



STRATEGIES FOR PREVENTING UNDUE INFLUENCE DURING REMOTE MEETINGS & ATTESTATION

By Suzana Popovic-Montag - October 2023

In Ontario, individuals have been able to execute a will or a power of attorney remotely using audio-visual communication technology for over two years now. Initially, remote execution was permitted through an emergency order-in-council made a month after the COVID-19 pandemic began;¹ however, remote execution is now a permanent part of the law: see the *Succession Law Reform Act*² and the *Substitute Decisions Act, 1992*.³ In keeping with this change, it is also becoming more common for clients to prefer meeting with us online, using platforms like Zoom or Microsoft Teams, for estate planning meetings, including those during which legal documents like wills and powers of attorney are executed and witnessed.

Lawyers who meet with clients online may face a particular challenge when it comes to identifying potential undue influence, since remote communications often limit lawyers' ability to perceive verbal and nonverbal cues. In light of these limitations, the British Columbia Law Institute (the "BCLI") updated its guide related to undue influence, intended specifically for practitioners, which now addresses additional measures that lawyers may wish to consider during remote client meetings.⁴

The BCLI guide recommends a number of strategies for ensuring that the clients we meet with remotely are not subject to undue influence, including:

- Advising the client prior to the meeting that anyone who assists with setting up the video meeting should be completely disinterested in the client's legal affairs and should be out of earshot during the meeting. A third party should not be permitted to attend the meeting under the guise that the client cannot handle a computer and video software without assistance, or on the pretence that the internet connection is not always stable.

That said, if the client genuinely cannot handle video conferencing technology due to a disability or illness, for example, the person assisting the client may need to remain present during the meeting. Under those circumstances, however, the person providing assistance with the technology should be warned to keep the

¹ O. Reg. 129/20: Order Under Subsection 7.0.2(4) of the Act – Signatures in Wills and Powers of Attorney.

² *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 4(3), (4), as amended.

³ *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 3.1

⁴ British Columbia Law Institute, *Undue Influence Recognition & Prevention: A Guide for Legal Practitioners*, BCLI Report no. 94 (December 2022), online: BCLI <<https://www.bcli.org/wp-content/uploads/undue-influence-recognition-prevention-guide-final-3.pdf>> [Report no. 94]. The original guide is available on CanLII: see British Columbia Law Institute, *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, BCLI Report no. 61 (October 2011), online: <<https://canlii.ca/t/sg23>>.

contents of the meeting confidential. Counsel should also record the individual's name and the reason for their presence during the meeting for the client file.

- When the meeting begins, lawyers should ask the client to turn the camera around the room so that the lawyer can verify that no one else is present in the room and off-camera. If there is someone else in the room and their presence is not required, lawyers should ask that individual to leave and advise that the meeting cannot proceed until the client is alone.
- When the meeting begins, lawyers should also ask the client to leave the microphone and video feed on throughout the entire meeting to guard against off-camera influencing.
- Lawyers should also advise the client that the video meeting must be one continuous session; interruptions should not be permitted, as they provide an opportunity for interference by an influencer.
- Lawyers should also consider steps to ensure that any document sent to the client for review during a virtual meeting remains confidential (for example, by using password-protected documents).

If the client advises their lawyer during a video conference meeting that a third party is trying to influence the client to change his or her will and/or power of attorney, the BCLI recommends asking the client to meet again in-person instead of virtually. It is also appropriate to request an in-person meeting if the internet connection is unreliable during the meeting or if other technical problems arise, although a disinterested person may also provide the client with technical assistance during the meeting.

While these strategies are not guaranteed to inoculate a client from undue influence during a video meeting or when a legal document is being executed remotely, they ought to be considered by estate planning lawyers opting to meet with clients virtually in order to limit the risk of undue influence, which may be higher when we are not meeting with clients in-person.