The Six-Minute Estates Lawyer 2013
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RETAINERS AND OPENING FILES

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(1)
INTRODUCTION

The area of estates and trusts can present practitioners with unique problems, many of which can be avoided or mitigated by taking appropriate measures at the outset of the solicitor-client relationship and maintaining them throughout the retainer. This paper provides practical tips that lawyers can undertake early in the solicitor-client relationship to help avoid pitfalls and possible negligence claims.

(2)
IDENTIFYING THE CLIENT

Ensure that you, the client and all relevant parties know <u>who</u> the client is.

Client identification is important in every practice area, but an estates practice presents special challenges. Frequently when estate planning is involved, the solicitor is considered by the client - and may even consider him or herself - to be the "family lawyer." Where family members may consider themselves authorized to instruct the lawyer on family affairs, problems are likely to arise when the subject matter involves such things as testamentary gifts to and from those very same parties.

A great deal of trouble may be forestalled simply by establishing at the very outset who *is* the client, and who is *not* the client. At the same time, be aware of other interested parties, and be mindful of to whom you owe your fiduciary duty and duty of loyalty. In the context of an estate administration, the lawyer must also make clear that

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the client is neither the estate nor the beneficiaries, but rather the estate trustee who is the personal representative.[2]

In *De Los Reyes v Timol*,[3] the lawyer acting for the estate trustee was sued by a beneficiary for breach of fiduciary duty. The plaintiff disputed the validity of the will probated by the lawyer, which later turned out to be false. The issue before the Ontario Superior Court of Justice was what duty, if any, is owed by a solicitor (acting on behalf of an estate trustee) to a beneficiary who is adverse in interest. The Court found that the lawyer acted correctly in that he

> *did not detach himself when a question as to the validity [of the will] arose. To do so might well have been a breach of his duties to his client, that is, the person who retained him. In certain circumstances a trustee acting in an estate will be found to owe a duty to beneficiaries. […] Here I find no such fiduciary duty owed to the plaintiff. At all times, his interest in representing the trustee was adverse in interest to that of the plaintiff. If the defendant acted improperly to the detriment of the estate, the claim of the plaintiff must lie against the trustee, not against the solicitor.*[4]

Thus, because there was no doubt as to who the client was and, by extension, to whom the lawyer's duties were owed, the lawyer escaped liability even though he had acted on an invalid will against the interests of the true will's rightful beneficiaries.

Identify not only the client, but the capacity in which you represent the client.

Just as important as knowing your client is knowing and clarifying the capacity in which you represent that client. For example, there is a difference between representing a person as estate trustee and representing a person in her personal capacity.

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[2] Clare E Burns & E Jasmine Sweatman, "An Estate Administration Checklist for Solicitors Advising Estate Trustees", paper presented at the Law Society of Upper Canada Continuing Professional Development Practice Gems: The Administration of Estates 2012 at 2-1.

[3] *De Los Reyes v Timol*, 2000 CarswellOnt 453 (Sup Ct).

[4] *Ibid* at paras 13-15.

In *Bott Estate (Trustee of) v Macaulay,*[5] the son of the testatrix hired a solicitor in the son's capacity as estate trustee. After the estate had been administered, the solicitor billed the son twice: once for services provided "as solicitor on behalf of the estate," and again for services provided to the son as estate trustee.[6] For the latter, the lawyer paid to himself an amount representing 5% of the estate. The son sought an order for assessment under the *Solicitors Act*.[7] The Court held that "[a]n estate is not a juridical person and cannot retain anyone, or incur liabilities. An estate solicitor is one performing services to a personal representative acting as such."[8] As such, the estate had no liability for fees, and the order for assessment was granted.

Clearly identify to yourself any peripheral or related parties.

