Index

Note: The abbreviation "ILA" is used in this Index for the phrase "independent legal advice".

Advice. See also ILA Checklists; Negligence and ILA

- Independent nature of, 750
- Issues that arise when providing, 754
- Quality of advice, 10

Amicus curiae.

- child litigants, 641
- costs of, 642
- determining informer privilege, 631
- in criminal law, 625
- role of, 631
- power of judge to appoint, 621

Bank Guarantees. See Guarantees.

Banks.

- Barclays Bank v. O'Brien test (U.K.), 70, 117, 134, 137-9, 218, 243, 245
- ILA, duty to recommend, 131
- ILA, where provided, 176
- Royal Bank of Scotland v.Etridge (No. 2) test (U.K.), 70, 117, 139, 233, 245
- Where bank explained documents, 174
- Tips for bank officers, 231

Burden of Proof.

- Duress, refuting, 70, 101
- Lawyer-client transactions, 28
- Non est factum, 54, 55
- Undue influence, refuting, 54, 70

Checklists. See ILA Checklists

Clients. See also Professional Standards

- Burden of proof on lawyer-client transactions, 28
- Business relationship with, need for ILA, 26
- Duty to unrepresented persons, 35

Codes of Professional Conduct. See also Professional Standards.

- Canadian Bar Association provisions, 9, 16, 26, 33
- Model Code of Professional Conduct (FLSC), 10, 19, 28, 35

Commercial certainty, 47, 107

Conflicts of Interest. See also Professional Standards

- Burden of proof to avoid, 28
- Duty to avoid, 16
- In estate planning, 533, 537, 540, 541, 562, 578, 583
- Negligence arising from failure to spot, 687

Corporate Counsel. *See also* Corporate Law; Majority Shareholders; Minority Shareholders.

- Conflicts of interest and ILA, 454
- Practical strategies involving ILA, 462
- Role of; who is the client?, 454

Corporate Law. *See also* Corporate Counsel; Majority Shareholders; Minority Shareholders.

- Minority and majority shareholders, transactions between,
- Role of ILA in, 462
- Transaction set aside, 445
- Transaction upheld, 429

Domestics Contracts. See also Family Law; Wives

- Best practices for lawyers advising on, 374-376
- Cohabitation / marriage agreements, ILA, 249
- Definition, 249
- Depression or drug dependency claimed, 277
- Husband challenging, where, 293, 331
- ILA not provided, where, 317, 360
- ILA provided, where, 265, 339
- Interpretation of, 251
- Undue influence or duress, 279
- Where set aside, 360
- Where upheld, 265
- Wife challenging, where, 322

Duress.

- Definitions, 46
- Economic duress, 92

- Guarantees, and, 211
- Not Proven, 94
- Physical duress, 90
- Proven, 101

Employment Contracts.

- Practical advice for employers, 420
- Special nature of, 384
- Settlement agreement set aside, 408
- Settlement agreement upheld, 395
- Termination of, factors considered by courts, 388
- Where employee received ILA, 388
- Where employee did not receive ILA, 395

Employment Law. See Employment Contracts.

Estate planning and ILA.

- ILA not provided, estate plan set aside, 563
- ILA not provided, estate plan upheld, 559
- ILA provided, estate plan set aside, 552
- ILA provided, estate plan upheld, 543
- Passing of accounts and costs issues involving ILA, 576
- Practical advice for estate planning lawyers regarding ILA, 580
- Research references (bibliography), 584

Estoppel,

• ILA acting as, 247

Ethical standards governing estate planning lawyers

- Acting as both executor and lawyer for the estate, 541
- Dealings with beneficiaries, 539
- Drafting wills, 535
- Joint retainers or joint or mutual wills, 537
- Receiving gifts from clients, 533

Ethics. See Professional Standards

Family Law. See also Domestic Contracts; Wives.

- Australian and British views of wives, 244
- Challenging domestic contracts, 249, 285, 288, 298, 302, 334, 351, 374
- Doctrine of marital unity, 239

- Hartshorne v. Hartshorne (S.C.C.), 257, 265
- Historical view of wives, as being in need of protection, 239
- Married women's property legislation, 241
- Miglin v Miglin (S.C.C.), 252, 257, 262, 268, 284, 365
- Practical ILA tips for family law lawyers, 371
- Rick v. Brandsema (S.C.C.), 261

Friend of the court. See Amicus curiae.

Guarantees.

- Alberta, Guarantees Acknowledgement Act, 226
- Bank officers, tips for, 231
- Canadian cases, where enforced, 152
- Duty to explain, bank's, 130, 141
- Enforceability, factors influencing, 129
- English, lack of, affecting, 199
- Explanation of terms by bank officer, 146
- Guarantor sophisticated/involved in business, 153
- Guarantor understood guarantee, 168
- Guarantor unsophisticated, 166
- ILA, bank's duty to recommend, 130, 141
- ILA provided, enforcement where, 176
- ILA waived, 185
- Negligence of guarantor, enforcing due to, 188
- Non est factum, 168, 188
- Undue influence, duress, misrepresentation, effect of, 211

ILA.

- ILR (Independent legal representation), compared, 10
- Meaning of "independent", 10, 750
- When providing, common issues that arise, 754

ILA Checklists.

