

CLIENT CAPACITY COMMITTEE

STATEMENT OF PRINCIPLES WITH GUIDELINES

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OVERVIEW

SECTION ONE – The Lawyer’s Role – The Ethical Ground Rules

Section One deals with the ethical ground rules for a lawyer who has unproven doubts about a client’s capacity to give instructions.

It suggests that the lawyer has no authority to ignore a client’s instructions or to act upon their own assessment of the client’s best interests.

It suggests, rather, that the lawyer’s role is to try to act on those instructions by enhancing, to the fullest extent, the client’s autonomous and informed choice.

The following are discussed:

- lawyers have to act on client’s instructions because they are fiduciary agents not principals;
- lawyers are concerned to uphold the human dignity of their clients;
- if therefore a client’s capacity to instruct is in doubt but not determined, the lawyer will be concerned to try to find a way to ensure that the client can maximise their autonomy and make an informed choice;
- in the extreme, but rare case, the lawyer may have to accept that they can’t act on their client’s instructions, although they need not abandon them;
- options if the lawyer cannot act on the client’s instructions.

SECTION TWO – Basic Principles Flowing from the Ethical Ground Rules

Section Two provides basic principles which, together with the ethical ground rules, should guide the lawyer who has unproven doubts about a client’s capacity to give instructions.

Respect for the dignity of the client means that:

- doubt as to incapacity is not to be expected or assumed;
- the presumption of capacity at common law is to be taken seriously;
- the client is to be valued and listened to;
- mental illness or disability is not to be equated with mental incompetence;
- eccentricity or imprudence is not to be equated with mental incompetence;
- effective communication must be worked for;
- lawyers cannot substitute their own view of ‘best interests’;
- doubt about capacity does not equate with incapacity.

SECTION THREE – Capacity – Basic Principles?

Section Three deals with some important but often overlooked features of incapacity which justify the approach recommended:

- capacity is decision specific/time specific;
- apparent limitations on a client’s ability to understand or communicate information do not necessarily signal incapacity to instruct;
- capacity to instruct is not an ‘all or nothing’ ability – it depends upon the nature and complexity of the job at hand;
- different degrees of cognitive ability are required for different transactions;
- bad decisions do not necessarily signal incapacity to instruct;
- some apparent incapacity on the part of the client does not necessarily signal incapacity to instruct on the subject-matter of the retainer.

SECTION FOUR – Taking Instructions

Section Four deals with the way the lawyer is encouraged to respond in a practical and ethical way to unproved but possible incapacity.

The section shows that lawyers already have an array of practical skills and techniques to enable the client to make the most of their established abilities to take/make authentic and informed decisions. The difficult question of assistance from a ‘third party’ (i.e. carer,

relative, friend) is discussed, and caution advised. Finally the issue of expert assessment is addressed.

Communication – Exploring and Enhancing Client Autonomy

Limitations on effective communication may be physical or temporary and not reflective of client incapacity to instruct. The lawyer's task is to clear a path to informed understanding and communication. Early clarification and management of barriers to effective communication should be undertaken.

- Client focussed practices will usually enable instructions to be obtained.
- Be wary of jumping to conclusions – lawyer self examination.
- Enhancing communication:
 - › external aids;
 - › choosing favourable conditions;
 - › breaking decisions into component parts;
 - › delaying the decision or the process of decision making;
 - › time to reflect.

Seeking Assistance from a Third Party

- A caution.
- Encourage clients but do not insist.
- Protections:
 - › no contact without consent;
 - › confirm with client;
 - › documentation.
- Providing information on how the client makes decisions.

Third Parties – Participation in Decision Making

- Assisted, not substituted, decision making - care is required.
- Undue influence?
- Distinguish third party presence from substituted decision makers.

Third Parties – Steps before Third Party Attendance

- Define the scope of assistance sought.
- Clear it with the client.
- Enable the client to retain control.
- Be aware of benefits or advantages which may preclude the third party attending.
- Avoid indirect disclosure of instructions.
- Define to third party the scope of assistance, not the advice given.
- Client's own instructions are paramount.

Expert Assessment

- Expert Assessment – only after informed consent.
- Encourage client to review refusal to be assessed.

SECTION FIVE – Limitations for the Lawyer

Section Five deals with the dilemma for the lawyer where unproven doubts about capacity to give instructions cannot be eliminated or overcome. It suggests that adoption of the practical steps advocated in Section 4 will ensure that the dilemma will be rare. The section concludes that the instinct to protect the client by adopting a course of action which is not ethically based ultimately fails to honour and respect the client.

- What the lawyer cannot do.
- But no abandonment.
- The lawyer-client relationship as a resource.
- Ceasing to act:
 - › review and document;
 - › what about protecting the client's position;
 - › S 40 of the Legal Practitioners Act (SA);
 - › handing over to another lawyer.

APPENDICES

The Appendices contain the following:

- discussion of different legal elements of incapacity as they pertain to different areas of legal practice (**Appendix 1**);
- case studies to show how the issue of capacity might arise in practice, and be addressed (**Appendix 2**);
- references and contacts of where to find additional assistance (**Appendix 3**). (To be added)

GUIDELINES

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SECTION ONE – The Lawyer’s Role – The Ethical Ground Rules

Lawyer and Client: The Legal Relationship

The Retainer

1. The legal relationship between lawyer and client is essentially one of agency.¹

Agency – certainly with respect to client and lawyer –

*“is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation”.*²

2. The contract between the lawyer and the client (the retainer) for the provision of legal services by the lawyer is central to most aspects of the lawyer-client relationship. It will contain both express and implied terms, pursuant to which the lawyer will owe duties of loyalty, competence and confidentiality; principally, a duty to use skill and diligence to carry out the lawful instructions of their clients. Lawyers occupy positions of knowledge and influence which result in their clients placing trust in them with respect to their private and business affairs, but which present opportunities for exploitation, coercion and paternalism. The resultant agency relationship carries a heightened obligation of loyalty and integrity. Maintaining loyalty to the client’s interests as the client defines them requires a measure of self-restraint that is central to the lawyer’s role.³

3. There can be no retainer unless the elements of contract are present, principally *consensus ad idem* (agreement) between the parties, whether evidenced in writing or

¹ **Dal Pont**, “*Law of Agency*”, Butterworths, 2001, para 1.35 (**Dal Pont on Agency**); **Bowstead & Reynolds on Agency**, 18th edition, 2006, para 6-032ff; **Dal Pont**, “Lawyers” Professional Responsibility”, Third edition, 2006, para 3.50 (**Dal Pont on Lawyers**)

² **Bowstead & Reynolds on Agency**, 18th edition, 2006, para 1-001; compare, the *American Restatement, Third*, § 1.01, which includes the element of ‘control’: “*the relationship which results from the manifestation of consent, by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act*”; discussed in **Bowstead & Reynolds**, at para 1-017, and in **Dal Pont on Agency**, at para 4.3.

³ **Dal Pont on Lawyers**, chapters 4 & 6; **Dal Pont on Agency**, Chapters 11 & 12; **Ysaiah Ross**, “*Ethics in Law: Lawyers’ Responsibility and Accountability in Australia*”, 4th edition, Butterworths, 2005, Ch 12. See also, **Deborah L Rhode & Geoffrey C Hazard, Jr**, “*Professional Responsibility and Regulation*” (Foundation Press, second edition, 2007) p 48; **Bradley Wendel**: “*Professional Responsibility*” (Aspen publishers, second edition, 2007);

orally, or inferred from the conduct of the parties.⁴ There are some restrictions on the lawyer's ability to accept,⁵ or terminate,⁶ a retainer, but generally speaking, ordinary principles of contract will apply. Particular features of the retainer can only be included if the agreement is in writing.⁷

4. A lawyer may be confronted by doubts about the mental capacity of a person to give instructions at two stages: before the lawyer-client relationship has been formed - that is, before any retainer - or after that person has retained the lawyer. In the first case, the question is whether the intending client can give a valid authority to act. In the second case, the question is whether the retainer has been terminated by a supervening mental incapacity on the part of the client. Once it has been established that the person has a mental incapacity which prevents them from instructing the lawyer, but only then, the law provides ways and means of ensuring the protection of the interests of that person through legal representation and advice.⁸

Mental Illness: Capacity to Retain

5. The normal rule is that the contracts of a mentally ill person are voidable if, and only if, that person can show that, by reason of mental illness, they were at the time of contracting incapable of knowing what they were doing, and that the other party was aware of the incapacity.⁹ In this context, mental incapacity means inability to appreciate the nature and quality of the act done.¹⁰
6. It has been suggested¹¹ that -

“anyone may be a principal who has the mental power to act at all, and that if he is a person of no, or limited, contractual power, his incapacity should be reflected solely in the contract made for him by his agent, which contract would stand on the same footing as if he had made it in person”.

⁴ *Wong v Kelly* (1999) 154 FLR 200, at 206 (Stein J); *Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1 at [208] (CA); *McGowan v Cmr of Stamps* (2001) 47 ATR 357 at [10] (McPherson J); see also, **Dal Pont on Lawyers**, para 3.05.

