Duty and Standard of Care of Solicitors Practicing in Estates

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To Whom Does the Drafting Solicitor Owe a Duty of Care?

- To the client/testator (or the client's estate after death).
    - A solicitor owes a duty of care to his or her client. This duty arises in contract (under the terms of the retainer agreement) and as a professional duty imposed on all lawyers to act with skill and competence when serving their client.
        - See *Central & Eastern Trust Co v Rafuse* (1986), 31 DLR (4th) 481, [1986] 2 SCR 147 (SCC) which held (at paragraph 66) that a solicitor is required to act with reasonable care, skill and knowledge in the performance of his or her services.
- To the client's intended beneficiaries.
    - The principle that a drafting solicitor owes a duty of care to the testator's intended beneficiaries was established in Canada in *Whittingham v Crease & Co* (1978), 88 DLR (3d) 353 (BCSC).
    - The court in *Haljan v Mercer* (2004), 11 ETR (3d) 172 (AB QB) summarized the principle in the following manner (at paragraph 8):

> What is clear from the cases is that a court may grant a remedy to a disappointed beneficiary where the interests of the testator and the disappointed beneficiary are in harmony and there is no possibility of conflict.

    - As a result, where the testator clearly intended for someone to be a beneficiary of his or her estate and the gift to the intended beneficiary failed due to the act or omission of the solicitor, the "disappointed beneficiary" may sue the solicitor in negligence.
- A solicitor does not owe a duty of care to beneficiaries named in a prior will. As a result, a drafting solicitor is free to draft a new will which revokes or changes prior wills.

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- See *Graham v Bonneycastle* (2004), 2004 ABCA 270, 10 ETR (3d) 167, 243 DLR (4th) 617, (AB CA) and *Harrison v Fallis* (2006), 2006 CarswellOnt 3545 (ON SCJ).

What is the Standard of Care?

- The appropriate standard of care of a drafting solicitor will vary with the circumstances. As a result, the solicitor must ensure that he or she has a full understanding of the circumstances surrounding the drafting of the will – the client's health and competency, family dynamics, the client's testamentary wishes, and a full appreciation of the client's assets.

- Failure to meet the standard of care (as defined by the circumstances) leaves the drafting solicitor vulnerable to a negligence claim.

- The drafting solicitor's basic duty is to ensure that the testator executes a valid will which gives effect to the client's testamentary wishes.

- A solicitor's duty is not limited to doing exactly what the client instructs.

  - See *Randall v Hare* (2010), 59 ETR (3d) 214, *sub nom. Burns Estate (Re)* (NB QB).

  - See also Archie Rabinowitz, "Solicitor's Negligence," *Key Developments in Estates and Trusts Law in Ontario*, 2011 edition, M. Yach, ed. (Toronto: Thomson Reuters, 2011).

- It is also part of a solicitor's duty to support a client's will. This includes documenting the evidence that may be relevant if ever the validity of the will is challenged.

  - See *Maw v Dickey* (1974), 52 DLR (3d) 178, 6 O.R. (2d) 146, where the court held (at paragraph 60):

    > The duty [the drafting solicitor] owed to his client was to properly support, at a later date if necessary, the will – once he was sure it expressed the sane and intended wishes of his client.

  - See also Mary L. MacGregor, "Solicitor's Duty of Care," *Special Lectures 2010: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Toronto: Irwin Law, 2011).

- Although the standard of care of a drafting solicitor will vary with the circumstances, the following list of duties should be kept in mind.

Prepare the will in a reasonable amount of time

- If the client is elderly or the solicitor knows that (or should know that) the client has a serious medical condition, the solicitor may be negligent for not preparing the client's will in a timely manner.
    - See *Makan v McCawley* (1998), 158 DLR (4th) 164, 22 ETR (2d) 88 (ON Ct. J.).
    - See also *McCullough v Riffert* (2010), 59 ETR (3d) 235 (ON SCJ) and *Rosenberg Estate v Black*, [2001] OJ No 5051 (ON SCJ).

Ensure that the will is validly executed

- Ontario's *Succession Law Reform Act*, RSO 1990, c S.26, sets out the requirements of a valid will (at sections 4-6). Strict compliance with the execution requirements is necessary.
- Nevertheless, the courts are sometimes willing to rectify a technical error. See for example *Re Malichen Estate* (1994), 6 ETR (2d) 217 (ON Gen. Div.).

