



# Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse

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# Introduction

In its 2017 report, *Elder Abuse: A National Legal Response*, the Australian Law Reform Commission proposed that best practice guidelines be developed for legal practitioners in relation to the preparation and execution of wills and other advance planning documents.<sup>1</sup> The Law Council of Australia makes the following suggestions as to the best measures which legal practitioners can adopt to mitigate risks, and to identify and respond to the situation of clients who are potentially subject to elder financial abuse. This document is based on the Law Society of New South Wales' Guide.<sup>2</sup> It will be reviewed by the Law Council of Australia after two years of operation.

## 1. Meeting set-up

In making the initial arrangements for the legal practitioner's engagement, attention should be given to the following:

### 1.1 Who is the client?

Failure to properly identify the client can expose the legal practitioner to liability. Care should be taken to precisely identify to whom the service is offered and to ensure that any other direct or indirect influences are excluded.

### 1.2 Have arrangements been made to take instructions directly from the client?

Failure to do so may lead to professional sanctions and personal liability for the legal practitioner.<sup>3</sup> Care should be taken to ensure that instructions are taken directly from the client and no others are present who might influence the client.

### 1.3 Is there a conflict?

While it is recognised that the client may consist of more than one person, it is important to ensure that those persons have a common interest. If their interests become adverse, the legal practitioner must not act unless *Australian Solicitors' Conduct Rules* r11<sup>4</sup> has been fully satisfied.<sup>5</sup>

### 1.4 Have arrangements been made to consult the client alone?

The ideal arrangement is for the legal practitioner to see the client alone (or, if necessary, with a support person who has no interest in the legal transaction).<sup>6</sup> Any person who may benefit should not be within sight or hearing.

### 1.5 Has adequate time been devoted to the meeting?

There needs to be sufficient time to enable an assessment of the client's understanding and volition.

### 1.6 Has the meeting been arranged for an appropriate time and place?

The meeting should take place at a time and place that is appropriate to receive advice about a legal transaction.<sup>8</sup>



### **1.7 Have you considered the atmospherics of the meeting?**

It is important to ensure that the environment allows the client to take in what he or she is told.<sup>9</sup> It may be necessary later to demonstrate that the client knew and approved the contents of their will.<sup>10</sup>

### **1.8 Does it matter who pays the bill?**

It does not matter who pays the bill; however it is important to identify who is the client and to whom the bill is addressed. If the bill is to be paid by someone other than the client, the legal practitioner should consider any implications which could arise.<sup>11</sup>

### **1.9 Is an independent interpreter or support person required?**

It is vital to communicate with the client in a language with which both the legal practitioner and the client are conversant. If this is not possible, ensure that an independent interpreter, with appropriate credentials, translates the conversation. This will often need to be arranged in advance of the meeting.

In no circumstance should a person who has an interest in the transaction be involved in the translation.<sup>12</sup> Legal practitioners should be cautious about acting as an interpreter or translator in a matter in which they act.<sup>13</sup>

## **2. Meeting procedures**

When meeting with the client, the legal representative consider the following:

### **2.1 Have you identified yourself as a legal practitioner?**

If the person is not an existing client, and the arrangement for the meeting has been made by another person, you should ensure that the person has chosen you as his or her legal practitioner and understands that they may choose their own legal practitioner.<sup>14</sup>

### **2.2 Does the client understand who is the client?**

If an attorney<sup>15</sup> instructs a legal practitioner to sell the home of the principal<sup>16</sup>, the client is the principal.<sup>17</sup> If an attorney consults a legal practitioner to ascertain whether the attorney has authority to act for the principal, the client will be the attorney.

## 2.3 Have you clarified what legal work the client wants the legal practitioner to perform?

This will define the legal practitioner's retainer.<sup>18</sup> It may be important to explain the work that the legal practitioner cannot perform, such as giving financial advice.

## 2.4 Have you explained the legal transaction?

This will often involve:

- drawing the client's attention to both the negative and positive effects of the legal transaction;<sup>19</sup>
- advising as to the propriety of the transaction, and warning the client against an improvident transaction;
- advising the alternatives available to the client;<sup>20</sup> and
- advising the advantages and disadvantages of the alternatives.<sup>21</sup>

## 2.5 Does the client really understand the transaction?

It is necessary to ensure that the client comprehends the contents, nature and effect of the relevant documentation. To assess a client's understanding, a legal practitioner should usually ask open questions.<sup>22</sup> These may be necessary to obtain the required information and instructions without introducing bias or unduly influencing the client's answers. Open questions will often start with the words like why, what, who, when and how. Open questions do not start with words such as do, is, can, will or has, as these words allow for a 'yes' or 'no' answer which may not aid in the assessment of a person's understanding. The use of open questions is one tool among many which can be used to assess capacity.

