



**A LAWYER'S DUTIES AND OBLIGATIONS WHERE CAPACITY, UNDUE INFLUENCE,
AND VULNERABILITY ARE AT ISSUE IN A RETAINER**

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INTRODUCTION

A client's capacity, vulnerability, and susceptibility to undue influence should always be live issues in the work of trusts and estates professionals. Lawyers, for their part, are obligated to ensure in any retainer that their client has the requisite capacity to: (1) retain counsel, and (2) give instructions to counsel and execute any documents necessary to resolve the specific matter for which counsel is retained. As such, matters such as granting powers of attorney, making testamentary dispositions, and effecting real property transfers each have discrete tests for capacity. Lawyers must therefore make time- and task-specific determinations of a client's capacity.

It goes without saying that in the course of retainers where a client's capacity, vulnerability, and susceptibility to undue influence are at issue, lawyers must be especially careful in their initial and ongoing assessment of their client's ability to retain and instruct counsel. This paper will explore the duties and obligations owed by lawyers to clients in such situations: Part I will examine the sources of duties and obligations owed by lawyers to clients; Part II will define capacity, undue influence, and vulnerability in the context of legal retainers; and Part III will examine solicitor's negligence in retainers where vulnerability capacity, and undue influence are at issue; and Part IV will examine jurisprudence related to a lawyer's duties where incapacity, undue influence, and vulnerability were found to be present in a retainer.

PART I: SOURCES OF OBLIGATIONS & DUTIES OF COUNSEL

A lawyer's duties and obligations to his or her client are manifold in any retainer, but are especially relevant in cases where vulnerability, capacity and undue influence are at issue. As Cullity J. stated in *Banton v. Banton*, "A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to

the Court.”¹ The duties and obligations owed to a client arise from professional rules, statutes, and jurisprudence – in addition to a lawyer’s own professional and ethical judgments – and should serve as guidance for lawyers in navigating issues of capacity, undue influence, and vulnerability.

Professional Duties

Each province and territory’s law society has rules or codes of professional conduct that outline the practice standards for lawyers. The rules and codes differ by varying degrees between each province and territory, and so for the sake of simplicity, this paper will focus on the Law Society of Ontario’s *Rules of Professional Conduct*.

One of the most fundamental duties of a lawyer is duty of loyalty, which encompasses many obligations that arise in a lawyer-client relationship. As outlined in Rule 3.4-1[2] of the *Rules of Professional Conduct*:

In addition to the duty of representation arising from a retainer, the law imposes other duties on the lawyer, particularly the duty of loyalty. The duty of confidentiality, the duty of candour and the duty of commitment to the client's cause are aspects of the duty of loyalty.

This duty of loyalty can be difficult to navigate, especially where a lawyer is concerned about the presence of undue influence or incapacity. In Ontario, the *Rules of Professional Conduct* provide, at Rule 3.2-9, guidance for lawyers acting for clients with diminished capacity:

3.2-9 When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client’s ability to make decisions depends on such factors as age, intelligence, experience and mental

¹ [1998] OJ No 3528, 1998 CarswellOnt 3423, at 91.

and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See commentary under Rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

It is therefore incumbent on lawyers to investigate the capacity of clients and potential clients, and to decline to act where the lawyer does not believe that the client has the capacity to retain and instruct counsel with respect to a given issue. If, however, the lawyer is satisfied that the client does have the requisite capacity, that lawyer should strive to make the lawyer-client relationship as normal as possible, keeping in mind the requirement for a “very high degree of professionalism” referenced in *Banton*.

Independent Legal Advice

Another important concept outlined in the *Rules of Professional Conduct* is that of independent legal advice. Independent legal advice is defined in Rule 1.1-1 as a retainer where:

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,
- (b) the client's transaction involves doing business with
 - (i) another lawyer,
 - (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
 - (iii) a client of the other lawyer,
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation,
- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view;

The Rules suggest that a lawyer should consider requiring that the client obtain independent legal advice: before the client consents to have the lawyer represent him or her despite a conflict of interest;

before the lawyer accepts a joint retainer; and if the lawyer will receive payment for legal services by the transfer of a share, or of an interest in a property or enterprise, from a client. A lawyer must require the client to obtain independent legal advice if the lawyer gives a loan to a client who is a related person, and a lawyer must advise the client to get a different lawyer to represent them if the lawyer gives a loan to a client who is not a related person.

Independent legal advice can be an effective tool for mitigating the possibility of undue influence where one party to a transaction may be vulnerable or dependent on the other party. Lawyers should strongly consider requiring independent legal advice where they have concerns that undue influence could be a factor in a transaction.

Several additional rules contained in the *Rules of Professional Conduct*, including rules regarding confidentiality and joint retainers, may require special attention where vulnerability, capacity, and undue influence are at issue. Appendix II provides a complete cross-Canadian overview of the rules and codes relevant to issue of capacity, vulnerability, and undue influence

Statutory Duties

Statutes are an additional source of duties for lawyers. In some instances, these statutory duties are formalizations of the duties or tests developed in the common law. The tests and duties created by statute often vary between provinces, as different provincial legislatures choose different language for their statutes and adopt different amendments over time.

In terms of the subject matter of this paper, one statute in particular, the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the “**SDA**”) is relevant to the issue of capacity. The SDA outlines the requisite tests for capacity with respect to granting or revoking powers of attorney, and the capacity to manage property and personal care.

Section 3 Counsel

The SDA also creates a special type of retainer between a lawyer and a client where that client's capacity is at issue in a proceeding. A lawyer in these cases is appointed under s. 3 of the SDA and so is referred to as Section 3 counsel. While all of the regular duties owed by a lawyer to his or her client apply to Section 3 counsel, there isn't a standard "retainer" between Section 3 counsel and their client; instead, the court orders the retention of Section 3 counsel to fulfill a specific statutory role.

That role is to determine the wishes of the client whose capacity is at issue, and importantly, per s. 3(1)(b) of the SDA, that client is deemed to have the capacity to retain and instruct counsel. This means that a lawyer acting as Section 3 counsel must take special care in the fulfillment of his or her duties, as there is a strong probability that the client has some cognitive deficits that may make it difficult to obtain consistent or clear instructions. Section 3 counsel must therefore take care not to provide the wishes of the client only to the extent that they can be obtained, and not substitute the lawyer's own opinion of what is in the best interests of the client for the client's actual wishes.

Common Law Duties

The Canadian law of wills and estates has developed from the more than one-thousand-year-old tradition of British common law; needless to say, many centuries of jurisprudence have created a myriad of legal tests and imposed a variety of duties on lawyers. These tests and duties have changed over time in accordance with new social norms and technological advancement, meaning that one of the fundamental characteristics of the common law is that it is always subject to change at the discretion of judges. This is one reason why, to come full circle, one of the standard professional duties of lawyers is to engage in continuing legal education.

For example, the legal test for testamentary capacity arises out of the common law, and it is the duty of a drafting solicitor, prior to drafting a will on behalf of the client, to investigate the issue of testamentary capacity as it is defined in the common law.

The specific duties and obligation owed by lawyers where vulnerability, capacity, and undue influence are at issue in context and in greater detail below.

PART II: CAPACITY, UNDUE INFLUENCE, AND VULNERABILITY

Capacity, undue influence, and vulnerability are separate but interrelated concepts that all lawyers working in trusts and estates will have to address in the course of their careers. Capacity and undue influence have specific legal meanings, while vulnerability is a broad term used to refer to situations where a lawyer should take greater care in assessing a client's legal needs and instructions in order to effectively advocate for a client's interests.

Capacity

Capacity in essence refers to a person's ability to make a certain decision at a certain time. There is no single test for capacity: a client may be able to make one type of decision, but not another, and may be able to make a decision in the morning, but not in the afternoon. As the courts have long held,

[Mental incapacity] is a matter of degree, and the degree of weakness differs in the same individual under different circumstances, and according to the different habits existing and the different situations in which he is placed, at one time or another of his life...²

It follows that there is no capacity "hierarchy". As Cullity J. stated in *Banton v. Banton*:

It is clear that capacity or incapacity for one [...] purpose does not necessarily determine the question for other purposes. Although in each case the question may depend, at least, in part, upon the individual's cognitive powers, the nature of understanding required is not the same."³

Therefore, in many files, a many types of capacity may be relevant, including: the capacity to retain and instruct counsel, the capacity to marry or divorce, the capacity to manage property, the capacity to

² *Portsmouth (Countess) v. Portsmouth (Earl)* (1828), 1 Hagg. Ecc. 355 at pp. 362-3.

³ 1998 CarswellOnt 3423, [1998] OJ No 3528 (Gen Div), at 6.

manage personal care, the capacity to grant a power of attorney for property, the capacity to grant a power of attorney for personal care, and the capacity to make a will. Practically speaking, if, for example, an individual is found to be capable of making complex decisions related to the use and disposition of their assets, they are likely also capable of making basic decisions related to their personal care. However, a lawyer must always satisfy himself or herself that an individual is capable of making each decision relevant to a retainer, and capacity to make one decision does not necessarily preclude incapacity to make another.

A Note on Capacity Assessments

If a lawyer is uncertain about the capacity of his or her client to make a decision, then the lawyer may wish to advise his or her client that they will not act until the client undergoes a capacity assessment that demonstrates that the client is capable with respect to that decision. In Ontario, capacity assessments are completed by an assessor certified by the Ministry of the Attorney General, and a list of qualified capacity assessors is available on the Ministry's website.

A lawyer should be careful to ensure that such an assessment is actually required in order to take on or fulfill a given retainer, as a finding of incapacity represents a significant loss of independence for an individual. There is a delicate balance to consider, and requiring a capacity assessment must be reasonable in the circumstances. As the Court held in *In Weldon McInnis v, John Doe*, discussed further below, lawyers are allowed a reasonable degree of deference in making such a decision:

In this particular case, [the lawyer] was facing a client who had, comparatively speaking, some complicated issues. The issue of his competence to effect a new Power of Attorney was, in my view, a predictable concern which a competent lawyer would have in mind. Whereas all persons are presumed to be competent, the circumstances of [the client] certainly created, at the very least, a doubt. Whether every lawyer would have undertaken the retaining of an expert at that particular time, is not the test. Allowance must be made for the individual opinions of solicitors who are ultimately responsible for their legal work.⁴

⁴ 2014 NSSC 437, 2014 CarswellNS 952, at 42.

Testamentary Capacity

In order to satisfy himself or herself that his or her client has the requisite capacity to make a will, a drafting solicitor should turn to the test outlined in *Banks v. Goodfellow*:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not been made.⁵

To translate the above into less antiquated language: a testator must be aware of the nature and effects of a will; of the nature and extent of the assets he or she owns; and of the moral claims that may exist against his or her estate. This awareness should not be eroded to the extent that the testator is incapable of giving effect to his or her actual wishes in a will. To that end, the final sentence of the test in *Banks v. Goodfellow* also incorporates, to an extent, the concept of undue influence, which is often used to “poison” the mind of a testator against certain objects of his or her affection.

The “moral claims” against an estate generally refer to individuals that the testator has a duty to support or would ordinarily support. A testator must be able to identify those individuals, and assess the claims that they might have against his or her estate.⁶ It is therefore important that a lawyer fulfill their duty to investigate a client’s testamentary capacity by asking questions not only about the testator’s assets and how he or she would like to dispose of them, but about the family situation of the testator. The age, relationships, education, financial status, and (dis)ability of the testator’s close friends and family may be relevant to the issue of moral claims against the estate, whether the testator would have those individuals be beneficiaries or not.

