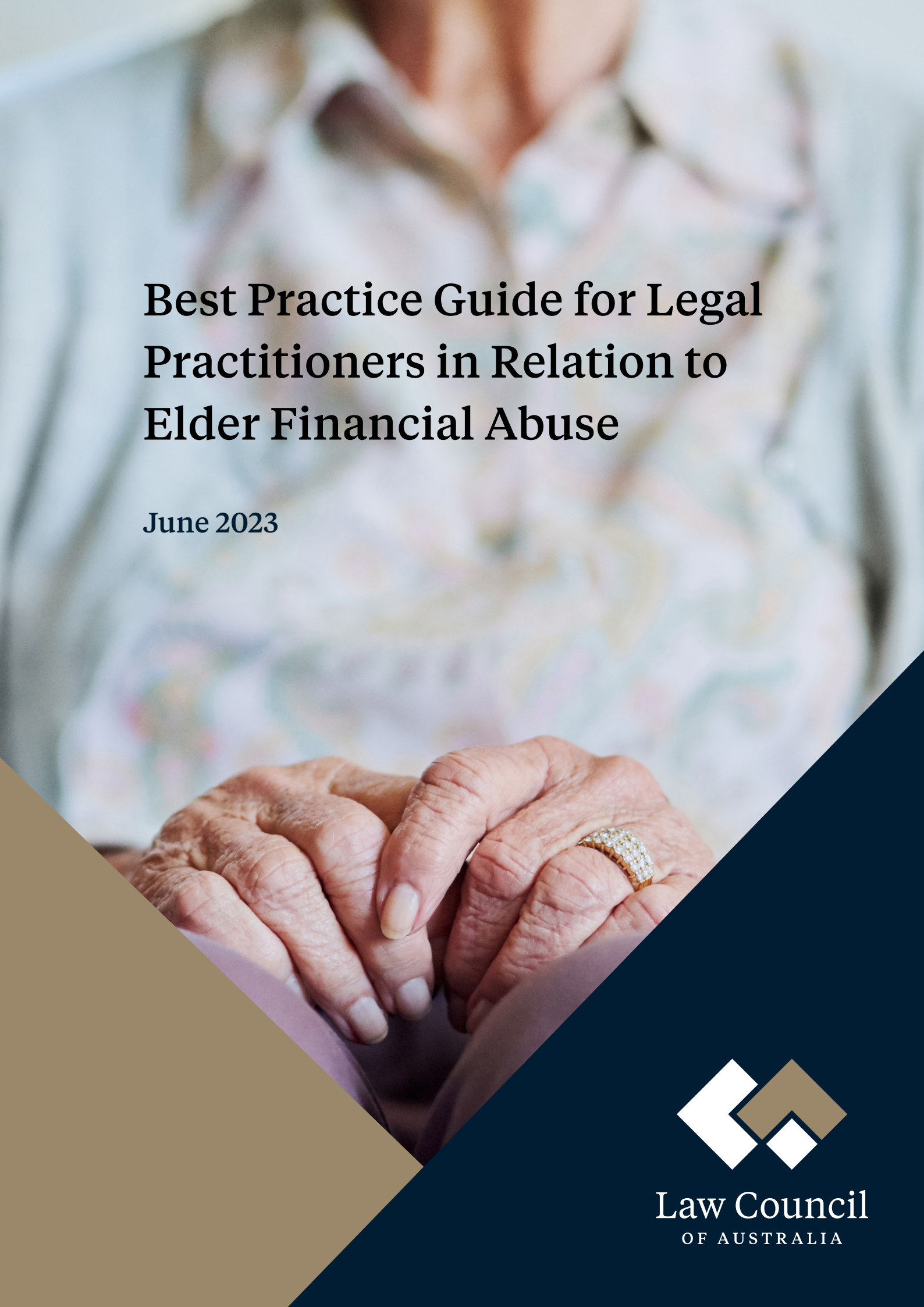

Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse

June 2023

Law Council
OF AUSTRALIA

Introduction

In its 2017 report, *Elder Abuse: A National Legal Response*, the Australian Law Reform Commission proposed that best practice guidelines be developed for legal practitioners in relation to the preparation and execution of wills and other advance planning documents.[1]

Through the 'Best Practice Guide for Legal Practitioners in Relation to Financial Elder Abuse' (**Best Practice Guide**), the Law Council of Australia suggests best practice measures to be adopted by legal practitioners to mitigate risks of elder financial abuse, and to identify and respond to clients who are potentially subject to such abuse. The Best Practice Guide was initially developed from the Law Society of New South Wales guide on the same issue.

Legal practitioners have a crucial role to play in the prevention of financial abuse of older persons. Older persons can be assisted in protecting themselves against current and future abuse and lawyers can also be alert to the potentially abusive nature of transactions which are commonly agitated before courts and tribunals.

Elder abuse can take many forms, such as physical, psychological, social and domestic, sexual, financial and neglect. Financial elder abuse can happen to an older person in conjunction with other types of abuse, such as social abuse. Financial abuse can range from minor incidents (such as borrowing small amounts of money and not repaying the loan, having money, possessions or property taken without permission, or the perpetrator not contributing to household expenses such as rent, food or aged care/home service fees where it was previously agreed) through to serious incidents (such as misusing an Enduring Power of Attorney (for financial matters)).

