RISK FACTORS IN INTERVIEWING AND ADVISING ELDERLY CLIENTS - THE 5CS

Introduction

With Singapore's rapidly ageing population, a significant segment of Singapore law practices' clientele in the future will likely comprise elderly persons. At the Second Reading of the Vulnerable Adults Bill in May 2018, it was noted that by 2030, one in four Singaporeans will be aged 65 and above, and the number of elderly Singaporeans is projected to double to more than 900,000.[1]

While elderly clients may not always present special risk factors as compared to the ordinary client, there are typical risk factors in the various contexts in which elderly clients seek legal advice. Lawyers and law practices should therefore be vigilant to these recurring factors and take appropriate measures to properly manage these factors, so as to avoid not only professional sanctions, but also reputational loss.

This article offers a 5Cs checklist, derived primarily from the American Bar Association's 4Cs of elder law ethics,[2] of the key risk factors that lawyers should observe in interviewing and advising elderly clients:

- Client Identification
- Conflicts of Interest
- Confidentiality
- Capacity
- Communication

Client Identification

You should first identify who the client is. As noted by the American Bar Association, "[t]his is especially important in elder law, because family members may be very involved in the legal concerns of the older person, and may even have a stake in the outcome."[3]

Unless you are being engaged to represent, for example, multiple family members, you should take care to avoid creating an implied retainer between yourself and any family members or caregivers who accompany the elderly client.

In *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani*,[4] the Court found that an implied retainer had arisen because the respondent solicitor who acted for an estate's administrator had taken it upon himself to answer the beneficiaries' questions and address their misgivings, without clarifying that he was acting for the administrator only, or telling the beneficiaries to seek independent legal advice.[5]

While this case did not strictly concern the solicitor failing to identify his client, it illustrates that a solicitor should take care in the way he communicates with parties whom he has identified as non-clients.

Identifying the client may be especially tricky when dealing with elderly clients because as US commentators Flowers and Morgan point out, family members or caregivers may:[6]

- arrange the initial meeting with the lawyer;
- accompany the elderly person to the lawyer's office;
- accompany the elderly person into the meeting with the lawyer, whether at the elderly person's request or not;
- be involved in making decisions, whether at the elderly person's request or not; or
- pay for the lawyer's services, whether from their own funds or the elderly person's funds.

You should be aware of these possibilities and ensure that you clarify the identity of your client(s) at the outset.

Conflict of Interest

In the context of elder law practice, conflicts of interest may arise where, for example, the lawyer is asked "to undertake joint or common representation in an estate-planning context", or "to take on additional roles in the representation, such as acting as the fiduciary, trustee, or guardian, or being named in the will as a beneficiary".[7]

Lawyers should be mindful of the different types of conflicts of interest prescribed in the Legal Profession (Professional Conduct) Rules 2015 (PCR)[8] (including personal conflicts) and thoroughly scrutinise their instructions to ensure that these do not give rise to any actual or potential conflict.

A clear example of a conflict of interest was seen in a recent Australian disciplinary decision, where the lawyer not only borrowed money from his elderly client without asking her to obtain independent legal advice, but also authorised payments of his invoices issued to her by drawing cheques on her personal bank account in his capacity as her appointed attorney for financial matters.[9]

Confidentiality

A lawyer's duty of confidentiality to his elderly client would prohibit the sharing of client information with other family members without the client's consent. Hence, it is good practice for a lawyer to arrange to meet the client privately.[10] Interviewing and advising the client in a private room, without family members or caregivers being present, may also reduce the effect of any coercion or undue influence on the client and help to detect any financial elder abuse.[11]

The latter point was illustrated in *Law Society of Singapore v K Jayakumar Naidu* ("*Jayakumar Naidu*"),[12] where the Court sanctioned the solicitor for failing to discharge his duties of diligence and competence as he did not take instructions directly and privately from his vulnerable client on critical matters. The solicitor was engaged by the client's brother, as the client was bedridden. The brother, acting under a power of attorney, had sold the client's flat and taken a loan secured on the sale proceeds, ostensibly to pay for the client's medical bills.

