

WHEN A CLIENT'S CAPACITY IS IN DOUBT

A Practical Guide for Solicitors

THE **ESSENTIAL** MEMBERSHIP
FOR THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia



When a client’s mental capacity is in doubt

A Practical Guide for Solicitors

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Preamble

When acting for a client, solicitors must act in the best interests of that client. However, solicitors must always bear in mind that as officers of the court their overriding duty is their duty to the court and to the administration of justice. This guide is designed to assist solicitors who are faced with the question of whether their client has the mental capacity to give instructions or make legal decisions. The basic principles set out in the guide must be read taking into account their paramount duty to the court and the administration of justice which may at times be in conflict with their duty to their client.¹

1. Introduction

It is common to refer to capacity and mean only one of the three types of capacity, that being mental capacity. However, there are three different types of capacity: legal capacity, mental capacity and physical capacity. This is a short, practical guide for solicitors on what to do and what resources are available to assist them if they are concerned that their client may lack mental capacity to give instructions or make their own legal decisions.

While there is a basic common law presumption that every adult person has mental capacity to make their own decisions, in some cases solicitors may find they have doubts about whether their client does have the required legal level of mental capacity.

This may be for a range of reasons - the client may have an intellectual disability, an acquired brain injury or a mental illness. As the proportion of older people in the community increases, so does the likelihood that an older client may have an age related cognitive disability, such as Alzheimer's disease, which impairs their mental capacity to make decisions.

Dealing with a situation where a person's mental capacity is in issue is often a complex area however there are some basic principles which can guide solicitors in responding to these situations.

2. What is the solicitor's role in mental capacity assessment?

It is not the role of a solicitor to be an expert in mental capacity assessment of their client. However, a solicitor can be involved in carrying out a "legal" assessment of their client's mental capacity which involves:²

- Making an preliminary assessment of mental capacity - looking for warning signs or 'red flags' using basic questioning and observation of the client.³
- If doubts arise, seeking a clinical consultation or formal evaluation of the client's mental capacity by a clinician with expertise in cognitive capacity assessment.⁴
- Making a final legal judgment about mental capacity for the particular decision or transaction.⁵

People whose cognitive capacity is impaired may be vulnerable to exploitation by others and may not be able to protect their own legal interests. Solicitors have ethical duties to the court, their

1 Rondel v Worsley [1969] 1AC 191.217 Lord Reid 'As an officer of the court concerned in the administration of justice [a legal practitioner] has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks is his personal interests.' This is reinforced in rule 5, Legal Profession Conduct Rules 2010 (WA) (LPCR).

2 The American Bar Association Commission on Law and Aging and the American Psychological Association, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005) at p 3 http://www.apa.org/pi/aging/diminished_capacity.pdf.

3 Ibid.

4 Ibid.

5 Ibid.

clients and to the administration of justice to ensure that the interests of their clients are promoted and protected at all times. Rule 7(a) of the *Legal Profession Conduct Rules 2010 (WA)* (LPCR) provides that a practitioner must follow a client’s lawful, proper and competent instructions. This may suggest that a solicitor assess whether a client has the requisite mental capacity before either taking instructions or assisting them to make a legal decision which will affect their interests.

There are several cases in which the Supreme Court of WA has considered the role of a solicitor when taking instructions from an older client where their mental capacity to understand a specific legal task is in question.⁶

3. What is “mental capacity”?

There is no single legal definition of mental capacity in Western Australia. Rather, the legal definition of mental capacity depends in each case on the type of decision which is being made or the type of transaction involved⁷.

This means there are a variety of legal tests of mental capacity, such as the test for testamentary capacity (refer to page 17 of the Guide). The different legal tests for mental capacity mean that a client may have the mental capacity to make some decisions, such as deciding whether to make small purchases like groceries, but may lack the mental capacity to make other decisions such as deciding whether to enter into more complicated financial arrangements.

A finding of incapacity in one area does not automatically mean that mental capacity is lacking in another area; for example, the Supreme Courts of WA and NSW have found that a person who is incapable of managing their financial affairs may still be mentally capable of making a will.⁸ It has been suggested that the same mental capacity may not be necessary to revoke a will as to make one⁹. Similarly, lesser mental capacity may be needed for a codicil than a will¹⁰. A person may not be capable of managing their affairs but have the mental capacity to make an enduring power of attorney¹¹. A person may not have the mental capacity to make a contract but have mental capacity to make a will¹². Similar, if not greater, mental capacity is needed to make a power of attorney compared to that required for a will¹³.

