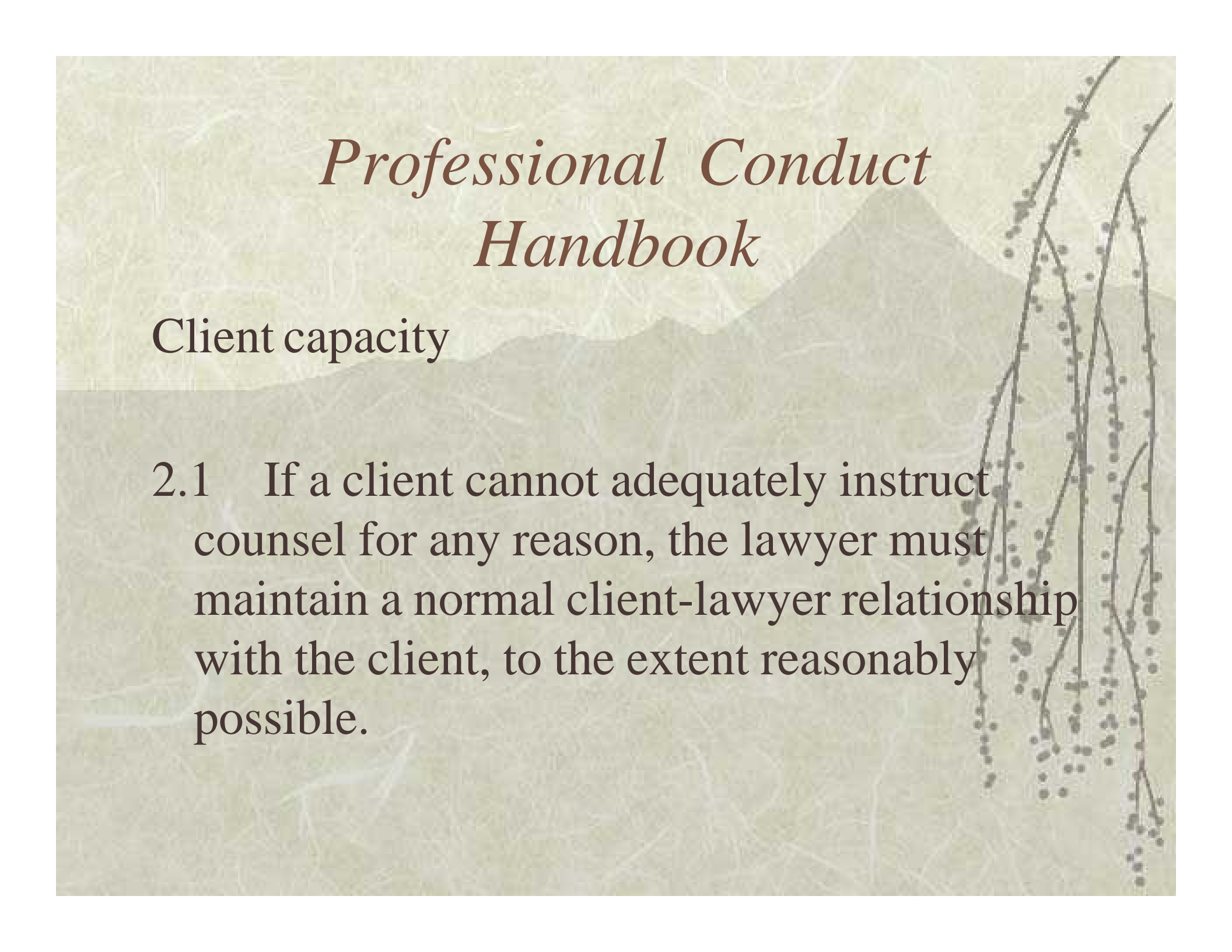
## *Selecting a litigation guardian*

The litigation guardian must have no interest in the proceeding adverse to the plaintiff.

Look for a litigation guardian who knows the plaintiff, has a positive, loving relationship with the plaintiff, and has the maturity to handle the responsibilities and difficult decisions that arise in TBI actions.

*Two people...*



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# *Professional Conduct Handbook*

## Client capacity

2.1 If a client cannot adequately instruct counsel for any reason, the lawyer must maintain a normal client-lawyer relationship with the client, to the extent reasonably possible.

# *Professional Conduct Handbook*

2.2 A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only if the lawyer:

- (a) reasonably believes that the client cannot adequately instruct counsel,
- (b) reasonably believes the appointment or other protective action is necessary to protect the client's interest, and
- (c) does not take any action contrary to any instructions given to the lawyer by the client when the client was capable of giving instructions.