Be alert to common drafting errors

- Common drafting errors include:
    - Failure to dispose of the residue of an estate.
    - Incorrect use of terminology (such as *per stirpes*) or ambiguous descriptions of classes of beneficiaries (for example, leaving a gift to "nieces and nephews" excludes family members not related by blood).
    - Inconsistent gift provisions (for example, giving an "absolute" gift of property while later imposing qualifications on the gift).
        - See Brian A. Schnurr, *Estate Litigation* Vol. 2, 2nd ed., looseleaf (Toronto: Thomson Reuters, 1994) for a complete discussion of common errors.
- In order to correct a drafting error, an application to court for interpretation of the will is necessary. The drafting solicitor may be liable for the costs of the application.

Ensure the will is the appropriate vehicle to give effect to the testator's intentions

- The drafting solicitor should ask probing questions about the testator's assets or confirm the legal registration of the assets on his own to ensure that the assets can be disposed of in the will. For example, the solicitor should ask questions about:
    - Current beneficiary designations of assets (for example, RRSPs or life insurance policies) to determine whether the assets will pass outside the estate on death.
    - The ownership of property (for example, to ensure that the testator, and not his corporation, is the registered owner).
    - Registration of real property (for example, a testator may not understand that real property owned jointly with a spouse will pass outside the estate unless the joint tenancy is severed).
        - See *Earl v Wilhelm* (1997), 18 ETR (2d) 191 (SK QB) where a solicitor was found negligent for failure to make appropriate inquiries about the testator's assets.
        - See also *Meier v Rose* (2012), 531 AR 369, 74 ETR (3d) 249 (AB QB) and *Michiels v Kinnear* (2011), 7 RPR (5th) 175, 2011 CarswellOnt 5253 (ON SCJ).

Make inquiries into capacity (where circumstances warrant)

- Capacity to make a will is a legal determination, not a medical one. The definition of testamentary capacity established in *Banks v Goodfellow* (1870), LR 5 QB 549 (Eng) has been followed in most Canadian courts.
- In *Hall v Bennett Estate* (2003), 227 D.L.R. (4th) 263, 50 E.T.R. (2d) 72 (ON CA) at paragraph 14, the court held that to have a "sound and disposing mind," the testator must:
    - Understand the nature and effect of a will.
    - Recollect the nature and extent of his or her property.
    - Understand the extent of what he or she is giving under the will.

  - Remember the persons that he or she might be expected to benefit under his or her will.
  - Where applicable, must understand the nature of the claims that may be made by persons he or she is excluding from the will.

- Where the solicitor has reason to believe that the will may be vulnerable to attack on the basis of testamentary capacity, the drafting solicitor is required to make inquiries into the testator's capacity and to document those inquiries.
  - See for example *Danchuk v Calderwood* (1996), 15 ETR (2d) 193 (BCSC).
- What type of inquiry is necessary depends on the circumstances – the older and more frail the client, the more probing an investigation of the client's capacity.
  - See *Leger v Poirier,* [1944] SCR 152.
- The solicitor may go so far as to require a letter from the client's family doctor, or refer the client to a qualified capacity assessor.
- The solicitor's notes should contain more than the solicitor's conclusions – they should include the reasons and evidence on which the solicitor based his or her conclusion.

Be alert to suspicious circumstances and adapt your interview with the client accordingly

- The drafting solicitor should be particularly alert to the presence of "suspicious circumstances" at the time of executing the will. Where suspicious circumstances exist, the will is more likely to be challenged on the basis of incapacity, lack of knowledge and approval of the contents of the will, and/or undue influence.
- What constitutes "suspicious circumstances" will vary, but common "red flags" include:
  - The new will represents a significant departure from previous wills.
  - The client provides inconsistent changes (speaks to capacity).
  - The new will excludes "usual beneficiaries" (spouse and children), or the estate is divided unevenly between them.

- The testator is ill, recently bereaved, or has been newly diagnosed with a serious illness.
- Someone other than the client makes the appointment and brings the client to the meeting.
- The client's instructions are provided in writing (possibly in someone else's handwriting).
- The client is new to the drafting solicitor.
- The solicitor is dependent on the proposed beneficiary due to age or infirmity.

- In his text, *Estate Litigation*, Brian Schnurr recommends that a solicitor breaks the will-drafting process into 4-steps where suspicious circumstances exist:

  (i) Meet with the client in a private environment, where only the client and solicitor are present.

  (ii) Send the draft will to the client for review.

  (iii) Schedule a second meeting with the testator to review the draft will and answer any questions.

  (iv) Schedule a third meeting with the testator to summarize and execute the will.