Although client identification at the outset of the relationship is paramount, the prudent estates lawyer should also take early steps to clearly identify parties other than the client, such as beneficiaries, next-of-kin, the donor of a power of attorney, and intestate heirs. During the course of an estate's administration, such individuals will very frequently have to be identified and located, which can be both difficult and time-consuming. You will be at an advantage for having made early inquiries. Moreover, in terms of solicitor's liability, the potential claimant is often not the client, but a beneficiary or other person affected by your retainer, with whom you may have no personal or professional relationship, or of whom you may not even have knowledge.[9] Knowing what parties exist, and the nature of their relationship to your client and the estate, may help in assessing such potential claims.

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[5] *Bott Estate (Trustee of) v Macaulay,* 2005 CarswellOnt 3743 (Sup Ct) [*Bott Estate*].

[6] *Ibid* at para 12.

[7] *Solicitors Act*, RSO 1970, c 441.

[8] *Bott Estate*, *supra* note 5 at para 19.

[9] Deborah Petch & Dan Pinnington, "Wills and estates claims: best practices for malpractice avoidance" (LawPRO Webzine, August 2011) [*Malpractice Avoidance*].

Claims by non-clients arising from an estate's administration can be extremely costly. In *Meier v Rose,*[10] the lawyer was sued by a beneficiary for negligently drawing up a will. The lawyer had failed to properly identify the holder of title to a piece of real property. Because it turned out to be held by one of the testator's companies instead of the testator personally, the attempted bequest of the property to the beneficiary failed. The lawyer was found liable in negligence and was ordered to pay damages equal to the value of the property, which came to some $480,000.

(3)
RETAINERS AND CONFLICTS OF INTEREST

When retained to draft a will, act in a timely fashion once instructions are received.

Time is often of the essence when a lawyer is retained to draft a will. Remember that contingencies do happen, and that a lawyer may be exposed to liability for failing to act in a timely fashion not just where the client is moribund, but also where the client is apparently robust and expects to live for years.

Identify any potential conflicts of interest or misunderstandings immediately.

A conflict of interest is something that will affect your ability to carry out your client's instructions. A personal conflict of interest may adversely affect your judgment and compromise your ability to fulfil your duty of loyalty to the client. The sooner you recognize the potential for a conflict to arise, the less grief that conflict will cause you if and when it does arise. Beneficiaries may believe that you are their lawyer. In those cases where you believe the person does not understand who you are acting for, a non-engagement letter is appropriate.

[10] *Meier v Rose,* 2012 ABQB 82.

When asked to act jointly, consider carefully whether acting for both parties is appropriate.

When asked for a joint retainer by a couple, consider whether: (1) you act or have acted for one spouse on another matter; (2) you act or have acted for any of their relatives; or (3) one spouse seems to be giving instructions on behalf of both spouses. Client contact with both clients is unlikely to be equal—indeed one spouse may be all too eager to delegate decision-making authority to the other. Be aware at all times that you owe the same duty to each client. Consider whether one spouse first approached you on behalf of both, and if special care is warranted in ensuring the interests of the "quiet spouse" are protected.

In *Remus v Remus,*[11] the wife brought a motion for removal of the husband's lawyer, claiming that she and her husband had jointly retained him in the past. She also claimed that she was friends with an ex-wife of a partner in the lawyer's firm, and that as such, the firm had acquired a knowledge of her psychological make-up which gave her husband an advantage in their custody dispute. Although the motion was denied because of doubts surrounding the joint retainer and the wife's failure to show that confidential information about her had passed to the husband's law firm, the case illustrates the sorts of problems that can arise, and of which any lawyer who deals with couples and joint retainers should be aware.

In *Agar v Agar*,[12] the husband successfully moved for removal of the wife's lawyer on the grounds of conflict of interest. The lawyer had been a longstanding friend of the wife's side of the family. The Court found that because the husband had trusted the lawyer's explanation of the separation agreement drawn up on the wife's behalf, this was sufficient to prevent the lawyer from representing the wife in a dispute to which the agreement gave rise.

[11] *Remus v Remus*, [2002] OJ No 4242.

[12] *Agar v Agar,* 2004 CarswellNB 378 (QB).