# *Professional Conduct Handbook*

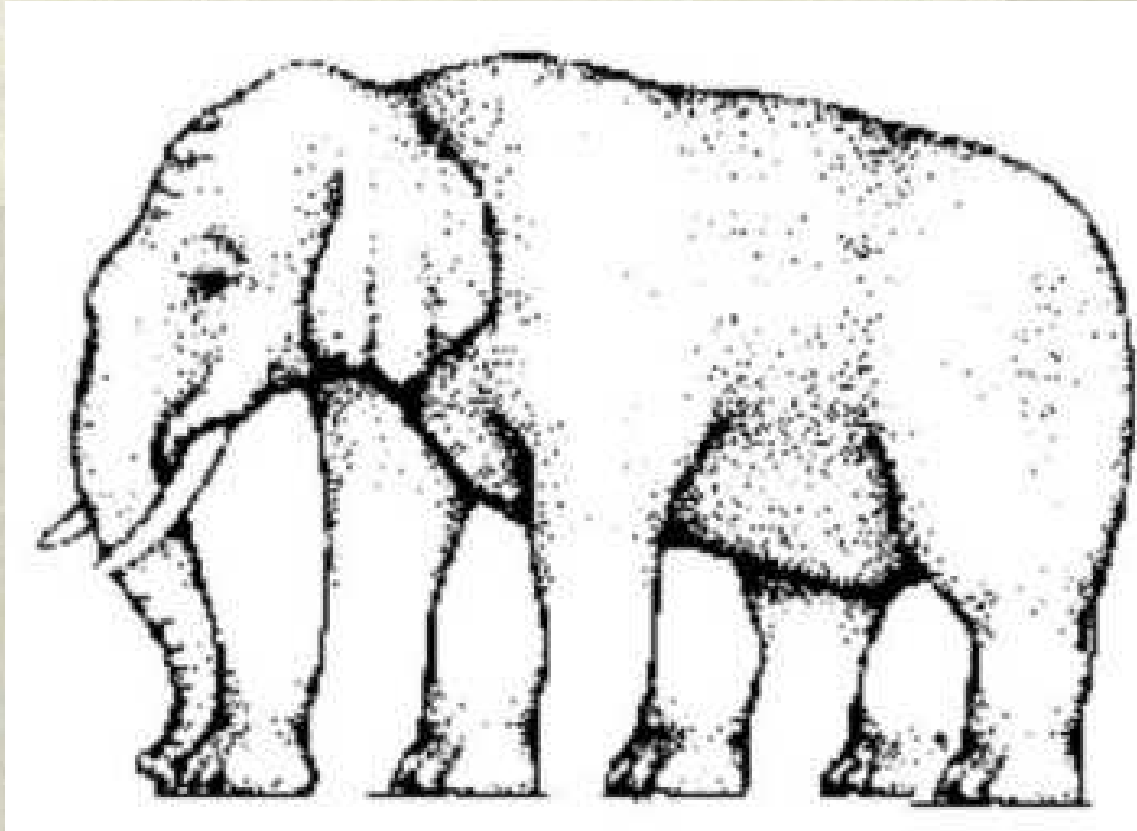
2.3 A lawyer who reasonably believes that a client cannot adequately instruct counsel may, pending appointment of a representative of the client, continue to act for the client to the extent that instructions are implied or as otherwise permitted by law.

# *Professional Conduct Handbook*

2.4 A lawyer who is prevented from entering into a client-lawyer relationship with a person because of the person's lack of capacity may provide reasonable and necessary minimal assistance to the person and disclose confidential information provided the lawyer:

# *Professional Conduct Handbook*

- (a) is satisfied the person cannot adequately instruct counsel...
- (b) makes it clear ... that the lawyer does not represent the person
- (c) discloses the minimum amount of information required, and
- (d) does not take action contrary to any direction given to the lawyer by the person.