Financial abuse is one of the most common forms of elder abuse.[2] There is evidence that in Australia the incidence of financial elder abuse continues to rise. In the 2021, Australian Institute of Family Studies' Final Report on its Prevalence Study on elder abuse, financial abuse emerged as the third most reported form of elder abuse, after psychological abuse and neglect, with just under half who reported financial elder abuse also reporting psychological, physical, or sexual abuse or neglect.[3]

The Australian Law Reform Commission has given the following examples of circumstances which may amount to elder financial abuse:

- incurring bills for which an older person is responsible;
- stealing money or goods;
- abusing power of attorney arrangements;
- refusing to repay a loan;
- living with someone without helping to pay for expenses;
- failing to care for someone after agreeing to do so in exchange for money or property; and
- forcing someone to sign a will, contract or power of attorney document. [4]

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1 Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131), May 2017, (ALRC Elder Abuse Report) Recommendation 8-1.

2 Ibid [2.42].

3 Qu, L, Kaspiew, R, Carson, R, Roopani, D, De Maio, J, Harvey, J, Horsfall, B (2021). *National Elder Abuse Prevalence Study: Final Report*. (Research Report). Melbourne: Australian Institute of Family Studies.

4 ALRC Elder Abuse Report [1.10].

Overview to this Guide

Essentially, the legal practitioner should be alert to signs that the transaction is being facilitated by a beneficiary, appointee or other person with a direct or indirect interest in the transaction, in circumstances that suggest elder abuse may be involved.

Such circumstances may include:

- the client appears to lack understanding about the legal work the practitioner is being asked to perform, or about the practitioner-client relationship;
- the client's mental capacity is in question, in the sense that there is doubt as to their ability to understand and make decisions about the transaction when it is explained to them (noting that mental incapacity alone does not necessarily imply elder abuse is occurring);
- there are indications, whether at the appointment or behind the scenes, that the other person may be exerting undue influence over the client in relation to a will, or there is a presumption of undue influence in relation to other documents due to a relationship of trust with the client; or
- there are indications the transaction may be unconscionable, as the client has a 'special disadvantage' which it appears the other person may be exploiting.

Where mental capacity is in doubt, as it may be in cases of suspected undue influence or unconscionability, the practitioner should consider requesting a medical opinion to inform their own assessment of the client's mental capacity to conduct the transaction.

If the practitioner remains unsatisfied as to the client's mental capacity, or if they suspect elder abuse may be involved, the practitioner should consider the best way that it can act in the best interests of the client.[5]

The following discusses the legal and practical considerations in further detail.

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5 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 clause 4.1.1; see:

https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules.

1. Meeting set-up

In making the initial arrangements for the legal practitioner's engagement,[6] attention should be given to the following:

1.1 Who is the client?

Failure to properly identify the client can expose the legal practitioner to liability.[7] Care should be taken to precisely identify to whom the service is offered and to ensure that any other direct or indirect influences are excluded.

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

Failure to do so may lead to professional sanctions and personal liability for the legal practitioner.[8]

Care should be taken to ensure that instructions are taken directly from the client.

1.3 Is there a conflict?

While it is recognised that the client may consist of more than one person, it is important to ensure that those persons have a common interest. If their interests become adverse, the legal practitioner must not act for persons without a common interest unless rule 11 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015[9] has been fully satisfied.[10]

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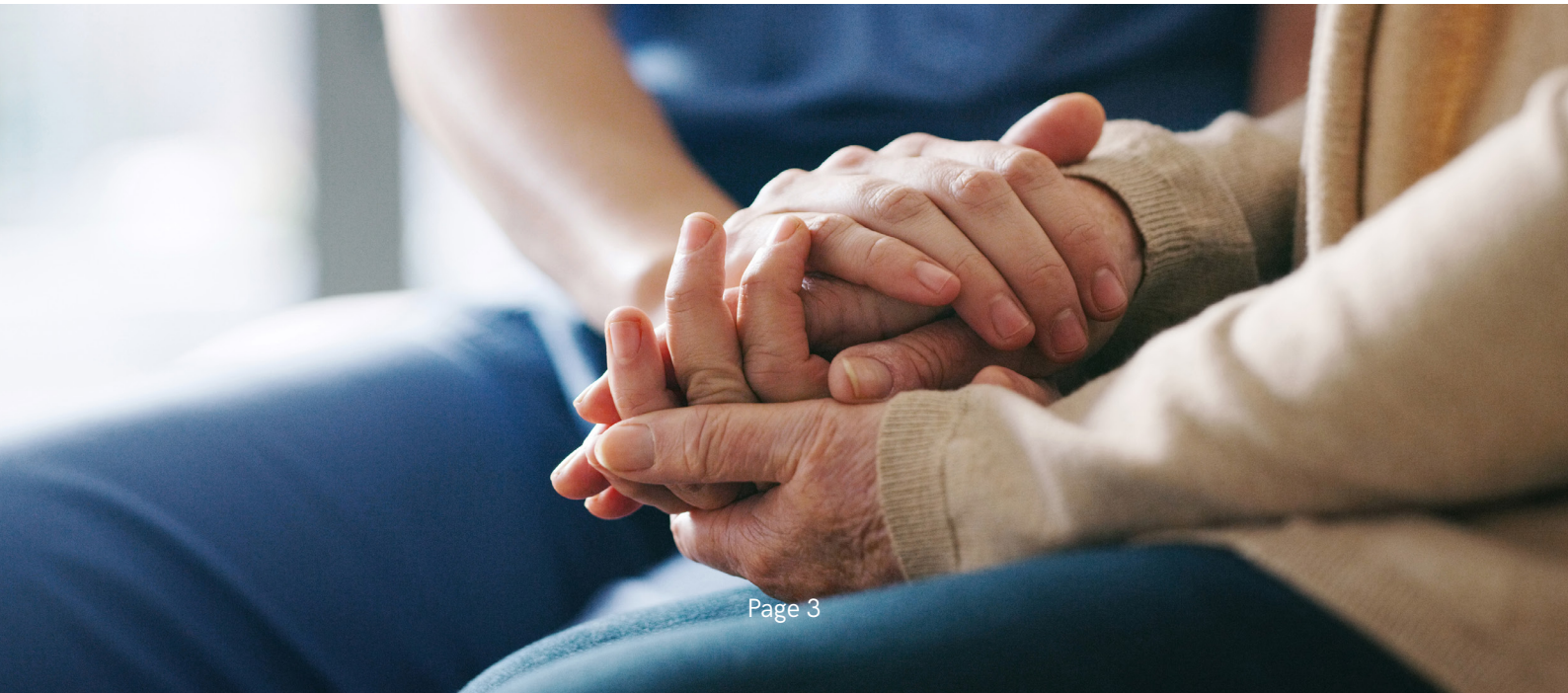
6 It is desirable that the legal practitioner, or a person familiar with these Guidelines, speaks directly to the client when arranging the appointment.