In *Onichuk v Blanchard,*[13] both parties to a custody dispute had previously been represented by the same lawyer on separate matters, one family and the other criminal. The respondent brought a motion for removal of the lawyer as the applicant's solicitor of record for the custody dispute. Despite the respondent having signed a statement that she waived "any and all conflicts", her motion succeeded on the grounds of conflict of interest. The Court found that the respondent's violent criminal history was highly relevant to the matters at issue in the custody dispute, such as her ability to act as a parent. As such, the lawyer who acted for her in the criminal proceeding could not act against her in a related proceeding.

If it is necessary to decline a retainer for any reason, be mindful of the commentary to Rule 3.01(1), which requires lawyers to exercise prudence in declining representation:

> *A lawyer declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another licensee, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.08(7), without charge.*

For joint retainers, inform *both* (or *all*) the clients:

1. **that you have been asked to act for both or all of them;**
2. **that nothing will be confidential as against the other client(s); and**
3. **that should a conflict arise, you may have to withdraw completely (subrule 2.04(6)).**

These steps must be taken every time you are jointly retained. Recall, though, that these steps exist so that informed consent can be given. So, after you've informed the clients of the above, be sure to obtain consent.

[13] *Onichuk v Blanchard,* 2004 CanLII 5908 (Sup Ct).

When asked to draft mirror wills, adhere to the Commentary to Rule 2.04(6).

When retained by a couple to draft mirror wills, inform them that if one of them subsequently wants to change the will, the following will occur:

1) the request would be treated as a request for a new retainer;
2) the communication would be confidential as against the other spouse; and
3) the request would be denied unless the relationship had been permanently ended, the other spouse had either died or given consent for the lawyer to act on new instructions.

In many cases, it will be appropriate for the clients to obtain independent legal advice. Although clients may not be receptive to the notion, it is also a good idea to remind clients that on the death of one spouse, the other may remarry and, consequently, wish to change the will.[14] In addition, you may want to suggest that the parties enter into an agreement not to change their wills except by mutual agreement.[15]

Clearly define the limits of the retainer at the outset.

Defining the scope, objectives, and duration of the retainer are essential steps in opening the file. Frequently in the practice of estates law, the most difficult question is determining when the retainer comes to an end.[16] For this reason, the best practice is to formally indicate to the client the scope of the retainer and, when the work has been completed, put in writing that the retainer has concluded. Before closing the file, review it to be sure that everything that is part of the retainer has been completed.[17]

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[14] Ian M. Hull, Suzana Popovic-Montag & Clare E Burns, "Selected Ethical Issues for the Estate Planner" at 7 [*Selected Ethical Issues*].

[15] Suzana Popovic-Montag, "Joint Retainers for Wills", December 4, 2009.

[16] *Selected Ethical Issues*, *supra* note 14 at 4.

[17] *Malpractice Avoidance*, *supra* note 9.

(4)
TAKING INSTRUCTIONS

Take pains to clarify who is authorized to give instructions on the retainer.

As indicated above, clearly identifying who the client is at the outset of the relationship is important. However, this does not mean that it will always be clear who is able to give instructions. An elderly client may wish to give instructions through one or more adult children. This can create problems where the instructions relate to a will in which the child is named as a beneficiary. Make clear at the beginning not only who the client is, but who is authorized to give instructions, and then adhere to whatever rules are agreed to.

Thoroughly document every communication you have with the client beginning with the very first contact.

A record should be kept of every communication or attempted communication between you and the client. This is especially true when you are receiving instructions. On important matters, it is best practice to confirm the instructions from the client twice: once after having received them, and again after having carried them out.[18] It is also best practice to incorporate more detail into your dockets.

Issues may later arise from a brief encounter before a formal retainer is signed. *Fisk v Land*[19] involved a wife's attempt to remove her husband's law firm on the basis that she had given a member of that firm confidential information. The issue was whether a preliminary phone call - and nothing more - made by a prospective client to a lawyer prohibited the lawyer from later acting against that prospective client if she was never formally retained. The lawyer had no notes, and claimed to have no memory of the

[18] Edwin G Upenieks & Gosha S Sekhon, "The Basics: Some Common Claims in Estate Litigation", paper presented at Ontario Bar Association Estate Litigation: A Primer, December 9, 2009 [Upenieks & Sekhon].