## *Step 2 – ethical issues during litigation*

Tension / conflict between desire to increase recovery v. increase compensation

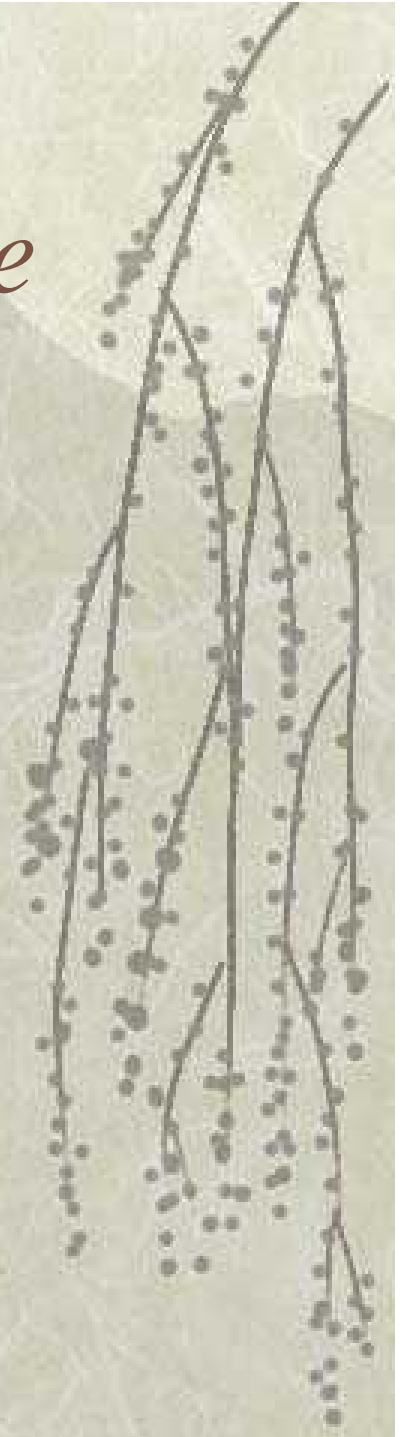
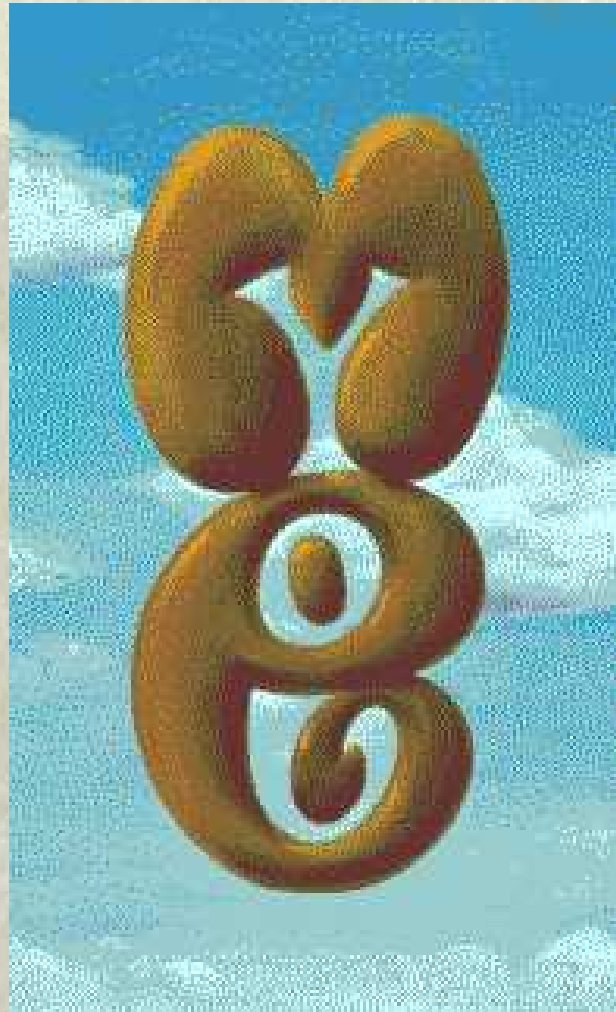
- How to encourage recovery and still document extent of plaintiff's problems?
- What should plaintiff be told about his/her injuries?

## *Step 2 – ethical issues during litigation*

Tension / conflict between supporting plaintiff by ignoring problems and exposing problems to support claim

- role of witnesses – describe what you see - to be used only for purposes of litigation
- “bubbles of confidentiality”
- need for plaintiff, family and friends to understand what has happened v. legal issues around education about TBI
- framework for litigation: hoping for the best, planning for the worst

*Finding the right balance*



## *Step 2 – ethical issues during litigation*

Tension / conflict between the need to spend money to establish scope of problems and exposure to costs

- ❖ What experts are needed to assess the plaintiff?
- ❖ Is lawyer / plaintiff / litigation guardian prepared to incur the costs of these assessments?