7 *McFee v Reilly* [2018] NSWCA 322; *Turner -v- O'Bryan-Turner* [2022] NSWCA 23.

8 See, for example, *The Estate of Tucker, Deceased*, [1962] SASR 99; Re *Estate Sharman; Ex parte Versluis* [1999] NSWSC 709; V*ernon v Watson; Estate Clarice Isabel Quigley dec'd* [2002] NSWSC 600; *Legal Profession Conduct Commissioner -v- Brook* [2015] SASCFC 128; *Legal Services Commissioner -v- Ho* [2017] QCAT 95; *Legal Services Commissioner v Ronald Aubrey Lawson* [2019] QCAT 100; *Legal Services Commissioner -v- Slipper* [2019] QCAT 146.

9 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules.

10 *Archer v Howell* (No. 2) (1992) 10 WAR 33; *Archer -v- Archer* [2000] NSWCA 314; V*ertzayias -v- King* [2011] NSWCA 215; *Legal Services Commissioner -v- McNamara* (Legal Practice) [2011] VCAT 1228; *Dickman v Holley*; *Estate of Simpson* [2013] NSWSC 18; *Matouk -v- Matouk* (No 2) [2015] NSWSC 748; *Pinter -v- Pinter* [2016] QSC 314; *Lucas v Lucas* [2018] NSWSC 962; *Anderson -v- Anderson* [2017] NSWCA 131; *McFee -v- Reilly* [2018] NSWCA 322; *Mekhail -v- Hana* [2019] NSWCA 197.



1.4 Have arrangements been made to consult the client alone?

The ideal arrangement is for the legal practitioner to see the client alone (or, if necessary, with a support person who has no interest in the legal transaction).[11] Any person who may benefit should not be within sight or hearing.[12] If the legal practitioner is engaging with the client by audio-visual communication, extra vigilance is needed. For instance, the legal practitioner should take steps to ascertain whether another person is present in the room. It may be appropriate to discreetly ask if the client feels comfortable and safe to speak openly.

1.5 Has adequate time been devoted to the meeting?

There needs to be sufficient time to enable an assessment of the client's understanding and volition.[13]

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

The meeting should take place at a time and place that is appropriate to receive advice about a legal transaction. Judging from failed legal transactions in various cases, this is unlikely to be a café,[14] recreational event[15] or any other place that does not offer a quiet space and afford privacy.

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11 *Woodley-Page -v- Simmons* (1987) 217 ALR 25; Estate of Sharman [1999] NSWSC 709; *Donato -v- Mangravite; Estate of Donato* [2005] NSWSC 488; *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275; Dellios -v- Dellios [2012] NSWSC 868; *Estate of Stanley William Church* [2012] NSWSC 1489; *Brown v Guss* [2014] VSC 251; *Smith -v- O'Neil* [2015] NSWSC 1924; *Ryan -v- Dalton; Estate of Ryan* [2017] NSWSC 1007; T*he Public Trustee of Queensland -v- Tennila* [2018] QSC 84; *Rahme v Benjamin & Khoury Pty Ltd* [2019] NSWCA 211; *Mekhail v Hana; Mekail v Hana* [2019] NSWCA 197.

12 *Church v Mason* [2013] NSWCA 481; *Barakett v Barakett* [2016] NSWSC 1257; *Rahme -v- Bebjamin & Khoury Pty Ltd* [2019] NSWCA 211; *McFarlane -v- McFarlane* [2021] VSC 197.

13 'Sufficient' time will depend on the nature and extent of the legal work undertaken, in particular to the nature, extent and complexity of the legal work. However, it is useful to bear in mind that in *Renard & Geach* [2013] FCCA 617 the court observed that spending about 50 minutes with the client was not 'long enough to take comprehensive instructions and give detailed and comprehensive advice about the [Binding Financial Agreement]'.

14 *Badman -v- Drake* [2008] NSWSC 1366, *Maestrale v Aspite* [2012] NSWSC 1420, [3]; *Matouk -v- Matouk* (No 2) [2015] NSWSC 748; *Ryan -v- Dalton; Estate of Ryan* [2017] NSWSC 1007; *McGettigan -v- Coulter; Coulter -v- McGettigan* [2021] NSWSC 1097.

15 *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18.

