

Ethical obligations and due enquiry as to a testator's testamentary capacity

The Affidavit supporting probate application (the Form 105), requires that where the cause of death or other evidence suggests lack of testamentary capacity, the deponent of the affidavit is either to swear or affirm that:-

- to the best of the deponent's knowledge, information and belief, the deceased had testamentary capacity at the time of executing his/her will; or
- if the deponent is aware of any circumstances which might give rise to any apparent doubt as to testamentary capacity, that circumstance must be disclosed.

The deponent executor has an obligation to make due enquiry as to whether the deceased had testamentary capacity at the time of execution of the will, where the cause of death, or other evidence may suggest a lack of testamentary capacity.

A client cannot be expected to realise the whole scope of this obligation without the aid and advice of the solicitor.

As officers of the court, we have a duty to carefully investigate the issue of testamentary capacity before a deponent swears or affirms the prescribed Form 105 affidavit. A solicitor cannot simply allow the client to make whatever affidavit the deponent thinks fit, nor can the solicitor escape the responsibility of careful investigation or supervision (*Myers v Elman* [1940] AC 282 at 322 per Lord Wright).

If the client will not give the solicitor the information needed or insists on swearing or affirming an affidavit which the solicitor knows to be imperfect or which he has reason to think is imperfect, then the solicitor's proper course is to withdraw and terminate the retainer (*Myers v Elman* [1940] AC 282 at 322 per Lord Wright).

To knowingly permit a client to swear a false affidavit, or to knowingly submit a false affidavit to the court would be unethical conduct by the solicitor and can lead to disciplinary sanction (*Rajasooria v Disciplinary Committee* [1955] 1 WLR 4.5 at 413 per Lord Cohen (PC); *In re Davies* (1893) 14 Times L.R. 332 at 333 per Lord Justice A. L. Smith; see also Rules 14.1, 14.2 and 15.1 Legal Profession (Solicitors) Rule 2007).

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If you wish to comment on or discuss any of the issues raised by this note or require guidance on any other ethical issue, contact the Ethics Centre on 07 3842 5843 or ethics@qls.com.au