## 2.6 Have you checked for mental capacity?<sup>23</sup>

It was said in *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 that "A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases". There can be significant disciplinary and civil consequences for a legal practitioner who fails to do this.<sup>24</sup>





## 2.7 Have you checked for volition?

It has long been said that legal transactions must be “the offspring of [the client’s] own volition”.<sup>25</sup> This issue is different from mental capacity.<sup>26</sup> Questions such as “Why are you doing this?” (or similar) can be a useful initial enquiry.

## 2.8 Are there any warning signs?

Factors which may suggest a lack of mental capacity or abuse, pressure, exploitation, coercion and the like are:

- regular changes to wills or powers of attorney within a relatively short period of time, especially to exclude a long-standing beneficiary or include a new acquaintance;
- changing legal practitioners especially from the clients long-standing 'legal practitioner';<sup>27</sup>
- use of a legal practitioner who acts for the person benefitting from the transaction<sup>28</sup> rather than an independent legal practitioner;
- legal documents and transactions being produced or undertaken at the instigation of the person benefitting;<sup>29</sup>
- the client disposing of almost all the person’s assets;<sup>30</sup> or
- the client disposing of all his or her assets for nominal or no consideration.<sup>31</sup>

## 2.9 Has the client been given an opportunity to reflect on the advice given?

Some clients will want or need an opportunity to reflect on the advice given. Accordingly, unless there is a need for urgency, the client should be provided the opportunity to consider any documents and issues at his or her leisure.<sup>32</sup> More than one meeting may be required to perform the client’s instructions.

# 3. Proof

## 3.1 Have you taken detailed notes? <sup>33</sup>

A legal practitioner should take detailed notes of questions asked, answers provided and general observations.<sup>34</sup> Legal practitioners should take care to ensure that any notes taken are accurate.<sup>35</sup> This is particularly important where there are circumstances which may cast doubt on the client’s mental capacity, such as a long-standing diagnosis of dementia,<sup>37</sup> hospitalisation<sup>38</sup> or medical condition.<sup>39</sup>

Notes should be made as soon as possible. It is not always possible to make notes simultaneously, however courts have in some circumstances accepted notes made on late the day of the interview, or on the day following it.<sup>40</sup>

### **3.2 Is it appropriate to seek a medical opinion?**

There is circularity in obtaining instructions to obtain an opinion on mental capacity which may disclose that the client did not have the mental capacity to give the instructions. However, there is no obvious and easily available approach which avoids this potential circularity. In most circumstances the solicitor could rely on the presumption of mental capacity.

### **3.3 Has a written authority been given for you to seek a medical opinion?**

If time, circumstance and the client's instructions allow, a solicitor should consider obtaining a medical opinion about the client's mental capacity, capacity to withstand pressure and any other appropriate issues.

### **3.4 Have you made arrangements to keep the important records in accordance with Professional Conduct Rules or otherwise as appropriate?**

A legal practitioner should retain file notes and any medical report for any period of time required by Professional Conduct Rules or, in the absence of any such rule, as appropriate in the circumstances. This is because the necessity for proof can arise many years after legal work is performed.<sup>41</sup> If it is not feasible to retain the whole file – which is the preferred situation – the most relevant records to the assessment of mental capacity should be retained.<sup>42</sup>