1.7 Have the atmospherics of the meeting been considered?

It is important to ensure that the environment allows the client to take in what they are told.[16] For instance, it may be necessary later to demonstrate that the client knew and approved the contents and effect of their will.[17]

1.8 Does it matter who pays the bill?

It is important to identify who is the client and address the bill to the client. It does not matter who pays the bill; however, if the bill is to be paid by someone other than the client, the legal practitioner should consider any implications which could arise.[18]

1.9 Is an independent interpreter or other support person required?

It is vital to engage in oral communication with the client in a language with which both the legal practitioner and the client are conversant.[19] If this is not possible, the legal practitioner should ensure that an independent interpreter, with appropriate credentials, translates the conversation.[20] This will often need to be arranged in advance of the meeting. In no circumstance should a person who has a direct or indirect interest in the transaction be involved in the translation.[21] Family members and friends should not be used as an interpreter or translator, even if they have the appropriate credentials.

In the context of the production of written documents (including the execution of wills) or interactions or meetings involving third parties, legal practitioners should not act as an interpreter or translator in any matter in which they are involved, even if they have appropriate credentials.[22] A legal practitioner who formally acts as an interpreter or translator may become a material witness and be prevented from representing a client in any proceedings that ensue. There may be adverse consequences for the client.[23] However, it may assist the client to have an independent support person or 'communication partner' attend a meeting with them.

1.10 Has the practitioner got the communication right?

It is usually important and often crucial to use simple, commonly used, clear English when communicating with a client, whether in writing or orally. For this reason, a legal practitioner should usually using avoid jargon and legalese. In short, explain the transactions and documents in terms which the client can understand.[24] Also, a legal practitioner should practise active listening skills.

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16 It is important to be conscious of arranging the meeting for the time of day which is likely to be most suitable for the client's comprehension; the need for adequate lighting; and the absence of background noise and distractions, among other things. This may mean asking the client to turn off their mobile phone and removing other distractions.

17 *Smart v Power* [2019] WASCA 106; *Lewis v Lewis* [2021] NSWCA 168.

18 The person paying the bill may have an expectation that the legal practitioner will act in that person's interests: see, for instance, *Hewitt -v- Gardner* [2009] NSWSC 1107; *Estate of Baissari; Chehade v El Khoury* [2020] NSWSC 563; *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275.

19 *Li v Choi* [2020] QCA 131.

20 *Ibrahim v Nasr* [2021] NSWSC 1321.

21 *Matouk v Matouk* (No 2) [2015] NSWSC 748.

22 *Rocco Condello v Sung Soo Kim* [2018] NSWSC 394; *Rogic -v- Samaan* [2018] NSWSC 1464; *Re Theodoulou* [2018] VSC 601; I*p -v- Chiang* [2021] NSWSC 822.

23 For instance, the consequence in *Re Theodoulou* [2018] VSC 601 was that the client was found to not know and approve the last will.

24 *Dellios -v- Dellios* [2012] NSWSC 868, [48] – [49]; *Matouk -v- Matouk* (No 2) [2015] NSWSC 748; *Barakett -v- Barakett* [2016] NSWSC 1257.

1.11 Does the client have any special needs?

If the client suffers from hearing or visual difficulties, consider what can be done to accommodate those needs. Options may include providing written information in large print, maintaining eye contact if the client lip reads, providing a magnifying glass for documents to be read or offering a hearing loop. To cater for other special needs, it may be necessary to provide wheelchair access and disability support.

2. Meeting procedures

When meeting with the client, the legal practitioner should consider the following:

2.1 Has the legal practitioner identified themselves as a legal practitioner?

If the person is not an existing client, and the arrangement for the meeting has been made by another person, the legal practitioner should ensure that the person has chosen the practitioner as his or her legal practitioner and understands that they may choose their own legal practitioner.[25]

2.2 Does the client and legal practitioner understand who is the client?

If an attorney[26] instructs a legal practitioner to sell the home of the principal,[26] the client is the principal.[28] If an attorney consults a legal practitioner to ascertain whether the attorney has authority to act for the principal, the client will be the attorney.

2.3 Has the legal practitioner ascertained the legal work the client wants the legal practitioner to perform?

This will define the legal practitioner's retainer.[29] It may be important to explain the work that the legal practitioner cannot perform, such as giving financial advice.

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25 *Irvine v Irvine* [2008] NSWSC 592.

26 An attorney is also called a 'donee'.

27 The principal is also called the 'donor'.

28 Instructions can only be taken from the attorney if the attorney has authority; and the power of attorney should be checked to ensure that sufficient authority exists.

29 A legal practitioner's duty of care is usually confined to performing the retainer and any additional assumed responsibility (ie the penumbral or peripheral duty): *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325; *Brogue Tableau Pty Ltd v Binningup Nominees Pty Ltd* [(2007) 35 WAR 27; [2007] WASCA 179; *AVWest Aircraft Pty Ltd as trustee for AVWest Aircraft Trust v Clayton UTZ* (A firm) (No 2) [2019] WASC 306; *Kerr v Australian Executor Trustees* (SA) Ltd; *Australian Executor Trustees* (SA) *Limited v Kerr* [2021] NSWCA 5; and *Badenach v Calvert* [2016] HCA 18.

