



LAWYERS' CHECKLIST: CHECKING FOR INDICATORS OF UNDUE INFLUENCE DURING VIRTUAL/DIGITAL (VIDEO) MEETINGS

In the current COVID-19 environment, the practice of law is changing daily & rapidly so.

Wills, estates, trusts, and, elder law lawyers may find themselves currently consulting with their clients more often by some form of video conference.

Lawyers may be virtually meeting with their clients to obtain instructions for the drafting of testamentary instruments, and for power of attorney documents, or for litigation instructions and consultations. Just how we are meeting our clients, whether by electronic means of whatever categorization or otherwise, may well be in transition, yet, what will remain static are our professional responsibilities and duties as lawyers.

Professionals must continue to be vigilant and assess whether potential clients/clients possess the requisite decisional capacity to provide instructions and too, that those instructions are free of undue influence - where one person has the ability to dominate the will of another, whether through manipulation, coercion, or the outright, yet, subtle abuse of power.

Undue influence may be difficult to detect in a usual face-to-face client meeting. Detecting such influences through video conferencing may be even more challenging. It is therefore important to adapt to current norms and develop processes and steps to help determine if undue influence is at play in all situations.

Below we have modified our "Undue Influence Checklist" for use during virtual/digital meetings or video conference calls with clients or potential clients.

QUESTIONS TO ASK YOURSELF OR YOUR CLIENT DURING VIRTUAL/DIGITAL MEETINGS

- Is there an individual or individuals who are with your client in the same room during the video conference? Try to interview the client alone. Explain the importance.
- Determine what technology the potential client/client is making use of ie., laptop, desktop, monitor, mobile device.
- Ask if able to do so that the potential client/client do a 360 view of the room that he/she is participating in the meeting from.
- Request that the potential client/client not mute the meeting for the duration.
- Request that any doors if applicable be closed during the meeting.
- Observe body language closely.
- Listen for rustling of papers, or other distractions and make inquiries if any.
- If someone insists on being present in the room, establish who they are- And why are they there?
- What is the relationship between this individual and your client?
- Who is your client living with during the pandemic?
- Analyse the room in which your client is taking the video call. Does it look disorganized? Observe for cleanliness and disarray. How is your client dressed? Does it raise any red flags about personal care?
- Is your client looking at the camera or looking off camera for answers? Is someone writing down and holding up written answers for your client to read? Try

to make sure your client is the one answering the questions and if on video, that you see all of the person as much as possible.

- Does your client have any documents in front of him or her? What do those documents say? Who wrote the documents? Ask direct and pointed questions.
- Consider using the record function for the video call and establish this protocol from the outset of the meeting.
- Are there any communication issues that need to be addressed? Can the client hear and see you clearly through the video conference service and can you hear and see them? Test this through questioning.
- Are there any language barriers that could limit the client's ability to understand and appreciate the documents being considered, drafted, or otherwise as applicable and related implications?
- Who set up the video call? Is the client technologically savvy, or did someone else set up the call or consultation? Who? Why?
- Is the client aware that he or she is paying for the consultation, or that the consultation is being paid for with his or her assets?
- What are the familial circumstances of your client? Is she or he 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?
- Observe any vulnerabilities.

- 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 establish the timing of any such gifts? What is the history of gifting, if any?
- Have there been any recent changes to any planning document(s) in question? What was the timing of such change and what was the reason for the change? For instance, did any change coincide with a shift in life circumstances, situations of conflict, or medical illnesses, physical disabilities?
- Are there significant changes being made because of the pandemic? Why are they being made now? Fraudsters and undue influencers may take advantage of the current crisis to prey on the vulnerable. Vigilance is key.
- 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? What is the timeline?
- Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different lawyers? If so, why?
- Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility or other? Establish timelines.

- Is the client physically dependent on another? Is the client vulnerable?
- 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?
- Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning of the retainer? Have instructions remained the same? Do the instructions seem reasonable?

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

- 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; and,
 - (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 couple's 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 instructions to corroborate information where appropriate to do so.

- Take the time required to complete the task you are being retained to do. Often these matters take more time, and there is a cost associated with this, but it is critical not to rush through complex matters such as where influences are at play.
- 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

- 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.
- Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate (if available during the pandemic), 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 a virtual/digital 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.
- Be compliant and mindful of required solicitor client consents and directions.
- Follow your instincts: where a person is involved with your client's video conference or virtual/digital meeting, 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.
- Be mindful of the *Rules of Professional Conduct* relevant to the lawyer's jurisdiction and keep up to date with any notices or information provided by the local law society with respect to meeting clients virtually/digitally and of course, be ensure clients' are compliant with statutory provisions.

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

Kimberly A. Whaley, Whaley Estate Litigation Partners, April 2020