⁵ (1870), LR 5 QB 549 (Eng QB), at p. 565.

⁶ *Banton*, supra note 3, at 28.

The principles set out in *Friesen v. Friesen Estate*,⁷ and summarized at paragraph 112 of *Wiseman v. Perrey*, set a high bar for lawyers to investigate the testamentary capacity of their clients:

(a) neither the superficial appearance of lucidity nor the ability to answer simple questions in an apparently rational way are sufficient evidence of capacity; (b) the duty upon a solicitor taking instructions for a will is always a heavy one. When the client is weak and ill and, particularly when the solicitor knows that he is revoking an existing will, the responsibility will be particularly onerous; and (c) a solicitor cannot discharge his duty by asking perfunctory questions, getting apparently rational answers and then simply recording in legal form the words expressed by the client. He must first satisfy himself by a personal inquiry that true testamentary capacity exists, that the instructions are freely given, and that the effect of the will is understood...⁸

Given the finality of testamentary dispositions, and the important policy considerations attached, the “high degree of professionalism” referenced by Cullity J. is especially important for a drafting solicitor in the course of a will drafting retainer.

Capacity to Grant or Revoke a Power of Attorney

The capacity required to give or revoke a power of attorney is outlined in the SDA. As always, a lawyer should investigate the issue of capacity before preparing Power of Attorney for Personal Care (“**POAPC**”) or Continuing Power of Attorney for Property (“**CPOAP**”) for his or her client.

The requisite capacity to give a POAPC is found at Section 47 of the SDA, which provides that a person is capable of granting or revoking a POAPC if the person has:

- (a) the ability to understand whether the proposed attorney has a genuine concern for the person’s welfare; and
- (b) appreciates that the person may need to have the proposed attorney make decisions for the person.

⁷ (1985) 24 E.T.R. 191 (Man. Q.B), at 83-89.

⁸ 2012 BCSC 1681 (CanLII).

Meanwhile, Section 8 of the SDA provides that a person is capable of granting or revoking a CPOAP if he or she:

- (a) knows what kind of property he or she has and its approximate value;
- (b) is aware of obligations owed to his or her dependants;
- (c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- (d) knows that the attorney must account for his or her dealings with the person's property;
- (e) knows that he or she may, if capable, revoke the continuing power of attorney;
- (f) appreciates that unless the attorney manages the property prudently its value may decline;
and
- (g) appreciates the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a POAPC if they are able to give one, and equally, a person is capable of revoking a CPOAP if they can grant one.

Capacity to Manage Property

The incapacity to manage property is also defined in the SDA. Section 6 of the SDA provides that: "A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision." Lawyers should keep this test in mind not only when they are drafting a CPOAP, but in any retainer where there is a transfer or agreement to transfer rights or assets, and especially real property, to or from the client. Vulnerable clients, particularly those with cognitive difficulties, are generally more susceptible to fraudulent scams which can deprive them of assets that will be required for their future care. Lawyers should be sensitive to their duty to ensure their clients capacity in any contract or transaction.

Capacity to Manage Personal Care

Incapacity to manage one's personal care is defined in Section SDA, which provides that: "A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision." If a client comes to a lawyer and is unhappy that someone else is making decisions about his or her personal care, the lawyer should keep in mind that there may not be a need to seek an assessment of the client's capacity to manage his or her personal care if the client is capable of granting or revoking a POAPC.

Capacity to Marry and Divorce

The capacity required to marry, in Ontario, is problematically minimal. In the leading English case of *Durham v. Durham*, the English court ruled that "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend."⁹ The Court proceeded to compare capacity to marry to capacity to enter into a contract. This analysis, the Court continues, would require the person in question to possess the:

- (a) Ability to understand the nature of the contract of marriage; and
- (b) Ability to understand the effect of the contract of marriage.¹⁰

In *Calvert (Litigation Guardian of) v. Calvert*, the court equated the capacity to divorce with the capacity to marry.¹¹

As the law in Ontario provides that a previously executed will is automatically revoked upon marriage (unless it was specifically made in contemplation of marriage), the low threshold for capacity to marry opens vulnerable people up to predatory marriages. Essentially, a person may have the capacity to marry, but lack the capacity to make a new will, entitling the predatory spouse to a large portion of the

⁹ (1885), 10 P.D. 80, at p. 82.

¹⁰ Ibid.

¹¹ 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169, leave to appeal to S.C.C. refused May 7, 1998.

vulnerable person's estate pursuant to the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 and the *Family Law Act*, R.S.O. 1990, c. F.3.

It is therefore incumbent on lawyers to fully investigate a client's capacity, and the presence of undue influence, when they are retained and where the retainer involves powers of attorney, contracts, wills, or property transfers arising out of a new marriage where one person appears to be more vulnerable or less sophisticated than the other.

Undue Influence

Undue influence is separate but related to the concept of capacity. Therefore, it is possible that an individual is capable with respect to a decision, but that the presence of undue influence renders that decision invalid. It is therefore important for lawyers to investigate the potential for both incapacity and undue influence in the course of a retainer.

Undue influence is more substantial than mere influence, and requires the application of coercion such that the person being unduly influenced is made to do something that they do not want to do.¹² Persuasion is allowed, but the will of a person cannot be overborne or dominated to the extent that their decisions aren't truly their own.¹³

There are several "red flags" that lawyers should be aware of related to undue influence, and that may also indicate diminished capacity, including: new relationships, sudden changes in old relationships, a change in caregiver, paranoia and suspicion, a change in residence, and an over-reliance on one individual. In a typical case of undue influence, someone – be they a relative, friends, neighbor, spouse or caregiver – will find ways to become increasingly involved in the affairs of a vulnerable person to the

¹² *Wingrove v. Wingrove* (1885), 11 PD 81 (Eng Prob Ct), at 82.

¹³ *Dmyterko Estate v. Kulikovsky*, 1992 CarswellOnt 543 (Gen Div).

exclusion of other friends and family. They may transfer assets into joint names, or have the vulnerable person execute new wills and powers of attorney.

Often, the undue influencer will bring the vulnerable person to a lawyer and may wish to be present throughout the interview. This is one of the reasons why it is important for a lawyer to meet with his or her client alone in order to investigate the potential for undue influence, keeping in mind that, as per W.N. Renke J., “The most effective control works regardless of presence.”¹⁴

Vulnerability

Vulnerability lacks a specific legal meaning, but is closely intertwined with capacity and undue influence in the sense that vulnerabilities resulting from any source – such as age, infirmity, disability, language barriers, or involvement in abusive relationships – may impair cognitive function and/or make an individual more susceptible to coercion or fraud,

Onus

As vulnerability is not a legal doctrine, there is no onus on either party to litigation to prove or disprove vulnerability; instead, it is typically apparent on the facts, and if present, will be considered in the court’s analysis of capacity and/or undue influence. Incapacity and undue influence, meanwhile, must generally be proven by the party seeking to attack the validity of a legal document, as capacity to make a certain decision is typically presumed at law. However, there are two situations in which the onus will shift to the party defending the validity of document: 1) when the court finds that there are suspicious circumstances surrounding the execution of a document; and 2) with respect to certain contracts or transactions, depending on the relationship between the parties. The presence or absence of incapacity and undue influence must be proved on the civil standard of a balance of probabilities.

¹⁴ *Re Kozak Estate*, 2018 ABQB 185, at 76.

For wills, there is a rebuttable presumption that the testator had the capacity to make a will. If suspicious circumstances are present, this rebuttable presumption is spent, and the party propounding the will must assume the burden of proving testamentary capacity and that the testator had knowledge and approval of the contents of the will.¹⁵ As the Supreme Court held in *Vout v. Hay*:

The suspicious circumstances may be raised by (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.¹⁶

As for certain contracts or transactions – the common example for estates and trusts lawyers being *inter vivos* property transfers – there will be a presumption of undue influence that must be rebutted when the relationship between the parties calls for such a presumption. The Supreme Court addressed the presumption of undue influence in *Goodman Estate v. Geffen*:

What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction...¹⁷

Therefore, while the burden of proving undue influence or incapacity will, for the most part, rest with the party alleging either (and they are generally argued in tandem) there are certain circumstances where the Court will place the onus on the party seeking to propound a will or uphold contract or transaction to prove the validity of same.

Lawyers should be careful to avoid creating suspicious circumstances by, for example, taking instructions from a person who is not their client. Equally, lawyers should consider the relationship between parties

¹⁵ *Vout v. Hay*, 1995 CarswellOnt 186 (SCC), at 27.

¹⁶ *Ibid*, at 25.

¹⁷ 1991 CarswellAlta 91 (SCC), at 43-44.

to a contract or transaction, and the nature of the contract or transaction, to consider whether it is appropriate to draft a document as instructed, and whether each party should obtain independent legal advice.

PART III: SOLICITOR'S NEGLIGENCE

Unfortunately, and despite our best efforts, lawyers sometimes fail to adequately address issues of capacity and undue influence in a retainer. While not all mistakes amount to negligence, there are many instances where the conduct of a lawyer falls below the standard required by the law. In these instances, the appropriate party is likely to make a claim for solicitor's negligence.

A claim for solicitor's negligence, which falls under the broader category of professional negligence, turns on two factors: (1) the existence of a duty of care owed by the solicitor to the party claiming negligence, and (2) a finding that the solicitor's actions were a departure from the applicable standard of care and so caused a loss to the plaintiff. A duty of care arises as a matter of course when a lawyer enters into a retainer with a client. As for the standard of care, per *1483677 Ontario Ltd. v. Crain*:

The applicable standard of care is that of a reasonably competent solicitor: *Ristimaki v. Cooper*. A lawyer who is retained must bring "reasonable care, skill and knowledge to the performance of the professional service which he [or she] has undertaken." As well, "a solicitor's conduct must be viewed in the context of the surrounding circumstances. The reasonableness of the lawyer's impugned conduct is judged in light of the surrounding circumstances such as the time available to complete the work, the nature of the client's instructions, and the experience and sophistication of the client." ¹⁸ (footnotes omitted)

It is not enough to say that a solicitor made an error of judgment or showed ignorance of some particular point of law; instead, the plaintiff must prove that a reasonably competent solicitor would not have done so in order for the solicitor to be liable for damages.¹⁹ *Per Alberta (Workers' Compensation Board) v. Riggins*, "the measure of damages is the amount that would have been awarded but for the

¹⁸ *1483677 Ontario Ltd. v. Crain*, 2015 ONSC 6217, 2015 CarswellOnt 15736, at 155.

¹⁹ *Ibid.*

negligence of the lawyer, unless that amount is not collectible. If that amount would not be collectible from the original tortfeasor, then the plaintiff has no right to the damages in question.”²⁰

Importantly, in the case of wills, the third party beneficiary rule extends the duty of care owed to the testator by the drafting solicitor to beneficiaries under a negligently-drafted will. A classic example is the case of *Whittingham v. Crease & Co.*,²¹ where a lawyer asked the wife of one of the beneficiaries to be a witness to the will, thereby voiding any gifts made to that beneficiary under the will. The plaintiff beneficiary in that case was successful in his negligence claim, and received as damages the difference between what he would have received under the will and what he did receive when the would-be gift was distributed under intestacy.

Case Law

Strong v. McCarron, 2003 NBBR 206, 2003 NBQB 206

This decision involved a claim against a solicitor, Ms. McCarron, by Larry Strong and Florence Strong, who received imperfect title to a property in which an unrelated party, Murray Steeves, retained a life interest pursuant (in part) to the Last Will and Testament of his wife, Dorothy Steeves. Dorothy’s will required her estate trustee to seek Murray’s consent before selling the matrimonial property.