2.4 Has the legal practitioner explained the legal transaction?

This will often involve:

- drawing the client's attention to both the negative and positive possible consequences of the legal transaction;[30]
- advising as to the propriety of the transaction, and warning the client against an improvident transaction;[31]
- advising the alternatives available to the client;[32] and
- advising the advantages and disadvantages of the alternatives.[33]

2.5 Does the client understand the transaction?

It is necessary to ensure that the client comprehends the contents, nature and effect of the transaction.[34] To assess a client's understanding, a legal practitioner should usually ask open questions.[35] These may be necessary to obtain the required information and instructions without introducing bias or inadvertently influencing the client's answers. Open questions will often start with the words like why, what, who, when and how. Open questions do not start with words such as do, is, can, will or has, as these words allow for a 'yes' or 'no' answer which may not aid in the assessment of a person's understanding. The use of open questions is one tool among many which can be used to assess mental capacity.

2.6 Has the legal practitioner checked for mental capacity?[36]

It was said in *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 that '[a] solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases'. There can be significant disciplinary and civil consequences for a legal practitioner who fails to do this.[37]

The legal practitioner should bear in mind that there is no single legal test for 'mental capacity'. The requirement for mental capacity may depend on the transaction and jurisdiction. However, the fundamental issue is that the client is able to understand the general nature of what they are doing, relative to the particular business being transacted, when it is explained.[38] For further guidance, practitioners may wish to consult the 'Best Practice Guide to Assessing Mental Capacity'.

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30 *Janson v Janson* [2007] NSWSC 1344; *Irvine -v- Irvine* [2008] NSWSC 592; *Winefield -v- Clarke* [2008] NSWSC 882; *Cavenham Pty Ltd v Robert Bax & Associates* [2011] QSC 348; *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831; *Turner -v- O'Bryan-Turner* [2021] NSWSC 5; *McFarlane v McFarlane* [2021] VSC 197.

31 *Badman v Drake* [2008] NSWSC 1366, [86]; *McFee -v- Reilly* [2018] NSWCA 322.

32 *Janson v Janson* [2007] NSWSC 1344; *Irvine -v- Irvine* [2008] NSWSC 592; *Aboody v Ryan* [2012] NSWCA 395; *McFarlane v McFarlane* [2021] VSC 197; *FC -v- SC* [2022] NSWSC 1780.

33 J*anson v Janson* [2007] NSWSC 1344; *Stivactas v Michaletos* (No 2) (1993) NSW ConvR 55-683.

34 *Lauvan Pty Ltd -v- Bega* [2018] NSWSC 154.

35 It is not suggested that open questions should be used in every circumstance or even in every circumstance where mental capacity is in question. There will be circumstances where closed questions will be appropriate. These are comparatively rare. The default position of open questions is therefore recommended unless it is considered that these will not produce sufficient information to enable a sound assessment of mental capacity.

36 In relation to a will, mental capacity is called 'testamentary capacity'. In some jurisdictions there are legislative definitions of mental capacity and different names can be used, such as 'decision-making capacity'.

37 *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commissioner v Comino* [2011] QCAT 387, *Legal Services Commissioner v de Brenni* [2011] QCAT 340; *LSC -v- Penny* [2015] QCAT 108; *LSC -v- Given* [2015] QCAT 225; *Legal Profession Complaints Committee and Wells* [2014] WASAT 112; *Council of the Law Society of NSW v Berger* (No 1) [2017] NSWCATOD 137 and (No. 2) [2018] NSWCATOD 4; *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87.

38 *Gibbons v Wright* (1954) 91 CLR 423, 434-438.

2.7 Has the legal practitioner checked for volition?

It has long been said that legal transactions must be 'the offspring of [the client's] own volition'.[39] This issue is different from mental capacity.[40] Questions such as 'Why are you doing this?' (or similar) can be a useful initial enquiry because it allows the client to state his or her reasons for seeing the legal practitioner. It affords the legal practitioner an opportunity to develop rapport quickly and to assess mental capacity and the possibility of undue influence. However, much deeper questioning may be necessary, including: 'Has someone suggested this to you?'; 'What do you think the consequences of this could be?'; and 'How would others (such as your potential beneficiaries) feel about this?'.

A client (whether or not they have mental capacity) may be subject to undue influence in relation to a will, in that they are coerced to a degree that their will is overborne.[41] Or there may be a presumption of undue influence in relation to a transaction other than a will because of the relationship between the client and a person benefiting from the transaction[42] or the circumstances of the transaction.

It should be borne in mind that there are two types of undue influence – that which applies in the context of wills and that which applies to all other legal transactions.[43] Testamentary undue influence equates to coercion.[44] Pressure, persuasion and incessant appeals to affection are not sufficient to establish testamentary undue influence.[45] Also, testamentary undue influence is difficult to establish.[46] It may be presently easier to do so than historically was the case.[47] Testamentary undue influence cannot be presumed. Actual undue influence (in the sense of coercion) must be proved and the onus is on the person alleging the undue influence (not on the propounder of the will).

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40 *Bridgewater -v- Leahy* [1998] HCA 66; 194 CLR 457; 158 ALR 66; 72 ALJR 1525; *Whereat v Duff* [1972] 2 NSWLR 147.

41 *Boyse v Rossborough* (1857) 10 ER 1192; *Nicholson v Knaggs* [2009] VSC 64, [116], [139].

42 *Johnson v Buttress* [1936] HCA 41; *Nicholson v Knaggs* [2009] VSC 64, [103].

43 *Trustee for the Salvation Army* (NSW) *Property Trust v Becker* [2007] NSWCA 136, [62]- [64].

44 *Hall -v- Hall* (1868) LR 1 P & D 481, 482; *Bridgewater -v- Leahy* [1998] HCA 66; 194 CLR 457.

45 *Montalto -v- Sala* [2016] VSCA 240.

