The **ETHICS** of **ACTING** for the most **vulnerable**

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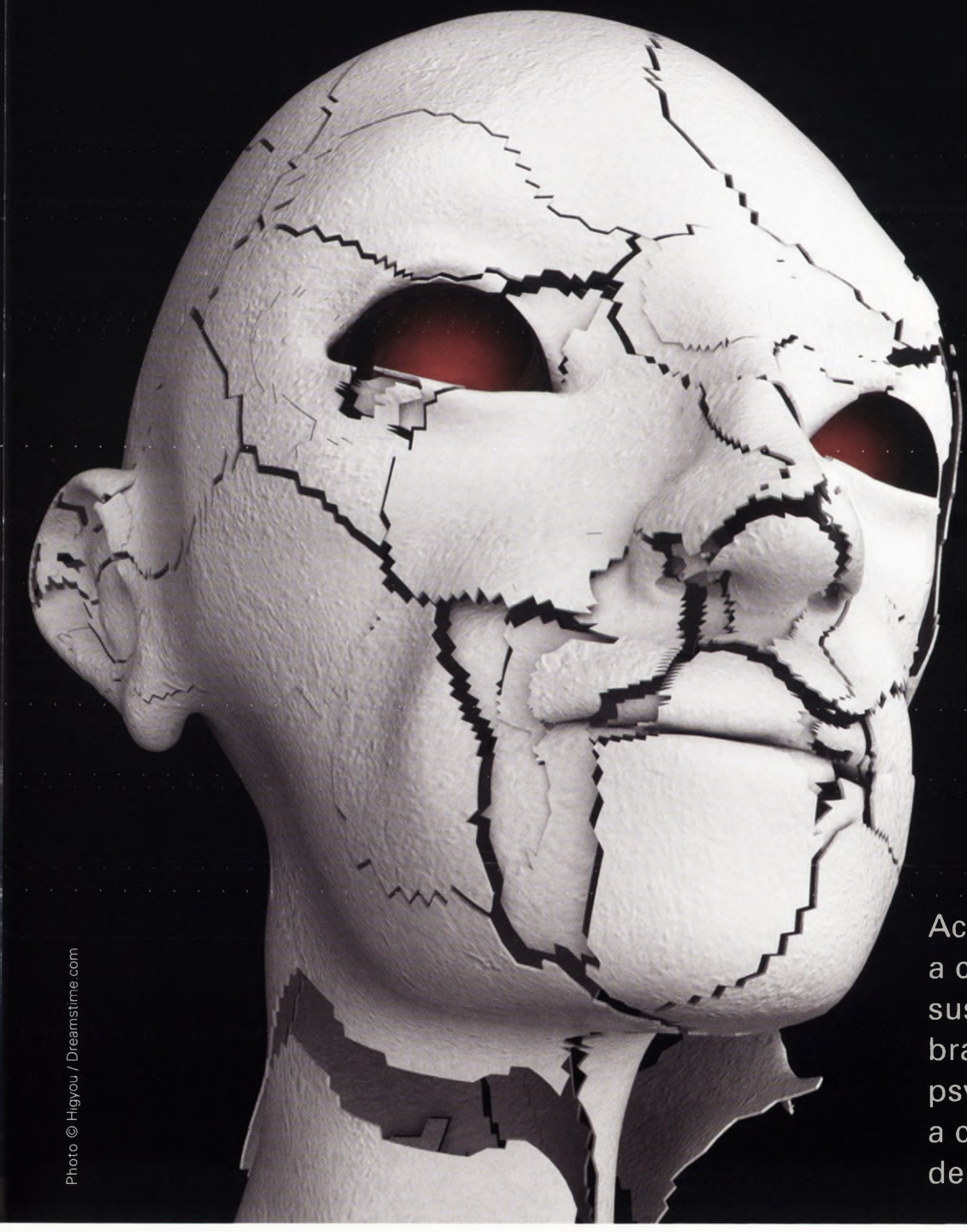

Acting for (or against) a client who has sustained a traumatic brain injury, or has a psychiatric disorder, is a complex and ethically demanding task.

Lawyers representing the interests of such unfortunate individuals must have regard to ethical, as well as tactical, considerations. The client is implicitly at a disadvantage, and is unlikely to have a complete understanding, or in some cases any understanding, of the way the matter is being conducted.

Brain injury or severe psychiatric illness often makes communication between lawyer and client problematic. The client may be mentally fragile. Advice should be tempered by sensitivity and compassion; forceful persuasion is unnecessary and inappropriate, and may simply distress the client.

Tolerance is required if the client is emotionally labile, or volatile, anxious or depressed. Unexpected outbursts or mood swings must be accepted as symptoms, not nuisances.

To complicate matters further, such clients may well lack insight – they may deny that anything is 'wrong' with them, creating interesting problems for their lawyers in obtaining instructions.

Most importantly, brain-injured or psychiatrically ill clients are very vulnerable. Lawyers must be aware of their ethical responsibility not only to take no advantage of that vulnerability, but also to ensure, as far as is practical, that the client is protected from exploitation by others.

APPOINTMENT OF A TUTOR

In NSW, UCPR r7.14 provides that a person under legal incapacity may not commence or carry on proceedings, except by a tutor.

For present purposes, a 'person under legal incapacity' includes a person who is incapable of managing his or her affairs, and a person incapable of instructing a solicitor or counsel.

If there is any doubt as to whether a particular client is, or is not, under legal incapacity, a tutor should be appointed.