- As with capacity, the solicitor is under a duty to document suspicious circumstances and the steps taken by the solicitor to ensure the will was a reflection of the client's true wishes and intentions. The solicitor's notes should include:
  - A list of who attended the meetings.
  - Who provided the solicitor with instructions.
  - The client's demeanor at meetings.
  - The explanation and reasons given by the testator for disposing of his or her property in a particular way.
    - See *Eady v Warring* (1974), 43 DLR (3d) 667 (ON CA) for a discussion of a solicitor's duties where suspicious circumstances exist.

- Although whether the solicitor has met the appropriate standard of care will depend on the circumstances, a drafting solicitor should keep these four general duties in mind:
    - **Inform** the client of his testamentary options and legal obligations (for example, support of dependants).
    - **Educate** the client (and the solicitor) about the requirements of a valid will (for example, the rules regarding witnesses) and the proper meaning and effect of the terms used in the will (for example, the difference between *per stirpes* and *per capita*).
    - **Investigate** the client's capacity, any suspicious circumstances, and the client's assets (such as title and pre-existing beneficiary designations).
    - **Document** all investigations undertaken, as well as the client's given reasons for disposing of his or her assets in a particular manner. Do not limit notes to the solicitor's own conclusions; notes that include the facts and circumstances on which the solicitor's conclusions are based are more persuasive and reliable in court.

<u>Amount of Damages</u>

- Damages may equal the value of the intended gift or may be restricted to the costs of the court proceedings.
    - See for example *Meier v Rose*, *supra*, where the damages awarded were equal to the value of the lost gift.
- Where the solicitor made a drafting error, the appropriate remedy is to bring an application to court to interpret the will. In those cases, the amount of damages is usually restricted to the costs associated with the interpretation. This is because the purpose of the interpretation application is to ask the court to determine the true intention of the testator. As a result, there are no "disappointed" beneficiaries (as they will received their intended gifts), only inconvenienced ones. It may also be possible to rectify a solicitor's drafting error in a will with cost consequences imposed by the court.
- It will also be difficult for disappointed beneficiaries to establish that the drafting solicitor is responsible for their loss where a will was deemed invalid on grounds of incapacity. In such

circumstances, the beneficiaries must prove that the solicitor *caused* the loss before they can establish liability in negligence. To establish causation, the beneficiaries must prove that had the solicitor acted properly, the court would have concluded that the testator had capacity and upheld the will. Unfortunately, the evidence needed to prove that the testator had capacity is unavailable due to the solicitor's negligence.

Duty of the Solicitor to Disclose His or Her File

- A solicitor has a general duty of confidentiality towards his or her client. Communications between solicitor and client are protected by privilege, and are generally not producible as evidence at court.

- However, a "wills exception" has been created – on death, the drafting solicitor is permitted, and indeed expected, to provide the testator's will to the named executor or beneficiaries.

    - The rational is that the client's waiver of privilege is implied by the circumstances: it is safe to assume that the client intends for the will to be produced on death in order to govern the distribution of his or her assets.

- The solicitor may face cost consequences of failing to deliver the original will to the estate trustee.

    - See for example *Re Bion Estate* (2011), 2011 ONSC 5447, 73 E.T.R. (3d) 48 (ON SCJ).

- In addition, the testator may be required to provide all documents supporting the client's testamentary intentions or evidence relating to the validity of the will. This may include the lawyer's notes to file, internal memos, client documents and communications with the client which would normally be protected by privilege.

    - See *Geffen v Goodman Estate*, [1991] 5 W.W.R. 389, 42 E.T.R. 97, 81 D.L.R. (4th) 211, [1991] 2 S.C.R. 353 (SCC).

- The reason supporting disclosure is that the testator's interests are further by allowing the court to determine his or her true testamentary intentions. The only way the testamentary intension can be discovered is through the examination of the solicitor's file.

- In *Geffen v Goodman Estate, supra*, the Supreme Court of Canada held (at paragraph 65):

> The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence [communications between solicitor and client] to be admitted is precisely to ascertain what her true intentions were.

- Although the drafting solicitor is required to provide a copy of the original will, the solicitor may request a court order for the contents of his or her file which explicitly waives privilege and the duty of confidentiality.
    - See Liza C. Sheard, "The Lawyer as Witness on a Will Challenge," paper presented at the LSUC 16th Annual Estates and Trusts Summit (2013) for a further discussion on production of a solicitor's file.
- The drafting solicitor should notify LawPRO as soon as the request for the solicitor's file is received.