

ASSESSING CAPACITY AND UNDUE INFLUENCE – VIRTUALLY IMPOSSIBLE?



Assessing a client’s capacity or whether a client is experiencing undue influence when giving instructions to make a Will is a lawyer’s obligation – and it can be challenging. Since virtual meetings are more common than ever now, lawyers need to be aware of the particular risks of remote meetings and how to control potential issues that may be present. Even the most experienced lawyers can miss something.

John E.S. Poyser is a senior litigation lawyer at WEL Partners and focusses his practice on matters arising out of gifts, wills, trusts, and other wealth transfers. He wrote “Capacity and Undue Influence,” a textbook to help lawyers and judges deal with attacks on the transfer of wealth by will, gift, and trust. Mr. Poyser was a presenter at a recent LAWPRO and Toronto Lawyer’s Association CPD entitled **The Virtual Legal Practice: From Client Intake to Resolution When Nobody Is in the Same Room** on the risks and advantages of remote meetings. Watch the full CPD [here](#).

demonstrate an understanding of the nature and effect of the transaction. And you want to do that without an asset list on the table. You want to do that without a diagram on the table. You want to do that in circumstances where it’s clear that they are proceeding from memory. And again, you have to control the environment to be able to get into that.”

Another advantage of an in-person interview is the ability to identify and control for any hearing and communication problems in the room. For example, Poyser suggests that people with hearing impairments may benefit from using a pocket talker or a head-phone device with a speaker on the table that allows for volume control to ensure the client can hear the lawyer clearly. Identifying and controlling these issues is more challenging when the meeting is held remotely.



Controlling the environment is easier during an in-person meeting

Poyser states that one of the primary dangers of a remote interview is the inability to control the environment. “When I interview our client, we’re face to face. I’m very good at controlling the environment. I make sure that there’s nothing on the table. I make sure that there’s no one standing over my shoulder, with cue cards, telling them what to say. ...the whole remote environment, lends itself to predatory behavior and the in-person environment is very strong in being able to control that.”

Poyser notes that controlling the environment is also about assessing capacity. When you assess a person’s capacity, he says, “it’s important that the person works from memory. It’s important that the client is able to demonstrate the powers of mind necessary to describe their assets, to describe the transaction in which they’re engaging, to discuss the pros and cons of that transaction, basically



Technology and a helping hand

Poyser says that the ability to get to know the client is more difficult in remote meetings. “There is no substitute for sitting across from someone and looking at them and gauging their demeanor.” Technology can pose a barrier to an effective client meeting, particularly if the client is elderly. But Poyser recognizes that remote meetings are sometimes necessary, and, in those situations, it will also be necessary to assess capacity and undue influence. One of the strategies he adopts, particularly if his client is elderly, is the use of a helper. He recommends engaging a younger person who is technologically adept, and who doesn’t stand to take advantage of the situation.

He says once he has his helper, he carefully makes sure they are not an imposter or a potential predator, and he verifies their identity. That helper can then be in the room with his client, and as soon as he is comfortable with the helper, his position, he says, is a lot stronger in the remote meeting.

The helper “can test the technology. They can put a pocket talker on my client’s head so my client can hear. I can satisfy myself with them in the room, that my client is engaging and listening and hearing. If the internet starts to break up, if the client can no longer hear me, the helper can say, ‘stop, the internet’s breaking up’... If someone walks into the room, the helper can say, someone’s just walked into the room.” Having a helper in the remote meeting is extremely useful to bridge any technology gaps and to bring comfort that the environment is controlled.



Testing 123

Another strategy Poyser recommends is taking your time with the remote meeting and scheduling several meetings. He suggests scheduling two or three video conferences over two or three days with the helper. The first meeting could be used to test the technology and serve as a warmup to help everyone get comfortable with each other. The next meeting, Poyser suggests, can be used to work out any issues that you may have had during the first meeting. “You might do another interview, you might continue to talk about the prospective transaction with the client, with assistance of a helper, and you’ll discover the client is more comfortable, and so are you. And everyone’s getting to be comfortable with the technology, and it’s working, and bugs are being worked out. And then maybe on the third day is when you have the real interview. The third day is where you have the functional interview, where you’re trying to assess capacity. On that third day, you will ask all the questions

necessary to assess capacity. You will ask all the questions necessary to probe for undue influence, and on that third day, you have every prospect of success if you practiced a little bit.”



Is there a remote advantage?

Poyser recognizes that there are in fact some advantages to virtual meetings when assessing capacity and undue influence. A virtual meeting, he says, allows you to create a record of how the client performed. This evidence can be relied on if the Will is later challenged. If you are using Microsoft Teams or Zoom, you can record the whole meeting, or you can record all three meetings you may have, with the client’s permission. Poyser says that you must make certain that the client understands that you are creating an audio-visual record which will be stored in the file for future use, and if you have the client’s permission, what you have, he says, “is a nice clean record of the client answering all sorts of questions.”

Another advantage of virtual meetings is expediency. “There are going to be some instances where the person’s health is precarious...where it’s important to act now and to get your instructions now, and to generate documents now. And in those instances, sometimes the ability to perform a virtual meeting is golden. They might live far away. They might live two hours away, but you might want to get the job done now if they’ve got surgery tomorrow.”

Despite these advantages, Poyser still warns that “where capacity and undue influence is at issue, it’s important that you try to meet in person, and if you have to meet remotely, you try to get past the risks, and try to find a meaningful way to put yourself in the same position as you would have been face to face.” ■



Key takeaways:

Be aware of the dangers of remote interviews and the importance of controlling the environment to ensure genuine instructions are received from the client.

Conduct multiple virtual meetings to ensure comfort and understanding with the technology and between the parties.

Be vigilant for signs of undue influence or capacity issues when meeting clients virtually and consider using a helper to assist with virtual meetings.

Adopt best practices for video conferencing setup, organization, and psychology to improve virtual meeting effectiveness.