Best practice guide for practitioners in relation to elder abuse

1 Meeting set-up

1.1 Who is the client?
Failure to properly identify the client can expose the solicitor 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]

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 solicitor. Care should be taken to ensure that instructions are taken from the client and no others are present who might influence the client.

1.3 Are you acting for only one client?
The client may consist of more than one person. For instance, a couple who purchase real estate are one client for the purposes of most transactions. There may also be more than one person named as executor of an estate. These persons have a common interest. If their interests become adverse, the solicitor must not act for both parties unless *Australian Solicitors' Conduct Rules* r11.5 has been fully satisfied.

1.4 Have arrangements been made to consult the client alone?
The ideal arrangement is for the solicitor to see the client alone (or, if necessary, with a support person who has no interest in the legal transaction). Any person who may benefit should not be within sight or hearing.[2]

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.[3]

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.

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.

---

[1] In relation to conveyancing transactions, specific rules apply in relation to the verification of the identity of the client, see Rule 4 of the NSW Conveyancing Rules and Rule 6.5 of the NSW Participation Rules.
[2] *Barakett v Barakett* [2016] NSWSC 1257.
[3] Judging from the failed legal transactions in various cases, a café is excluded, as is a social occasion or a recreation event: *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18.

2 Meeting procedures

2.1 Have you identified yourself as a solicitor?
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 solicitor and understands that they may choose their own solicitor.[4]

2.2 Have you got the language right?
It is vital to communicate with the client in a language with which both you and the client are conversant. If this is not possible, ensure that an independent interpreter, with appropriate credentials, translates the conversation. In no circumstance should a person who has an interest in the transaction be involved in the translation.[5]

2.3 Have you clarified what legal work the client wants the solicitor to perform?
This will define the solicitor's retainer.

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;[6]
- advising as to the propriety of the transaction, and warning the client against improvident transaction;
- advising the alternatives available to the client;[7] and
- advising the advantages and disadvantages of the alternatives.[8]

2.5 Have you checked for mental capacity?
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 solicitor who fails to do this.

2.6 Have you checked for volition?
It has long been said that legal transactions must be "the offspring of [the client's] own volition". This issue is different from mental capacity. Questions such as "Why are you doing this?" (or similar) can be a useful initial enquiry. A factor which may suggest abuse, pressure, exploitation, coercion etc is regular changes to wills or powers of attorney within a relatively short period of time. Other signs of a lack of volition include:

- the client making a transaction disposing of almost all the person's assets; or
- the client disposing of all his or her assets for nominal or no consideration.

2.7 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 solicitor should usually ask open questions.[9] Open questions will often start with the words like why,

[4] *Irvine v Irvine* [2008] NSWSC 592.
[5] *Matouk v Matouk (No 2)* [2015] NSWSC 748.
[6] *Janson v Janson* [2007] NSWSC 1344.
[7] Ibid.
[8] Ibid.
[9] 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.

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.

2.8 Should the client be 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.[10]

3 Proof

3.1 Have you taken detailed notes?
A solicitor should take detailed notes of questions asked, answers provided and general observations made.[11] Solicitors should take care to ensure that any notes taken are accurate. 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, hospitalisation or medical condition.

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 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. The Law Society has developed template letters to a doctor that may be used by solicitors where medical information may assist the solicitor assess testamentary capacity or mental capacity for a power of attorney. These letters can be found on the Law Society website here, together with comments about the use of the letters.

3.4 Have you made arrangements to keep the important records indefinitely?
A solicitor should retain file notes and any medical report indefinitely. This is because the necessity for proof can arise many years after legal work is performed.[12] 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.

Sourced From: https://www.lawsociety.com.au/resources/practice-resources/my-practice-area/elder-law

[10] *Irvine v Irvine* [2008] NSWSC 592.
[11] Anything which is unusual about a client's appearance, stated reasons or behaviour should be carefully recorded.
[12] 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.