The client's family, through another law firm, later warned the solicitor that the client had not understood the consequences of the power of attorney or known that the flat had been sold. The other law firm also warned the solicitor that the brother had gambling problems and had likely taken the loan for his own debts. The solicitor was further asked not to release the flat's sale proceeds to anyone, including his client in view of the risks of abuse. The other law firm then acted on the client's behalf to execute a deed of revocation of the brother's power of attorney.

At no point did the solicitor ask his client whether the family's allegations against his brother were true, or to explain why he had revoked his brother's power of attorney.

Instead, when the brother approached him to release the sale proceeds, the solicitor arranged for the client to be interviewed by a psychiatrist to certify his mental capacity, and then to execute a letter of authority (third letter of authority) before a Commissioner for Oaths to authorise the sale proceeds' release to the brother. The third letter of authority directed that the sale proceeds (after deducting for legal and agent fees) be paid into a specified OCBC account. The brother subsequently improperly misappropriated the sale proceeds.

The Court held that the solicitor was guilty of misconduct for failing to advise his client on the nature, purport and consequence of the third letter of authority.[13] The Court found that it was unreasonable for the solicitor to have accepted that the directions contained in the third letter of authority were the result of his client's "own fully informed decision and in his interests".[14] The Court noted, amongst others, that the solicitor had allowed the brother to accompany the client to the psychiatrist who assessed the latter's mental capacity. A prudent solicitor would have readily appreciated the "impropriety" of this, because "at the very least, this would have raised plausible concerns about [the client's] willingness or ability to be candid during the examination."[15]

In any event, the Court found that most importantly, the solicitor had not questioned the client alone, without the brother being present, about the family's allegations:

"In light of the allegations that had been made, it was incumbent upon the respondent to ascertain his client's true state of mind and intentions. However, the respondent had made no effort to directly confront the allegations against [the brother] by asking [the client] about them. It is indisputable that these allegations were a matter of grave significance that should have been raised with [the client]. In choosing to comply with the third letter of authority without first questioning his client about these matters, the respondent was merely blindly executing instructions.

… Questioning [the client] about the allegations alone and away from the influence of [the brother] would have at one stroke enabled the respondent to determine their legitimacy and the reasons [the client] had for his divergent instructions. …It is what any reasonably competent lawyer would have done in the circumstances to satisfy himself that there was no risk of misappropriation of the sale proceeds."[16] [emphasis added]

Capacity

A lawyer should take the necessary precautions if he has reason to believe that his client lacks mental capacity. Under the Mental Capacity Act,[17] the starting point is that a person must be assumed to have capacity unless it is established otherwise,[18] and a lack of capacity cannot be established merely because of a person's age.[19]

If you have doubts about a client's mental capacity, it may be prudent to refer the client for a medical assessment.[20] The Office of the Public Guardian's "Code of Practice on the Mental Capacity Act" recommends that lawyers assess whether a client has capacity to instruct them, and seek a medical opinion if in doubt.[21] In the context of will-preparation, the Court of Appeal remarked in *Chee Mu Lin Muriel v Chee Ka Lin Caroline* ("*Chee Mu Lin Muriel*") that solicitors should adopt good practices such as getting a medical assessment of the client's capacity and attending to the client personally:[22]

"… If a testator is known to be suffering from any mental infirmity, a doctor should be called to certify her mental capacity before she is allowed to sign the will to ensure that such a testator fully understands the will. In the case of a person with mental infirmities like Mdm Goh [ensuring that the will reflected her wishes] should have included attending on Mdm Goh personally to take instructions from her, providing her with and explaining a draft of the will to her, and if there is any doubt as to her mental capacity, to advise that a psychiatrist (or some other qualified medical practitioner) attend on her to assess her mental capacity." [emphasis added]

The Court of Appeal also exhorted lawyers to ask "appropriate questions" to ascertain if a testator had capacity to understand the will's contents.[23] Lawyers should ask questions such as whether the testator was making a will for the first time, whether he or she had previously made a will, and – for testators with previous wills – whether he or she knew that the existing will would be revoked.[24] Lawyers should not view such questions as "formulaic", but part of good practice to avoid professional liability.[25]

On the topic of asking questions to ascertain mental capacity, the NSW Best Practice Guide suggests that a solicitor should ask open questions, i.e. questions that cannot be answered with a yes or no. [26] Similarly, the High Court observed in *Ng Bee Keong v Ng Choon Huay and others*[27] that open questions were generally more reliable than leading questions to determine testamentary capacity.[28] However, the Court recognised that asking leading questions with time for the testator to explain could be a "practical compromise" if the testator had difficulty speaking.[29]