## Endnotes

- 1 The Australian Law Reform Commission report, *Elder Abuse – A National Response* is available at <https://www.alrc.gov.au/publications/elder-abuse-report>. see Proposal 8.1.
- 2 If you are a NSW practitioner, further NSW-specific guidance is available on the website of the Law Society of NSW <<https://www.lawsociety.com.au/resources/practice-resources/my-practice-area/elder-law>>.
- 3 See, for example, *The Estate of Tucker, Deceased*, [1962] SASR 99; *Re Estate Sharman*; *Ex parte Versluis* [1999] NSWSC 709; *Vernon v Watson*; *Estate Clarice Isabel Quigley dec'd* [2002] NSWSC 600; *Legal Profession Conduct Commissioner –v- Brook* [2015] SASCFC 128; *Legal Services Commissioner –v- Ho* [2017] QCAT 95; *Legal Services Commissioner v Ronald Aubrey Lawson* [2019] QCAT 100; *Legal Services Commissioner –v- Slipper* [2019] QCAT 146.
- 4 The *Australian Solicitors' Conduct Rules* can be found at...[https://www.lawcouncil.asn.au/files/web-pdf/Aus\\_Solicitors\\_Conduct\\_Rules.pdf](https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf).
- 5 *Archer v Howell (No. 2)* (1992) 10 WAR 33; *Archer –v- Archer* [2000] NSWCA 314; *Vertzayias –v- King* [2011] NSWCA 215; *Legal Services Commissioner –v- McNamara (Legal Practice)* [2011] VCAT 1228; *Dickman v Holley*; *Estate of Simpson* [2013] NSWSC 18; *Matouk –v- Matouk (No 2)* [2015] NSWSC 748; *Pinter –v- Pinter* [2016] QSC 314; *Lucas v Lucas* [2018] NSWSC 962; *Anderson –v- Anderson* [2017] NSWCA 131; *McFee –v- Reilly* [2018] NSWCA 322; *Mekhail –v- Hana* [2019] NSWCA 197.
- 6 *Woodley-Page –v- Simmons* (1987) 217 ALR 25; *Estate of Sharman* [1999] NSWSC 709; *Donato –v- Mangravite*; *Estate of Donato* [2005] NSWSC 488; *Petrovski v Nasev*; *The Estate of Janakievska* [2011] NSWSC 1275; *Dellios –v- Dellios* [2012] NSWSC 868; *Estate of Stanley William Church* [2012] NSWSC 1489; *Brown v Guss* [2014] VSC 251; *Smith –v- O'Neil* [2015] NSWSC 1924; *Ryan –v- Dalton*; *Estate of Ryan* [2017] NSWSC 1007; *The Public Trustee of Queensland –v- Tennila* [2018] QSC 84; *Rahme v Benjamin & Khoury Pty Ltd* [2019] NSWCA 211; *Mekhail v Hana*; *Mekail v Hana* [2019] NSWCA 197.
- 7 *Church v Mason* [2013] NSWCA 481; *Barakett v Barakett* [2016] NSWSC 1257.
- 8 Judging from the failed legal transactions in various cases, a café is excluded (*Badman –v- Drake* [2008] NSWSC 1366, *Maestrale v Aspite* [2012] NSWSC 1420, [3]; *Matouk –v- Matouk (No 2)* [2015] NSWSC 748; *Ryan –v- Dalton*; *Estate of Ryan* [2017] NSWSC 1007), as is a social occasion or a recreation event: *Dickman v Holley*; *Estate of Simpson* [2013] NSWSC 18.
- 9 It is important to be conscious of arranging the meeting for the time of day which is likely to be most suitable for the client's comprehension; the need for adequate lighting, and the absence of background noise and distractions, among other things.
- 10 *Smart v Power* [2019] WASCA 106.
- 11 The person paying the bill may have an expectation that the legal practitioner will act in that person's interests: see, for instance, *Hewitt –v- Gardner* [2009] NSWSC 1107.
- 12 *Matouk v Matouk (No 2)* [2015] NSWSC 748.
- 13 *Rocco Condello v Sung Soo Kim* [2018] NSWSC 394; *Rogic –v- Samaan* [2018] NSWSC 1464; *Re Theodoulou* [2018] VSC 601.
- 14 *Irvine v Irvine* [2008] NSWSC 592.
- 15 An attorney is also called a 'donee'.
- 16 The principal is also called the 'donor'.
- 17 Instructions can only be taken from the attorney if the attorney has authority; and the power of attorney should be checked to ensure that sufficient authority exists.
- 18 A solicitor's duty of care is usually confined to performing the retainer and any additional assumed responsibility (ie the penumbra or peripheral duty): *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325; *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* [(2007) 35 WAR 27; [2007] WASCA 179; *AVWest Aircraft Pty Ltd as trustee for AVWest Aircraft Trust v Clayton UTZ (A firm) (No 2)* [2019] WASC 306; *Kerr v Australian Executor Trustees (SA) Ltd*; *Australian Executor Trustees (SA) Ltd v Fuller and others trading as Sparke Helmore Lawyers* [2019] NSWSC 1279; and *Badenach v Calvert* [2016] HCA 18.
- 19 *Janson v Janson* [2007] NSWSC 1344.
- 20 *Ibid.*
- 21 *Ibid.*
- 22 It is not suggested that open questions should be used in every circumstance or even in every circumstance where mental capacity is in question. There will be circumstances where closed questions will be appropriate. These are comparatively rare. The default position of open questions is therefore recommended unless it is considered that these will not produce sufficient information to enable a sound assessment of mental capacity.
- 23 In relation to a will, mental capacity is called 'testamentary capacity'. In some jurisdictions there are legislative definitions of mental capacity and different names can be used, such as 'decision-making capacity'.