[19] *Fisk v Land,* 2004 MBQB 192.

conversation. The Court in this case was not satisfied on the basis of the wife's evidence that she had imparted confidential information to the lawyer, and her motion was denied.

In respect of conflict procedures, a three-stage process should be practised:

1) Take only the names of the parties involved and the nature of the retainer. No further information should be provided.
2) A conflict search should be conducted.
3) The lawyer can then speak to the potential client and update any conflict search if new parties' names arise.

(5)

CAPACITY

Be alert to possible issues of testamentary capacity.

Wills and estates lawyers have a greater obligation than other lawyers to get to know their clients. When meeting a client for the drafting of a will, the lawyer has a duty to consider whether the client has testamentary capacity,[20] and to make inquiries in circumstances that would raise doubt in the mind of a reasonable and competent solicitor.[21]

It was noted by the Court in *Calvert* that "[i]t has been said that the highest level of capacity is that required to make a will."[22] The criteria for testamentary capacity were set out by Laskin JA in *Schwartz v Schwartz*:[23]

> *The testator must be sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty, and (3) the testamentary provisions he is making; and he must, moreover, be*

[20] Dragana Sanchez Glowicki, "Levels of Mental Capacity", paper presented at Society for Estate and Trust Practitioners, Edmonton, Alberta, March 29, 2012 [Glowicki] at 3.

[21] Debra Rolph, "Dementia and conveyances of property", LawPRO Webzine, August 2011 at 2 [Rolph].

[22] *Calvert (Litigation Guardian of) v Calvert*, 1997 CarswellOnt 581 (Ont Gen Div) at 56.

[23] *Schwartz v Schwartz* (1970), 10 DLR (3d) 15 (Ont CA).

> *capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.*[24]

To make a will, your client must not only be of sound mind, memory, and understanding in general but should also have an understanding of the nature and extent of her property; any obligations she may have to, for example, dependents; and the consequences of, for example, the revocation of any prior testamentary dispositions.[25]

In *Collicut Estate, Re*[26] the octogenarian testatrix resided in a nursing home where, upon arrival, a physician had noted that she was paranoid, depressed, confused, withdrawn, frail and delusional. Although she had over $200,000, she believed she had no money. She had two previous wills which made dispositions to relatives, with the residue going to various charities. However, a lawyer drew up a codicil making her long-time friend the sole beneficiary. The lawyer made no inquiries as to the testatrix's mental competence, nor did he examine her former will or pay any mind to the profound change in her disposition. The codicil failed and, it might be said that the lawyer was lucky not to be sued in negligence.

Although the above case illustrates the dangers of failing to adequately assess capacity, just as great a difficulty may lie in assessing capacity without being overzealous to the extent of infringing an elderly testator's right to dispose of his assets as he sees fit.[27] Although an estates lawyer must always be aware of the potential that an issue of capacity can arise, don't rush to make inquiries in unsuspicious circumstances, or where the client is in good health.[28]

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[24] *Ibid* at para 44.

[25] Upenieks & Sekhon, *supra* note 18 at 3.

[26] *Collicut Estate, Re*, 1994 CarswellNS 427 (Prob Ct).

[27] Glowicki, *supra* note 20 at 4.

[28] Rolph, *supra* note 21.

Be alert to any possibility of undue influence.