Dorothy passed away on July 27, 1996. Ms. McCarron was retained by Normand and Shari Daigle in March of 1997 with respect to a purchase of the Steeves’ marital home from Dorothy’s Estate. (The Strongs are the parents of the Shari Daigle and purchased the property from them in June of 1998.)

Ms. McCarron had knowledge of Murray’s life interest in the property, but as he was ill in hospital around the closing date of the sale, never asked for or received his written consent to the sale as required by the will and by the *Statute of Frauds*. Instead, Ms. McCarron relied upon a Statutory

²⁰ 1992 ABCA 263, 1992 CarswellAlta 140, at 21.

²¹ 1978 CarswellBC 456.

Declaration by one of Murray's daughters that he consented to the sale of the property and that the sale would be used to pay Dorothy's debts. Ms. McCarron also relied on s. 9 of New Brunswick's *Devolution of Estates Act*, which empowers a personal representative to sell the property of a deceased, without consent of the beneficiaries, if the sale is in whole or in part to pay the debts of an estate. Ms. McCarron certified that the Daigles held free and unencumbered title to the property after the sale (which was not in fact the case).

Another of Murray's daughters later swore an affidavit that her father had never consented to the sale of the property. As for s. 9 of the *Devolution of Estates Act*, the court held that it does not apply where, as in this case, a lawyer has notice of a life interest in the property. Further, s. 9 was not appropriate to rely on where the only evidence that the sale was being used to pay debts was the Statutory Declaration.

The Court held that Ms. McCarron had not acted in a manner consistent with a reasonably competent solicitor in failing to obtain Murray's consent to the transfer, *inter alia*. The Court held:

36 On the facts of this case, I conclude that the express grant of a life estate in a registered will would have caused a reasonably competent and prudent lawyer to obtain a written release of the life interest prior to closing. The specific bequest of the testatrix giving the right to her spouse Murray Steeves to use the property "as a home for my spouse until his death or remarriage, whatever first occurs" and the restriction on the sale with the "consent of my spouse" were not, in my view, ambiguous terms. They were clear signs that should have alerted McCarron to the need for Steeves' consent as a condition precedent to closing.

37 Faced with the actual notice of Steeves' interest as devised in the will, I am satisfied that a reasonably competent lawyer would not have relied on the existing statutory declaration or on section 9 of the *Devolution of Estates Act* in certifying to the purchasers that they were obtaining a marketable title to the property

As a result of Ms. McCarron's negligence, the Strongs eventually learned, in the course of seeking mortgage financing, that Murray's life interest remained on title. Murray's life interest was held to be worth \$18,000, and pursuant to an agreement made before trial, Ms. McCarron paid the Strongs approximately \$30,000 in damages, interest and costs.

Baron v. Mamak, 2018 ONSC 2169 (CanLII)

This solicitor's negligence claim, *Baron v. Mamak*,²² arose from the case of *Juzumas v. Baron*,²³ but this claim was brought not by the victim, as you might expect; but by the perpetrator.

By way of brief background, a younger woman met an elderly gentleman, Mr. Juzumas, when she began providing him with housekeeping services. Mr. Juzumas was born in Lithuania and spoke very little English. He had no family in Canada. The housekeeper was also born in Lithuania and she had been married several times before. The two married on the understanding that the housekeeper would look after Mr. Juzumas and take care of the house until his death, as he did not want to live in a nursing home. The housekeeper did not hold up her end of the bargain and preyed on the elderly man for financial gain, including by taking steps to have title to his house transferred into the name of her son.

Eventually, through the assistance of a neighbor, the older man was able to bring a claim to have his home transferred back into his name and obtained a divorce, but not before suffering emotionally, physically, and financially from the actions of the housekeeper. Justice Lang, who presided over the original action, dismissed *quantum meruit* claims brought by the housekeeper and her son against Mr. Juzumas with costs.

The day before their marriage, the housekeeper and Mr. Juzumas attended at a lawyer's office and prepared a will naming the housekeeper as the sole executor and beneficiary of Mr. Juzumas' estate. The lawyer did not meet with Mr. Juzumas separately. He did not arrange for an interpreter. There was no discussion with Mr. Juzumas as to the value of the house or whether a marriage contract might be appropriate.

²² 2018 ONSC 2169 (CanLII)

²³ 2012 ONSC 7220 (CanLII)

Later Mr. Juzumas went to a different lawyer and executed a new will, leaving most of his estate to his niece in Lithuania. He left a bequest of \$10,000.00 to the housekeeper.

When the housekeeper became aware of this new will she consulted with the original lawyer, and decided that Mr. Juzumas' house, which formed a significant part of his estate, would be transferred to the housekeeper's son, subject to a life interest in favor of Mr. Juzumas. The housekeeper, her son, and Mr. Juzumas then had a brief meeting at the lawyer's office. The lawyer did not explain the concept of a "life tenancy" to Mr. Juzumas; there was no discussion about the value of the property being transferred during the meeting; and there was no interpreter present. There was a suggestion that the housekeeper had drugged Mr. Juzumas prior to the meeting.

After receiving the lawyer's confirmation letter in the mail confirming the transfer of the house, Mr. Juzumas contacted the lawyer on three separate occasions asking to reverse the transfer. The lawyer consistently advised him that the transfer could not be undone because it was "in the computer".

With the assistance of his neighbor, Mr. Juzumas consulted another lawyer and ultimately brought an action to reverse the transfer. After failing in their claims, the housekeeper and her son brought a solicitor's negligence claim seeking damages from the lawyer who prepared the transfer of the house and various other documents.

The defendant lawyer conceded that his actions fell below the standard of care. Justice Gray noted that under the circumstances, the lawyer was clearly not in a position to represent both the housekeeper and her son on the one hand, and Mr. Juzumas on the other. He was obliged to obtain separate representation for Mr. Juzumas. Furthermore, Justice Gray stated that it clearly would have been prudent to ensure that Mr. Juzumas understood what was going on given his limited language skills.

However, despite the lawyer's failure to meet the requisite standard of care, Justice Gray concluded that it was impossible to find that the breach of care caused any of the damages claimed by the plaintiffs, the

housekeeper and her son. The transfer of the property from Mr. Juzumas to the son was the product of a scheme perpetrated by the plaintiffs on an elderly and unwell man. It was the product of their undue influence. Even if the defendant lawyer had fulfilled his duty of securing separate representation for Mr. Juzumas that would have simply prevented the transaction from occurring. Justice Gray dismissed the plaintiffs' negligence claim.

PART IV: CASE LAW

Several types of cases are outlined below, some of which include findings of negligence against a lawyer and some of which do not. In every instance, the lawyer failed, at least in part, to live up to their duties in instances where their clients were vulnerable.

Some are cases that arose on the basis of incapacity or undue influence where the court held that lawyers failed to meet their duties in the course of their retainer. Others are cases where the Law Society of Ontario, exercising its control over the professional licensing of lawyers in Ontario, determined that the lawyers had engaged in professional misconduct that was sufficiently egregious to merit suspension of the lawyers' license to practice law. Finally, the last case will address the assessment of a lawyer's bill where her client was found to be incapable with respect to the management of his property and certain other decisions.

Vulnerability

Lizotte v. Lizotte, 2002 NBCA 29, 2002 CarswellNB 108

This decision concerns a transfer deed executed in 1986 that conveyed all of the family farmlands to one brother, Léonil Lizotte, for no consideration. In this case, the vulnerability of the wronged party was the result of language barriers and a lack of legal sophistication.

Léonil's mother, Ida, sister, Ella, and brother, Rino, executed the transfer deed believing that one or more of them would be entitled to the lands on Léonil's death. Importantly, both Ida and Rino had matrimonial homes located on the property that was transferred by the deed. However, Léonil had a son, who he told the parties about in 1996 after the execution of the deed, and who would therefore have inherited the whole family property if Léonil died intestate, which he did on December 30, 2000. Such an outcome was not in line with Rino's intentions and expectations when signing the deed.

The New Brunswick Court of Appeal ultimately upheld the trial judge's decision to rescind the deed on the basis of mistake, and confirmed the judge's findings that the solicitor who prepared the deed was negligent. The Court also upheld the trial judge's award of solicitor and client costs against the solicitor for the full amount required to compensate Rino for the legal fees incurred in asserting his legal rights.

The solicitor, Mr. McLaughlin, acted under a joint retainer between Rino and Léonil despite the fact that this was not an arm's length transaction, and without obtaining written permission from the parties or advising his clients that there were conflict of interest, in addition to marital property issues, with respect to the transfer. Additionally, the deed was prepared in English, a language which Rino could not speak or write in. The Court therefore held that, on a number of bases, Mr. McLaughlin had failed to provide the services of a reasonably competent solicitor, and had failed to heed the rules of professional conduct with respect to joint retainers.

This case therefore highlights the duties and obligations of a solicitor where a client may be vulnerable as the result of language barriers, a lack of legal sophistication, and an over-reliance on the good intentions of family members. The red flags in this case – the lack of consideration, the language issue, the unresolved marital property issues – would have caused a reasonably competent solicitor to take the requisite steps to ensure that Rino, Ida and Ella had independent legal advice and understood the full consequences of the transfer and the significant renunciation of their inheritance rights that it represented.

Law Society of Upper Canada v. Aldo Tollis, 2010 ONSLAP 0020

This Law Society Appeal Panel decision contains an egregious set of facts which demonstrate that the solicitor in question, Mr. Tollis, took advantage of clients whose capacity was at issue in Consent and Capacity Board hearings on several occasions.

In this case, Mr. Tollis moved for an order allowing him to file a late appeal to the decision in *Law Society of Upper Canada v. Aldo Tollis, 2009 ONLSHP33*, which imposed a 14-month suspension on Mr. Tollis and precluded him from representing clients whose capacity was at issue. The Appeal Panel rejected Mr. Tollis' request for an extension of time.

The original Hearing Panel found that Mr. Tollis had:

charged fees that were not fair and reasonable, and had, in offering professional services to prospective clients, used means that amounted to coercion, duress, or harassment, or that he otherwise took advantage of his clients. Mr. Tollis admitted professional misconduct by way of an Agreed Statement of Facts.

Notably, the Hearing Panel stated that it would have imposed a more severe penalty on Mr. Tollis (likely disbarment) were it not for the joint submission.

Mr. Tollis, in the Agreed Statement of Facts (“**ASF**”), admitted to professional misconduct with respect to three (3) clients: Mr. L, Mr. S, and Mr. W. In each case, Mr. Tollis rendered excessive accounts for his work on behalf of his clients, and included in his accounts time spent in securing and cashing funds from his clients. In Mr. L's case, Mr. Tollis refused Legal Aid on behalf of his client. In Mr. S' case, Mr. Tollis billed in excess of \$11,000 (or 25.1 hours) for a three-day retainer. In Mr. W's case, Mr. Tollis billed over 55 hours after coming to the conclusion that his client's extensive psychiatric history rendered a capacity hearing with respect to his ability to consent to treatment untenable.

In his attempted Appeal, Mr. Tollis resiled from the ASF and asserted that he was coerced by his counsel into signing it. In an ironic twist, Mr. Tollis claimed that his counsel failed to live up to the duty of loyalty

and duty of care that they owed to him. He further alleged that his counsel colluded with the Law Society and preferred their own professional interests to his. He also suggested that the Law Society was out to get him.

Mr. Tollis argued that his mental state precluded him from appealing the Hearing Panel decision within the 30-day limit, but the Appeal Panel rejected his submissions. The Appeal Panel held that Mr. Tollis was capable of making the decision to submit the ASF, and that he was not entitled to an extension of time for an appeal because he now regretted it. The Appeal Panel therefore upheld Mr. Tollis' suspension and preclusion from working with clients whose capacity is at issue.