⁵ Where (eg) acceptance would involve a conflict of interest and duty or duty on the part of the lawyer: **Dal Pont on Lawyers**, para 3.145

⁶ Where (as is usual) the retainer is an entire contract: **Dal Pont on Lawyers**, para 3.155

⁷ S 42 (6), *Legal Practitioners Act 1981* (SA); *McNamara Business & Property Law v Kasmeridis* (2005) 92 SASR 382 (FC)

⁸ See, eg, Appendix 1.

⁹ **Bowstead & Reynolds**, at para 2-009

¹⁰ **Bowstead & Reynolds**, at para 10-020, citing *Boughton v Knight* (1873) LR 3 P & D 64, at 72; **Dal Pont on Agency**, para 25.17; see also, GHJL Fridman, “*Mental Incompetency: Part I*” (1963) 79 LQR 502, at 511-16.

¹¹ Mechem, “*Outlines of Agency*”, 4th Edn, p. 9; cited by **Bowstead & Reynolds**, at para 2-007

But this seems contrary to available authority, which seems to support an even stricter rule in the case of a putative principal and agent: namely, that a mentally incapacitated person may be unable validly to appoint an agent at all.¹²

Mental Illness: Termination of Authority by Supervening Incapacity to Instruct

7. The *actual* authority of an agent, whether conferred by deed or not and whether expressed to be irrevocable or not, is terminated by supervening mental incapacity.¹³ Some duties of the agent survive termination of the retainer – for example, the duty of confidentiality,¹⁴ or the duty to avoid conflict of duty and interest.

Mental Incapacity: No Agency of Necessity

8. It is to be doubted that any so-called doctrine of Necessity¹⁵ can be relied on, whether in relation to an intending client or an existing client, and in any event, where proof of mental incapacity is lacking. Legislation can sometimes authorise a measure of protective action.
9. Section 40, *Legal Practitioners Act 1981* (SA) provides:

- (1) *The authority of a [legal practitioner](#) to act on behalf of a person is not abrogated by reason only of the fact that that person becomes of unsound mind.*
- (2) *When the mental unsoundness of a person on behalf of whom a [legal practitioner](#) is acting comes to the knowledge of the [practitioner](#), the [practitioner's](#) authority to act on behalf of that person ceases, subject to subsection (3), and determines.*
- (3) *Where it is necessary for the purpose of protecting the interests of a person of unsound mind in any legal proceedings or other business, the authority of a [legal practitioner](#), notwithstanding that the [practitioner](#) knows of the mental unsoundness of the person on behalf of whom the [practitioner](#) is acting, continues for the purpose of completing those proceedings or that business.*

It is to be observed, however, that the section merely preserves the lawyer's authority to act; that is, the express authority initially conferred by the instructions of the

¹² **Bowstead & Reynolds**, at para 2-007, citing *Daily Telegraph Newspaper Co Ltd v McLaughlin* (1904) 1 CLR 243, affmd, [1904] AC 776; but cf, *Gibbons v Wright* (1954) 91 CLR 423, at 444-5 (Dixon CJ, Kitto, Taylor JJ); see also, **Dal Pont on Agency**, para 3.2.

¹³ **Bowstead & Reynolds**, at para 10-015 (Article 119), citing *Drew v Nunn* (1874) 4 QBD 661; *Yonge v Toynbee* [1910] 1 KB 215; *Re Coleman* (1920) 24 Tas LR 77; *James v Evans* [2000] 3 EGLR 1; see also, **Dal Pont on Agency**, para 25.17; Enduring Powers of Attorney are, of course, an important exception to this.

¹⁴ **Dal Pont on Lawyers**, para 10.35

¹⁵ It is doubtful if there is any general doctrine, and it seems only to apply to particular, time-honoured, cases (salvage contracts entered into by the shipmaster, and acceptors 'for honour' of a bill of exchange). Nevertheless, a general proposition has been essayed: "*A person may have authority to act on behalf of another in certain cases where he is faced with an emergency in which the property or interests of that other are in imminent jeopardy, and it becomes necessary, in order to preserve the property or interests, so to act*": **Bowstead & Reynolds**, at para 4-001 (Article 33).

client, and the implied authority to do all such things incidental to the object of the representation¹⁶ – including, it may be, authority to compromise a claim.¹⁷ The section does not confer on the lawyer an independent power to make decisions “in the best interests” of the client¹⁸: it merely enables the lawyer to complete the retainer where that is necessary to protect the incapacitated client’s interests, that is, the interests already identified by the client in the terms of the retainer.

The Ethical Dilemma

10. Ethical issues arise where the lawyer, despite conscientious attention to the client’s concerns and wishes, has doubts about the capacity of the client, by reason of mental illness or disability, to give instructions on the subject of the retainer, but the client is unwilling to share the lawyer’s doubts, or is otherwise unwilling or unable to authorise the lawyer to obtain an independent expert assessment of their mental capacity.
11. So the lawyer is confronted with a dilemma. The lawyer is not sure about the capacity of the intending or current client to give instructions, yet does not have the permission of the client, or intending client, to arrange for an expert assessment of mental capacity. The interests of the client, or intending client, may be in imminent need of protection for which decisions perhaps should be made and action taken. We have seen that in the case of a current client with an established supervening incapacity, section 40 of the *Legal Practitioners Act 1981* (SA) preserves the lawyer’s authority to act in protection of those interests – so far as the express and implied terms of the retainer would permit. But without the means of establishing the very lack of capacity which triggers the operation of the section, it provides little protection. What is the lawyer to do? The law offers few, if any answers. This Paper proposes that there are ethical considerations that will assist the lawyer in determining the right course of action.

¹⁶ **Dal Pont on Lawyers**, para 3.75-3.95

¹⁷ **Dal Pont on Lawyers**, para 3.95

¹⁸ Contrast, s 269W, *Criminal Law Consolidation Act 1935* (SA)

Ethical Considerations

12. For the purpose of moral discourse, autonomy has been defined as:

*“the second order capacity of persons to reflect critically upon their first order preferences desires, wishes and so forth and the capacity to accept or attempt to change these in the light of higher first order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives and take responsibility for the kind of person they are.”*¹⁹

In short, it is the capacity to make rational choices about one’s life, and the opportunity to exercise that capacity in one’s own life.²⁰ It is not difficult to see how but a small step leads to a *right* of autonomy or *freedom* to make autonomous choices.

13. A lawyer’s respect for client autonomy is reflected in – perhaps even derived from – the legal relationship, which is grounded in agency. The lawyer as agent cannot, in the absence of the principal’s consent, make decisions or take action as a principal. There is no such implied term in a lawyer’s retainer.²¹ Even if an intending client’s mental competence might be seen as affecting the capacity to enter into a retainer with the lawyer, there is no principle²² that responds to that circumstance by conferring the powers of the principal on the putative lawyer-agent. Accordingly, the lawyer will respect the autonomy and integrity of a client, or intending client, and their right to pursue their own lawful interests²³, including the choice of an option not preferred by others²⁴, or of one which the advising lawyer considers unwise or otherwise “not in the client’s best interests”. Lawyers do not act on their own, or anyone else’s perception, of a client’s “best interests”. A family or community expectation cannot prevail over client autonomy.
14. But the above definition of autonomy assumes the ability to ‘reflect critically’ or to make a rational choice. It leaves no room for the person whose ability to ‘reflect critically’, or to make a rational choice, is compromised or in doubt.

¹⁹ Gerald Dworkin, *“The Theory and Practice of Autonomy”*, (Cambridge, CUP, 1988), at p 20; see also, Joseph Raz, *“The Morality of Freedom”* (OUP, 1986), Chapter 14 (Autonomy and Pluralism), Chapter 15 (Freedom and Autonomy).

²⁰ “a life freely chosen”: Raz, *ibid*, p 371.

