

## Will Drafting - Drafting With Ethics in Mind

6 March 2020  
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### BASICS

- Start with the Rules (Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015)
- Rule 9 - 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement [to others]
- [Exceptions - Rule 9.2 - consent, legal compulsion, avoiding criminal offences, imminent serious physical harm to client or other, obtain ethical/insurer advice.]
- Rule 10 and 11
  1. Don't act where there is conflict of duty between clients (incl. former client)
  2. Interests conflict
  3. Confidential information in solicitor's possession
- Rule 12 - don't act where there is conflict with solicitor's own interests
  1. General Obligations - confidentiality; privilege
  2. Confidentiality and privilege obligations survive death of the client

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### SOLICITOR AS BENEFICIARY

In short, don't draft the will.

- Unless family member, associate, breach of Rule 12
- Creates 'suspicious circumstances' - onus is on the solicitor/drafter/beneficiary to show that the will is a proper one. Cost risk! (*Daulizio*)
- Registrar of Probates may require 'affidavit of good conscience' setting out the reasons why the lawyer prepared the will.

If you must draft the will, you must refer the client to get independent legal advice. In *White v Wills* [2014] NSWSC 1160 - another solicitor took instructions and made the will - that was OK.

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Solicitor as executor - commission issues

- Should you do it at all? (*Foster CF McClung*)
- If you do, and you have a charging clause *of any sort* - conflict alert!
- Rule 12.4.1 - in writing
  - Advise the willmaker of the charging clause (commission or costs)
  - And that they may appoint someone else who will not charge.
- Extends to appointment of own firm to provide legal services
- Statutory requirements ( s 65B A & P Act ( Vic) –
- Written informed consent – (more than advice)  
(*Szmulewicz v Recht* - extra requirements for 'informed consent')
- Failing to inform - clause not usable; ethical misconduct

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**Court power to reduce commission, costs**

- Court can moderate solicitors costs and commission despite charging clause
- In *Re Shave [2012] NSWSC 1428*
- Solicitor co-executor sacked by daughter co-executor (OK to terminate joint retainer)
  - Solicitor co-executor charged under charging clause in the will.
  - On objection Court reduced bills relating to:-
  - Solicitor firm charging professional fees for non-legal work
  - Solicitor firm charging after G revoked the retainer
  - Solicitor firm charging for disputes between the estate and the solicitor over his costs and application for commission

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Solicitor-executor - beneficiary consent to commission

- Make sure beneficiaries are fully informed; have the opportunity for independent legal advice (*Estate of Pump; Walker v D'Alessandro*).
- Failure to do so will vitiate any beneficiary consent (leaving the sol-executor to apply to the court in the usual way)
- May be professional misconduct
- Need to provide proper information even if beneficiaries represented (*Re Shave*)
- Recent professional misconduct case - *Victorian Legal Services Commission v Zaitman [2019] VCAT 1100*

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Instructions and the pushy beneficiary

- Don't make will at the instigation of an existing client ( *Pates v Craig* )
- Don't take instructions from others without confirming constructions and capacity with client and doctors ( *Legal Profession Complaints ctee v Wells* )
- Take instructions from the client directly - to determine if truly 'incapable' so as to trigger operation of Power of Attorney ( *Victorian Legal Services Commission v Bramich* )
- Don't let beneficiary be present ( *Brown v Guss* )
  - Professional embarrassment
  - Ensures independent instructions
  - Helps avoid 'influence' questions

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Beneficiary Fraud and Misrepresentation

Can you detect it at all? Is it your job to be the arbiter?

If detected:

- Ask beneficiary to leave
- Fully inform client as to truth of situation
- If instructions persist and appear erroneous, decline to act
- Make clear you decline to act

Effect of fraud or mistake on the will:

- Rarely will a court intervene, unless the error appears on the face of the will and can say what T would otherwise have done
- Mistaken motive doesn't invalidate understanding of the will

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Capacity concerns

Willmaking

Assess capacity - use open questions

- Be careful when client is elderly or in care - get an assessment done ( *Ryan v Dalton* )

Capacity dubious but instructions still OK ( *Ryan v Public Trustee* )

- Investigate capacity with doctor
- Make the will = people presumed competent; cases where known dementia sufferers made valid wills
- Keep good notes

Role of court, not solicitor, as ultimate arbiter of capacity ( *Public Trustee v Till* ); solicitor not exposed to costs

Capacity clearly no good ( *Hall v Estate of Bruce Bennett* )

- decline to make will, inform client (& carer) you are doing so

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VCAT Administration proceedings

- If not capacity, no retainer
- Difficult situation - concerns about capacity, but LIV said 'continue to act' - VCAT recognised valuable assistance provided
- Be objective , not intemperate
- Need 'scrupulous record-keeping'
- Beware costs agreement may be invalid (*Victorian Legal Services Commissioner v Geron*)

Litigation generally (*Goddard Elliot ( a firm) v Fritsch*)

- Capacity is decision-specific (difficult - 'incapable' or 'unwilling')
- Does the person have capacity to – understand they have a problem; seek advice and describe the problem to that advisor; to understand and make decisions on the advice they are given. (*White v Fell*)
- Costs risk of acting without capacity to enter retainer
- If no proper instructions, inform court, adjourn to refer to Tribunal

