

ONTARIO BAR ASSOCIATION

BEYOND WILL AND ESTATE PLANNING ESSENTIALS

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**A REVIEW OF ETHICS AND
DEFENSIVE PRACTICE TOOLS
IN AN ESTATE PLANNING CONTEXT**

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INTRODUCTION

There are several professional rules and many areas of liability exposure which have direct impact in a lawyer's estate planning practice. In this presentation, I intend to focus on two issues in estate planning practice which I believe are topical and give rise to a need for additional attention.

The first issue is timely advice and service, with a focus on will preparation. Sounds rather mundane one may think, but since a number of deadlines (no pun intended) arise in estate practice, and given the preparation of wills is a core function of the typical estate planning practice and recent case law developments, timeliness is an issue which needs attention and focus.

In this regard, I will review how timeliness is framed within our professional rules of conduct, a breach of which can also give rise to a complaint to our professional body. With regard to the preparation of wills, I intend to consider the duty of care and how Ontario courts have framed this issue where it was alleged a will was not prepared on a timely basis, giving rise to a claim in negligence against the lawyers involved in preparing the will in question.

I will also identify situations in the estate planning context which give rise to greater potential for breach of our professional rules with regard to timeliness, and liability exposure, which we need to consider in our risk management. I will also outline defensive tools and protocols to better manage this risk.

The second major area I will focus on is "dynastic" estate planning, and representation of multiple family members in estate planning.

The topic of conflicts of interest has emerged to the forefront in many different areas of professional work, in particular in the last ten to fifteen years, and has lead to the development of more stringent professional rules and the need for heightened awareness by professional advisors.

Interestingly, the Law Society of Upper Canada has stated that conflicts which arise from acting for more than one party in a matter represent the second most frequent cause of claims against Ontario lawyers. Understanding the nature of a conflict of interest, and the way it must be handled to avoid liability, is a matter which in their own self-interest all practitioners will be concerned.

But apart from exposure to liability, why is it so important to understand conflicts? In particular for estate planners? We all would likely agree that fundamental to a good relationship with our clients and achieving professional excellence is loyalty and independence of judgment. But a conflict may imperil the ability to be loyal to our client, and to provide objective advice.

In dealing with multiple parties, conflicts may not be apparent, at least not at first blush, in particular, when dealing with several members of a family, or partners or shareholders in a business. But how does one identify diverging issues?

I will review applicable professional rules with respect to conflicts and what should the lawyer do. Can the lawyer continue to act where there is a conflict? I will also outline common situations where the potential for a conflict can arise in the estate planning context, and protocols to address this situation.

A. Diligence and Timely Advice and Service

1. Review of L.S.U.C. Professional Rules of Conduct - Rule 2.01 and Rule 2 of STEP Code of Professional Conduct (See 1 and 2 of Appendices).
2. In the estate planning context, what are some of the areas of concern that might put the professional in breach of his or her ethical responsibilities, and in some cases, liable for damages for failure to provide timely service? Consider:
 - failure to complete and execute a will or other estate planning documents prior to death or incapacity
 - failure to file tax returns and elections and attend to other tax compliance on a timely basis

- failure to act on a timely basis in assisting in the administration of an estate or trust
3. What are some of the "time-sensitive" situations that estate planners must be particularly aware/wary of? Consider:
- terminally-ill clients and need to get full disclosure of the client's medical situation
 - high-risk matters where the proposed will or estate plan if not completed will result in a "disappointed beneficiary"
 - "death-bed" planning
 - pre-nups "on the way to the altar"
 - short timeframes under the I.T.A.: triggering capital losses within the first year of death
 - changes of tax residence inbound/outbound in a short timeframe
 - unreasonable time limits imposed by the client
4. Will Preparation: what is the standard of care with regard to the timeframe for preparation and execution of a will?
- See *McCullough v. Riffert*, 2010 ONSC 3891 (Can LII) and *Rosenberg Estate v. Black* [2001] O.J. No 5051, 110 A.C.W.S. (30) 560 (SJC), both in

the Appendices for two recent Ontario cases which analyzed the duty of care.