²¹ Except by force of legislation. See, for example, s 269W, *Criminal Law Consolidation Act 1935*

²² Again, short of legislation

²³ *The Convention on the Rights of Persons with Disabilities*: Article 3, principle (a)

²⁴ Whether family or community

15. On the other hand, it is a risky exercise to attempt a lay assessment of capacity. There is no agreement on the best method of assessing mental incapacity, and no certainty of result in any method. Some methods might provide some indication of where the client is most likely to be capable of giving instructions, but can only be regarded as a very 'rough and ready' test of incompetence.
16. It might be concluded, therefore, that the lawyer in doubt, but without authority to resolve doubt, will desist from accepting instructions or otherwise acting out of respect for the client's autonomy – or what is left of it. If the client's disability inhibits or prevents – or is reasonably thought to be inhibiting or preventing– critical reflection or reasoned choice, even about an assessment of their own condition, the lawyer cannot act contrary to, or without instructions, as that (it might be said) is a failure to respect client autonomy, and therefore a denial of essential human dignity.
17. But the lawyer's relationship with the client is not limited to respect for autonomy. It is suggested that the lawyer's paramount concern is to ensure that in searching out and propounding a client's claim to justice (in litigation) or to just dealing (the full attention of the law in non-litigious matters) the client is respected and honoured as a person, however disabled in body or mind.²⁵
18. The freedom to exercise autonomous choice is a consequence – but not a definition – of the inherent worth of being human, to which the only human response is one of respect and honour.²⁶
19. On this view, respect for autonomy will not be enough – at least, if that means the lawyer in doubt must desist from acting until the client's mental state is somehow expertly assessed. Rather, it involves enabling the client to identify, retain and exercise such autonomy as they have. It involves searching out and establishing a means of communication that will best enable the client to reclaim their autonomy, and thus to do themselves justice. In all but a handful of rare cases, careful exploration and communication will often allay any doubts about capacity to instruct.
20. People with disabilities – especially the mentally ill or disabled²⁷ - are often patronised, ignored, unheard and dishonoured. The lawyer is there to show that they are valued as complete human beings, that they are to be listened to, and their wants

²⁵ Cp, *The Convention on the Rights of Persons with Disabilities*: Article 3, principle (a)

²⁶ *The Convention on the Rights of Persons with Disabilities*: Article 3, principle (a)

²⁷ Reminder: mental illness is not to be equated with mental incapacity.

and needs honoured. Conduct as in the passage below is the antithesis of an honouring and respectful lawyer:

*“[S]ome lawyers struggle with wanting to appear credible in the eyes of the judge and court personnel. If the client is behaving in a way that indicates severe mental illness, a lawyer advocating for the client’s release may feel foolish. There is a temptation to dissociate him or herself from the client’s ‘craziness’, by adopting a compassionate but condescending manner towards the client, by stating the client’s position, but in a tone that conveys a different message to the court. Lawyers may justify this in individual cases by saying they made a pragmatic assessment that the client would not win, and by ‘rolling over’ in this case are gaining credibility for a future client with a stronger case”.*²⁸

²⁸ Deborah L Rhode & David Luban, *Legal Ethics*, Fifth edition, Foundation Press, 2009, at p 745, citing Costello, “Why would I need a lawyer?: Legal counsel and advocacy for people with mental disabilities”, in *Law, Mental Health and Mental Disorder*, Bruce D Sales & Daniel W Schuman, eds, 1996.

SECTION TWO – From the Ethical Ground Rules to Some Guiding Principles

The foregoing discussion suggests that the following precepts will assist a lawyer to resolve the dilemma here identified.

Doubt as to Incapacity is not to be Expected or Assumed

21. Doubt as to incapacity is not to be expected or assumed. This is a caveat of the first importance.

There is a real concern that, by the very act of writing this paper, lawyers will assume that a state of doubt about an intending or current client's capacity to instruct is something to be expected as a common experience. The concern is that lawyers will too easily assume that they have arrived at that state of doubt – precisely because they think it is to be expected – and will not be suspicious or critical of that belief when it first creeps into their consciousness.

In truth, a state of doubt is a very rare state, and lawyers should be wary, and acutely suspicious if they think they are in it.

There is a Presumption of Capacity at Common Law

22. There is a presumption of capacity to instruct at common law on presentation of adult clients.²⁹

Exhibited symptoms, such as emotional distress, fatigue, inebriation, anxiety, mild depression, should not be mistaken as mental illness, let alone incapacity.

A lawyer is not a medical diagnostician and is not qualified to make assessments about a client's mental capacity.

The Client is to be Valued and Listened To

23. The lawyer's role is to represent that person's claim to justice (the full protection or vindication of the law) or to just dealing (the full attention and application of the law). Lawyers should take the time to search out that claim to justice.

²⁹ *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 – such presumption must be displaced on the balance of probabilities by those seeking to assert otherwise, including where incapacity has been established at a point in time; see also, *Gibbons v Wright* (1954) 91 CLR 423, at 444-5 (Dixon CJ, Kitto, Taylor JJ)

Mental Illness or Disability is not to be Equated with Mental Incapacity

24. Many individuals suffering impairment in some areas retain decision-making capacity in others.

Eccentricity or Imprudence is not to be Equated with Mental Incapacity

25. There is rarely a value-neutral standpoint from which to assess the rationality of another's convictions.

Effective Communication Must be Worked For

26. Lawyers should work assiduously to ensure that the client is being heard. This may take time and effort especially if the client's ability to communicate effectively is inhibited by disabilities that have nothing to do with mental illness or incapacity. Lawyers should make every effort to overcome these inhibitions through patient and sensitive exploration.³⁰

The search is for the client's claim to justice and just dealing, and the lawyer's first task in that search is to help the client to do justice to themselves.³¹ The lawyer will make it known to the client by words and action that this is their 'set and constant purpose'.³²

Lawyers Cannot Substitute their Own View of 'Best Interests'

27. Lawyers should not allow their own personal judgments about the client's perspectives, beliefs, behaviours or decisions to intrude into the lawyer's response to the client's instructions. A family or community expectation cannot prevail over client autonomy.³³

³⁰ For further information refer to Section 4

³¹ See now, *Australian Solicitors' Conduct Rules* (ASCR) (adopted by the Law Society on 25 July 2011) Rule 4. The Superseded Conduct Rules: *Professional Conduct Rules, 2003 (SA)*, Section 12 (**SA PCR 12**) provide legitimate elaboration: A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law and these rules. **12.1** A practitioner must seek to assist the client to understand the issues in the case, and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.

³² *The Institutes of Justinian*, Book 1, Title 1, 'Of Justice and Law'.

³³ The classical view of autonomy assumes, however, the ability to 'reflect critically' or to make a rational choice. It leaves no room for the person whose ability to 'reflect critically', or to make a rational choice, is compromised or in doubt.

Doubt About Capacity Does Not Equate With Incapacity

28. There will usually be a level of capacity about which the lawyer is not in doubt.

It will be a rare case where the client who seeks the assistance of a lawyer will not have some capacity to give instructions in the form of aims and objectives, however general in nature. Doubt about capacity must be distinguished from proof of incapacity.

SECTION THREE – Capacity – Basic Principles

Capacity is Decision Specific /Time Specific

29. The preferred approach when forming a view about capacity is a functional or decision-specific approach.

A “decision specific” approach recognises that:

- (a) capacity is “decision-specific”. It is rare for a person not to have capacity for any decisions, and a person’s capacity to make a decision will depend upon the nature and complexity of the issue;
- (b) capacity may fluctuate, both short and long term, and may be sporadic or constant;
- (c) capacity will be dependent upon the ability of both lawyer and client to communicate effectively.

A “decision specific” approach also recognises that decision making includes a capacity to identify, understand and retain information relevant to:

- (a) contemplated decisions, including the implications of any such decision;
- (b) use of that information for the purpose of making a decision; and
- (c) weighing up information to balance risks and needs.

Apparent Limitations on a Client’s Ability to Understand or Communicate Information Do Not Necessarily Signal Incapacity to Instruct

30. There is an infinite variety in the way people assimilate, use and weigh information. A person’s capacity *to reason and deliberate* (which may be regarded as some guide to an incapacity ultimately to give instructions in the particular retainer) must be distinguished from various degrees of *inability to understand or communicate*

information and lawyers should not assume that inabilities of this kind are evidence of incapacity to instruct.

Capacity to Instruct is not an 'All or Nothing' Ability

31. Incapacity may be temporary; it may fluctuate temporally, or may be partially controlled. An apparent incapacity (such as delusions) may have no impact on the capacity of a client to instruct on matters unrelated to delusional thoughts³⁴.

Different Degrees of Cognitive Ability³⁵ are Required for Different Transactions³⁶

32. There are differing requirements for competence in testamentary acts (wills), commencing or continuing litigation, entering into a contract and completion of transactional paperwork affecting established rights.³⁷

Bad Decisions do not Necessarily Signal Incapacity to Instruct

33. While there is an inherent relationship between decisions made and a person's capacity to make them, caution must be exercised in determining client capacity solely by reference to content or outcome.

Competent persons can and do make seemingly 'bad' or 'unwise' decisions, or decisions that are inconsistent with conventional values.

Some Apparent Incapacity on the Part of the Client Does Not Necessarily Signal Incapacity to Instruct on the Subject-Matter of the Retainer

34. Persons who exhibit some limitation in capacity are not necessarily unable to make choices that meet self-identified best interests relevant to the subject-matter of the retainer.

SECTION FOUR – Taking Instructions

Communication – Exploring and Enhancing Client Autonomy

35. A person's capacity to communicate an instruction to a lawyer is crucial as lawyers will only act on lawful instructions. However, client difficulty in communication does not abrogate the lawyer's obligation diligently to seek a client's instruction, and

³⁴ See Appendix 2 for case study examples
³⁵ ie functionality

³⁶ *Crago v McIntyre* [1976] 1 NSWLR 729 at 739 per Holland, J. See Appendix 1
³⁷ See Appendix 1 for further information about these particular areas of practice

may positively require the lawyer to take further action to ensure effective client communication.

Limitations on effective communication may be physical or temporary and not reflective of client incapacity to instruct.

Early clarification and management of mechanical/cultural/communication /language barriers to effective communication should be undertaken.