- Contents of typical checklist, 751
- Discussion of, 581, 751, 765

ILR (Independent legal representation).

• ILA, compared, 10

Insurance Contracts.

- Advice for insurers, 524
- Coverage issues, 510

- Enforceability, insurance releases, of, 478
- Mental incapacity and ILA, 493
- Non-waiver agreements and ILA, 518, 521
- Releases, where enforced, 478
- Releases, where set aside, 494
- Reservation of rights letters and ILA, 518

Insurance Law. See also Insurance Contracts.

- Obligation of insurer to pay for ILA, 517
- Special obligations of public insurers, 471

Legal advice privilege in estate litigation, waiver

- Certificates of independent legal advice, 574
- Joint retainers for a joint or mutual will, 537, 573
- To prove the intention of the testator, 574

Litigation Strategies.

- Examination for Discovery, 608, 760
- Pleading non est factum, 757
- Pleading undue influence or duress, 759

Majority Shareholders. *See also* Corporate Counsel; Corporate Law; Minority Shareholders.

- Transactions between, 428
- Transactions set aside, where, 445
- Transactions upheld, where, 429

Malpractice. See Negligence and ILA.

Minority Shareholders. *See also* Corporate Counsel; Corporate Law; Minority Shareholders.

- Transactions between, 428
- Transactions set aside, where, 445
- Transactions upheld, where, 429

Negligence and ILA. See also Standard of Care

- Conflicts of interest, 434, 445, 454, 470, 504, 511, 537, 562, 688, 708, 750, 764
- Duty to recommend ILA upon discovering error, 33
- Failing to recommend ILA, 687
- Incompetently providing ILA, 726
- Where lawyer found negligent, 687, 726
- Where lawyer found not negligent, 711

Non est factum. See also Duress; Economic Duress; Unconscionability; Undue Influence

- Applicability to all contracts, 50
- Burden of proof, 54
- Canada, position in, 54
- England, position in, 48
- Fundamental different test, 57
- Illiterate persons, applicability, 49, 60, 67, 69
- Marvco Color Research v. Harris, 54
- Mistakes of character of contract, 57
- Mistakes of content of contract, 57
- Negligence, effect of party's, 53, 59
- Saunders v. Anglia Building Society, 52, 54, 55, 57
- Void versus voidable contracts, 50

Practice Management.

• Office procedures for ILA, 763

Pro se litigants. See Self-represented litigants.

Professional Standards

- Business relationship with client, need for ILA, 26
- Code of Professional Conduct (CBA)
 - Rule 2, 13
 - Rule 3, 10
 - Rule 5 (conflicts), 16,26
 - Rule 6, 26
 - Rule 19, 35
- Conflicts of interest, duty to avoid, 15
- Errors and omissions, 33
- Model Code of Professional Conduct (FLSC), 11, 19, 28, 35
- Unrepresented persons, duty towards, 35

Real estate transactions, 24, 82, 164, 203, 213, 217, 722

Releases, execution of.

• By employees. See Employment Contracts. By insureds. See Insurance Contracts.

Retainer, scope of, 9-13

Self-represented litigants

• amicus curiae and self-represented litigants. See amicus curiae.

- administrative tribunals, appearing before, 608
- challenges for self-represented litigants, 598
- challenges for judges, 600
- challenges for litigation lawyers, 603
- costs
 - amicus curiae, 656
 - costs awards regarding self-represented litigants, 642
 - costs granted to self-represented litigant, 643
 - costs not granted to self-represented litigant, 642
 - costs ordered to by paid by self-represented litigant, 645
 - no order for costs involving self-represented litigants, 646
 - pro bono counsel or public interest litigation, 654
 - where lawyer is the self-represented litigant or in-house counsel, 647
 - special or enhanced costs awards involving self-represented litigants, 650
- criminal law, challenges for, 626
- ethical duties for litigation lawyers, 605
- family law litigation, impact, 632
- independent legal advice, role, 606
- legal representation required, 616
- McKenzie friend, 640
- research references (bibliography), 657
- solutions to problems facing self-represented litigants, 604

Standard of Care

• When providing ILA, 10, 472, 539, 541, 608, 689, 693, 702, 726, 736

Unconscionability. See also Duress; Economic Duress; Non Est Factum; Undue Influence

- Cases, leading Canadian, 90
- Definition, 90
- Improvident transactions, examples, 90
- ILA, role of in defeating, 109, 116
- Legislation, 113
- Unequal bargaining strength, 90

Undue Influence. See also Duress; Economic Duress; Non Est Factum; Unconscionability

- Actual undue influence, 69
- Canadian position, 71

- Duress, compared to, 90
- Economic duress, 92
- English position, 70
- Presumed undue influence, 70
- Role of ILA in defeating, 109, 116

Unrepresented persons, duty to. See also Professional Standards

- Need for ILA, 2, 35
- Negotiations, in, 35

Wives. See also Family Law; Domestic Contracts

- Australian and British views of, 244
- Challenging domestic contracts, 265, 289, 334, 387
- Doctrine of marital unity, 239
- Historical view, as being in need of protection, 239
- Married women's property legislation, 241