Law Society of Upper Canada v. Farant, 2005 ONLSHP 31 (CanLII)

This disciplinary decision concerns a lawyer who, *inter alia*, charged unreasonable fees, breached an order of the Court, and misled his client and other members of the bar to conceal these activities.

The lawyer, Joseph Omer Jean-Michel Farant, acted for DP with respect to a tort and accident benefits claim related to a motor vehicle accident. DP was a highly vulnerable person: he attended school only until Grade 2; he is unable to read or write; and a capacity assessment undertaken in 2001 found that he could not understand when he was being exploited and could not defend himself from exploitation. Throughout DP's retainer with Mr. Farant, he was not represented by a litigation guardian, though the PGT was later appointed as DP had no close friends or family.

Over the course of his retainer, Mr. Farant improperly dealt with funds totaling approximately \$154,000 from DP's trust account with his firm. For the tort and accident benefits claim, Mr. Farant billed approximately \$190,000 more in legal fees than in work he actually completed on the file, and on several occasions never sent an account to DP. Further, Mr. Farant violated an order of the court by paying himself \$35,000 in excess of what was ordered out of DP's settlement funds.

Mr. Farant refused to see DP due to his disruptive behavior on several occasions, and misled him about the funds that were taken and the state of DP's claims. Mr. Farant also misled successor lawyers hired by DP.

The Hearing Panel found found:

[84] The facts admitted by Mr. Farant raise matters which lie at the heart of a lawyer's obligations. The calling of a lawyer is to protect his client. The calling is highest where the client is vulnerable. Mr. Farant failed in this calling....

...

[86] As set out above, Mr. Farant failed in his highest duty to protect DP, a highly vulnerable client. Mr. Farant did so for personal gain. He breached the court order, misled his client and partners, and misrepresented the state of affairs to successor lawyers.

The Hearing Panel relied on joint submissions, and found that issues in Mr. Farant's personal life, his previously spotless discipline record, and the rehabilitation Mr. Farant had demonstrated served as mitigating factors. Ultimately, Mr. Farant was suspended for 14 months, and was required to be supervised for 2 years following his return from suspension.

Incapacity and Undue Influence

Danchuk v. Calderwood, 1996 CarswellBC 2555

This is a classic case involving the predatory marriage of a caregiver to an older adult, and includes the drafting of new wills, powers of attorney, and the creation of joint bank accounts and credit cards between the older adult and the caregiver. The older adult, George Danchuk, passed away on June 2, 1994, having ben purportedly married on January 14, 1994, and having executed a new Last Will and Testament on February 3, 1994.

After George's separation from his second wife in 1986, his daughter from his first marriage, Sonja Calderwood, assisted him with the management of his day-to-day affairs. Her assistance became

increasingly necessary as George began to suffer from the effects of dementia in the early 1990s. In the spring of 1993, Sonja hired Ida Ducolon, with whom she had been acquainted for several years, to assist with George's in-home care. After Ida began living with and assisting George, his friends and family report that he became increasingly isolated.

By the winter of 1994, George and Ida had "married" (though he was not actually divorced from his second wife), and George had executed a new will and powers of attorney in favor of Ida, completely unbeknownst to the rest of his family.

Ms. Heidi Bellis, the solicitor who prepared these documents for George, never met with him alone and noted concerns about George's capacity and that Ida was speaking for George at their meetings. Nevertheless, Ms. Bellis felt satisfied that George had the requisite capacity to make a will and grant powers of attorney. At trial, however, Harvey J. held with respect to Ms. Bellis:

116 In keeping with what I understand to be the law applicable to the duty of a solicitor, in the circumstances here, I accept the submission of counsel for the defendants that she failed with respect to that duty.

117 In my view, in the particular circumstances here, at the outset:

- (1) she should have regarded the circumstances as suspicious having regard to the deceased's advanced age and considerable seniority to that of the plaintiff as well as his apparent dependency upon her, including allowing her to speak for him;
- (2) she should have undertaken an inquiry, including interviewing the plaintiff and the deceased separately with regard to the age difference and as to the independence of the deceased in giving instructions;
- (3) the inquiry should have confirmed whether the deceased had a prior existing will and, if such a will existed, what were the reasons for any variations or changes therefrom prompting the disposition being put forward;
- (4) the inquiry should have encompassed why and for what reasons the deceased had given a power of attorney to his daughter in late 1992 and, more importantly, why upon revocation of that power of attorney, a new power of attorney was to be given by the deceased to the plaintiff; and,
- (5) collateral to (4), supra, the inquiry should have included some investigation of the health of the deceased.

118 In this perspective, I understand the law to be that a solicitor does not discharge her duty in the particular circumstances here by simply taking down and giving expression to the words of the client with the inquiry being limited to asking the testator if he understands the words. Further, I understand it to be an error to suppose because a person says he understands a question put to him and gives a rational answer he is of sound mind and capable of making a will. Again, in this perspective, there must be consideration of all of the circumstances and, particularly, his state of memory.

119 If the solicitor had made such inquiry and had been made aware of the circumstances in a fuller sense, including the medical assessment of the ongoing progression and state of senile dementia, I am satisfied the said will would not have been prepared by her at that time.

120 For these reasons, I attach little weight to the testimony of the solicitor.

The trial judge held that the 1994 Will has invalid, and did not have to deal with the issue of the validity of the marriage, as George never divorced his second wife. Special costs were awarded to George's children and wife.

Kozak Estate (Re), 2018 ABQB 185

This a recent case out of the Alberta Court of the Queen's Bench, demonstrates the difficulties that drafting solicitors may face in identifying the presence of undue influence, even where they have taken steps to ensure that their client has testamentary capacity. In this case, two wills prepared by the deceased near the end of his life were set aside on the basis of undue influence.

In this case, the deceased, Ted Kozak, passed away in March of 2014 having executed a 2011 Will and subsequent 2012 Will that significantly benefitted his fiancée – or a “really good” friend, as she claimed – Maryann Seafoot. Ted met Maryann at a gun show when he was a 72-year-old bachelor living on a farm near Kingman, Alberta that had been in his family for more than a century, and she was 56-years-old, unemployed, and considering a move to Daysland, Alberta. Only a few months later, Ted sold the family farm to a neighbor for \$600,000 and purchased an acreage in Daysland where he invited Maryann to live with him.

Though Ted wanted to marry Maryann, and proposed to her early in their relationship, Maryann initially paid rent at the Daysland property and she and Ted slept in different bedrooms. Maryann gave contradicting evidence of her relationship with Ted, claiming both to have loved Ted dearly and that he was simply a good friend. Ted retained Mr. Andreassen, a lawyer, to assist in the preparation of the 2011 Will and the 2012 Will, the latter of which was made in contemplation of Ted’s marriage to Maryann.

There is no record of the meeting where the 2011 Will was signed, however, Mr. Andreassen met with Ted alone to determine his testamentary capacity and execute the will. (Maryann may have been present in the outer office.) Mr. Andreassen asked Ted about the nature and extent of his assets, his health, any legal and moral claims that might exist against his estate, and his relationships with friends and family. Ted told Mr. Andreassen that he had fallen out with his sister, Yvonne, and was adamant that he loved Maryann and wanted to provide for her. Ted stated that he didn’t want “a lecture from his lawyer” on the issue of a marital property agreement with Maryann. Mr. Andreassen was satisfied based on this conversation that Ted had testamentary capacity.

Ted was admitted to Viking Extendicare Centre, a care facility, in March of 2013. Mr. Andreassen met with Ted again in June of 2013 to change his Power of Attorney. Ted’s attorney at that time was his cousin Rick, with whom he’d a lifelong friendship; however, Rick did not want to be involved with Ted’s estate if Maryann was. Maryann brought Ted to the office, but Mr. Andreassen met with Ted and Rick alone. At the meeting, Mr. Andreassen was satisfied that Ted had the requisite capacity to change his attorney. Ted executed a Power of Attorney and Personal Directive naming Maryann as his attorney and agent in June of 2013.

Ted’s account with Viking Extendicare Centre quickly went into arrears under Maryann’s attorneyship. An auction of Ted’s personal property was conducted, in part, to pay his outstanding account. In October of 2013, As Ted’s health continued to deteriorate, Yvonne contacted Mr. Andreassen, with a note from Ted giving her authority to discuss his legal matters, expressing concern about Maryann’s

management of Ted's affairs. Mr. Andreassen prepared new Power of Attorney documents ousting Maryann from the management of Ted's estate. When Maryann brought Ted in to Mr. Andreassen's office in November of 2013, Ted said that he did not want to change his attorney, and that he wanted to marry Maryann. Mr. Andreassen met with Ted alone and was satisfied as to his competency, however, concerned that Ted's loved ones were exerting influence over him, told Maryann after the meeting that, "It's not what you want or Yvonne wants or the family wants, it's what Ted wants."

In the decision, Justice Renke opined on the difficulty facing lawyers where capacity is present, but undue influence is part of a hidden narrative:

73 The difficulty any lawyer would have faced, not just Mr. Andreassen, was this: The client presents himself, meets alone with the lawyer, and capacity is established. Measures are taken to ensure that third parties do not interfere. No third party was present, the retainer is not by a third party, no communications affecting the will are received from a third party, no information is provided to a third party without the client's consent.

74 Mr. Andreassen accepted the narrative that was put to him by Ted. Ted was head over heels in love with Maryann. He wanted to provide for her. He therefore changed his mind about his estate arrangements. In January 2012, Mr. Andreassen was not on notice that there might be any difficulties with this narrative.

75 Further, a lawyer taking instructions for a will is structurally limited in terms of information access. The client comes to him or her. What the lawyer knows is what the client reveals in answer to questions as well as any historical knowledge the lawyer may have from other dealings with the client (in this case respecting the earlier real estate transaction). Taking instructions for a will does not involve an independent factual investigation into the life of the client. In this case, as Mr. Shipley emphasized, Mr. Andreassen did not know Ted or his family. He did not have a baseline against which to assess Ted's relationship with Maryann.

76 And, unless there were obvious signs that something was amiss, as there was not in this case, the lawyer is not in a position to go beyond his or her capacity examination to test the information the client brings. The lawyer doesn't know how it is or why it is that the client has adopted his or her understanding that produces the instructions. The lawyer doesn't know and can't know what influences have been working on the client. Those influences may be operative, hard at work, while the meeting progresses. A third party who has controlled and manipulated a client can continue to control and manipulate that client while not being physically present. Contrary to a suggestion of Mr. Mohr's, control does not depend on presence. The most effective control works regardless of presence. Further, the mere presence of counsel does not

by itself counter manipulation. Again, the presence of counsel is not an inoculation against undue influence.

What Mr. Andreassen didn't know was the extent to which Ted's assets has been depleted in the two year since he'd met Maryann, and the true nature of their relationship.

While she claimed otherwise, it was clear from Maryann's actions and testimony that she was not particularly devoted to Ted. She did not know when, how often or why he was in hospital; she could not recall what happened to the proceeds from the sale of his family farm; despite being his attorney, she did not know the cost of his care at Viking Extendicare Centre; and she did not know how often she visited him, refusing to give a serious answer when asked. She admitted to using Ted's money on gambling all over Alberta – in Fort McMurray, Boyle, Camrose, Viking, Stettler, Edmonton, Daysland, and Red Deer – while she was Ted's attorney, and yet claimed distance and expense were barriers to visiting him. She lied to hospital officials and others about the nature of her relationship with Ted and the extent of his assets. She could not recall if Ted proposed to her six weeks or six months into their relationship. She tried to sell the Daysland property using her authority as Ted's Power of Attorney, and the property was ultimately sold in March of 2014.