The onus to ensure that a client is properly protected falls squarely on the client's legal representatives. The opposing party and its insurer are not required to ensure that a claimant is capable of providing instructions.

Care should be taken in appointing a tutor. There must be no reasonable possibility of a conflict of interest between tutor and client at any stage of proceedings. In the event of any doubt as to the existence of a conflict, the tutor should be removed, and another appointed. UCPR r7.18 provides the mechanism for replacing a tutor.

FAMILY MEMBERS

Where a client has suffered a traumatic brain injury, or has a psychiatric illness, family members will understandably be anxious for his or her welfare, and concerned as to the outcome of proceedings brought on the client's behalf.

It is inevitable that family members will be affected by subjectivity. It is the role of the client's legal representatives to ensure that objective advice is given before, during and after trial.

Lawyers must bear in mind that the family of a victim of brain injury, or severe psychiatric injury, is experiencing its own trauma every day. Sensitivity is required.

However, lawyers should also bear in mind that family members may have their own agendas, which may impact directly on their attitude to legal advice.

As with tutors, lawyers should be alert to any potential conflict of interest between the client and family members wishing to be involved in, or to 'assist', the client's case.

CONFERENCES

When conferring with a brain-injured or psychiatrically incapacitated client, different communication techniques may be required.

Whether or not the client has a tutor, unless the client is completely incapable of communication, it is the lawyer's obligation to ensure that the client has, as far as is possible, a complete understanding of the legal process in which he or she is involved, the issues to be proved or resolved, and the need to provide full, accurate and honest instructions.

In conference, the lawyer should take into account that the client may be less capable of understanding questions and advice than those who do not suffer from similar disabilities. The onus is on the lawyer, not the client, to ensure that questions and advice are simple and unambiguous.

This may require patience and repetition. Lawyers not prepared to extend those courtesies should not act for clients who have suffered a traumatic brain injury or psychiatric impairment. >>

If there is any doubt as to whether a particular client is, or is not, under legal incapacity, a tutor should be appointed.

It is no reflection on the client's integrity to observe that extra caution is required when obtaining instructions or information from such clients.

Wherever possible, instructions should be checked constantly against other evidence; if instructions are improbable or contradictory, further information should be sought.

IN THE WITNESS BOX

Calling evidence from (or cross-examining) clients who have a traumatic brain injury or a psychiatric condition requires special care (and skill).

Often, it is best to allow such clients to tell the whole story in their own words, with minimal interference. If the evidence wanders, or becomes obscure or confused, so be it: that just demonstrates the incoherence of the client's thinking, and how that must affect his or her daily life.

If the client, through no fault of his or her own, is prone to outbursts of anger, obscenity or abuse, it is appropriate to warn the judge beforehand, so that the judge understands that no disrespect is intended.

The client must be properly protected during cross-examination. It is the client's right that questions be unambiguous, and comfortably within his or her level of understanding.

Lawyers must bear in mind that cognitive fatigue is a very common symptom of brain injury and some psychiatric disorders. Tiring the client by lengthy questioning is both unfair and counterproductive.

Cross-examination of any witness with cognitive impairment or severe psychiatric disability requires skill and subtlety. Cross-examination used as a blunt instrument is unlikely to benefit anyone.

APPROVAL OF SETTLEMENTS

In NSW, the *Civil Procedure Act* provides for the approval by the court of any agreement or settlement made by or on behalf of a person under legal incapacity, before [s75], or after [s76], court proceedings are commenced.

If a claim is settled, either in whole or in part, and the client's legal representatives have any doubts as to the client's legal capacity, ability to provide instructions, capacity to understand advice, or understanding of every aspect of the agreement or settlement, then the approval of the court should be sought.

The responsibility for deciding whether approval is required or not falls squarely on the client's legal representatives. If in doubt, seek approval.

PROTECTING THE CLIENT'S FUNDS

In NSW, where a sum of money is recovered on behalf of a client under legal incapacity, with or without court proceedings, s77 of the *Civil Procedure Act* requires that the amount recovered is to be paid into court, or otherwise as the court directs.

Where a client is incapable of managing his or her affairs, and/or will be incapable of managing any verdict he or she obtains, the client's legal representatives may apply for a public or private fund manager to be appointed to manage the client's estate. Such an application may be made before, during or after court proceedings.

Commonly, the appointment of a fund manager is sought *after* the client obtains a verdict. The anticipated cost of fund management is, of course, claimed and awarded as part of the client's damages, and is dependent on the sum to be managed, and the period for which management is required.

Preliminary enquiries should be made of potential fund managers, and estimates of cost obtained, before proceedings are concluded, so that a fund manager can be appointed quickly and efficiently after judgment.

Because the client must have an ongoing relationship with the fund manager, often for the rest of his or her life, the client, the tutor, and the client's family should be involved in selecting a fund manager. It is inappropriate, and may be unethical, for the lawyer to foist a favoured fund manager onto a client without proper consultation.

It may be necessary to protect the client's assets *before* proceedings are concluded. For example, the client may obtain lump sum benefits from a workers' compensation insurer, while other proceedings are still on foot.

The need for fund management is a medical issue. If there is any doubt as to whether fund management is, or is not, required, a specific opinion should be obtained from a medical practitioner.

In cases of doubt, or if the client, tutor or family disagree with a recommendation for fund management, the matter should be brought before the court for determination as to whether the client is, or is not, a person under legal incapacity.

Put simply, extra care, sensitivity and caution are required when dealing with cases of this kind. Things can go badly wrong, for clients *and* their lawyers, if these ethical and legal standards are disregarded. ■

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