Client Focussed Practices will Usually Enable Instructions to be Obtained

35.1 As with any client, emphasis is placed on the professional duties of honesty, personal integrity, candour and frankness.

In the course of a lawyer-client relationship, where the client is indicating some degree of mental illness or disability, the use of normal client focussed practices will often ensure that the client is properly informed, and will enable effective instructions to be obtained.

In the majority of cases these approaches will either permit instructions to be obtained, or result in the client agreeing to receive support or accept intervention, including expert assessment of capacity.

Be Wary of Jumping to Conclusions – Lawyer Self Examination

35.2 At some point in a lawyer client relationship, the lawyer may note behaviour or a pattern of behaviour which raises a real doubt about lack of capacity to give instructions.

Where this doubt emerges, the lawyer should identify and examine the reasons for doubt, in case they should turn out to be attributable to causes other than incapacity (e.g. physiological impediments to communication).

Enhancing Communication – External Aids

35.3 Communication difficulties are often subtle and therefore difficult to detect. Check that any difficulty does not relate to the means or manner of communication adopted. Consider whether the client would benefit from the provision of equipment to aid communication during a meeting.

This applies especially to persons who are illiterate, are hearing and visually impaired, or where non-verbal communication is the primary means of communication.

Enhancing Communication – Choosing Favourable Conditions

35.4 Consider whether there might be a language or cultural barrier which might be addressed by the use of an interpreter (language or neutral), or a language advocate, or whether the client might benefit from a different setting other than the lawyer's office because it is quieter (or less distracting), or a location which puts the actual decision in familiar context, say visiting a locality or domicile.

Would information from the client, such as the time medication is usually taken, impact of types of noise on hearing, variations in levels of anxiety or like conditions, or the best part of a day for understanding, be useful information when arranging to meet with a client?

Enhancing Communication – Breaking Decisions into Component Parts

35.5 Consider how the decision which needs to be made can be 'broken down' into component parts. This is very helpful if the lawyer perceives that the enormity of the process is overwhelming for the client. Proceeding step by step may assist the client to unclutter thoughts and to express them in a way which enables the lawyer to discern objectives (claims to justice or to just dealing). A flow chart for the lawyer's use often assists in this (not least for the lawyer!).

Enhancing Communication – Delaying the Decision or the Process of Decision Making

35.6 Do all of the decisions need to be made now?

Temporal fluctuations in the client's condition may indicate that a short delay in making the decision will remove any doubts as to capacity. But any consequences for the client's position of a later decision will have to be considered too.

Can the decision be made at a later date so that access to a new service or use of equipment can be explored with the client?

Enhancing Communication – Time to Reflect

35.7 Allow as much time as possible for the client to consider the options. It may also be useful for the client to have the options in written form as well as orally. (This may be all the client needs to make a considered decision, and all the lawyer needs to remove any doubts about capacity.)

What may initially appear as a limitation in capacity may, upon adequate time given, reveal that hesitation, frustration or other matters unrelated to capacity were a large factor in presentation. For example, pain or confusion may be a greater distracting factor at certain times of the day, depending on ailments suffered or proximity to a daily event which increases their anxiety.

Seeking Assistance from a Third Party

36. The desire to seek assistance from a Third Party raises issues that require special attention.

Third parties – A Caution

36.1 Having as much information to assist in advising a client is always the preferred position of lawyers.

However, seeking information from apparently helpful, well meaning or ‘innocuous sources’ close to the client is an invasive step and contrary to professional duties if it should occur without the consent of the client³⁸.

Although most people are well intentioned, a person’s familiarity with the client’s lifestyle and with the role of giving practical assistance, can sometimes lead to their overstepping the boundaries of sought after assistance.

Do not assume that a client’s carer or support person knows that the client has sought the lawyer’s advice and assistance.

Do not assume that presence of others will be welcomed or make a client more comfortable. Sometimes it may have the reverse effect and may increase anxiety.

Even where not sought out, family or others may raise issues of lack of client capacity with the lawyer. Where this occurs, the lawyer should raise the matter with the client and explore the extent to which the client concurs

³⁸ **ASCR 9** provides that a solicitor must not disclose to any person information which is confidential to the client and acquired by the solicitor during the client’s engagement unless authorised by the client; the solicitor is permitted or compelled by law to disclose; the information is disclosed in a confidential setting for the sole purpose of obtaining advice in connection with the solicitor’s legal or ethical obligations; the disclosure is required to avoid the probable commission of a serious criminal offence; the disclosure is required to prevent imminent physical harm to the client or another person, or the information is disclosed to the insurer of the solicitor, law practice or associated entity.

with the concern. The client may instruct the lawyer to explore the matter further. Importantly, the lawyer should test the ‘supposition’ with other information known and shared with them.

Encourage Clients but do not Insist

- 36.2 It is appropriate to encourage and support clients in seeking the views and assistance of others. This may involve raising this idea on more than one occasion. However, this does not include ‘overstating’ the importance of the recommendation. There is a fine line between encouragement and insistence. The latter may become overbearing which would be a betrayal of trust, in light of the special position the lawyer holds with the client.

Protections – No Contact without Consent

- 36.3 In the absence of client consent, the lawyer cannot contact persons to obtain further information, support or even understanding as to any limitation of the client’s capacity. To do so would be to override the client’s wishes in breach of client trust and confidence³⁹.

There must be complete transparency and frankness with the client and the client should always be present at any meeting with a third party.

Protections – Confirm with Client

- 36.4 Despite the help that a third person may be able to give, the lawyer should always take time to confirm the client’s instructions **alone** with the client.

Protections – Documentation

- 36.5 The use of a third party should be documented, because it is helpful for all if later there is doubt as to involvement in the decision made.⁴⁰

Third Parties – Providing Information on How the Client Makes Decisions

- 36.6 Sometimes information from a Third Party on how best the client makes decisions may help with communication. Such useful information as the time medication is taken, impact of types of noise on hearing and best part of day for understanding, can be useful information when arranging to meet with a client.

³⁹ This breach of client/lawyer trust and confidence includes information conveyed to the lawyer by the client and in the broader context, information gained about the client as a result of the confidential relationship.

⁴⁰ As to the actual involvement of third parties, see further below, paragraphs 37-38

Third Parties – Participation in Decision Making

37. A third party (family, friend, support worker) might also assist the client in:
- (a) understanding the range of legal options open to them;
 - (b) explaining the consequences of their decision for the wider social, family, medical and financial situation in which the client finds themselves, or which they would wish to be in a position to enjoy.

Third Parties – Assisted, not Substituted, Decision Making – Care is Required

- 37.1 Be careful to ensure that any assisted decision making does **not** involve substituted decision making.

While there are occasions where family members, carers, trusted friends and support persons may aid client communication and explanation, third party assistance is **not** a substitute for taking time to explain the legal consequences of decisions to the client – which is always to be preferred.

Third Parties – Undue Influence?

- 37.2 Be aware of situations where a client may be unduly influenced by another. In such cases the client does not necessarily lack the capacity to instruct, but may be being denied the opportunity to do so. Questions of cognitive capacity and voluntariness of decision making may be closely linked, where those with reduced capacity rely on others for assistance.

Third Parties – Distinguish Third Party Presence from Substituted Decision Makers

- 37.3 The attendance of a third party at an assisted meeting (above) is to be distinguished from situations where a client has appointed another person to act on their behalf in a limited situation, on an ongoing matter, or for a particular purpose, an example being a power of attorney.

Third Parties – Steps before Third Party Attendance

38. Before any third party attends with the client, be clear on the following key steps (having assessed these matters with appropriate documentation) namely:

Define the Scope of Assistance Sought

- 38.1 Be clear as to how the client's limitations in management of their affairs (whether social, money or asset management) are impeded and how the third party might be able to assist practically in this?

If this question cannot be answered satisfactorily, then it may be that 'support in numbers' is the real driver and the assistance sought may not be of real benefit.

The lawyer will be alert to the risk that an assisted meeting may confuse rather than clarify, hinder rather than help. It is for the assistance of the client, not the lawyer.

Clear it with the Client

- 38.2 Ensure the client's consent has been obtained and the client appreciates the limitation of the third party's attendance.

Enable the Client to Retain Control

- 38.3 Be aware that some clients will surrender control to third parties out of habit or convenience. It is important to ensure that the client retains control by giving a consent which is conscious and deliberate.

Be Aware of Benefits or Advantages which may Preclude the Third Party Attending

- 38.4 Make sure that the third party does not have any interests (such as benefit or advantage) which should preclude their attendance.

In addition, if during the assisted meeting the lawyer becomes concerned that the client's choices are being overborne, or there may be advantages not previously recognised, then the lawyer must feel free to ask the third party to leave the meeting to enable the lawyer to talk to the client in private. It may be possible to continue with the assisted meeting after speaking with the client.

Avoid Indirect Disclosure of Instructions

- 38.5 The prohibition on contact without instructions includes avoiding any situation in which:

- (a) the lawyer expressly discloses doubt about the client's capacity; or
- (b) interested others 'discover' the instructions or the lawyer's concern about capacity.