46 *Revie -v- Druitt; Revie -v- Druitt in the estate of Revelle* [2005] NSWSC 965, [14].

47 *Dickman v Holley* [2013] NSWSC 18; *Brown v Wade* [2010] WASC 367; *Petrovski v Nasev* [2011] NSWSC 1275; *Brown -v- Guss* [2014] VSC 251; and *Moloney -v- Hayward* [2022] SASC 79.

The equitable type of undue influence may be either actual[48] or presumed. It may be presumed by reason of the type of relationship[49] or by reason of the circumstances.

The presumption of undue influence by reason of the circumstances arises if there is a special relationship[50] and the transaction involved an amount 'so substantial, or so improvident, as not to be reasonably accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary persons act'.[51]

The first element, a special relationship, is established if the party benefiting from the transaction occupied or assumed towards another, a position naturally involving an ascendancy,[52] dominion[53] or influence,[54] and/or that there was a dependency, reliance, obligation or trust on the part of the other person.[55]

If undue influence is prima facie established, it may be rebutted. It is usually rebutted by proof that the weaker party received independent, competent and sufficient legal advice[56] although this is not necessary to rebut the presumption[57] and receipt of independent advice may not rebut the prima facie presumption in the particular circumstances.[58]

It is to guard against undue influence that the legal practitioner should ask open ended questions of the client to learn what has prompted the client to provide the instructions given, with a view to ascertaining the client's true wish or desire.

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48 As to the requirements for actual undue influence in equity, see *Bank of Credit and Commercial International SA v Aboody* [1989] 1 QB 923. This is also difficult to establish: see *Haskew v Equity Trustees Executors & Agency Co Ltd* [1919] HCA 53; (1919) 27 CLR 231.

49 These relationships, with the person who is presumed to unduly influence stated first, include legal practitioner and client, physician and patient, parent and child, guardian and ward, and religious advisers and their adherents. The relationship of principal and attorney is not one of these relationships.

50 In *Jenyns v Public Curator* (Qld) [1953] HCA 2; (1953) 90 CLR 113 it was said that a special relationship was 'set up by the actual reposing of confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence': 133, [28].

51 *Quek v Beggs* (1990) 5 BPR 11,761, 11,764; T*ulloch (deceased) v Braybon* (No 2) [2010] NSWSC 650, [81]; *Courtney v Powell* [2012] NSWSC 460, [38]; *Re Mahoney* [2015] VSC 600, [194].

52 In *Johnson -v- Smith* [2010] NSWCA 306, in the context of a gift to her son of $270,000, ascendency was established by reason of the influenced person's age, dependence, bonds of love and affection, and the instigation of the transaction by the influencer.

53 *Johnson v Buttress* [1936] HCA 41; (1936) 56 CLR 113, 119, citing *Dent v. Bennet* [1839] EngR 434; (1839) 4 My & Cr 269; 41 ER 105; *Smith v. Kay* [1859] EngR 38; (1859) 7 HLC 750; 11 ER 299.

54 There need not be a finding that the benefitting person exercised dominion over the donor, only that they were in a position to do so: *Johnson v Buttress* [1936] HCA 41; (1936) 56 CLR 113, 119; *Turner -v- O'Bryan-Turner* [2021] NSWSC 5, [384].

55 *Johnson v Buttress* [1936] HCA 41; (1936) 56 CLR 113, 134-135 per *Dixon J; Louth v Diprose* [1992] HCA 61; (1992) 175 CLR 621, 632; *Janson -v- Janson* [2007] NSWSC 1344, [72]; *Tulloch (deceased) v Braybon* (No 2) [2010] NSWSC 650, [38]; *Whereat v Duff* [1972] 2 NSWLR 147; *Whereat v Duff* (1973) 1 ALR 363; 47 ALJR 540; *Amil Dlakic by his tutor Liliane Dlakic v Michael John Vaughan* [2018] NSWSC 1455, [275].

56 *Haskew v Trustees, Executors and Agency Co Ltd* [1919] HCA 53; (1919) 27 CLR 231, 235; *Watkins v Combes* [1922] HCA 3; (1922) 30 CLR 180, 196; *Spong v Spong* [1914] HCA 52; (1918) 18 CLR 544, 549; *Johnson v Buttress* [1936] HCA 41; (1936) 56 CLR 113, 119; To be independent, the legal practitioner must only act for the party subject to the influence: *Aboody -v- Ryan* [2012] NSWCA 395.

57 Where the transaction is a simple transfer of property independent legal advice may not be necessary, so long as the giver understands the terms of the instrument of gift: *Bank of New South Wales v Rogers* [1941] HCA 9; (1941) 65 CLR 42, 87.

58 *Thorne -v- Kennedy* [2017] HCA 49; *FC -v- SC* [2022] NSWSC 1780, [260].