An Australian commentator noted that open questions help because a cognitively-impaired client "may have learnt to mask their symptoms by feigning understanding and preferring agreement as the path of least resistance".[30] Similarly in Singapore, the Court of Appeal observed that even though a will was read line by line to a testatrix with dementia, who had nodded in agreement, the testatrix "could have appeared to understand the contents" without having "actual understanding" – especially since the will had not been explained to her.[31]

If your client initially has mental capacity and later becomes impaired, you must continue to act in the client's best interests as far as reasonably possible.[32]

Communication

Interviewing

When lawyers interview elderly clients, they need to adapt their interviewing techniques and provide a suitable environment to facilitate effective communication.[33] As noted by US commentators Flowers and Morgan, "[t]he interview process for the elderly client must be specifically tailored for the individual; the elder law practice is not a "one size fits all" process".[34]

Ensure that you have enough time to meet the elderly client so that the client and caregivers will not be rushed. Clients who may need longer to understand what you are explaining, or who are communicating through a third party, may need extra time.[35]

The NSW Best Practice Guide recommends that the meeting environment should "allow the client to take in what he or she is told".[36] Flowers and Morgan suggest steps to create conducive environments for elderly clients:[37]

- Change the time or location of meetings
- Shorten the interview length
- Break the interview into a series of short interviews conducted over a period of time
- Use a different communication style
- Use visual aids
- Change how much information is provided to the client
- Change the process of reaching a decision

Flowers and Morgan also suggest that a lawyer should tailor the interview process for an elderly client specifically for that individual.[38] For example, a lawyer could turn off background music or noisy office equipment to accommodate a client suffering from hearing loss; use larger fonts, ensure adequate lighting and read out documents to a client with visual impairment; and schedule interviews for the time of day when a client with memory or comprehension problems is most alert.[39]

Language Barriers

If you cannot speak the client's language, it is good practice to get a person with no interest in the transaction to interpret.

In *Goh Jong Cheng v MB Melwani Pte Ltd* ("*Goh Jong Cheng*"),[40] the Court set aside a mortgage because the plaintiff successfully pleaded *non est factum*. In that case, the plaintiff was illiterate and only spoke the Hainanese dialect. The Court found that the plaintiff's solicitor did not explain the mortgage document to the plaintiff sentence by sentence in the Hokkien dialect (as the solicitor had claimed), although the Court thought that the solicitor explained it generally in English to the plaintiff's son, who was acting as an interpreter.[41] However, the son "deceitfully did not correctly interpret"[42] the mortgage to his mother. Chao Hick Tin JC (as he then was) remarked that solicitors had to take extra care when dealing with the elderly, and that only a "disinterested person" should be asked to interpret:[43]

"[Solicitors] need [to take] extra care…in dealing with elderly and/or illiterate persons (or others under disability), particularly when such persons are assuming responsibilities or liabilities of others. It is vitally important to ensure that such a person fully understands what he is about to do and that there is no undue influence or deception. Only a disinterested person should be asked to be an interpreter. And where a solicitor is acting for all parties in a transaction he must be ever so conscious of a conflict situation arising and should not hesitate, wherever there is a reasonable doubt, to ask the person to seek independent legal advice." [emphasis added]

This best practice of getting "an independent interpreter with appropriate credentials" is also encouraged in New South Wales.[44]

Record-keeping

Finally, you should keep proper attendance notes. This is a duty owed to all clients as part of your professional duty of honesty, competence and diligence under rule 5(2)(k) of the PCR, which states that a legal practitioner must "keep proper contemporaneous records of all instructions received from, and all advice rendered to, the client." The Court of Appeal in Chee Mu Lin Muriel emphasised the importance of making a "contemporary written record" to aid recall of what happened during a client meeting.[45]

Conclusion

When working with elderly clients, adopting the five good practices of identifying the client, watching out for conflicts of interest, maintaining the client's confidentiality, checking the client's mental capacity, and communicating effectively will go a long way towards minimising risk and demonstrating high professional standards.