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Client lack of mental capacity - summary

- Capacity is presumed
- If proper instructions can't be obtained, lawyer can't continue to act. - clearly decline
- Make good notes

If will/power of attorney transaction -

- Client consent to medical assessment?
  - If yes act according to assessment
  - If no don't make POA, terminate retainer
    - Will - If clear no – Don't make will
    - If uncertain - if instructions allow, make will, court decides later

If litigation:-

- Client consent to assessment? If yes - act according to positive assessment;
  - If negative assessment, consider substitute decision-maker
    - If no - consider substitute decision-maker OR cease to act
- Query if you can speak to health professional - appears to breach confidentiality , but it is done without remark.
- Can (and should) inform court/tribunal client's mental state. Seek instructions to do so as a matter of decency, but if no capacity, inform court in the absence of instructions

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Instructions impractical or improper

Impractical:

- Check ownership of assets to ensure gift can be carried out
- Inform the client that the gift cannot be carried out due to impracticality.
- If client insists, then make the will
- Make good notes re client's understanding
- Clear advice gift will be unable to be carried out without further steps
- Make clear the extent of the retainer- are you providing advice as to those further steps, or not? Are you following up, or not? Are you making recommendations or not?
  - If accepting client's word - either make clear the limited retainer, OR follow-up.

Improper:

- Decline if clearly illegal act
- Otherwise, may decline, but make clear you are doing so

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### Warn of risk of challenge to will

- Warn of risk
- Client's own choice to make will or not
- Provide advice re options - (or clearly say you are not providing such advice)
- *Calvert v Badenach (2016) HC* - no negligence for solicitor to fail to warn of risk and steps which might have been taken. No evidence what T would have done had he known.

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### Confidentiality

#### Joint Clients

- Two testators give common instructions - then one changes their mind. Duties to both to keep confidential the instructions, duties to both to act in client's best interests ( i.e.: by informing them of the change)
- Seek instructions from the 'changing' client to tell the other one. If no such instructions, withdraw from acting for both clients.
- Does the retainer have a clause allowing information to be shared?
- Consider why one testator changed their mind. influence? incapacity?

#### Former clients

- Confidentiality obligations arise to persons with whom the solicitor has met in a context in which they have given instructions, even if they have not become a client.

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### Demands for your will instruction file?

#### Executor

- Yes, can demand it - entitled to the testator's client documents as part of the testator's estate. (Rule of thumb - client documents include documents (including drafts) created for the client. Also include the solicitor file notes if the client was charged for the preparation of them. )
- A solicitor cannot assert a lien over an executed will. (*Hawkins v Clayton*)
- LPR can waive privilege. Privilege lost where file notes are subject matter of claim

#### Capacity challenges - demand by challenger

- UK practice note, *Larke v Nugus* - letter setting out properly founded request for will file notes, ought to be responded to as part of solicitor's duty to court. If the file is compellable in proceedings, it ought to be produced to court to inform the court and to save costs.
- Australia - some practice notes support that practice, but solicitor ultimately not compellable in the absence of instructions.

#### Family provision claims

- Notes not compellable unless estate puts testator's reasons in issue.

#### Disappointed beneficiary (error in will drafting)

- Yes, file likely to be compellable

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### Demands for a will

#### After death of testator

- Statutory provisions compel production to persons in relevant categories
- All states have statutory power of production to court/Tribunal
- Duty on solicitor to inform executor of the existence of the will
- Solicitor criticised for not revealing existence of will, leading to wrong grant being made (*In re Solowei; Soloway v Soloway*)

#### Living client

- Confidential document of client, dont release without instructions

#### Demand by Attorney

- Dont release as a matter of course
- Does power of attorney document imply custody of will
- Attorney may ask Tribunal to obtain copy of will

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### Duties after death of client

- Tell executor you have the will (*Hawkins v Clayton*)
- Act with even-handedness
- Not obliged to tell potential claimant they have a claim (*Robbins v Hume*)
- Suggest potential claimant get their own legal advice
- Don't conceal information :
  - About death (*Sadler v Public Trust*)
  - About estate (*Robson*)

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### Family provision or other claim made

#### Family provision claim

- Solicitor who drafted will cannot act for claimant
- Will-making solicitor may act to defend will . Try to be objective.
- Don't defend litigation 'at all costs'.
- Don't take sides between warring parties
  
- Will maker's file not available on discovery as of right. Estate may put reasons 'in issue' but is not obliged to do so.
  
- If will-maker feels their file notes contain matters which support plaintiff's claim, inform executor, consider whether likely to be a witness (for any reason), whether need to cease acting.
  
- **Error in will-drafting**
  - Duty to court to ensure proper will is probated
  - Should act positively
  - Likely pay costs of rectification

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### Explanatory statements in will

- Talk client through consequences of statement appearing in will
  - Will be used as evidence
  - Things can change
  - Can spur on a disappointed beneficiary
  - OK if family (and court) see them?
- Better to appear in separate letter?
- Properly founded - get client to set out history in own words, consider doing affidavit
- Properly founded - not the product of poor memory, paranoia, can actually explain problems rationally

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## Questions?

Presented by Michelle Bennett  
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*Liability Limited by a Scheme approved Under the Professional Standards Legislation*

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