In the few years he knew Maryann before his passing, Ted went from being a frugal bachelor with hundreds of thousands of dollars in assets, to owing extensive debts on a line of credit and in unpaid bills. Ultimately, the court found that the 2011 and 2012 wills were the product of undue influence by Maryann and declared the wills to be invalid.

This decision in its result appears to depart significantly from *Danchuk v. Calderwood*, above, which suggests that where the circumstances appear to call for it, lawyers have an obligation to investigate the information given to them by their clients. However, the facts are distinct: in this case, the lawyer met with his client alone, asked probing questions about his relationships and assets, and there was no medical evidence of Ted's declining capacity. Ted was, to borrow a phrase form Justice Cullity's decision in *Banton v. Banton*, supra, a "willing victim" of Maryann.

Mayer v. Rubin, Endorsement of F.L. Myers J., dated February 10, 2017

In his Endorsement in this matter, Justice Myers strongly condemns the actions of a lawyer, Mr. Henry Juroviesky, in purporting to act for the mother in this case. The Endorsement appoints a litigation guardian, Mr. Pernica, for the mother with respect to the ongoing family litigation involving a family trust. Myers J. appointed the litigation guardian for his following reasons:

[3] I have yet to hear an independent voice for the mother. Mr. Juroviesky was duty-bound to protect her and yet took instructions from the other respondents knowing that the mother was incapacitated, could not retain him, and, as a litigator, deemed to know that she could not participate in the litigation without a properly appointed litigation guardian. He even continued to purport to express her personal wishes after the capacity assessment removed any remaining vestige of plausible deniability. (There really was none given that Mr. Juroviesky's 2014 memo makes his knowledge clear throughout.) His threat to Deloitte, ignoring the terms of my prior order, and purportedly on the mother's behalf, has superficially aided only Morris Rubin and Sarah Werner by impeding production of documents required for their accounting. One can question if obstructive delay of an accounting by trustees actually serves their overall interests. But that is for another day. It is beyond dispute that the accounting is distinctly in the interests of the mother on whose behalf Mr. Juroviesky was purporting to act.

[4] These are issues best left to another forum, and, perhaps, for costs. I raise them to highlight that on the merits, despite Mr. Juroviesky purporting to represent the mother, I have yet to hear an independent voice for her.

This Endorsement therefore demonstrates the vulnerable position of a party who lack capacity where someone, and especially a lawyer, purports to act for them or have their interests at heart. In the case of divisive litigation between family members, a party under disability must be represented by an independent litigation guardian.

Stevenson Estate v. Siewert, 2000 ABCA 222, 2000 CarswellAlta 817

This case concerns the release of a bank draft by a law firm to a dependent adult, who then endorsed the bank draft, which was payable to herself.

Mrs. Stevenson, the 99-year-old dependent adult, and Mr. Salvino, approached the lawyer in this case, Wulf Siewert, about a potential joint business venture. After learning that Mrs. Stevenson was a party under disability, Mr. Siewert advised that he could not represent her, though he later billed her for time spent on her matter to that point.

Mrs. Stevenson's trusteeship was only with respect to her Albertan assets, and in early July of 1990, she asked a Bahamian bank to send a \$100,000 bank draft to Mr. Siewert's office. Mr. Siewert left for vacation without knowledge of the bank draft, and while he was away, his legal secretary released it to Mr. Salvino, who was eventually convicted of theft with respect to the bank draft. The trial judge concluded that Mrs. Stevenson and Mr. Salvino had arranged for the bank draft to arrive while Mr. Siewert was away in order to avoid the scrutiny of her trustee.

Mrs. Stevenson endorsed the draft, and the amounts were deposited and transferred pursuant to Mr. Salvino's instructions. Mrs. Stevenson, by mid-July, had already tried to retain counsel to get the funds back from Mr. Salvino. By October, only \$100 remained in an account over which Mrs. Stevenson had any control.

The Court of Appeal held that Mrs. Stevenson had not had the capacity to endorse the bank draft, and that the law firm owed duties to Mrs. Stevenson when it came in possession of the draft. The Court of Appeal held that the bank, the lawyer, and the legal secretary were liable in conversion and granted judgment against them, jointly and severally, for the \$100,000. Because of the finding of liability in conversion, the Court did not address the standard of care owed by the lawyer and legal secretary to Mrs. Stevenson.

Walman v. Walman Estate, 2015 ONSC 185, 2015 CarswellOnt 350

In this case, the deceased, Murray Walman, married his second wife, Estelle, in 1991, and made 3 wills, in 2003, 2005, and 2007, as well as several dispositions of capital property that benefitted Estelle. Murray had three sons from a previous marriage. The net effect of the 2007 will and property transfers

was to leave the entirety of Murray's estate to Estelle – save \$5,000 to \$10,000 to be divided between Murray's sons.

After his death in 2009, Murray's sons sought orders to invalidate the 2017 will and set aside the capital dispositions in favor of Estelle. Corbett J. held that Murray lacked testamentary capacity during the period in question, and that in any event, Estelle had exerted undue influence over Murray with respect to the 2007 will and property transfers.

The court found that the solicitor, Mr. Clapperton, though experienced, should have inferred from the ample medical evidence available that Murray lacked testamentary capacity as the result of Parkinson's Disease and Lewy Body Dementia, both diagnosed several years prior to the execution of the 2007 will. In fact, Murray's previous counsel, Jules Kronis, had advised Murray and Estelle that Murray should have his capacity assessed before preparing any new will. Instead, Estelle brought Murray to Mr. Clapperton. In the context, Corbett J. held that the "strength of Mr. Clapperton's testimony is significantly undermined in this context: it is self-serving to the extent that it (a) justifies his decision to proceed without a capacity assessment, and (b) explains his failure to recommend an assessment" (para. 9).

However, the court also held that:

55 Mr Clapperton did several things "right" in connection with this interview. He interviewed Murray in Estelle's absence. He kept good notes. And he asked questions that, facially, comport with the requirement of determining whether the testator understood the extent of his assets. However, in the circumstances of this case, he needed to go further than he did. Murray was proposing to cut his children out of meaningful inheritance in favor of his second wife. To have a financial basis for such a change, Murray had to understand not only what his assets were, but also what Estelle's assets were. This was not explored appropriately. Murray also had to understand what dispositions he had made to Estelle already. This too was not explored appropriately. Had these issues been explored, Mr. Clapperton would have discovered what the case law refers to as "suspicious circumstances": recent transfers of substantial wealth from Murray to Estelle that had the effect of significantly denuding Murray's financial position to the benefit of Estelle.

56 On the issue of filial estrangement, the circumstances were such as to require a more probing inquiry than Mr. Clapperton conducted. Murray described his disappointment as arising from relatively recent disregard of his needs by his sons. The cases are replete with judicial decisions that relatively minor slights at the very end of life — whether real or imagined — that result in a change in a will — may be more evidence of loss of capacity than of any significant failure by a beneficiary. Here there was good reason to be concerned that Murray's expressed disappointment was a product of his diminished capacity, or the influence of his wife, than of any material failure on the part of his children. Of course, Mr. Clapperton did not have the benefit of the record before me of the decades-long close relationship between Murray and his boys, and Murray's statements that he felt well supported by his family. I am not satisfied that Mr. Clapperton conducted this part of the interview in sufficient depth. I conclude that what he did learn was sufficient to give rise to concerns about Murray's stated concerns. This should have been questioned more thoroughly.

Therefore, this case in contrast to Kozak suggests that lawyers have a duty to not only determine whether a testator is aware of the extent of his assets, and has reasons for any major changes to their disposition, but to investigate same where the surrounding circumstances appear to demand a degree of skepticism.

Wedemire v. Wedemire, 2017 ONSC 6891

The Applicant, Charles Wedemire, is the husband of the Respondent Myrtle Wedemire, and the adoptive father of the other Respondent, Neallos Wedemire. Neallos had Myrtle sign Powers of Attorney naming him as her attorney for property and personal care after Myrtle's health declined significantly following the death of her sister, Bearon, in the spring of 2013.

Neallos became very close with Myrtle after Bearon's death. He was added to her bank accounts, after which large sums started to be withdrawn and transferred. Neallos had been explicitly left out of Myrtle's will because she had never been repaid for financing she provided Neallos so he could buy a house, despite requests for repayment. Myrtle felt that she had provided Neallos with enough assistance throughout his life.

Nevertheless, on June 18, 2013, title to Myrtle’s home at 946 Danforth was transferred into Neallos’ name. Myrtle had lived in the property with Charles since 1977, but the property had always been solely in her name. The transfer to Neallos claimed that Myrtle was legally separated from Charles and that the Danforth property was not their matrimonial home. Both Myrtle and Charles deny this fact. The transfer was registered as a gift.

Neallos claimed that Myrtle and Charles had been legally separated, though living in the same house, since the 1980s. A divorce order was obtained dated April 2, 2014, but Myrtle claims that Neallos had her sign papers and that she was not aware of what she was signing. Charles claims that he was never served with divorce papers. Charles claims that he did not know of the transfer or the purported divorce until October of 2014, when Neallos tried to sell the property. Charles subsequently brought an application for equalization related to the Danforth property.

By the time a CPL was registered on the Danforth property, Neallos had registered mortgages on the property totaling \$105,000.

The lawyer who effected the transfer acted for both Myrtle and Neallos. There was no evidence that Myrtle was offered independent legal advice. Myrtle denied ever telling the lawyer – Mr. Lieberman – that she wanted to transfer the house; she claims that she was simply given papers to sign.

Ultimately, Young J. held that the transfer was invalid, and ordered Neallos to repay amounts related to the joint chequing account, Myrtle’s line of credit, and, was ordered to account for the mortgages on the Danforth property.

Weldon McInnis v. McGuire, 2014 NSSC 437, rev’g in part *Weldon McInnis v. John Doe*, 2014 NSSM 13

This case concerns an assessment of a solicitor’s accounts where the capacity of her client was at issue. The assessments of a lawyer’s account is conducted pursuant to the *Solicitor’s Act*, R.S.O 1990, c. S. 15,

and is distinct from solicitor's negligence. Essentially, a lawyer is asked to prove the fees and disbursements incurred in the course of a retainer.

In this case, Ms. McGinty, a solicitor at Weldon McInnis, represented John Doe. John Doe's daughter, Jane Doe, gave evidence at the assessment hearing. The assessment concerned four accounts rendered by Ms. McGinty, totaling \$9,116.89, for legal services performed with respect to John Doe's Powers of Attorney while he was living at an assisted living facility in Halifax. The second account was purely to pay a disbursement, namely the medico-legal report of Dr. Brunet, which ultimately found that while John Doe was capable of granting a Power of Attorney and instructing counsel, he was not capable of managing his assets/property.

John Doe contacted Ms. McGinty because he no longer wanted Jane Doe to act as his attorney due to concerns about her management of his finances; because his daughter, bank, and assisted living facility would not accept his letter revoking the Power of Attorney that appointed his daughter; and because he wanted the ability to look for a different place of residence.

Ms. McGinty gave evidence that she was satisfied that John Doe was competent and had the capacity to instruct counsel, and that he was in need of legal services. Ms. McGinty also gave evidence that she ignored the comments from staff at John Doe's facility that he was incapable because her focus was on her client. Despite a request from Jane Doe, Ms. McGinty did not speak to Dr. Couture, the physician who oversaw Mr. Doe's care, because John Doe told her that he was biased.