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Endnotes

1. Singapore Parliamentary Debates, Official Report (18 May 2018) vol 94, Second Reading of Vulnerable Adults Bill (Desmond Lee, Minister for Social and Family Development and Second Minister for National Development and Deputy Leader of the House) <https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-100> (accessed 14 December 2018).
2. Singapore Parliamentary Debates, Official Report (18 May 2018) vol 94, Second Reading of Vulnerable Adults Bill (Desmond Lee, Minister for Social and Family Development and Second Minister for National Development and Deputy Leader of the House) <https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-100> (accessed 14 December 2018).
3. Ibid.
4. (2006) 4 SLR(R) 308.
5. At (43)-(44) and (47)-(48).
6. Roberta K. Flowers & Rebecca C. Morgan, Ethics in the Practice of Elder Law (American Bar Association, 2013) at p 19.
7. Flowers & Morgan, supra n 6, at p 89.
8. Legal Profession Act (Cap 161), Legal Profession (Professional Conduct) Rules 2015 (S 706/2015).
9. Legal Services Commissioner v Brown (2018) QCAT 263
10. See e.g. Law Society of New South Wales, “Best practice guide for practitioners in relation to elder abuse” < https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/my-practice-area/elder-law> (accessed 26 December 2018) (“NSW Best Practice Guide”) at paras 1.2 and 1.4.
11. Tang Hang Wu, “The Prevention of Financial Elder Abuse”, Singapore Law Gazette (May 2010) <http://v1.lawgazette.com.sg/2010-05/feature3.htm> (accessed 26 December 2018). For more information about financial elder abuse, see Ministry of Community Development, Youth and Sports, “Stop Family Violence – Elder Abuse” <https://www.msf.gov.sg/publications/Pages/Stop-Family-Violence-Elder-Abuse.aspx> (accessed 26 December 2018).
12. (2012) 4 SLR 1232.
13. Id, at (58).
14. Supra n 12, at (64).
15. Jayakumar Naidu, supra n 12, at (68).
16. Jayakumar Naidu, supra n 12, at (72).
17. Cap 177A.
18. s 3(2)
19. s 4(3)(a)
20. For an empirical study of what can go wrong when lawyers self-assess a client’s mental capacity instead of referring the client for a medical assessment, see also Lise Barry, “He was wearing street clothes, not pyjamas’: common mistakes in lawyers’ assessment of legal capacity for vulnerable older clients”, Legal Ethics 2018; 21:1: 3-22, abstract available at <https://doi.org/10.1080/1460728x.2018.1493070> (accessed 26 December 2018).
21. Office of the Public Guardian, “Code of Practice on the Mental Capacity Act (Chapter 177A)” <https://www.publicguardian.gov.sg/opg/Pages/The-Code-of-Practice.aspx> (accessed 14 December 2018).
22. Chee Mu Lin Muriel v Chee Ka Lin Caroline (Chee Ping Chian Alexander and another, interveners) (2010) 4 SLR 373 at (60).
23. Ibid.
24. Supra n 22.
25. Supra n 22.
26. Supra n 10 at para 2.7.
27. (2013) SGHC 107.

Endnotes

28. At (85) and (89)
29. At (86) and (89)
30. Lise Barry, supra n 20 at p 16.
31. Chee Mu Lin Muriel, supra n 22 at (56) and (59).
32. See rule 5(4) of the PCR.
33. Flowers & Morgan, supra n 6, at p 139.
34. Ibid.
35. Law Society of England and Wales, "Practice note on meeting the needs of vulnerable clients" (2 July 2015) <https://www.lawsociety.org.uk/support-services/advice/practice-notes/meeting-the-needs-of-vulnerable-clients-july-2015/> (accessed 26 December 2018).
36. Supra n 10 at paras 1.6 and 1.7.
37. Flowers & Morgan, supra n 6, at p 140. See also Rebecca C. Morgan, "From the Elder-Friendly Law Office to the Elder-Friendly Courtroom: Providing the Same Access and Justice for All", 2 NAELA J 325 (2006).
38. Flowers & Morgan, supra n 6, at p 139.
39. Flowers & Morgan, supra n 6, at pp 140-141.
40. (1990) 2 SLR(R) 289.
41. Id, at (38).
42. Ibid.
43. Goh Jong Cheng, supra n 40 at (40).
44. Supra n 10 at para 2.2.
45. Chee Mu Lin Muriel, supra n 22 at (60).