

## Short Minutes Transcript: Does Your Client have Capacity?

As the population ages, the proportion of those suffering from a reduced mental capacity is increasing.

Solicitors are facing more and more situations where they need to assess client capacity. Assessing capacity is often challenging.

A failure to assess or properly assess capacity has resulted in negligence claims and conduct complaints against solicitors.

A solicitor may be required to give evidence as to the solicitor's conduct in assessing or failing to assess the capacity of a client when taking instructions for a will, power of attorney or a transactional document.

There are many reported cases where the issue on trial is the capacity of a person at the time of signing a document. If a solicitor is involved in the preparation or the signing of the document where capacity is in doubt, there are two definitive guides to assist you. They are The Law Society's "Practical Guide to Solicitors" or the Justice Department's "Capacity Toolkit".

Links to these guides can be found below:

- [The Law Society of NSW "Practical Guide to Solicitors: When a Client's Mental Capacity is in Doubt"](#)
- [NSW Government Justice Department's "Capacity Toolkit"](#)

Lawcover recommends, at the very least:

- Interview the client alone
- Ask open-ended questions
- Make a comprehensive file note of the interview including questions asked and the answers given
- Obtain appropriately qualified medical evidence, if appropriate
- Retain all file notes and medical evidence indefinitely

Remember that capacity is task and time specific and that the starting point is a presumption of mental capacity. The test is a legal test and not a medical test. Medical reports are only evidence and not necessarily conclusive.

If you follow these guidelines your risk of a negligence claim, conduct complaint or embarrassing cross-examination will be minimised.

I'm Malcolm Heath