This is not a trivial matter. Disclosure by a lawyer of client information or of doubt about client capacity (whether intended or not), may lead to relatives overriding a client's wishes by commencing a process intended to

assess capacity, or taking proceedings before a body such as the Guardianship Board.

Even if the lawyer thinks that these steps might be desirable in a given case, their unilateral initiation is no part of the lawyer's role, which is to uphold and enhance the client's autonomy.

Define to Third Party the Scope of Assistance

38.6 Where consent for a third party to attend is given, confirm with the third party prior to meeting that they are not there to recommend, or be persuaded of the best decision for the client. Confirm with them that they are merely present to assist the client in understanding the choices and their wider impact on the client's life, because of the unique regard in which they are held by the client.

But not the Advice etc. Given

38.7 Prior to the agreed meeting, avoid engaging with the third party (at least in a detailed way) as to any advice regarding various options and consequences, as (with any meeting) the client may withdraw their consent for the assisted meeting and the position of trust with the client is then compromised.

Client's Own Instructions Paramount

38.8 The client's instructions are paramount and the assistance of a third party will always be supplementary. Any information provided by a third party must be both evaluated and confirmed by the client before being acted upon.

Expert Assessment

39. Lawyers are not experts in determining mental capacity of clients. In situations of doubt, an assessment by a medical practitioner of a client's capacity to instruct for that transaction is indicated.

Expert Assessment – Only After Informed Consent

39.1 Expert assessment should only occur after a fully informed consent is obtained from the client. This involves discussion about benefits and risks, and warnings as to likely outcomes and impact on other aspects of their life (such as the loss of control over financial and business affairs) beyond the proposed transaction.

Where a client refuses an assessment, and doubt still remains as to their capacity to instruct in respect of the particular retainer, the lawyer is placed in a difficult position.

At this point it will not have been determined that there is a lack of capacity to instruct. There is merely an untested concern as to that state of affairs.

It may be that the lawyer's understanding of the client's skills and communication preference is incomplete.⁴¹

Encourage Client to Review Refusal to be Assessed

39.2 Where a client has refused an assessment of capacity, whether by a general practitioner or other health professional, it is appropriate to **revisit** this opportunity with the client, after a time or on a change of circumstances, where:

- (a) initial concerns as to lack of client capacity in the context of the contemplated instruction remain;
- (b) other options listed above have been fully explored and rejected, or are not available, including use of an appropriate support person; and
- (c) the possible consequence of being unable to act further on their behalf has been fully explored with them.

SECTION FIVE – Limitations for the Lawyer

What the Lawyer Cannot Do

40. Where, despite a careful and determined resort to the foregoing practical steps, doubt about the client's capacity to understand advice and give instructions remains an obstacle, the lawyer should reflect upon the position reached. The following methods of overcoming the obstacle are **not** available.

- A lawyer **cannot** unilaterally seek instructions from a third party (for example, a family member) because, for reasons already discussed, the lawyer can act only on the client's instructions and is bound by obligations of confidence even if an approach to a third party were thought to be in the interests of the client.

41

See paragraph 35

- A lawyer **cannot** seek legal protection for a client as this entails revealing confidential information about the client to a third party.
- A lawyer **cannot**, in the absence of express instructions, act in what the lawyer believes to be the client's best interests.⁴²

But No Abandonment

41. Where the lawyer lacks instructions for the job in hand because of unresolved doubt as to client capacity, whether it be as to client inability to communicate, reason or understand, some may suggest that the only remaining ethical option is to cease to act for the client.⁴³

The action indicated by the ethical considerations underlying these Guidelines is not, however, to cease to act, but rather to remain with the client even if nothing can be done. That is the action which, as a matter of justice, is due to them as a living human being. By remaining, rather than withdrawing, the lawyer is able to respond to any change for the better in the client's ability to communicate, and at the very least, able to give the client a real sense that they are not abandoned.

Nevertheless a permanent impasse will be rare. Client-focussed practices, raising and openly discussing concerns about capacity, and advising the client to seek assessment of capacity and protective support, will usually permit instructions to be obtained, or result in the client agreeing to receive support or accept intervention.

The Lawyer-Client Relationship as a Resource

42. Do not underestimate the value of the ongoing relationship with the client, including the history accumulated as to their method of decision making, previous decisions made, reasoning, hopes and longer term plans.

This information is of inestimable value. It is only rarely that another lawyer will be able to assist with the same level of knowledge and background information regarding a client.

⁴² It has been suggested by some that section 40, *Legal Practitioners Act, 1981* (SA) contains a statutory mandate to a lawyer under an existing retainer to continue to act for a client suffering a supervening incapacity despite that incapacity, and for that purpose to act in the client's best interests. It is thought that s 40 does not go that far.

⁴³ **ASCR 13** provides that a solicitor must complete the legal services required by the engagement unless otherwise agreed; discharged by the client; the law practice terminates the engagement for just cause and on reasonable notice to the client; the engagement comes to an end by operation of law.

Beware of assuming that another lawyer ‘would do a better job’, achieve an improved outcome, or exhibit better skills in dealing with the situation.

Ceasing to Act

43. However, if the lawyer has no instructions on which to act they are obliged at least to advise the client of their inability to act and to explain fully and frankly both the direct and indirect consequences. The lawyer must accept the possibility that the client may react by terminating the retainer, even though the lawyer might not move to do so.

If client distress seems likely, support persons may be needed.⁴⁴

Review and Document

43.1 Whenever the lawyer concludes that they are unable to act further (whether or not that results in termination of the retainer), they should immediately review the client’s position at the point of impasse, by reference (if needs be) to the client’s file. In particular, the lawyer will:

- (a) document the point at which they were unable to complete a client’s instructions; and
- (b) consider those steps still able to be taken to preserve the client’s position (such as avoiding detriment caused by inactivity, or limiting or precluding advantage to another at client expense).

What about Protecting the Client’s Position?

43.2 The immediate dilemma for the lawyer will be, on the one hand, the risk of leaving the client unprotected in legal process in the event of termination, and, on the other hand, the temptation to take action without instructions from the client, or to breach the client’s confidence by taking guardianship proceedings resulting in the client losing some or all of their legal rights⁴⁵.

Each of these should be unpalatable to the lawyer.

⁴⁴ See paragraph 38

⁴⁵ This action not only breaches confidence of the client, but breaches the lawyers duty of loyalty, to advance the client’s interests (assuming that a client does not want intervention).

S 40 of the Legal Practitioners Act (SA)

- 43.3 S 40 of the Legal Practitioners Act (SA) permits a lawyer under an existing retainer to take action to protect a client's position where the lawyer is not able to obtain further instructions due to mental incapacity.

The extent of this permission has not been tested, but it is couched in terms that suggest it could be relied upon to take interim procedural or protective steps in a current dispute or transaction. There is little guidance on whether (for example) it can extend to accepting an offer of settlement or signing a legally binding document, without further instructions.

Handing over to another Lawyer

- 43.4 Where it is determined by the client (after consultation with the lawyer), that the matter would be better handled by another lawyer, immediate steps should be taken to ensure that all notes are up to date.

This includes assessments of difficulties encountered when acting for the client at various stages, their instructions at each stage, the basis for taking certain courses of action, the avenues explored and rejected, the assistance received, both material and human. These types of matters should be recorded as a matter of course.

- 43.5 Other action taken by another lawyer does not negate the appropriateness of the action taken by on the client's behalf. Ultimately, there is never a 'right' outcome for any client, only action taken on clear and tested instructions, after careful professional evaluation and explanation of all options explored. What is critical is evidence of the basis on which the client's decision has been made in this case, by appropriate documentation of the client's considerations and assistance given in evaluating the options.

APPENDICES

Appendix 1: Particular Areas of Practice

Wills and Powers of Attorney

Wills

The classic statement regarding testamentary capacity is contained in the case **Banks -v- Goodfellow (1870) LR 5QB 549** –

“It is essential to the exercise of (testamentary) power that a Testator shall understand the nature of the Act and its effects, shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind has been sound, would not have been made”.

It now appears well established that there are three essential elements required for testamentary capacity. A Testator must:

- “(a) comprehend the nature of what is being done, and its effects;*
- (b) realise the extent and character of the property being dealt with; and*
- (c) weigh the claims which naturally ought to press upon him when making his Will”⁴⁶*

In practical terms, the Testator must understand that the document being signed is intended to give directions about disposal of property after death, must have some knowledge of the property owned and its relative value at the time the Will is made, should be able to name close family members, and must make decisions about the level of property they might receive under the terms of the Will.

The solicitor taking instructions for a Will must necessarily obtain personal details from the Testator, information about the financial position of the Testator, family details including current partners, whether legal or defacto, previous relationships and their financial outcome, children, grandchildren and details of other persons whom the Testator wishes to benefit, or alternatively, wishes to exclude with some explanation for the exclusion if possible.

⁴⁶

In the Will of Wilson (1897) 23 VLR 197

If, during the course of obtaining this information, the solicitor suspects any lack of capacity, the solicitor should further question the Testator to ascertain additional information which may assist in identifying a problem with mental capacity, which would impact upon testamentary capacity.