McCullough v. Riffert (supra)

Relevant facts:

- R.M. died ten days after giving instructions to a lawyer for his will, which was never executed.
- R.M.'s niece would have received his entire estate under his new will. Instead, his three estranged children became entitled on an intestacy.
- Niece sued lawyer in negligence, as the "disappointed beneficiary" for not attending to the preparation and execution of the will before R.M. died.
- No medical evidence was called at trial because R.M. had refused to seek medical advice although he appeared very ill for undiagnosed reasons and emaciated.
- Lawyer had previously acted for R.M. on his divorce and a house purchase. Her testimony was though he looked older and thinner, she was not shocked by his appearance, and did not feel he was gravely ill. Her notes indicated that R.M. said that since he was no longer working as a firefighter, he was not as hungry and did not feel like eating as the explanation for his weight loss. Her notes also indicated he was planning

a visit to Texas with his niece, and the niece wanted the will prepared before they departed in April, otherwise there was no particular hurry. The date of the meeting was February 11. On February 14, the lawyer mailed a draft will for review. Further information and instructions were required. R.M. did not call to provide the missing information, nor did the niece follow up.

- Both parties called expert witnesses to provide opinion evidence as to the standard of care of a reasonably competent solicitor.
- The first expert witness accepted the niece's evidence as the basis for her opinion that the lawyer was faced with a terminally ill client, including the niece's evidence that in contacting the lawyer to make an appointment she discussed R.M.'s poor health, and that he said he had "seen death" and thought he had cancer, and that he was extremely thin.
- The expert witness opined that the lawyer had a duty to probe his health issue, and that where a lawyer is faced with a terminally ill client, a reasonably competent lawyer would draft a simple will and have the client sign it at the time of the meeting, or direct the client to do a holograph will, or if a bit more time was required, would prepare the will within twelve to twenty-four hours and go and see the client and see to execution, if the client could not reattend.

- The second expert witness opined the standard of care for a reasonably competent solicitor would be informed by the state of health of the testator. There was conflicting evidence on the state of health, as a result he gave two different opinions.
- In his first opinion, the expert opined that if a client presents to the lawyer an extreme case of poor health, possibly facing colon cancer and facing imminent death, the lawyer would have an obligation to take action and to ask probing questions about the client's health to ensure a will was in effect right away in the office or the next day.
- In his second opinion, if the lawyer's evidence was accepted that she had less knowledge of the client's health, the client expressed no urgency, the lawyer accepted the client's reason for his weight loss, and that he was planning a trip in April, he opined the lawyer should get the will out within a few days.
- In its decision, the court reviewed three questions:
 - (1) What is the standard of care required of the solicitor in preparation of a will?
 - (2) Is the solicitor liable to a disappointed beneficiary?

- (3) In the circumstances of this case did the solicitor fail to meet the standard of care?
- In setting out considerations in evaluation of a solicitor's actions and whether he or she have acted as a reasonably competent solicitor where a testator dies before the will is executed, the court referred to the factors set out by one of the expert witnesses in *Rosenberg Estate v. Black* (*supra*):
 - (1) The terms of the lawyer's retainer: for example whether a precise timetable is agreed upon.
 - (2) Whether there was any delay caused by the client.
 - (3) The importance of the will to the testator.
 - (4) The complexity of the job - for example the more complex the job the more time required.
 - (5) The circumstances indicating the risk of death or onset of incapacity in the testator; and
 - (6) Whether there has been a reasonable ordering of the lawyer's priorities.
 - In this case, the court concluded the lawyer met the standard, and was not negligent, and referenced several factors, including the timing of the

appointment for the initial meeting made one week after the niece's call who arranged it, and that the will was sent out in three days, well before the lawyer's note to send a draft out by February 29, R.M. attended the meeting, walked with the aid of a cane, was properly dressed, did not express any urgency other than that the will be completed before his trip to Texas in April, there was no diagnosis that R.M. had a terminal illness, R.M. did not call back after the meeting nor did the niece to see if the will was ready, and that the niece was shocked when he died ten days later, not expecting it.