Ms. McGinty decided to have John Doe's competency assessed by Dr. Brunet, after consultations with John Doe, in lieu of simply preparing new Power of Attorney documents for him. After the report was delivered on August 23, 2013, Ms. McGinty was unable to get an answer from John Doe, after several attempts, about who he wanted to act as his attorney. Subsequently, Ms. McGinty received a report from Dr. MacKnight, dated August 26, 2013, finding that John Doe was not competent to make decisions

about his living situation, care, and finances. The report was silent as to John Doe's capacity to instruct counsel. Ultimately, John Doe instructed Ms. McGinty to close his file.

Jane Doe assessed Ms. McGinty's accounts, claiming that none should be paid: (1) on the basis that Ms. McGinty failed to take the reasonable steps of speaking with doctors and staff at John Doe's residence to confirm certain facts and allegations he made, and (2) that John Doe lacked the capacity to retain and instruct counsel.

In the first paragraph of the initial decision, the assessment officer, Adjudicator Richardson, identified some difficult questions facing lawyers when the capacity of a client is at issue:

The news is now replete with articles about the social impact of a growing population of older people. Many of these discuss the concurrent growth of people whose mental capacity is impaired in varying degrees by the aging process. Others discuss the problem of elder abuse. This context will on occasion raise difficult questions of client assessment for lawyers. Is an allegation made by a client that his or her children are abusing him or her real, or a figment of suspicions born of declining mental faculties? Can a solicitor accept and act on the instructions of a client when there is reason to be concerned about the capacity of the client to give those instructions? What steps-if any-must or should or can a solicitor take to determine the mental capacity of his or her client prior to acting on those instructions? Under what circumstances can a solicitor charge such a client for following instructions that later prove to have been based on the client's delusions? How is the value of services provided under such circumstances to be assessed?

Ultimately, Adjudicator Richardson held that Ms. McGinty's fees were reasonable, with a reduction, as the evidence before him did not suggest that John Doe was incapable of retaining and instructing counsel, relying on the task-specific test for capacity and the presumption of capacity. However, Adjudicator Richardson held that the disbursement for the report of Dr. Brunet was unreasonable, because, *inter alia*, Ms. McGinty advised John Doe to obtain such a report shortly after meeting with him and without the benefit of a review of his full medical file. The account for the disbursement was disallowed in its entirety.

The assessment was appealed to the Nova Scotia Supreme Court of the case above. The Court held that the adjudicator in Small Claims Court misapplied the test of reasonableness with respect to Ms. McGinty's conduct in obtaining the capacity report from Dr. Brunet by failing to consider whether counsel's approach was reasonable in and of itself and instead analyzed her actions in the context of an alternative approach. The Court held that the disbursement incurred in obtaining the expert's report was reasonable, citing the ultimate responsibility of lawyers for the legal work they perform.

The Court further held that the adjudicator's reasons for finding Ms. McGinty's fees unreasonable lacked specificity, and so allowed an appeal of the issue of the outstanding legal bills.

CONCLUDING REMARKS

It is easy to see the difficulty for lawyers to balance the various duties they owe to their client when vulnerability, capacity, and undue influence are at issue in retainer. In every case, a lawyer has the supreme duty of ensuring that his or client has the requisite capacity to retain and instruct counsel, as any defense or assertion of a client's legal rights must rest on the foundation of a valid lawyer-client relationship. It may not always be possible to detect every instance of undue influence or incapacity, but a lawyer must always be satisfied that they can act for a given client and fulfill all of the duties and obligation owed to that client.

The checklists contained in Appendix I and the cross-Canadian professional conduct rules provided at Appendix II are intended to serve as guidance for lawyers in determining whether they have considered all of their duties and obligations where vulnerability, capacity, and undue influence are at issue in a retainer.

APPENDIX I: CHECKLISTS

CAPACITY CHECKLIST: THE ESTATE PLANNING CONTEXT

Capacity Generally

There is no single definition of capacity, nor is there a general test or criteria to apply for establishing capacity, mental capacity, or competency.

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.²⁴

Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.²⁵

In determining the ability to understand information relevant to making a particular decision, and to appreciate the consequences of making a particular decision, or not, the following capacity characteristics and determining criteria are provided for guidance purposes:

Testamentary Capacity

The question of testamentary capacity is almost wholly a question of fact.

The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

- (a) The nature of the act of making a Will (or testamentary document) and its effects;
- (b) The extent of the property of which he or she is disposing of; and
- (c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).²⁶

Further elements of the criteria applied for determining testamentary capacity that the testator must have, are:

- A “disposing mind and memory” to comprehend the essential elements of making a Will;

²⁴ *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 WL 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calvert* [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff'd [1998] O.J. No 505 (C.A.) leave ref'd [1998] S.C.C.A. No. 161

²⁵ *Estates, Trusts & Pension Journal*, Volume 32, No. 3, May 2013

²⁶ *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)

- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the person(s) who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and
- A sufficiently clear understanding and memory to appreciate all of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property.²⁷

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*²⁸:

“If the propounder of the Will proves that it was executed with the necessary formalities and that it was read over to or by a testator who appeared to understand it, the testator is presumed to have known and approved of its contents and to have testamentary capacity.”

Notably, the court recently opined on delusions and the effect on testamentary capacity finding their existence alone is not sufficient to determine testamentary capacity, but are a relevant consideration under the rubric of suspicious circumstances.²⁹

Capacity to Make Testamentary Dispositions other than Wills

The Succession Law Reform Act³⁰ defines a “Will” to include the following:

- (a) a testament,
 - (b) a codicil,
 - (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
 - (d) any other testamentary disposition. (“testament”)
- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and

²⁷ The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz*, 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne Estate* (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (Baillii)

²⁸ *Vout v Hay*, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.) at P 227

²⁹ *Laszlo v Lawton*, 2013 BCSC 305, SCBC

³⁰ R.S.O. 1990 c.s.26 as amended subsection 1(1)

others.³¹ Therefore, capacity is determined on the criteria applied to determining testamentary capacity

- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.³² The criteria to be applied, is that of testamentary capacity.
- The capacity required to create an inter vivos trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.

Capacity to Grant or Revoke a Continuing Power of Attorney for Property (“CPOAP”)

Pursuant to section 8 of the Substitute Decisions Act,³³ to be capable of granting a Continuing Power of Attorney for Property (“CPOAP”), a grantor requires the following:

- (a) Knowledge of what kind of property he or she has and its approximate value;
- (b) Awareness of obligations owed to his or her dependants;
- (c) Knowledge that the attorney will be able to do on the person’s behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- (d) Knowledge that the attorney must account for his or her dealings with the person’s property;
- (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;
- (f) Appreciation that unless the attorney manages the property prudently its value may decline; and
- (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.³⁴

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.³⁵

³¹ S.51(10 of the Succession Law Reform Act

³² S.1(1)(a) of the SLRA

³³ R. S.O. 1992, c 30, as am.

³⁴ SDA, subsection 8(2)

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.³⁶

When an Attorney should act under a CPOAP

If the CPOAP provides that the power granted, comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when:

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or
- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the Mental Health Act³⁷

Capacity to Manage Property

The criteria for assessing the capacity to manage property is found at section 6 of the SDA. Capacity to manage property is ascertained by:

- (a) The ability to understand the information that is relevant in making a decision in the management of one's property; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.³⁸

A person may be incapable of managing property, yet still be capable of making a Will.³⁹

Capacity to Grant or Revoke a Power of Attorney for Personal Care ("POAPC")

Pursuant to section 47 of the Substitute Decisions Act, to be capable of granting a Power of Attorney for Personal Care ("POAPC"), a grantor requires the following:

- (a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

³⁵ SDA, subsection 9(1)

³⁶ SDA, subsection 9(2)

³⁷ R.S.O. 1990, c. M.7

³⁸ See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)

³⁹ *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291

- (b) The appreciation that the person may need to have the proposed attorney make decisions for the person⁴⁰

A person who is capable of granting a POAPC is also capable of revoking a POAPC.⁴¹

A POAPC is valid if at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution⁴²

When an Attorney should act under a POAPC

- In the event that the grantor is not able to understand information that is relevant to making a decision concerning personal care, or is not able to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, the attorney must act having regard to S.45.

Capacity to Make Personal Care Decisions

The criteria required to determine capacity to make personal care decisions is found at section 45 of the SDA. The criterion for capacity for personal care is met if a person has the following:

- (a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and
- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

“Personal care” is defined as including health care, nutrition, shelter, clothing, hygiene or safety.

Capacity under the Health Care Consent Act, 1996⁴³

Subsection 4(1) of the Health Care Consent Act, 1996 (HCCA) defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

- (a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and

⁴⁰ SDA, subsection 47(1)

⁴¹ SDA, subsection 47(3)

⁴² SDA, subsection 47(2)

⁴³ S.O. 1996, C.2 Schedule A

- (b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity to Contract

A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.⁴⁴

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.⁴⁵

Capacity to enter into a contract is defined by the following:

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract's specific effect in the specific circumstances.⁴⁶

The presumptions relating to capacity to contract are set out in the Substitute Decisions Act, 1992 ("SDA").⁴⁷ Subsection 2(1) of the SDA provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.⁴⁸ Subsection 2(3) then provides that a person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."⁴⁹

Capacity to Gift

In order to be capable of making a gift, a donor requires the following:

- (a) The ability to understand the nature of the gift; and
- (b) The ability to understand the specific effect of the gift in the circumstances.⁵⁰

⁴⁴ G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).

⁴⁵ *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859

⁴⁶ *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant*, [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

⁴⁷ *SDA*, *supra* note 2

⁴⁸ *SDA*, subsection 2(1)

⁴⁹ *SDA*, subsection 2(3)

⁵⁰ *Royal Trust Company v. Diamant*, *Ibid.* at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.⁵¹

Capacity to Undertake Real Estate Transactions

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,⁵² which as set out above, requires the following:

- (a) The ability to understand the nature of the contract; and
- (b) The ability to understand the contract's specific effect in the specific circumstances⁵³

If the real estate transaction is a gift, and is significant relative to the donor's estate, then the standard for testamentary capacity applies, which requires the following:

- (a) The ability to understand the nature and effect of making a Will/undertaking the transaction in question;
- (b) The ability to understand the extent of the property in question; and
- (c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

Capacity to Marry

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.⁵⁴

A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage.⁵⁵

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.⁵⁶

⁵¹ *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel* [1956] S.C.R. 477 at 487

⁵² See for example: *Park v. Park*, 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII)

⁵³ *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant*, [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

⁵⁴ *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)

⁵⁵ *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)

⁵⁶ *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik

The capacity to separate and divorce is arguably the same as required for the capacity to marry.⁵⁷

Capacity to Instruct Counsel

There exists a rebuttable presumption that an adult client is capable of instructing counsel.

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: “Notes on Capacity to Instruct Counsel” by Ed Montigny.⁵⁸ In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

- (a) Understand what they have asked the lawyer to do for them and why,
- (b) Be able to understand and process the information, advice and options the lawyer presents to them; and
- (c) Appreciate the advantages, disadvantages and potential consequences of the various options.⁵⁹

Issues Related to Capacity

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.⁶⁰

Case law has defined “undue influence” as any of the following:

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one’s will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;⁶¹
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and

⁵⁷ *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff’d 1998 CarswellOnt 494

⁵⁸ Staff lawyer at ARCH Disability Law Centre.