In many instances, discussion with the Testator regarding aspects of everyday life will assist the solicitor to identify a possible issue of testamentary incapacity. Enquiries regarding the Testator's ongoing ability to manage his or her financial affairs such as attending to payment of accounts and understanding bank statements may be useful. Similarly, a lack of proper understanding might be revealed through discussions about personal behaviour, interaction with family and friends, eating habits, and ability to manage medication. Solicitors should be aware that older clients who may lack capacity will often present in a manner which does not initially reveal any difficulties, but they may be particularly reliant upon adult children who have accompanied them and frequently request responses from the children when questioned, rather than providing their own individual responses to the solicitor's questions.

Powers of Attorney

The mental capacity required to execute an Enduring Power of Attorney was considered in the case of **Re K (1988) 1 Chancery 310**, at 313-

“The Act does not specify the mental capacity needed to execute an enduring power and the answer must therefore be found in the common law. It is well established that capacity to perform a juristic act exists when the person who purported to do the act had at the time mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and the effect of that particular transaction: see In re Beaney Deceased (1978) 1WLR770. In principle, therefore, an understanding of the nature and effect of the power was sufficient for its validity”.

Hoffman J. proceeds to itemise 4 basic elements comprising “*the nature and effect*” of an Enduring Power of Attorney. He considered it necessary for the donor of an Enduring Power of Attorney to understand that:

1. the Attorney can assume complete authority over all of the donor's assets and affairs;
2. the Attorney can in general do anything with the donor's property which the donor could have done personally;

3. the authority of the Attorney will continue, notwithstanding the donor becomes mentally incapable; and
4. if the donor subsequently becomes mentally incapable, the power remains irrevocable without any confirmation by the Court.

Because the Attorney appointed under an Enduring Power of Attorney does not receive any absolute interest in the property of the donor, and such appointment does not result in a transfer of interest in the donor's property, it is often considered that the level of capacity required by a donor, in comparison with the level of testamentary capacity required by a Testator, is somewhat less. However, it is still necessary to ensure the donor has a full understanding of the implications of an Enduring Power of Attorney, particularly because the failure of an Attorney to fulfil their duties might result in considerable loss to the donor and/or the beneficiaries named in a donor's Will.

In the same manner as the solicitor might seek to be guided about the mental competency to give instructions for a Will, a solicitor might also utilise discussions with a potential donor about financial affairs, personal relationships and everyday life, as a means of considering capacity to provide property instructions so that a valid Power of Attorney might be executed.

Appointments of Enduring Guardian, Medical Powers of Attorney and Advance Directives

Appointments of Enduring Guardian (Enduring Power of Guardianship) and Medical Powers of Attorney

What are Enduring Powers of Guardianship (EPG)?

An EPG is made pursuant to Section 25 Guardianship and Administration Act, 1993 (the G&A Act). The purpose of the document is to appoint an enduring guardian to exercise the powers at law or in equity if the grantor becomes mentally incapacitated and therefore is unable to do so himself/herself. This authority extends to the power to consent to or to refuse medical treatment unless the grantor has appointed a person as a medical agent. (For the purposes of the G&A Act, medical treatment will include dental treatment but will not include “prescribed treatment” such as the termination of a pregnancy or sterilization, except in particular circumstances described in sections 61, 62). The powers of a guardian include the ability to decide:

- where the grantee is to live;
- what education or training the grantee may receive;
- whether the person may work and the nature of that work.⁴⁷

An EPG only becomes effective upon the grantor losing capacity to make decisions for himself/herself.

The grantee of an EPG must be over 18 and must not be a person involved directly or indirectly in the medical care or treatment of the person.

An EPG may be subject to conditions, limitations or exclusions.⁴⁸

EPG Formalities

An EPG must be in the form set out in the Schedule to the G&A Act or substantially similar to it.

The EPG must contain an acceptance in the form set out in the Schedule or substantially similar (the effect of that requirement is that the grantee states that s/he accepts the appointment, will act honestly in the role and in accordance with the principles stated in the Act).

⁴⁷ Halsbury's Laws of Australia, Vol 20.9[92]
⁴⁸ Section 25(5), G&A Act

The signature of the grantor and the signature of any guardian must be witnessed by an Australian JP, commissioner for taking affidavits in the Supreme Court of SA, proclaimed bank manager, postmaster or police officer, or minister of religion or a notary public.

The person witnessing the signature of the grantee must provide a certificate stating that the grantee signed freely and voluntarily and appeared to understand the effect of what they were doing.

There is no requirement for registration.

What is a Medical Power of Attorney?

A medical power of attorney is made under the Consent to Medical Treatment and Palliative Care Act for the purpose of appointing an agent with power to make decisions about “medical treatment”.

A medical power of attorney only becomes effective when the grantor loses the capacity to make these decisions about himself/herself.

A medical power of attorney authorises the agent, subject to any conditions and directions contained in the medical power of attorney, to make decisions about the medical treatment of the person who granted the power if that person is incapable of making decisions on his or her own behalf.⁴⁹

The grantee of a medical power of attorney must be over 18 and must not be a person involved directly or indirectly in the medical care or treatment of the person.

The grantee must act in a way which the grantee genuinely believes is in the best interests of the grantor, but subject always to any specific instructions in the document.⁵⁰

The medical power of attorney does not authorise the agent to refuse food and water, drugs to relieve pain or distress, or medical treatment which would result in the grantor regaining capacity to make decisions about his or her own medical treatment, unless the grantor has made an advance direction to this effect (see below).⁵¹

Medical Power of Attorney Formalities

A medical power of attorney must be in the form set out in the form prescribed by regulation or in a form to similar effect.

⁴⁹ Section 8(7), Consent to Medical Treatment and Palliative Care Act, 1995

⁵⁰ Section 8(8), Consent to Medical Treatment and Palliative Care Act, 1995

⁵¹ Section 8(7), Consent to Medical Treatment and Palliative Care Act, 1995

If more than one agent is to be appointed, they cannot be appointed together but must be appointed individually and in substitution for one another.

The medical power of attorney must be witnessed by an authorised witness who completes a certificate in the form prescribed by regulation or in a form to similar effect.

The signature of the grantor and the signature of any nominated guardian must be witnessed by a JP (anywhere in the world), a commissioner for taking affidavits in the Supreme Court, a proclaimed bank manager, postmaster or police officer, or minister of religion or a registered pharmacist.

The person witnessing the signature of the grantor must provide a certificate stating that the grantor of the medical power of attorney signed it freely and voluntarily and appeared to understand the effect of what they were doing.

The medical agent must sign an acceptance which states that the agent will accept appointment as a medical agent under the medical power of attorney and will undertake to exercise the powers conferred honestly, in accordance with the conditions and directions set out above, and, subject to that, in what s/he genuinely believe to be the principal's best interests.

There is no requirement for registration for either an EPG or medical power of attorney to be valid, however, a register has been established under the Consent to Medical Treatment and Palliative Care Act, 1995, and it is possible to register the medical power of attorney.⁵²

Capacity Considerations for the Grantor of an EPG or a Medical Power of Attorney?

General Principles

The general principles relating to capacity apply to EPGs and medical powers of attorney. Those principles may be summarised as follows:

- there is a presumption of capacity;
- in general terms, the client must be capable of understanding the broad nature of what s/he is doing;
- in relation to a particular decision, the client must:
 - › be able to understand the information being given;
 - › be able to make a decision on the basis of the information given after having weighed and appreciated the positive and negative consequences of it;

⁵²

Section 14, Consent to Medical Treatment and Palliative Care Act, 1995

- › be able to communicate that decision.

Capacity considerations special to EPGs and medical powers of attorney are spelt out in the formalities concerning signing. In relation to both EPGs and medical powers of attorney, the requirement is contained in the certificate of the witness – i.e. that the grantor:

- signed the document freely and voluntarily; and
- appeared to understand the effect of the document.

These issues are addressed in the paragraphs below.

Practical guidelines

Note: A client should have capacity both when giving instructions for the preparation of an EPG or medical power of attorney, and when signing the EPG or medical power of attorney, however, if the validity of the document is later challenged on the basis of lack of capacity it will be crucial to be able to establish capacity at the time the document is signed.

- (i) Where there is no indication of a lack of capacity

For the vast majority of clients, capacity is not an issue. For these clients the lawyer will be able to establish quickly that the client has the necessary capacity to make an EPG or medical power of attorney by asking the client to confirm:

- the purpose of their visit;
- the general nature of the document;
- the precise nature of any specific directions to be included in the document;
- the person(s) whom they are appointing;
- any other specific directions in the document.

- (ii) Where there is concern that the client may have a lack of capacity

The first step should be to ascertain whether the client has capacity in a general sense, by asking questions such as:

- what day/date is it?
- what is your address?
- what is your date of birth?
- who is the prime minister?

and then go through the questions specific to the nature of the document outlined in paragraph (i).

After the questioning process, if the lawyer is satisfied that the client has the necessary capacity, then the client can sign the document and it can be witnessed in the usual way. However, a detailed file note of the process undertaken to establish capacity should be made.