2.8 Is the transaction unconscionable?

There are two main issues to be considered by the legal practitioner.[59]

First: is the client at a 'special disadvantage' vis à vis the other party to the transaction? 'Special disadvantage' means something that 'seriously affects the ability of the innocent party to make a judgment as to his [or her] own best interests'.[60] There is no exhaustive list of factors which amount to a 'special disadvantage'. This will be dependent on the client's individual circumstances, but may include 'poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary'.[61]

Secondly: is there an unconscientious exploitation by the other party of the client's disadvantage? Instances of unconscionable dealing include:[62]

- an elderly man whose faculties were found to be 'gravely impaired by prolonged and excessive consumption of alcohol' negotiating a transaction at an undervalue while being plied with rum;[63]
- an 'utterly infatuated' man whose feelings were 'manipulated' for gain;[64]
- a very old and frail man whose transfer of his property at an undervalue was initiated by his nephew and business partner, on whom he depended;[65]
- a person with, at best, a limited understanding of English[66] who put total trust in a close relative;
- a 'depressed and vulnerable' woman who was 'seduced', 'promised marriage', 'infatuated' and 'depende[nt]';[67] and
- an 'unsophisticated', 'naïve', 'unemployed' man with 'little financial nous' and no regular income borrowing money whilst incapable of understanding the 'inevitable' financial risks.[68]

59 A third issue, required to establish unconscionable conduct, is whether the person benefitting from the transaction has knowledge of the client's disadvantage.

60 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447, 462.

61 *Blomley v Ryan* [1956] HCA 81[1956] HCA 81; (1956) 99 CLR 362, 405; *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14[1983] HCA 14; (1983) 151 CLR 447, 462, 474 475; *Louth v Diprose* [1992] HCA 61[1992] HCA 61; (1992) 175 CLR 621, 628-629, 637 638, 650; *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6, [40].

62 These are instances recognised by the court, using terms contained in the relevant judgments recorded in quotation marks.

63 *Blomley v Ryan* [1956] HCA 81; (1956) 99 CLR 362.

64 *Louth v Diprose* [1992] HCA 61; (1992) 175 CLR 61; *Ward -v- Ward* [2011] NSWSC 107 [34]; *Juzumas -v- Baron* 2012 ONSC 7220.

65 *Bridgewater v Leahy* [1998] HCA 66; (1998) 194 CLR 457 [119].

66 *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447; *Sleboda -v- Sleboda* [2008] NSWCA 122 and *Matouk -v- Matouk* (No2) [2015] NSWSC 748 (mother and daughter).

67 *Truran -v- Cortorillo* [2011] VSC 488.

68 *Stubbings -v- Jams 2 Pty Ltd* [2022] HCA 6.

Not all pressure on an elderly person will be unconscionable. Persons such as family members or carers might genuinely believe that obtaining some financial support during the life of the person is fair. But good intentions or a 'proper' motive is no defence if the circumstances of the relationship are such that the elderly person is in a vulnerable and inferior position which puts them at a disadvantage.

If there are indications of possible unconscionable conduct underlying the client's instructions in relation to transactions that would be seriously against their best interests, the practitioner should consider the best way that it can act in the best interests of the client.[69] If mental capacity is in doubt, the lawyer can seek a medical assessment to assist to inform the legal practitioner's assessment of the client's mental capacity.

2.9 Are there any warning signs?

Warning signs of abuse, undue pressure, exploitation, or coercion are:

- signs of distress or confusion or lack of care;
- instructions to make changes to long-standing financial arrangements without being able to provide an adequate explanation as to the reason for the change;
- the client is ill, alcohol or drug-dependent, unable to read or write, at a disadvantage in speaking English, financially unaware, or anxious when discussing the transaction, explaining their reasons or the person who will benefit;
- the client is physically or emotionally dependent on another;
- regular changes to wills or powers of attorney within a relatively short period of time, especially to exclude a long-standing beneficiary or include a new acquaintance;
- changing legal practitioners especially from the clients long-standing 'legal practitioner;[70]
- use of a legal practitioner who acts for the person benefitting from the transaction[71] rather than an independent legal practitioner;
- legal documents and transactions being produced or undertaken at the instigation of the person benefitting and not appearing to be in the interest of the client;[72]

69 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 clause 4.1.1.

70 *Robinson -v- Spratt* [2002] NSWSC 426; *Tevenar -v- Ussfeller* [2005] NSWSC 582; *Janson -v- Janson* [2007] NSWSC 1344; *Brown -v- Wade* [2010] WASC 367; *Sprong -v- Sprong* [1914] HCA 52, (1914) 18 CLR 544; *Doulaveras v Daher* [2009] NSWCA 58.

71 *Smith v. Glegg* [2004] QSC 443; *Brown v Fisher* (1890) 63 LT 465, 466; *Vernon v Watson; Estate Clarice Isabel Quigley dec'd* [2002] NSWSC 600, [14].

72 *NAU* [2014] NSWCATGD 16.

- the client disposing of almost all the (older) person's assets;[73] or
- the client disposing of all his or her assets for nominal or no consideration.[74]

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

Some clients will want or need an opportunity to reflect on the advice given, and the legal practitioner should encourage the client to reflect on the advice given. Accordingly, unless there is a need for urgency, the client should be provided the opportunity to consider any documents and issues at his or her leisure.[75] More than one meeting may be required to perform the client's instructions.

2.11 Are there any other relevant orders, interests or parties?

The legal practitioner should consider whether there any orders or documents relevant to the transaction – such as court or tribunal orders, directives, registered property interests[76] or powers of attorney.

2.12 Has the legal practitioner got any remaining doubts about the transaction?

If the legal practitioner has remaining doubts or concerns about the transaction, they should ask their clients more questions, or consult a colleague on a de-identified basis, as appropriate. It is important that the legal practitioner maintain client confidentiality in accordance with their professional obligations when seeking any assistance.

If mental capacity appears to be in issue, the legal practitioner should consider obtaining a medical opinion to inform their assessment of that issue. The question of mental capacity may be a relevant factor when considering possible elder abuse. For further guidance, practitioners may wish to consult the 'Best Practice Guide to Assessing Mental Capacity'.