## Endnotes

- 24 *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commissioner v Comino* [2011] QCAT 387, *Legal Services Commissioner v de Brenni* [2011] QCAT 340; *LSC -v- Penny* [2015] QCAT 108; *LSC -v- Given* [2015] QCAT 225; *Legal Profession Complaints Committee and Wells* [2014] WASAT 112; *Council of the Law Society of NSW v Berger (No 1)* [2017] NSWCATOD 137 and *(No. 2)* [2018] NSWCATOD 4; *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87.
- 25 *Hall -v- Hall* (1868) LR 1 P & D 481, 482.
- 26 *Bridgewater -v- Leahy* [1998] HCA 66; 194 CLR 457; 158 ALR 66; 72 ALJR 1525; *Whereat v Duff* [1972] 2 NSWLR 147.
- 27 *Robinson -v- Spratt* [2002] NSWSC 426; *Tevenar -v- Ussfeller* [2005] NSWSC 582; *Janson -v- Janson* [2007] NSWSC 1344; *Brown -v- Wade* [2010] WASC 367; *Sprong -v- Sprong* [1914] HCA 52, (1914) 18 CLR 544; *Doulaveras v Daher* [2009] NSWCA 58.
- 28 *Smith v. Glegg* [2004] QSC 443; *Brown v Fisher* (1890) 63 LT 465, 466; *Vernon v Watson*; *Estate Clarice Isabel Quigley dec'd* [2002] NSWSC 600, [14].
- 29 *NAU* [2014] NSWCATGD 16.
- 30 *Johnson -v Buttress* [1936] HCA 41; (1936) 56 CLR 113; *Smith v. Glegg* [2004] QSC 443.
- 31 *Turner v Windever* [2005] NSWCA 73; *Irvine -v- Irvine* [2008] NSWSC 592; *Sleboda -v- Sleboda* [2008] NSWCA 122; *Smith v. Glegg* [2004] QSC 443; *Ward -v- Ward* [2011] NSWSC 107; *Aboody -v- Ryan* [2012] NSWCA 395; *Cohen -v- Cohen* [2016] NSWSC 336. Inadequate consideration has long been a relevant factor which a court considers when exploring the legal propriety of a transaction, see, for instance, *Dobson -v- Dobson* (1879) 13 SALR 137; *Carello -v- Jordan* [1935] St R Qd 294; *Richardson -v Otto* [1938] QWN 15; *Blomley -v- Ryan* (1956) 99 CLR 362; *Nichols -v- Jessup* [1986] 1 NZLR 266; *Nichols -v- Jessup (No2)* [1986] 1 NZLR 237.
- 32 *Irvine v Irvine* [2008] NSWSC 592; *Tabtill Pty Ltd v Creswick*; *Creswick v Creswick* [2011] QCA 381; *Thorne -v- Kennedy* [2017] HCA 49.
- 33 Notes may include electronic records, such as tape recording and video, where the client's consent has been obtained in relation to making that type of record.
- 34 Anything which is unusual about a client's appearance, stated reasons or behaviour should be carefully recorded.
- 35 *Gray v Hart* [2012] NSWSC 1435,
- 36 *Ryan -v- Dalton*; *Estate of Ryan* [2017] NSWSC 1007.
- 37 *d'Apice -v- Gutkovitch*; *Estate of Abraham (No2)* [2010] NSWSC 1333; *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831.
- 38 *McNamara -v- Nagel* [2017] NSWSC 91.
- 39 *Freeman -v- Brown* [2001] NSWSC 1028; *Glenda Phillips v James Phillips*; *John Matthew Phillips by his Tutor NSW Trustee & Guardian v James Phillips* [2017] NSWSC 280.
- 40 *Smart v Power* [2019] WASCA 106.
- 41 An example is *Hookway v Hookway* [2017] TASFC 4 where nine years after the deceased's will, death and the grant of probate, a beneficiary successfully brought proceedings for the revocation of the grant on the basis of a lack of testamentary capacity.
- 42 Note eg, rule 14.2 of the Australian Solicitors Conduct Rules, which provides that solicitors or law practices may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legal obligations to the contrary.