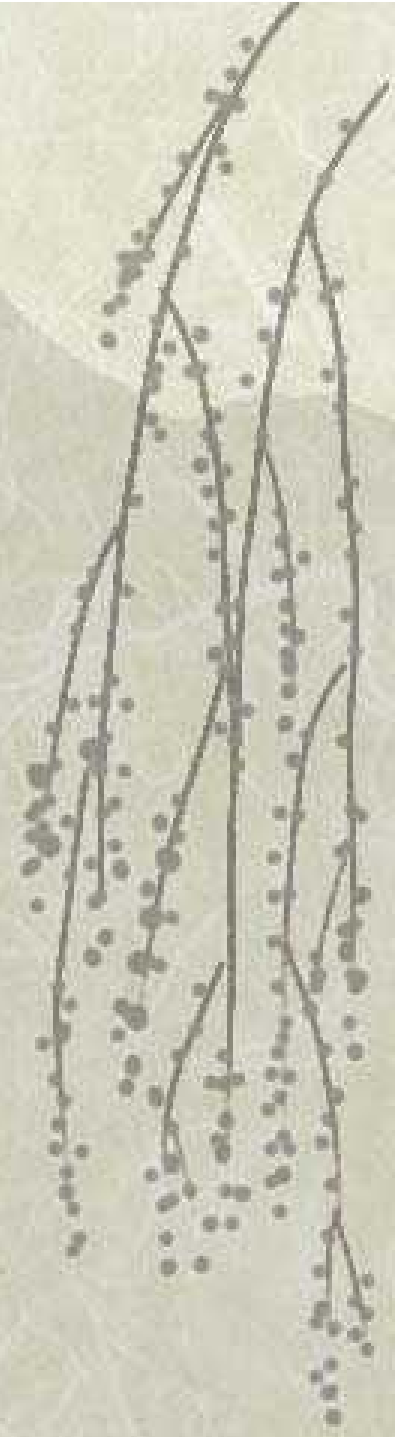
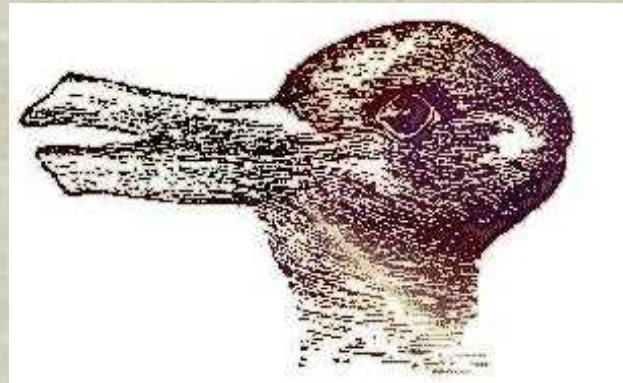


## *Step 2 – ethical issues during litigation*

Tension / conflict between assessing potential for improvement and predicting problems and disability

- who sees the experts' reports?
- where is “the truth”?

*What picture emerges?*



## *Step 3 – ethical issues when resolving the claim*

Conflict / tension between more money with risk (trial) and less money without risk

- ❖ what are the plaintiff's priorities?
- ❖ explaining what a trial will involve
- ❖ exploring settlement
- ❖ explaining and exploring
  - the issues in dispute
  - the consequences of losing
- ❖ understanding the pros and cons of trial

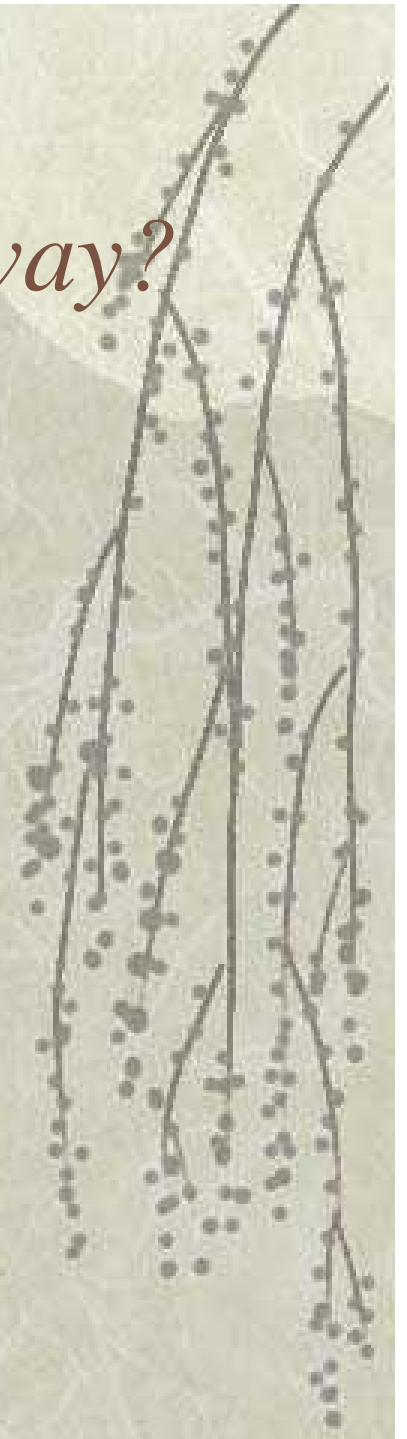
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## *Step 3 – ethical issues when resolving the claim*