73 *Johnson -v Buttress* [1936] HCA 41; (1936) 56 CLR 113; *Smith v. Glegg* [2004] QSC 443.

74 *Turner v Windever* [2005] NSWCA 73; *Irvine -v- Irvine* [2008] NSWSC 592; *Sleboda -v- Sleboda* [2008] NSWCA 122; *Smith v. Glegg* [2004] QSC 443; *Ward -v- Ward* [2011] NSWSC 107; *Aboody -v- Ryan* [2012] NSWCA 395; *Cohen -v- Cohen* [2016] NSWSC 336. Inadequate consideration has long been a relevant factor which a court considers when exploring the legal propriety of a transaction, see, for instance, *Dobson -v- Dobson* (1879) 13 SALR 137; *Carello -v- Jordan* [1935] St R Qd 294; *Richardson -v Otto* [1938] QWN 15; *Blomley -v- Ryan* (1956) 99 CLR 362; *Nichols -v- Jessup* [1986] 1 NZLR 266; *Nichols -v- Jessup* (No2) [1986] 1 NZLR 237; *Ip -v- Chiang* [2021] NSWSC 822.

75 *Irvine v Irvine* [2008] NSWSC 592; *Hewitt -v- Gardner* [2009] NSWSC 1107; *Tabtill Pty Ltd v Creswick; Creswick v Creswick* [2011] QCA 381; *Thorne -v- Kennedy* [2017] HCA 49.

76 For real estate, this involves a search of Land Registry Services and the like. For personal property, a search should be made of PPSR.

3. Proof

3.1 Has the legal practitioner taken detailed notes?[77]

A legal practitioner should take detailed notes of questions asked, answers provided, advice provided, and general observations (including any doubts or concerns and anything unusual about the transactions or instructions).[78] Legal practitioners should take care to ensure that any notes taken are accurate.[79] This is particularly important where there are circumstances which may cast doubt on the client's mental capacity,[80] such as a long-standing diagnosis of dementia,[81] hospitalisation,[82] brain injury,[83] medical condition[84] or medication.[85]

Notes should be made as soon as possible. It is not always possible to make notes simultaneously, and courts have in some circumstances accepted notes made later on the day of the meeting, or on the day following it.[86] Care should be taken to ensure handwritten notes are legible. If prior consent is obtained from all persons who may be recorded, the legal practitioner may consider audio- or video-recording the meeting with the client.

3.2 Has correspondence been sent to the client?

A legal practitioner should take detailed notes of questions asked, answers provided, advice provided, and general observations (including any doubts or concerns and anything unusual about the transactions or instructions).[78] Legal practitioners should take care to ensure that any notes taken are accurate.[79] This is particularly important where there are circumstances which may cast doubt on the client's mental capacity,[80] such as a long-standing diagnosis of dementia,[81] hospitalisation,[82] brain injury,[83] medical condition[84] or medication.[85]

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77 Notes may include electronic records, such as tape recording and video, where the client's consent has been obtained in relation to making that type of record.

78 Anything which is unusual about a client's appearance, stated reasons or behaviour should be carefully recorded.

79 *Gray v Hart* [2012] NSWSC 1435; *Renard & Geach* [2013] FCCA 617.

80 *Ryan -v- Dalton; Estate of Ryan* [2017] NSWSC 1007.

81 *dÄpice -v- Gutkovitch; Estate of Abraham* (No2) [2010] NSWSC 1333; *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831.

82 *McNamara -v- Nagel* [2017] NSWSC 91.

83 *Freeman -v- Brown* [2001] NSWSC 1028; Glenda Phillips v James Phillips; John Matthew Phillips by his Tutor NSW Trustee & Guardian v James Phillips [2017] NSWSC 280.

84 Ibid.

85 *Dybac v Czerwaniw; The Estate of the Late Apolonia Czerwaniw* [2022] NSWSC 1279.

86 *Smart v Power* [2019] WASCA 106.

3.4 Has the legal practitioner made arrangements to keep the important records in accordance with Professional Conduct Rules or otherwise as appropriate?

Legal practitioners should ensure that their file notes and all documents (including medical reports) are retained in an accessible format for any period of time required by Professional Conduct Rules[87] or, in the absence of any such rule, as appropriate in the circumstances. If that format is electronic, the practitioner should ensure ease of access, in the event that they are required to produce their file.

This practice is desirable because the necessity for proof can arise many years after legal work is performed.[88] Best practice would encourage the legal practitioner to retain the entire file. However, if this is not possible, the legal practitioner should retain any records relevant to the issue of elder abuse and/or mental capacity.[89]

3.5 How the practitioner confirmed their advice in writing to their client?

Legal practitioners should confirm their advice to their clients in writing, even if that means simply repeating advice provided orally to the client. The communication should use appropriate language and provide details suited to the specific client. This assists legal practitioners with proof that they provided particular and specific advice to the client.

Conclusion

Ultimately, if the legal practitioner has doubts about the client's mental capacity or volition, or the unconscionability of the transaction in which the client is involved, the practitioner should consider the best way that they can act in the best interests of the client.[90]

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87 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

88 An example is *Hookway v Hookway* [2017] TASFC 4 where nine years after the deceased's will, death and the grant of probate, a beneficiary successfully brought proceedings for the revocation of the grant on the basis of a lack of testamentary capacity.

89 Note eg, rule 14.2 of the Australian Solicitors Conduct Rules, which provides that solicitors or law practices may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legal obligations to the contrary https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules.

90 Ibid clause 4.1.1.

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