



# Practice Resource

## Independent legal advice checklist

### Annotated with additional risk management tips from the Lawyers Indemnity Fund<sup>1</sup>

When giving independent legal advice<sup>2</sup>, it is important to go much further than explaining the legal aspects of the matter and assessing whether the client appears to understand your advice and the possible consequences. You must also consider whether the client has capacity and whether the client may be subject to undue influence by a third party. Further, if the client has communication issues (e.g. limited knowledge of the English language), you should ensure that the client understands or appears to understand your advice and the related documents. You may need to arrange for a competent interpreter.

We recommend that you take notes during your meeting with the client and make a written record of your meeting. Consider writing a brief reporting letter that covers the essential matters that you discussed, including the nature, extent and scope of services that you have provided.

You may use the following checklist in two ways: (1) to remind yourself of questions to ask a client seeking independent legal advice, and (2) as a form of record of your meeting. Before you begin, see the *BC Code*. Especially consider rules 3.4-27 to 3.4-27.1, 3.4-32 to 3.4-33, Appendix A, paragraph 1(c) and commentary [9] to [11] and 3.6-1, commentary [2]. Also consider the rules regarding a “limited scope retainer” (a defined term in rule 1.1-1). Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and *must confirm in writing* to the client as soon as practicable what services will be provided (rules 3.1-2, 3.2-1.1, 7.2-6 and 7.2-6.1.). Further, consider whether you must inform the client of the availability of qualified advisors in other fields who would be in a position to advise the client on the matter from a business point of view (rule 3.4-27.1(c)).

The requirement that a lawyer either must or should recommend to a person that he or she have independent legal advice comes up in a number of places in the Code, particularly in the conflict rules under section 3.4, but also in other locations (see rules 3.4-2, commentary [5], 3.4-4. to 3.4-6, 3.4-27 to 3.4-36, 3.4-39, 7.2-9, and 7.8-1; Appendix B, paragraph 3(a); and Appendix C, paragraph 7).

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<sup>1</sup> As noted in the article [Giving ILA? Stop. Read this first.](#), a checklist is a seminal risk management tool for the ILA lawyer. Each item in this model checklist is important. In this annotated copy, additional tips or comments from LIF are added as footnotes. The unannotated ILA checklist is [here](#).

<sup>2</sup> Attend to the basics. Don't act unless you have the expertise required, and make sure your client will pay for the time proper ILA requires. If additional advice or services are required, clarify what you will – and will not – do.

**Model<sup>3</sup> independent legal advice checklist**

mm/dd/yyyy	Start time	Finish time	
Client's full name		Occupation	
Home address		City and Province	Postal code
Business address		City and Province	Postal code
Telephone – residence	Telephone–business		Telephone- cell
Fax		Email	
Client's spoken languages		Written languages	
Family status			Age
Referred by	Reason for independent legal advice		
Security requested by lending institution			
The client has limited facility with English, so I obtained an interpreter whose name was <sup>4</sup> :		If client wishes another person to be present during our meeting, consider implications, e.g. privilege, undue influence, unrepresented persons. Record name and interest of any person present.	
I reviewed the following documents:			

<sup>3</sup> As each ILA situation you encounter is fact specific, remember to adapt this checklist and/or any certificate of ILA you are asked to sign as needed.

<sup>4</sup> Proper interpretation may require using a neutral party or non-family member to translate. S. 47 of the Land Title Act, if applicable, makes proper understanding a statutory obligation in relation to a client who appears to be unable to read English or sign his name in English characters. Interpretation obligations relating to affidavits are set out in Rule 22 – 2(7) of the Supreme Court Civil Rules and Rule 10-4(7) of the Supreme Court Family Rules, as referenced in the BC Code, Appendix A, commentary [11].

**Part A — The client<sup>5</sup>**

I advised the client that the client has the right to independent representation

I reviewed the current state of the client's health and capacity

I reviewed the current state of the client's marriage

I asked about domestic violence and was told:

The client said that the reason for his or her consent to this transaction or agreement was:

I satisfied myself that the client did not appear to be subject to duress or undue influence and that the client was signing relevant documents freely and voluntarily, without pressure from anyone (see [undue influence](#) resource on Lawyers Indemnity Fund website) <sup>6</sup>

<sup>5</sup> To give proper ILA, you need information. Digging into the reasons for the transaction, your client's financial situation, relevant family dynamics or the characteristics of the parties involved may uncover critical information. And ask your client for their understanding of the effect of the transaction or agreement, so that you can correct any inaccuracies.

<sup>6</sup>You must satisfy yourself in relation to undue influence and capacity, particularly if your client is elderly or vulnerable. Satisfy yourself that your client appears to understand the transaction and its consequences, and to be acting of their own free will. In Ontario, the Court commented on an ILA lawyer's duties as follows:

*"To rebut the presumption of undue influence, the ILA lawyer must have full knowledge and appreciation of the client's personal circumstances, including the client's state of health, both mental and physical, the client's relationships with parties affected by the terms of the agreement, including the nature and extent of those relationships, the client's current and future financial prospects, the client's expectations arising from life in general and from the agreement or documents in particular, and all other matters relevant to the effect the transaction will or could produce on the client."*  
*Brandon v. Brandon [2007] O.J. No. 2986 (Ont. S.C.J.) affirmed on appeal*

The BC Law Institute's [Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide](#), will help ensure that you act in accordance with your client's genuine independent wishes. Although intended to assist when drafting wills, it is also applicable to various common transactions, including gifts, loans and guarantees between family members and acquaintances. It includes red flags and guidelines. For a helpful resource on issues of capacity, see BCLI's [Report on Common-law Tests of Capacity](#).