- ❖ How prepared is the plaintiff for mediation?
- ❖ Who attends the mediation?
  
- ❖ How prepared is the plaintiff for trial?
- ❖ Who attends the trial?



*Building bridges, or sailing away?*



*Step 4 – ethical issues  
when managing damages award*

Tension / conflict between the need to promote independence and the need to protect the person

Options

1. Structured settlement
2. Joint bank account
3. Financial advisor

## *Step 4 – ethical issues when managing damages award*

- ❖ Section 55(1) of the *Insurance (Motor Vehicle) Act* provides: “The court must order that an award for pecuniary damages in a motor vehicle action be paid periodically, on the terms the court considers just,  
(a) if the award for pecuniary damages is, after section 25 has been applied, at least \$100 000 and the court considers it to be in the best interests of the plaintiff, or

## *s. 55(1) continued*

(b) if

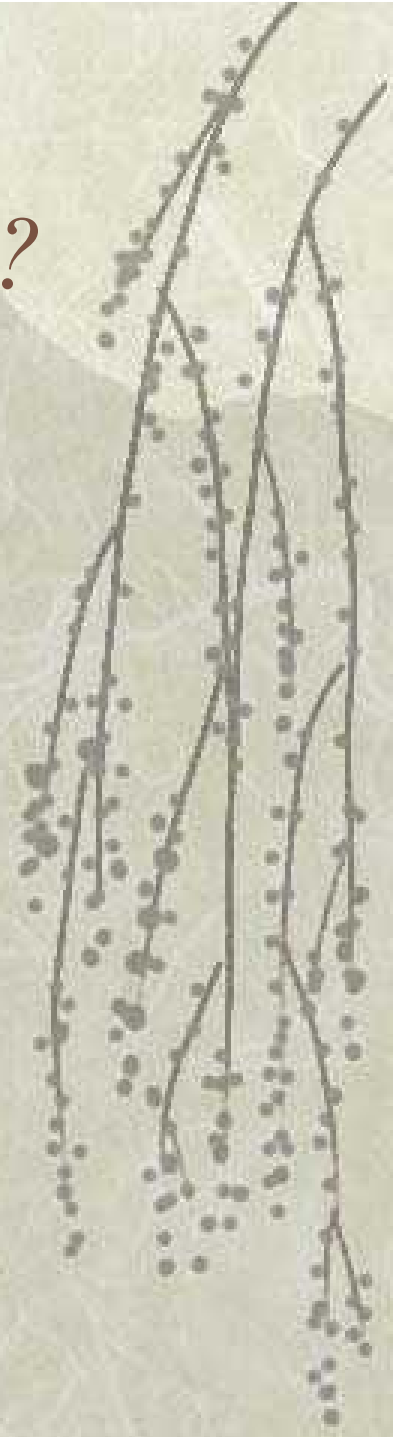
- (i) the plaintiff requests that an amount be included in the award to compensate for income tax payable on income from investment of the award, and
- (ii) the court considers that the order, that the award be paid periodically, is not contrary to the best interests of the plaintiff.”

# *Conclusion*

The Honourable Madam Justice C. Adele Kent:  
*Medical Ethics: The State of the Law*

“It is precisely because there are, ethically and morally, no right or wrong answers that makes these issues so interesting and challenging. The point is to look at the challenges [to see how they] may be met in the future.” (p. 3 – Introduction)

*Where does the puzzle begin? end?*



# Thank you

to my clients ... who have taught me  
how to listen with my heart as well  
as my cranium

And thanks to the National Institute of  
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- go to kids' pages 😊

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