

Lawyers, Powers and Capacity



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Being blasé about client capacity can generate disciplinary consequences

It is trite to observe that lawyers are to act on their clients' instructions. The entire nature of the lawyer–client relationship presumes that lawyers owe legal (and ethical) obligations to their clients, whether in contract, tort, equity or under statute. Those obligations cannot, of course, override the duty to the administration of justice, but outside this, client instructions are, generally speaking, the lawyer's charter.

The foregoing assumes that clients are well positioned to give instructions. Occasions will arise where following client instructions will, in the lawyer's opinion, be adverse to the client's interests. Yet if the client is fully informed of the consequences of the lawyer implementing those instructions, and there are no legal or ethical impediments for the lawyer doing so, there is nothing to preclude the lawyer so acting. The position is otherwise where the client lacks capacity to give instructions for the matter in question. As a lawyer–client relationship is constituted via a contract, the basic tenet of freedom of contract presupposes the requisite mental capacity to contract. A contracting party lacking that capacity cannot exercise the freedom required by law.

At least so far as mental incapacity is concerned, the traditional focus has been on a client's capacity to give instructions to draft his or her will. What purports to be a testamentary document can be denied effect if it is established that its maker lacked the requisite capacity to make it. Competent lawyers who take instructions to draft wills are therefore alert to tell-tale signs of mental incapacity.

With the increasing popularity of enduring powers of attorney – which are ordinarily premised to take effect upon the donor's incapacity¹ – the skills required of will drafters have direct application in this context. That enduring powers of attorney are not infrequently made at a time when the donor has commenced to exhibit signs of impending mental incapacity should, moreover, heighten lawyers' alertness to questions of capacity.

Ascertaining a client's capacity to grant an enduring power of attorney is important from the perspective of avoiding potential liability in tort. Indeed, there is arguably greater scope for tortious liability in this context than in the testamentary one, as in the latter context any dispute ordinarily arises after the client has died, and the court can set aside an ineffective will without rendering the lawyer liable to any beneficiary.² Capacity disputes relating to enduring powers of attorney almost invariably arise during the life of the donor, albeit where the donor is represented by someone on his or her behalf, precisely because all powers of attorney terminate upon the death of the donor.

But beyond legal liability there is the prospect of professional disciplinary sanction, stemming in large part from the statutory

concept of "unsatisfactory professional conduct", defined as it is to include conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.³ On three occasions recently, Queensland solicitors have been disciplined for failing to take sufficient precautions to ensure the mental capacity of a donor of an enduring power of attorney. In the seminal case, the decision in *Legal Services Commissioner v Ford*,⁴ Fryberg J (sitting in the Legal Practice Tribunal) referred to guidelines issued by the Office of the Adult Guardian in Queensland, which set out various processes to assist witnesses to enduring powers to determine the capacity of the donor.⁵ His Honour opined that the respondent solicitor's attitude to the guidelines was "a little arrogant perhaps because of his lengthy experience and age".

And in *Legal Services Commissioner v de Brenni*,⁶ a case described as "another example of the pitfalls which can surround the taking of instructions for the appointment of attorneys", the respondent solicitor effected an enduring power of attorney, at the request of a third party with an interest, for a donor aged 88 residing in an aged care facility with little information or knowledge in the way of medical evidence about her condition. Wilson J held that "[i]n light of her age, and circumstances, it was necessary and appropriate that the solicitor make specific enquiries about the client's mental health status and his failure to do so constitutes unsatisfactory professional conduct".⁷ Less than a month later his Honour found likewise regarding a solicitor who, without any inquiry into mental competence, drafted a power of attorney for clients aged in their 80s whom he had not previously met.⁸

The foregoing is not to suggest that lawyers must obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity – "[s]uch a requirement would be insulting and unnecessary",⁹ it has been said – but that with the increasing proportion of the population that is likely to require advice as to enduring powers of attorney, nor can lawyers approach the capacity issue in a blasé fashion.

NOTES

1. See Dal Pont, GE 2011, *Powers of Attorney*, LexisNexis Butterworths, [1.25]–[1.29].
2. See Dal Pont, GE *Riley: Solicitors Manual NSW*, LexisNexis Butterworths, Looseleaf, [26,070].
3. *Legal Profession Act 2008 (WA)* s402.
4. (2008) LPT 12.
5. These guidelines are entitled "Capacity Guidelines for Witnesses of Enduring Powers of Attorney", and can be found at www.justice.qld.gov.au. Fryberg J erroneously referred to these as guidelines published by the Law Society.
6. (2011) QCAT 340 at [2].
7. (2011) QCAT 340 at [9].
8. *Legal Services Commissioner v Comino* (2011) QCAT 387.
9. *Hill v Fellowes (a firm)* (2011) 118 BMLR 122 at [77] per Sharp J.