**Part B — I explained the following to the client<sup>7</sup>**

- The nature and consequences of a mortgage
- The nature and consequences of a guarantee
- The effect of power and sale / judicial sale and foreclosure
- The effect of an action on the covenant and the liability for any insufficiency
- The consequences of his or her spouse's default
- The possible consequences of failure to honour the financial obligations (loss of her or his house, business and all other property)
- The possibility of obtaining security for the financial obligations
- That an indemnity will be worthless if the spouse declares bankruptcy
- The risks to the client if there is a breakdown of the marriage
- The client appeared to understand the advice given
- The availability of qualified advisors in other fields who might advise the client from a business point of view

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<sup>7</sup> *Ensure that your client fully understands the nature and effect of the transaction and their rights and entitlements, especially the risks and possible adverse consequences. You must also meet your duties in relation to undue influence and capacity (see footnote 6). And don't assume that you have been understood. Check that out by asking your client to tell you what they think that you advised.*

**Part C — If the independent legal advice relates to a domestic contract<sup>8</sup>**

- I obtained complete financial disclosure from both my client and the other side
- I determined that the document was sufficiently well-drafted to accomplish my client's objectives
- I ensured that the terms of the agreement were both certain and enforceable
- I ensured that, if the agreement is to be filed against property or as an order of the court, the statutory requirements for filing have been met
- I explained the final nature of the agreement
- I reviewed the risks and consequences of the agreement
- I discussed the effect of the agreement upon the client if her or his spouse dies first
- I explained all the clauses of the agreement
- I witnessed the client's signature on these documents
- The client appeared to understand the advice given
- The availability of qualified advisors in other fields who might advise the client from a business point of view

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<sup>8</sup>Appreciate your particular responsibilities in relation to ILA in the family law context. In BC, the Courts have commented that giving this ILA:

*"...must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course. [Gurney v. Gurney, 2000 BCSC 6](#)*

*"...is important because it ensures that the spouses are fully aware of their statutory and common law rights and obligations. It safeguards against one spouse taking unfair advantage of another and redresses or at least minimizes disparity of bargaining power between them..."*  
[Bradshaw v. Bradshaw, 2011 BCSC 1103](#)

*Ensuring that your client fully appreciates the financial consequences of an agreement may require non-legal expertise in areas such as asset valuation. If you are relying on figures provided by a sophisticated client, confirm that in writing. If needed, have your client retain others to provide the information required.*

**Part D — When client signs<sup>9</sup> contrary to advice<sup>10</sup>**

I advised the client in writing against signing the documents, but the client wished to proceed contrary to my advice

I explained my advice in the presence of a witness (consider using a witness from your firm), whose name was:  
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The client signed an acknowledgement, in the presence of a witness, that she or he was signing the documents against my advice

I declined to witness the client's execution of the documents<sup>11</sup>

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<sup>9</sup> *If you are attending to execution of a document in accordance with the Land Title Act, know and meet your officer certification obligations. Part 5 of the Land Title Act codifies a specific scheme of certification. Under Part 5, if you are certifying the execution of an instrument as an officer, you are certifying both the signature and identity of the signor. Specifically, you are certifying that the signature you witnessed on the document is the signature of the individual who appeared before you and acknowledged that he or she is the person named in the instrument as signor. You are not guaranteeing identity. And remember that properly witnessing the execution of an instrument is also an ethical obligation under [Appendix A](#) of the BC Code. For more detailed information, see the Land Title Practice Manual – Volume 1, Land Title Act: Part 5 (ss. 41 to 50), Attestation and Proof of Execution of Instruments, published by the [Continuing Legal Education Society of BC](#).*

<sup>10</sup> *A client may decide to proceed with a transaction despite your advice that doing so is contrary to their interests. In addition to the checklist items, be sure to confirm your advice in writing.*

<sup>11</sup> *Sometimes the transaction is simply so harmful that you will want to decline to act. And if you are ultimately just too uncomfortable with the matter—for any reason – refuse to sign.*

**Part E — File management<sup>12</sup>**

- I opened a file
- I followed client identification and verification procedures
- I placed this checklist, a copy of the document and my notes in my general independent legal advice file
- I took notes of my meeting(s) with the client and retained these
- I docketed the time spent advising the client
- I sent a reporting letter that included the nature, extent and scope of services provided and that outlined the terms of the agreement or obligation assumed, together with my account
- My advice was verbal only and I sent no reporting letter
- I accepted payment from the client or if another person paid my bill, the payment was made with full disclosure to the client and with the client's consent. The payment from the other person did not affect my loyalty to the client or professional judgment.

**Notes**


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<sup>12</sup> You may be a witness in a subsequent dispute over the transaction, or even a target. This may arise years later, when you will likely have no independent memory of the matter. As more than one lawyer has discovered, it is difficult for us to defend you without documentation, even if, for example, you know that you explained fully the nature and effect of that guarantee your former client is now trying to avoid. Keep copies of this checklist, with checkmarks as evidence that you dealt with an issue, your notes, the document(s) and any reporting letter. And if it's not your client who later makes inquiries, remember your duties in relation to confidentiality and privilege. Call a Law Society Practice Advisor for assistance in this regard.

As with any retainer, conclude it effectively. If further steps are required, alert your client. Be clear that you will not be taking any such steps on their behalf, and document that advice.

Although the Law Society offers minimum file retention guidelines, use your judgment. If the transaction might be questioned at some later date, your file material will help to give us the evidence we may need to defend you.