

Proceed with caution over client capacity

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Lawyers have a professional obligation to make sure their clients have the capacity to give instructions in a legal matter. This obligation sits alongside our other professional obligations, such as maintaining confidentiality and acting in the best interests of the client.

However, capacity can be a tricky issue and can cause difficulties for even the most experienced legal practitioners.

No single test

The issue of capacity lies at the core of the client-solicitor relationship. Legal capacity is the ability to enter into legal relations, and to make decisions that have legal consequences.

There is a common law presumption that adults have legal capacity, yet someone's capacity can be affected by various factors including mental illness, ongoing medical conditions, stress and age.

One major difficulty is that there is no one single test for capacity. The appropriate test will vary depending on the particular circumstances of the matter. For example, the legislative test for appointing an enduring guardian under the *Guardianship Act 1987* (NSW)¹ differs from the test for testamentary capacity, which is a common law test.² Legal practitioners will need to consider the effect of both legislation and the common law in the particular area in which

they are advising before reaching a conclusion regarding client capacity.³ Capacity is a fluid concept and a client's capacity may fluctuate from time to time.⁴ Legal practitioners need to remain alert to changes that affect a client's decision-making capacity.

Risks for legal practitioners

Legal practitioners who act on instructions from clients who are later deemed to lack capacity can be at financial and professional risk. A lawyer who robustly addresses the issue against a client's wishes may also face criticism, where delicate issues of personal sovereignty and freedom may be at stake.⁵

A legal practitioner who fails to adequately address capacity risks liability in negligence and can even face disciplinary action.⁶ There have also been cases where legal practitioners have been held liable for costs as a result of failing to make a proper assessment of capacity.⁷

The case law demonstrates that lack of capacity can often raise the question of undue influence over the client's decisions.⁸ This applies not just to client-solicitor dealings and gifts, but also, for example, to dealings between or involving a client and their relatives.

Assessing decision-making capacity

To keep up to date, a good starting point would be to become familiar with the resources available to provide practical guidance. These include the Law Society's *When a client's*

*capacity is in doubt*⁹ and the *Capacity Toolkit 10* published by NSW Attorney General's Department. Solicitors can also consult the flowchart in the December 2011 edition of *LSJ*.¹¹

Be on the lookout for warning signs from clients. Disorientation, forgetfulness, confusion and lack of mental flexibility can all be indicative of an impaired capacity. However, be careful not to make assumptions simply based on appearance or age. Be aware also that communication difficulties can stem from cultural differences, or hearing or vision impairments, rather than incapacity.

Capacity can be decision-specific. Clients may lack the capacity to make major financial decisions, but retain the capacity for more commonplace decisions.

Don't forget that you are assessing a client's decision-making ability, not the decision that they make. You must always make such an assessment on your own, and not simply because a relative or friend tells you that the client has diminished capacity. As always, you should take full instructions from your client in a manner in which you can be reasonably sure that the client consents to the matter proposed (which will likely include meeting the client in the absence of relatives or people who accompany them).

Remember that legal practitioners have to presume their client has capacity, but this presumption is only a starting point. The process has various stages:

- a solicitor must be alert to

clues that there might be a capacity issue;

- if those signs are present, then the solicitor must reach a conclusion as to whether the client has capacity;
- if the solicitor cannot reach a conclusion, or concludes that the client may lack capacity, then a solicitor may need to consider whether a referral for opinion from an appropriate medical practitioner for a formal capacity assessment is necessary;¹² and
- if the client lacks capacity, then the solicitor should consider whether appropriate agencies should be consulted (for example, the NSW Trustee and Guardian).

Capacity can be a complex area of law. Considerations often involve the interaction between a client's right to self-determination and the danger of a client making important decisions when lacking the necessary capacity to understand the ramifications. Make sure you are prepared to deal with these issues as and when they arise. As always, you should fully and contemporaneously record what has occurred in writing.