Personally oversee the execution of the will including, where necessary, an affidavit of execution. Keep the will securely in your offices.[29] Be wary of "trusted advisors," or anyone in whom your client seems to place an unusual amount of trust. Any instructions given in the presence of such a person must be confirmed in private with the client.[30] If an elderly client requests major changes with respect to their will or finances, ask questions to find out what's going on, and consider who would be benefitting from the requested change.[31]

Although undue influence must be watched for with vigilance, be aware that not every case which bears its stereotypical hallmarks will give rise to a finding of undue influence. *Banton v Banton*[32] is a case whose bare facts presented many such hallmarks. In that case, the 88-year-old testator was lonely, depressed, incontinent, terminally ill, and severely disabled and cognitively impaired. He married a 31-year-old waitress who worked in the restaurant of his nursing home in a ceremony in her apartment, unbeknownst to any of his children. Shortly thereafter, the wife brought the testator to a lawyer who, upon production of their marriage certificate, drafted a power of attorney in favour of the wife, as well as a new will in which he left the whole of his estate to his wife and cut out his children entirely. Despite these facts, medical examinations both before and after the execution indicated that the testator had testamentary capacity. The Court described the lawyer's conduct in drafting the will:

> *As a solicitor experienced in taking instructions for wills, Mr. Wolfe was aware of the necessity to satisfy himself of his client's testamentary capacity. On the basis of the testimony of his secretary, Carol Davis, I believe he had some initial concern about this and it is clear that he thought there was a possibility that the will might be challenged. After*

[29] *Ibid* at 6.

[30] *Ibid* at 5.

[31] LawPRO, "Practice Pitfalls", LawPRO Magazine, vol 9 no 2, September 2010, online: LawPRO <http://www.practicepro.ca/LawPROmag/PracticePitfalls.pdf> at 8.

[32] *Banton v Banton*, 1998 CarswellOnt 3423 (Ont Gen Div).

> *asking George Banton about his property and his reasons for leaving nothing to his children, Mr. Wolfe decided that there was capacity. He testified that he concluded that his client knew what his assets were "as much as most people", whom he intended to benefit and who were the beneficiaries of his previous will. His evidence was supported to some extent by that of Carol Davis and each of them dictated a memorandum that was placed in George Banton's file.*[33]

Despite circumstances that some might see as raising every alarm bell, the solicitor who drafted the will was protected by having taken the appropriate precautions from the outset, and keeping a record.

Don't Rush to Seek a Capacity Assessment.

In *Thorpe v Fellowes Solicitors,*[34] the Court stated that "there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary."[35] Capacity assessments are difficult to obtain. Before resorting to one, remember that a capacity assessment is an intrusive and, for the assessed party, a hugely consequential ordeal.[36]

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[33] *Ibid* at para 25.

[34] *Thorpe v Fellowes Solicitors,* [2011] EWHC 61 (QB) at para 88.

[35] *Ibid* at para 77.

[36] Angela Case, "A Practical Guide to Capacity Assessments", paper presented at Ontario Bar Association Trusts and Estates Law: Best Practices, Practical Tips, and Risk Management Strategies for Estate Planning, February 7-9, 2013.

(6)
PROPOSED CHANGES TO RULE 2.04(37)-(39)

The following proposed changes to Rule 2.04 which are directed at estates lawyers have been recommended by the Law Society's Professional Regulation Committee:

> *2.04(37) 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.*
>
> *2.04(38) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.*

The effect of these proposed changes is that you will no longer be able to draft a will for a client which directs the executor to retain you as a solicitor in connection with administering the estate. Nor will you be able to draft a will for a client that names yourself as a beneficiary.

A further proposed rule is not recommended by the Committee, which would prohibit a lawyer from accepting more than a "nominal" gift from a client unless the client has received independent legal advice.[37]

[37] Law Society of Upper Canada, "Information on Proposed Amendments to the *Rules of Professional Conduct* Arising from Implementation of the Federation of Law Societies of Canada's Model Code of Professional Conduct" (undated) at 14.

ADDENDUM

LIST OF RESOURCES

File Management Guide:

http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/File-Management/Document-Management/File-Management-Practice-Management-Guideline/

File Opening Checklist:

http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491870

Client Services and Communication Practice Management Guideline:

http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Representation/Client-Communication/Client-Service-and-Communication-Practice-Management-Guideline/

Guide to Retention and Destruction of Closed Client Files:

http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147491048