⁵⁹ At page 3

⁶⁰ *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. (dissenting in part); *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194, 47 O.A.C. 345, 1991 CarswellOnt 280 (C.A.); *Brandon v. Brandon*, 2007, O.J. No. 2986, S.C.J. ; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349 ; *Hall v. Hall* (1868) L.R. 1 P & D.

⁶¹ *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162

- Coercion⁶²

The hallmarks of undue influence include exploitation, breach or abuse of trust, manipulation, isolation, alienation, sequestering and dependency.

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.⁶³

Actual violence, force or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.⁶⁴

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences.⁶⁵

Psychological pressures creating fear may be tantamount to undue influence.⁶⁶

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document ... “cannot be said to be that of the deceased.”⁶⁷

Undue influence must be corroborated.⁶⁸

Suspicious circumstances will not discharge the burden of proof required.⁶⁹

* See Undue Influence Checklist

Suspicious Circumstances

Suspicious circumstances relating to a Will may be raised by and is broadly defined as:

- (a) circumstances surrounding the preparation of the Will;
- (b) circumstances tending to call into question the capacity of the testator; or

⁶² *Wingrove v. Wingrove* (1885) 11 P.D. 81

⁶³ *Scott v Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.)

⁶⁴ *Wingrove v. Wingrove* (1885) 11 P.D. 81

⁶⁵ *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)

⁶⁶ *Tribe v Farrell*, 2006 BCCA 38

⁶⁷ *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58

⁶⁸ S. 13 of the *Ontario Evidence Act*: In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.; *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d) 224

⁶⁹ *Vout v Hay*, at p. 227

- (c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.⁷⁰

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.⁷¹

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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2016

⁷⁰ *Eady v. Waring* (Ont. C.A.) 974; *Scott v. Cousins*, [2001] O.J. No 19; and *Barry v. Butlin*, (1838) 2 Moo. P.C. 480 12 E.R.1089; *Vout v Hay*, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.)

⁷¹ *Laszlo v Lawton*, 2013 BCSC 305 (CanLII)

UNDUE INFLUENCE CHECKLIST

UNDUE INFLUENCE: SUMMARY

- The doctrine of undue influence is used by courts to set aside certain inter vivos gifts/wealth transfers, transactions, and planning and testamentary documents, where, through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent. Where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.⁷²

TESTAMENTARY UNDUE INFLUENCE

- Testamentary undue influence requires coercion. It is only where the will of the person who becomes coerced into doing that which he or she does not desire to do, that it is undue influence.⁷³ Common law has continued to apply the historical definition of undue influence, focusing on a mind “overborne” and “lacking in independence”. Persuasion is allowed, but where one person has the ability to dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power, undue influence will be found.⁷⁴
- Burden of Proof: While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence.⁷⁵
- Standard of Proof: *C(R) v McDougall*⁷⁶ held that there is a single standard of proof in civil cases— the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations. One must look at all of the surrounding circumstances. Mere influence by itself is insufficient.⁷⁷

⁷² *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.

⁷³ *Wingrove v Wingrove* (1885) 11 PD 81 at 82

⁷⁴ *Dmyterko Estate v. Kulikovsky* (1992) CarswellOnt 543

⁷⁵ Note that under section 52 of the British Columbia *Wills, Estates and Succession Act*, SBC 2009, Chapter 13, if the will-challenger establishes that the alleged undue influencer was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will has the onus of establishing that the alleged undue influencer did not exercise undue influence.

⁷⁶ 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.

⁷⁷ *Kohut v. Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38

- Indirect Evidence: In the U.K. case of *Schrader v Schrader*⁷⁸, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator’s vulnerability and dependency of the influencer, including consideration of the influencer’s “physical presence and volatile personality.” The court also noted the lack of any identifiable evidence giving reason for the testator to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.
- Relationship: Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. However, dependency is not always an indicator. As individuals grow older or develops health issues it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.⁷⁹
- Multiple Planning Documents: In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.⁸⁰
- Language: In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.⁸¹ For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.⁸²
- Indicators of Testamentary Undue Influence: The Ontario Superior Court of Justice in the decision of *Gironda v Gironda*⁸³ provided a (non-exhaustive) list of indicators of undue influence:

⁷⁸ *Shrader v Shrader*, [2013] EWHC 466 (ch)

⁷⁹ See for example *Hoffman v. Heinrichs*, 2012 MBQB 133 in particular paragraph 65: a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was “scrupulous” in helping her manage her finances and encouraged her to buy things for herself.

⁸⁰ See for example *Kohut Estate v Kohut*, where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer’s office.

⁸¹ See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

⁸² *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

⁸³ *Gironda v Gironda*, 2013 CarswellOnt 8612.

- The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with his or her prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.⁸⁴

In *Tate v. Guegueirre*⁸⁵ the Divisional Court noted that the following constituted “significant evidence suggesting that [a] Will was a product of undue influence”:

- Increasing isolation of the testator, including a move from his home to a new city;
- The testator’s dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator’s failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;
- The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator to the lawyer to have it executed;
- There were documented statements that the testator was afraid of the respondent.⁸⁶

INTERPLAY BETWEEN CAPACITY AND SUSPICIOUS CIRCUMSTANCES

- Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.⁸⁷ Evidence of undue influence may even rebut the presumption of capacity that would usually apply.⁸⁸

⁸⁴ *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.

⁸⁵ 2015 ONSC 844 (Div. Ct.)

⁸⁶ *Tate v. Guegueirre* 2015 ONSC 844 (Div. Ct.) at para.9.

⁸⁷ See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman’s will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence. In *Leger v. Poirier*, [1944] SCR 152 the Supreme Court of Canada explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a

- Suspicious Circumstances: Typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:
 - Circumstances surrounding the preparation of the Will or other planning instrument;
 - Circumstances tending to call into question the capacity of the testator/grantor, and;
 - Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.⁸⁹

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- Secrecy in the preparation of the Will;
- Seemingly “unnatural” dispositions;
- Preparation or execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.⁹⁰

INTER VIVOS GIFTS: UNDUE INFLUENCE

- Distinct from Testamentary Undue Influence: Testamentary undue influence arose from common law courts while inter vivos gift undue influence was developed by the courts of equity in the 1700s and 1800s. It is available against a broader spectrum of conduct and renders the gift of wealth transfer voidable (unlike testamentary undue influence which renders a wealth transfer void).

Two Classes of Undue Influence: Actual and Presumed

- Actual Undue Influence: Has been described as “cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . .”⁹¹

“disposing mind and memory” without the requisite ability to grasp some degree of appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

⁸⁸ *Nguyen Crawford v Nguyen*, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).

⁸⁹ *Vout v Hay*, [1995] 2 SCR 876 (SCC).

⁹⁰ Mary MacGregor, “2010 Special Lectures- Solicitor’s Duty of Care” (“Mary MacGregor”) at 11.

⁹¹ *Allcard v. Skinner* (1887) LR 36 Ch.D. (Eng. C.A. Ch. Div.) at p. 181

Actual undue influence is not reliant on any sort of relationship. The onus to prove actual inter vivos gift undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities.

- Presumed Undue Influence: This class does not depend on proof of reprehensible conduct. Equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or “special” relationships from being abused.⁹² These relationships are determined by a “smell test”: does the potential for domination inhere in the relationship itself?

Relationships where presumed undue influence has been found include: solicitor and client, parent and child, and guardian and ward, “as well as other relationships of dependency which defy easy categorization”. However even close, traditional relationships (i.e. parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination.

Shift in Evidentiary Burden: Once a presumption of undue influence is established there is a shift in the onus to the person alleging a valid gift to rebut it. However, it is noted that the presumption casts an evidential burden not a legal one. The legal burden is always on the person alleging undue influence.

The presumption of undue influence can be rebutted by:

- No actual influence was used in the particular transaction or the lack of opportunity to influence the donor;
- The donor had independent legal advice or the opportunity to obtain independent legal advice;
- The donor had the ability to resist any such influence;
- The donor knew and appreciated what she was doing; or
- There was undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.

LAWYERS’ CHECKLIST

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present. In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that

⁹² *Ogilvie v Ogilvie Estate* (1989) 49 BCLR (3d) 277 at para. 14

undue influence is present. In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Checklist

- Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
- What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- Is there conflict within your client's family?
- If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?
- If the client is isolated, does he/she live with one particular individual?
- Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?
- Based on conversations with your client, his/her family members or friends, what are his/her character traits?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
- If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent

legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.

- Have numerous successive planning documents of a similar nature been made by this client in the past?
- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
- Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility or other?
- Is the client physically dependant on another? Is the client vulnerable?
- Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?
- In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?
- Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

- Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependency? Is the client in some way susceptible to external influence?

- Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
- Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?
- Is the client making a marked change in the planning documents as compared to prior documents?
- Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?

Guidelines for Lawyers to Avoid and Detect Undue Influence

When taking instructions from a client in respect of a planning document, there are some checklist recommended guidelines to assist in minimizing the risk of the interplay of undue influence:

- Interview the client alone;
- Obtain comprehensive information from the client, which may include information such as:
 - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
 - (ii) Any previous planning documents and their contents, copies of them.
- Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);

- Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;
- Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability. Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;
- Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;
- Address recent health changes and determine whether the client have any physical impairment (hearing, sight, mobility, limitations)?
- Consider evidence of intention and indirect evidence of intention; and
- Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

Practical Tips for Drafting Lawyers - Checklist

- Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;
- Determine Intentions;
- Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);
- Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third

parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

- Follow your instincts: where a person is involved with your client’s visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;
- Where a person appears to be overly involved in the testator’s rapport with the law office, it may be worth asking a few questions and making inquiries as to that person’s relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;⁹³ and
- Be mindful of the Rules of Professional Conduct⁹⁴ which are applicable in the lawyer’s jurisdiction.

This checklist is intended for the purposes of providing information and guidance only and is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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2017

⁹³ For a helpful review of tips for solicitors to prevent undue influence, see “Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide”, BCLI Report no. 61, Appendix, in particular “Checklist” and “Red Flags”, <http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf>

* For other related resources, see WEL “Publications, Website”: www.whaleyestatelitigation.com

⁹⁴ *Rules of Professional Conduct*, Law Society of Upper Canada, <http://www.lsuc.on.ca/with.aspx?id=671>

APPENDIX II: PROFESSIONAL CONDUCT ACROSS CANADA

OVERVIEW

Name of Rules	Relevant Rules (Text Provided Below)
<i>Code of Conduct</i>	<ul style="list-style-type: none"> • Client Instructions – Rules 3.2-4 and 3.2-6 • Clients with Diminished Capacity – Rule 3.2-15 • Confidential Information – Rule 3.3-1 • Conflicts, Consent and Disclosure – Rule 3.4-1[7] to [10] • Joint Retainers, Informed Consent – Rule 3.4-5[12] • Business with a Client, Gifts and Bequests – Rule 3.4-13[16] • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Concurrent Representation – Rule 3.4-4 • Joint Retainers – Rule 3.4-5
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Joint Retainers – Rule 3.4-5 • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Joint Retainers – Rule 3.4-5 • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Concurrent Representation – Rule 3.4-4 • Joint Retainers – Rule 3.4-5 • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Client Instructions – Rule 4(6) • Clients with Diminished Capacity – Rule 4(13) • Confidential Information – Rule 5(1) • Implied Consent – Rule 6(4)[2A] • Concurrent Representation – Rule 6(10) • Joint Retainers – Rule 6(11)

Name of Rules	Relevant Rules (Text Provided Below)
	<ul style="list-style-type: none"> • Restrictions – Rule 12(2) • Marketing of Professional Services – Rule 13(1)
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Concurrent Representation – Rule 3.4-4 • Joint Retainers – Rule 3.4-5 • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1
<i>Model Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Concurrent Representation – Rule 3.4-4 • Joint Retainers – Rule 3.4-5 • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1
<i>Rules of Professional Conduct</i>	<ul style="list-style-type: none"> • Limited Scope Retainer – Rule 3.2-1A.1 • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Joint Retainers – Rule 3.4-5 • Documenting Independent Legal Advice – Rule 3.4-29[8] • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Concurrent Representation – Rule 3.4-4 • Joint Retainers – Rule 3.4-5
<i>Code of Professional Conduct of Lawyers</i>	<ul style="list-style-type: none"> • General Rules – Rule 8 • Duties Pertaining to Mandates – Rule 28
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Concurrent Representation – Rule 3.4-4 • Joint Retainers – Rule 3.4-5 • Gifts and Testamentary Instruments – Rules 3.4-37 to 3.4-39 • Restrictions – Rule 4.1-2

Name of Rules	Relevant Rules (Text Provided Below)
<i>Code of Professional Conduct</i>	<ul style="list-style-type: none"> • Marketing of Professional Services – Rule 4.2-1 • Clients with Diminished Capacity – Rule 3.2-9 • Confidential Information – Rule 3.3-1 • Consent – Rule 3.4-2 • Concurrent Representation – Rule 3.4-4 • Joint Retainers – Rule 3.4-5 • Restrictions – Rule 4.1-2 • Marketing of Professional Services – Rule 4.2-1

CLIENT INSTRUCTIONS

Alberta – Rules 3.2-4 and 3.2-6

Northwest Territories – Rule 4(6)

3.2-4 A lawyer must obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.