(iii) What should be done where there is uncertainty about the client's capacity?

In these circumstances further steps should be taken to ascertain whether or not the client has the necessary capacity. For example, a certificate could be obtained from a medical practitioner (preferably a person who knows the client and has been providing treatment for a period of time) to the effect that on the day the document is signed by the client, the medical practitioner holds the view that the client has the capacity to sign the EPG or medical power of attorney, and in particular, understands the general nature of the document, knows and approves of the person to be appointed, and is aware that that person will have the authority to make medical and dental decisions on their behalf should they lose the capacity to do so themselves.

If it is not possible to obtain a certificate from a medical practitioner, then a second opinion should be obtained from another legal practitioner. Again a detailed file note of what has occurred, the conclusions about capacity and the reasons leading to that conclusion should be made.

(iv) What should be done where the client does not have a good grasp of the English language or may be illiterate?

Obviously, in itself this will not mean that the client does not have the capacity to make an EPG or medical power of attorney. The difficulty may arise when conveying their understanding of the document, and their ability to read the document.

If there is concern that the client may be unable to read the EPG or medical power of attorney document due to illiteracy, then the lawyer may offer to read it to them, and provided they are then able to summarise the effect of the document verbally then they have adequately demonstrated their capacity. However, the signing clause should be modified to reflect the situation (see a suitable text on wills for an appropriate clause).⁵³

53

Hutley's Australian Wills Precedents, any edition, contains an appropriate clause.

If the client is unable to read the English language, but is able to understand it, the lawyer may offer to read it to them, and provided they are able to summarise the effect of the document verbally then they have adequately demonstrated their capacity. Once again, an appropriate signing clause should be used.

If the client is unable to read or understand the English language, then an interpreter will have to be arranged. Considerations of undue influence (see paragraph below) must be kept in mind, and the lawyer will have to use judgment about whether or not to insist on an independent (professional interpreter). This might arise, for example, where:

- the grantor appoints the person interpreting as the grantee (or an immediate relative of the grantee);
- other immediate family members are omitted from the role in circumstances where they could be expected to be included;
- there is a sudden change in arrangements without any adequate explanation as to why.

Again, an appropriate signing clause should be used.

(v) Considerations of undue influence

It is not uncommon for clients (particularly those who are elderly or frail), to be accompanied by another person when attending at an appointment to sign an EPG or medical power of attorney. This should not be automatically regarded with suspicion, but should be treated with caution depending on the circumstances.

In order for an EPG or medical power of attorney to be valid, it must have been signed voluntarily. Circumstances which might suggest that the client is being unduly influenced would include:

- if the person accompanying the client answers questions directed to the client;
- if the person accompanying the client gives the client directions about answering questions;
- if the EPG or medical power of attorney is in favour of the person attending with the client in suspicious circumstances (e.g. where other family members have been omitted and the lawyer might reasonably have expected them to be included).

If there is concern that the client may be under the influence of another person, the lawyer should try to see the client independently of the other person to ensure the client is not being unduly influenced. A detailed file note of the interview should also be made.

Capacity Considerations for the Grantee of an EPG or Medical Power of Attorney

The lawyer may be asked to witness the signature of the grantee of an EPG or medical power of attorney. The requirements of the legislation for the grantee's signature to be valid are that the person witnessing the grantee's signature must be satisfied that the grantee:

- signed the document freely and voluntarily; and
- appeared to understand the effect of the document.

In other words, the legislation places the same obligations on the witness of a grantee's signature as for the witness of a grantor's signature.

Therefore, in general terms the same principles apply to establishing the capacity of the grantee of an EPG or medical power of attorney. In practice, situations of doubtful capacity are less likely to occur with grantees, particularly in relation to undue influence.

Advance Directions

What is an Advance Direction?

The purpose of an advance direction (or anticipatory directive) is to give a direction about the medical treatment the person wants or does not want if he or she is at some future time:

- in the terminal phase of a terminal illness or in a persistent vegetative state; and
- is incapable of making decisions about medical treatment when the question of administering the treatment arises.⁵⁴

The significant difference between an advance direction and an EPG or medical power of attorney is that an advance direction is not made in favour of an individual (i.e. it does not appoint an agent or attorney to perform the instructions contained in the document). The advance direction contains instructions as to the provision (or withholding of the provision of) certain treatment in particular circumstances. However, a medical agent or guardian must comply with the directions and it is possible to include the terms of an advance direction in the attorney or guardian appointment.

⁵⁴

Section 7, Consent to Medical Treatment and Palliative Care Act, 1995

A common form of wording used in advance directions is that no life-sustaining measures be taken at the point when the person is in the terminal phase of a terminal illness or in a persistent vegetative state, and that only palliative care measures will be administered.

Advance Direction Formalities

An advance direction must be in the form prescribed by regulation (there is no option for it to be in substantially the same form – cf with EPGs and medical powers of attorney).

The advance direction must be witnessed by a JP (anywhere in the world), a commissioner for taking affidavits in the Supreme Court, a proclaimed bank manager, postmaster or police officer, or minister of religion or a registered pharmacist.

The form of witnessing requires the witness to state that the document was signed in his/her presence and that the person making the direction appeared to understand the nature and effect of the document.

The advance direction does not need to be registered in order to be valid, but may be registered on the register established under the Consent to Medical Treatment and Palliative Care Act, 1995.

Capacity Considerations for an Advance Direction

General Principles

The same general principles apply to advance directions as those described above in relation to EPGs and medical powers of attorney except for the requirement to establish that the person making the direction does so freely and voluntarily (This is because it is inherently unlikely that another person will be attempting to influence the person making the direction).

- Capacity considerations special to advance directions are spelt out in the formalities concerning signing. They are that the person making the directions appeared to understand the nature and effect of the direction.

Practical Guidelines

The same practical guidelines can be used for establishing capacity for an advance direction as those described above in relation to EPGs and medical powers of attorney except that there is no need to address questions of undue influence.

Litigation Practice

In the assessment of a client's mental capacity, the following principles may be gathered from the valuable judgment of DeBelle J in *Dalle-Molle v. Manos*.⁵⁵

The law in Australia requires that a person who enters into a transaction or executes a document should have the mental capacity to understand the nature of the document or the effect of the document.⁵⁶

Examples of the kinds of transactions in which mental capacity may arise include the following:

- entering into a contract;
- making a will or other testamentary disposition;
- executing a power of attorney;
- executing a deed;
- entering into marriage;
- consenting or refusing to consent to medical treatment.

All adults are presumed to have capacity, and those who assert the contrary bear the onus of proof.⁵⁷

The level of understanding required depends on the particular transaction, and may be described as the capacity to understand the nature of that transaction when it is explained.⁵⁸

The required mental capacity is relative to the particular transaction contemplated;⁵⁹ and the required capacity is the capacity to understand the nature of the transaction when explained.⁶⁰

The Rules of Court state the required capacity for a party to litigation.⁶¹

The required mental capacity is the capacity to give sufficient instructions to take, defend or compromise legal proceedings. Specifically, the 2006 Rules require a capacity "to

⁵⁵ [2004] SASC 102.
⁵⁶ *Dalle-Molle* at [16]: Note - all references hereafter will be to *Dalle-Molle* unless otherwise indicated
⁵⁷ At [17]
⁵⁸ At [18]; see also, *Gibbons v. Wright* (1954) 91 CLR 423, 441
⁵⁹ At [19]
⁶⁰ At [19]
⁶¹ 2006 Rules, Rule 78, 79, and see definition of "disability" in Rule 4; 1987 Rules, Rule 35 and definition of "person under a disability".

make rational decisions about taking, defending or settling proceedings (or to communicate decisions to others)”.⁶² This requirement may be further elaborated.

The required capacity is a capacity not only to give sufficient instructions to prosecute or defend, but also to compromise proceedings for which there must be, according to common law principles, capacity to contract.⁶³

“Sufficient *instructions*” means that, once appropriate explanation has been given, the person is able to understand the essential elements of the action, and is able then to decide whether or proceed or whether or not to compromise the action.⁶⁴

The understanding must be in relation to the facts and subject matter of the particular litigation and the issues in that litigation.⁶⁵

“*Unable to give sufficient instructions*” does not mean slow to give instructions.⁶⁶

The required level of understanding of legal proceedings is not limited to an understanding in broad terms of what is involved in the decision to prosecute, defend or compromise. The explanation - and the understanding - must extend to the nature and purpose of the litigation, its possible outcomes and the risks in costs.⁶⁷ For example, there may be two defendants and two different issues and a question arising as to whether to compromise with one but not the other.⁶⁸

The capacity to give sufficient instructions is not determined by whether the client has the required mental capacity to make other legally effective decisions in day to day affairs, although that will be relevant.⁶⁹

If the condition suffered renders the client vulnerable to exploitation or places the client at risk of making rash or irresponsible decisions, it does not necessarily follow that the client is unable to give instructions, although those considerations are relevant to that question.⁷⁰

Overall, it may be said that what is being looked for is a capacity to understand and retain the information relevant to the contemplated decisions, including the implications of any decision made and a capacity to use that information in the decision-making process.