- The court commented there is a "continuum between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. The level of urgency to prepare a will quickly will increase as factors mount".
- Interestingly, no reference is made in the case, including the expert evidence, that the coroner's report indicated the cause of death was suspected myocardial infarction, not terminal cancer.

5. Defensive Practice in Estate Planning Practice. Consider:

- documenting timeframe for completion of the service after discussion with the client

- use of timetables and follow-up lists for outstanding estate planning documents
- putting the onus on the client
- follow-ups with the client, confirming need for a response in writing, closing the file
- use of action plans
- declining to act where timelines are unreasonable and prevent the professional from consulting fully with the client and other third parties or giving a matter appropriate time and attention

B. "Dynastic" Estate Planning and Representation of Multiple Family Members in Estate Planning

1. Review of L.S.U.C. Professional Rules of Conduct - Rule 2.04 (1) - (19) and Rule 8 of STEP Code of Professional Conduct.
2. Consider:
 - LSUC advises that conflicts which arise from acting for more than one party in a matter represents the second most frequent cause of claims against Ontario lawyers.
 - Extensive consideration of general issues involving conflicts of interest by CBA Task Force on Conflicts of Interest in "Conflicts of

Interest: Final Report, Recommendations and Toolkit August 2008". Helpful chart is included for navigating the rules (See Appendices).

3. In dealing with multiple parties, conflicts may not be apparent at the outset, in particular in dealing with several members of a family. What is a conflicting interest? Consider:

- A conflicting interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.

4. Where interests may/do diverge, what should the professional advisor do? Can the advisor continue to act? Consider:

- Need for informed consent
- A lawyer has the client's informed consent to act in such a matter where the client or prospective client, preferably in writing, has consented to the lawyer so acting after the lawyer, preferably in writing, has advised the client or prospective client:

- (a) that the lawyer intends to act in the matter not only for that client or prospective client but also for one or more other clients or prospective clients;
 - (b) that no information received from one client respecting the matter may be treated as confidential with respect to any of the others;
 - (c) that if a dispute develops in the matter that cannot be resolved, the lawyer cannot continue to act for any of the clients and has a duty to withdraw from the matter;
 - (d) whether or not the lawyer has a continuing relationship with one of the clients and acts regularly for that client; and
 - (e) that the client or prospective client obtain independent legal advice where the lawyer has a continuing relationship with one or more of those for whom the lawyer intends to act.
- A lawyer, however, has a duty not to act for more than one client where, despite the fact that all parties concerned have given informed consent, it is reasonably obvious that an issue contentious between them may arise or that their interest, rights or obligations will diverge as the matter progresses.

5. Conflict identification: Who is the client? And who does the client think is his or her lawyer?

Consider:

- a child retains the professional to act for his/her elderly parent
- a parent asks a lawyer to act for their minor child
- where there are spouses, is the client the "spousal unit"? In "dynastic" planning, is it the dynastic family? Or is it each individual person?
- Essential to have clarity on "who is my client" and to ensure there is not divergence on this issue with regard to who the client thinks his or her lawyer is.

6. Defensive Practice.

- Use of Joint Retainer and Multi-Representation Agreements
- Identification of "high-risk" situations:
 - Estate planning for spouses which impact matrimonial and family property rights
 - Estate planning involving multiple parties including shareholder and buy/sell arrangements and cottage succession planning

- Lending arrangements between family and other non-arms length parties.
- Property transfers among family and other non-arms length parties, in particular "improvident" transfers and those involving valuations.
- Estate freezes by parents, including where only one child may benefit from the freeze and receive the benefit of future equity growth.
- Where there is unequal treatment of children in an estate plan or will and where the law firm has acted for multiple generations of the family in prior separate retainers, include those members who are to receive preferred treatment
- Estate planning involving the lawyer's family members.