Commentary

...

[3] If a client persistently refuses or fails to provide instructions, the lawyer is entitled to withdraw (see Rule 3.7-2). If, however, the failure to provide instructions is due to the client's disappearance or incapacity, the lawyer has additional duties to attend to before withdrawal is justified (see Rules 3.2-5 and 3.2-15 and accompanying commentaries).

...

3.2-6 When receiving instructions from a third party on behalf of a client, a lawyer must ensure that the instructions accurately reflect the wishes of the client.

Commentary

[1] It is not inherently improper for a lawyer to accept instructions on a client's behalf from someone other than the client. For example, a client may be indisposed or unavailable and therefore unable to provide instructions directly, or a lawyer may be retained at the suggestion of another advisor, such as an accountant, with the result that at least the initial contact is made by the advisor on the client's behalf.

[2] In these circumstances a lawyer must verify that the instructions are accurate and were given freely and voluntarily by a client having the capacity to do so. The lawyer's freedom of access to the client must be unrestricted. In certain situations it may be appropriate for the lawyer to insist on meeting alone with the client (see also Rule 3.2-1 and related commentary).

[3] From time to time a lawyer is retained and paid by one party but requested to prepare a document for execution by another party. While on a technical analysis the instructing party may be the client, the facts may indicate a relationship with the other party as well that carries with it certain duties on the part of the lawyer, such as the duty to make direct contact with the other party to confirm the instructions. If, for example, a lawyer has been asked to prepare a power of attorney or a will for a relative of the person providing instructions, the possibility of coercion or undue influence requires that steps be taken to protect the interests of the relative. If that person's wishes cannot be satisfactorily verified, it is improper for the lawyer to carry out the instructions.

...

CLIENTS WITH DIMINISHED CAPACITY

Alberta – Rule 3.2-15

British Columbia, Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon – Rule 3.2-9

Northwest Territories – Rule 4(13)

3.2-15 When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client’s ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client’s ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[2] A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

[3] If a client’s incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client’s interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client’s interests.

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative’s assessment of what is in the best interests of the client under a

disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See commentary under Rule 3.3-1 (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

CONFIDENTIAL INFORMATION

Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon – Rule 3.3-1

Northwest Territories – Rule 5(1)

3.3-1 A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Society; or
- (d) otherwise permitted by this rule.

Commentary

...

[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief the person lacks capacity, the potential harm to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

CONSENT

Manitoba, New Brunswick, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon – Rule 3.4-2

3.4-2 A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

- i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
- ii. the matters are unrelated;
- iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
- iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

...

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

CONFLICTS, CONSENT AND DISCLOSURE

Alberta - Rule 3.4-1[7] to [10]

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

...

Consent and Disclosure

[7] Except for representing opposing parties in a dispute (see Rule 3.4-2), these rules allow a lawyer to continue to act in a matter even when in a conflict of interest, if the clients consent. The lawyer must also be satisfied that the lawyer is able to proceed without a material and adverse effect on the client.

[8] As defined in these rules, “consent” means fully informed and voluntary consent after disclosure. Disclosure may be made orally or in writing, and the consent should be confirmed in writing.

[9] “Disclosure” means full and fair disclosure of all information relevant to a person’s decision, in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. A lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that a conflict of interest could adversely affect the client interests. This would include the lawyer’s relations to the parties and any interest in connection with the matter.

[10] This rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest. In some cases, however, the lawyer should recommend such advice, especially if the client is vulnerable or not sophisticated.

DISCLOSURE AND CONSENT

Northwest Territories – Rule 6(4)[1] to 2A]

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client’s consent and arises from the duty of candour owed to the client. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] Disclosure means full and fair disclosure of all information relevant to a person’s decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client’s interests. This would include the lawyer’s relations to the parties and any interest in or connection with the matter.

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client’s consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

JOINT RETAINERS, INFORMED CONSENT

Alberta – Rule 3.4-5[12]

- 3.4-5** Before a lawyer acts for more than one client in the same matter, the lawyer must:
- (a) obtain the consent of the clients following disclosure of the advantages and disadvantages of a joint retainer;
 - (b) ensure the joint retainer is in the best interests of each client;
 - (c) advise each client that no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
 - (d) advise each client that, if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely

...

Informed Consent to Joint Representation

...

[12] Rule 3.4-5 does not require that a lawyer advise the client to obtain independent legal advice about a conflicting interest. In some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend independent legal advice. If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter, the lawyer should advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

JOINT RETAINERS

British Columbia, Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon – Rule 3.4-5

Northwest Territories – Rule 6(11)

- 3.4-5** Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients that:
- (a) the lawyer has been asked to act for both or all of them;
 - (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other. The Law Society website contains two precedent letters that lawyers may use as the basis for compliance with rule 3.4-5.

...

CONCURRENT REPRESENTATION

British Columbia, Newfoundland & Labrador, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan, Yukon – Rule 3.4-4

Northwest Territories – Rule 6(10)

3.4-4 Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

- (a) disclosure of the risks of the lawyers so acting has been made to each client;
- (b) each client consents after having received independent legal advice, including on the risks of concurrent representation;
- (c) the clients each determine that it is in their best interests that the lawyers so act;
- (d) each client is represented by a different lawyer in the firm;
- (e) appropriate screening mechanisms are in place to protect confidential information; and
- (f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

...

[3] The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

...

LIMITED SCOPE RETAINER

Ontario – Rules 3.2-1A.1

3.2-1A.1 When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

Commentary

...

[5.2] In addition to the requirements of Rule 3.2-9, a lawyer who is asked to provide legal services under a limited scope retainer to a client who has diminished capacity to make decisions should carefully consider and assess in each case if, under the circumstances, it is possible to render those services in a competent manner.

...

DOCUMENTING INDEPENDENT LEGAL ADVICE

Ontario – Rule 3.4-29[8]

Documenting a Client's Decision to Decline Independent Legal Advice or Independent Legal Representation

...

[8] If the client is vulnerable and declines independent legal advice or independent legal representation, the lawyer should not enter into the transaction. Some signs that the client may be vulnerable include cognitive decline, disabilities such as impaired vision and hearing, financial

insecurity, and major changes in life circumstances that may make the client more susceptible to being unduly influenced.

RESTRICTIONS

Alberta, Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon – Rule 4.1-2

Northwest Territories – Rule 12(2)

4.1-2 In offering legal services, a lawyer must not use means that:

- (a) are false or misleading;
- (b) amount to coercion, duress, or harassment;
- (c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or
- (d) otherwise bring the profession or the administration of justice into disrepute.

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not recovered may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable, exploitive or other means that bring the profession or the administration of justice into disrepute.

MARKETING OF PROFESSIONAL SERVICES

Alberta, Manitoba, New Brunswick, Newfoundland & Labrador, Nova Scotia, Nunavut, Ontario, Saskatchewan, Yukon – Rule 4.2-1

Northwest Territories – Rule 13(1)

4.2-1 A lawyer may market professional services, provided that the marketing is:

- (a) demonstrably true, accurate and verifiable;
- (b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;
- (c) in the best interests of the public and consistent with a high standard of professionalism.

Commentary

[1] Examples of marketing that may contravene this rule include:

- (a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;
- (b) suggesting qualitative superiority to other lawyers;
- (c) raising expectations unjustifiably;
- (d) suggesting or implying the lawyer is aggressive;
- (e) disparaging or demeaning other persons, groups, organizations or institutions;
- (f) taking advantage of a vulnerable person or group; and
- (g) using testimonials or endorsements that contain emotional appeals.

BUSINESS WITH A CLIENT, GIFTS AND BEQUESTS

Alberta – Rule 3.4-13[16]

3.4-13 A lawyer must not enter into a transaction with a client who does not have independent legal representation unless the transaction is fair and reasonable to the client and the client consents to the transaction.

...

Gifts and Bequests

[16] A "transaction" includes the acceptance of a gift or bequest. A lawyer is not entitled to make a profit from clients other than through fair professional remuneration. If a gift or bequest from a client appears to be unearned or disproportionately substantial, it is prima facie not "fair and reasonable" to the client as required by this rule and a presumption of undue influence is raised. A lawyer must refuse to accept a gift that is other than nominal unless the client has received independent legal advice.

GIFTS AND TESTAMENTARY INSTRUMENTS

Saskatchewan – Rules 3.4-37 to 3.4-39

Gifts and Testamentary Instruments

3.4-37 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

3.4-38 A lawyer must not include in a client’s will a clause directing the executor to retain the lawyer’s services in the administration of the client’s estate.

3.4-39 Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer a gift or benefit from the client, including a testamentary gift.

Commentary

[1] A conflict of interest between lawyer and client may exist in cases where the lawyer gives property to or acquires it from the client by way of purchase, gift, testamentary disposition or otherwise. In cases of inter vivos gifts or purchases, it may be sufficient to ensure that the client has independent legal advice before proceeding with the transaction. However, in cases of testamentary dispositions or where there is any indication that the client is in a weakened state or is not able for any reason to understand the consequences of a purchase or gift or there is a perception of undue influence, the lawyer must not prepare the instrument in question and the client must be independently represented. Independent representation and preparation of the instrument will not be required where the gift, purchase or testamentary disposition is insubstantial or of a minor nature having regard to all of the circumstances, including the size of the testator’s estate.

GENERAL RULES

Québec – Rule 8

8. A lawyer who offers his professional services cannot, by any means whatsoever, make or allow to be made a representation that is false or misleading, that amounts to coercion, duress, or harassment or that seeks to take advantage of a person who is vulnerable due, in particular, to his age or his physical or psychological condition.

DUTIES PERTAINING TO MANDATES – ACCEPTANCE OF MANDATE

Québec – Rule 8

28. A lawyer must determine together with the client the terms, conditions and scope of the mandate given to him. In particular, he must set out in an objective manner the nature and scope of the problems as he sees them on the basis of the facts brought to his attention and the risks inherent in the measures recommended. A lawyer must obtain the client’s consent to the mandate, paying particular attention and care when the client is vulnerable due, in particular, to his age or his physical or psychological condition.