⁶² 2006 Rule 4.

⁶³ At [21]

⁶⁴ At [22]

⁶⁵ At [23]

⁶⁶ At [24]

⁶⁷ At [25]-[26]

⁶⁸ At [23]; see also, *Gibbons v. Wright* (above) at 438-9

⁶⁹ At [27], citing *Masterman-Lister v. Brutton & Co* [2003] 3 All ER 162 at [17], [73].

⁷⁰ At [27], citing *Masterman-Lister* (above) at [78]

Whilst a decision that has no logical or reasonable basis may indicate a lack of capacity, the assessment of what is reasonable should not be too rigid or rigorous: capable minds can differ on what is reasonable.⁷¹

Appendix 2: Case Studies

Introductory Remarks

A number of hypothetical scenarios will be considered, all of which originate in one of the following ways:

Instructions have been Taken and the Person Loses Capacity.

The lawyer may be able to rely on Section 40 *Legal Practitioners Act, 1981* (SA) (LPA) consistent with previous unaffected instructions.

New Instructions

There are two possibilities:

Scenario 1

The person has individually sought your advice.

In order to be in your office at least some of the following **must** have occurred - all of which involve, and demonstrate, a measure of capacity. The origin of the problem which brought the client to your office may result from some form of mental illness or disability, but the person probably will not lack legal capacity to instruct you because:

- they must have recognised that there is a problem;
- they must have recognised that they need to do something;
- they must have recognised that that involves seeing a lawyer;
- they will most likely have taken steps to make an appointment but if not;
- they must have got themselves to your office by whatever means;
- they have then been able to tell you something is wrong and ask if you can help.

This may take considerable time and patience on your behalf.

It is likely that you will be able to act for this person.

They may not at that stage understand the full range of solutions you may have on hand but as a client centred lawyer you can address these carefully at the right time as needed.

If the matter is complex *Dalle-Molle v. Manos*⁷² provides guidance.

Scenario 2

(a) The person has individually sought your advice and has met all the criteria above under Scenario 1 but the instructions are perverse/unlikely to be successful.

Perhaps the instructions are based on a delusion and that delusion itself is the source of the cause of action the person proposes rather than the cause /origin of the legal problem.

Can you act and if so what do you do?

See below, “**Joan’s**” case study.

(b) They have brought a support person.

If indeed they appear to lack capacity, the support person may consider applying pursuant to the *Aged and Infirm Person’s Property Act 1940* (SA) (**AIPPA**) if there is a vulnerable position to be addressed, or assets to be preserved.⁷³

You can advise the support person to seek independent legal advice about the matter.

The issue of fluctuating capacity has not been considered in the scenarios as this is addressed in the guidelines above.

Carol’s Case Study

Carol has a firm and fixed delusion that her ex-husband and adult son are entering her house at night and tapping into her phone lines and electrical circuits so that she is under constant surveillance (she is experiencing auditory hallucinations/ she can hear footsteps, tapping and buzzing). The delusion has some attachment to reality as she recently replaced several electrical appliances (including a TV and computer) after a power surge.

Scenario

Carol decides that it will be a good idea to outsmart her ex-husband and son if she sells the house and moves and keeps the address silent. She finds a not too kind real estate agent who rips her off on the house sale. Carol is happy just to be away from there and does not

⁷² (2004) 88 SASR 193

⁷³ It should be remembered, however, that authority suggests that the Act does not go so far as to confer on the manager a power to maintain an action to set aside a past disposition of the protected person on the ground of undue influence or the like: property so disposed of does not form part of the real or personal estate of the protected person until it is re-vested “by, or in pursuance of, a decree” in the exercise of the equitable jurisdiction to set aside transactions: *Jenyns v Public Curator (Q)* (1953) 90 CLR 113, at 135-137. But that is not to say that an appointed manager might not also become the Litigation Guardian under the relevant Rules of Court.

mind that she has lost a lot of money on the sale and now has to move into rented Housing Trust accommodation.

Consideration

Various consequences may follow.

First consequence: Carol does not seek your advice as she is happy with the situation.

Second consequence: a concerned third party (e.g. Carol's son /friend/ social worker) finds out and comes to see you as they are concerned about the loss of Carol's property.

Further consideration: the concerned third party may be able to seek advice as to how Carol's losses might be recovered. Whether you can do that depends on whether your client is Carol or the concerned third party.

NB - Carol might not like this however.

Third consequence: Carol realises she has made a mistake and comes to see you.

Further consideration: See Introductory Remarks above.

She must have a measure of capacity to give you basic instructions to do what you can to get the deal set aside.

If complex, and lacking prospects, *Dalle-Molle*⁷⁴ provides guidance.

Fourth consequence: Carol gives initial instructions but gets sick again.

She says that she does not want you to proceed because she received a message through her tapped phone from the Archbishop who told her that the real estate agent needed the money he made from the transaction. She is currently detained.

Further consideration:

(a) Section 40, LPA allows you to act on her previous unaffected instructions to preserve the situation until she recovers.

(b) From a practical perspective it would be highly likely that the situation would come to the attention of the hospital and social workers who would more than likely take steps to tell family and they can seek advice as to how to preserve the situation.

Ray's Case Study

Ray has a fixed delusion that his neighbours are coming through the roof cavity of his Housing Trust unit (which has joint walls and a common roof space) and are moving his belongings about the house. He believes several items have been stolen. He has been banging on his neighbours' doors and threatening them.

Scenario 1

The HT are evicting him. He has a letter and he comes to see you to see if you can help him.

Consideration

He does not want to be evicted/ he has sought advice.

He probably has capacity to instruct – See Introductory Remarks above.

The origin of the problem (his delusions) does not stop him being able to give you instructions to help him. You can on those instructions arrange a meeting with the HT manager and advocate on his behalf. There may be a solution like moving him to a house where there is no joint roof or getting the HT to agree to install bolts on the inside of the manhole. But he does have capacity despite his delusions and the fact that they have caused the problem.

His accommodation is protected.

Scenario 2

Ray wants you to issue restraining orders against the neighbours.

This is more difficult as the origin of the cause of action is his delusion.

Consideration

Do you just refuse to act as he is giving perverse instructions with no possibility that they will be believed by the Magistrate?

Or do you treat him like any other client and explain that his scenario most probably will not be accepted by the Magistrate, and more evidence will be needed to justify action. Of course this is itself fraught with difficulties, as he is unlikely to have the means to get surveillance done etc. But at this point you might still try to get him to consider a meeting with the HT and getting them to agree to bolts on the manhole.

The point is that you would treat him as any other person who gives perverse instructions rather than reject him because he is delusional.

Joan's Case Study

Joan firmly believes that she is a member of the Danish royal family and is waiting for the Danish government to come and rescue her from Australia. The basis for the delusion seems to be that she grew up in Tasmania in the same area as Princess Mary who is about the same age as her own daughter. She has written many letters to Denmark and received no response. She cannot understand why they do not come.

Scenario 1

Joan is on a Continuing Detention Order and is locked up in Glenside and has been for many years. She has appeared before the GSB who confirmed the detention and has now lodged an appeal. You are representing her.

Case notes reveal that Joan has had periods outside detention in the past and it has never worked and she has been at risk. Joan tells you she wants another go at living independently.

Consideration

She would appear to have capacity to instruct you about the appeal:

- she knows that she is currently unable to leave Glenside at will;
- she knows she is detained;
- she knows that there is a life outside of Glenside and wants that for herself.

Whether she has compelling grounds for an appeal and will be successful, is up to the Tribunal.

Scenario 2

Joan says she wants to sue the Mental Health Services for keeping her away from her real family in Denmark.

Consideration

Here, as well as being the cause or origin of the problem that has led her to consult you, the delusion itself is the source of the client's proposed cause of action.

Consider how this situation differs, if at all, from any other case where the client who obviously has capacity gives perverse instructions or instructions to take action which has no real prospect of success?⁷⁵

Why would we not do the same with and for the person whose delusion fails to identify an arguable cause of action? In such circumstances there seems to be a strong case for **not** recommending that the client submit to the potential distress of an assessment?

These considerations suggest an early question where capacity is in doubt: “are the instructions such that, even if there were no issue of capacity, professional ethics would permit you to act on them?”

Karen’s Case Study

Karen is on a Community Treatment Order and is being forced to take medication she does not want. She wants to appeal the order and tells you that her health professionals hate her and the medication they are giving her is actually poison because they are trying to poison her slowly so no-one will notice. Karen accepts that she has a mental illness and that she needs medication she just wants to choose and have control over the medication she has to take.

Consideration

Here again, if the basis of the instructions is a delusion the following questions arise:

- Does this mean you cannot act?
- Is it different because the remedy sought is to protect her as a person rather than to “get something” for her?
- Is it relevant that the remedy sought is in a tribunal which deals with mental illness?

Should this make a difference as to whether you can act on these instructions?

⁷⁵ Are the professional and ethical issues of ‘doing justice’ less confronting where it would be unprofessional to take on the case because there is no possibility of success?