Appendix A to this Guide lists some of the more common tests for mental capacity in different legal areas but solicitors must ensure they keep up to date with the most recent statutory or common law mental capacity tests in the particular area involved.

Despite the many different legal tests for mental capacity, the fundamental issue is whether the client is able to understand the general nature of what they are doing¹⁴.

If a client has ongoing difficulty in demonstrating this level of understanding then this may indicate a lack of mental capacity which warrants further exploration by the solicitor.

6. See *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284 per Kirby at 294; *Atwell v Morgan* [2019] WASC 182; *Legal Profession Complaints Committee v Wells* [2014] WASAT 112 ,
7. *Gibbons v Wright* [1954] HCA 17.
8. *Re Estate of Margaret Bellew* [1992] Supreme Court of NSW, Probate Division (Unreported) McLelland J, 13 August 1992; *Re Full Board of the Guardianship and Administration Board* [2003] WASC 268.
9. *d’Apice v Gutkovich - Estate of Abraham (No. 2)* [2010] NSWSC 1333, [96] , *Public Trustee v Elderfield; estate of Poole* (Supreme Court of NSW, Young J, 26 April 1996, unreported).
10. *Hay v Simpson* (1890) 11 LR (NSW) Eq 109.
11. *Re K* [1988] 1 Ch 310.
12. *Banks v Goodfellow* (1870) LR 5 QB 549 citing *Stevens v Vancleve* (1822) 23 F. Cas. 35.
13. *Szozda v Szozda* [2010] NSWSC 804; *Legal Profession Complaints Committee v Wells* supra paras 17-19 but see *Lindsay J in Scott v Scott* [2012] NSWSC 1541.
14. In *Gibbons v Wright* (ibid.) the High Court stated: “The general law does not prescribe a fixed standard of “capacity” required for the transaction of business. The level of capacity required of a person is relative to the particular business to be transacted by him or her, and the purpose of the law served by an inquiry into the person’s capacity: *Gibbons v Wright* (1954) 91 CLR 423 at 434-438”.

4. Key principles

Whenever a client's mental capacity may be in issue, it is important to remember and follow the following principles¹⁶:

- **Always presume a person has mental capacity**

Under common law you must presume that a person has the mental capacity to make all their own decisions.

- **Mental capacity is decision-specific**

Apply the presumption of mental capacity for every decision a person makes. If a client can make some but not all decisions, then they have a right to make as many decisions as possible.

- **Mental capacity is fluid**

A person's mental capacity can fluctuate over time or in different situations, so you will need to assess their mental capacity for each decision whenever there is doubt about mental capacity. Even where a client lacked the ability to make a specific decision in the past, they might be able to make that decision later on. Clients might also regain, or increase their mental capacity, for example by learning new skills or taking medication. Other factors such as stress, grief, depression, reversible medical conditions or hearing or visual impairments may also affect a person's decision-making mental capacity.

- **Don't make assumptions that a person lacks mental capacity because of their age, appearance, disability or behaviour**

A person's mental capacity should not be assessed solely on the basis of:

- the way a person looks
- the way a person presents
- the way a person communicates
- a person's impairment
- the way a person acts or behaves.

See also rule 17(5)(a) LPCR – a practitioner must not engage in conduct which constitutes unlawful discrimination.

- **Assess a person's decision-making ability – not the decision they make**

A client cannot be assessed as lacking mental capacity merely because they make a decision you think is unwise, reckless or wrong. Individuals have their own values, beliefs, likes and dislikes, and the majority of people take chances or make 'bad' decisions occasionally.

See also *Law Society of Western Australia Ethical and Practice Guidelines 2015 11.17* - a practitioner should not change or water-down any unwelcome advice because the client wants the practitioner to do so.

- **Respect a person's privacy**

Assessing a person's mental capacity means dealing with personal information about them and there are a variety of legislative and ethically based privacy principles which are involved. In most cases, a client must consent to their personal information being provided to others.

16. Set out in the Capacity Toolkit published by the NSW Department of Communities and Justice.

- **Substitute decision-making is a last resort**

A client may be able to make a particular decision at a certain time because they have support during the decision-making process (assisted decision-making). Before concluding lack of mental capacity, ensure that everything possible has been done to support the client to make a decision. Only seek the appointment of a substitute decision-maker such as a guardian or administrator as a last resort.

See also rule 9 LPCR re confidentiality.

These principles provide solicitors with a useful, practical and flexible approach to exploring issues of mental capacity according to the individual circumstances of each client.

5. Indicators of lack of mental capacity – warning bells and red flags!

It will often be difficult to know when a client's mental capacity may be an issue. On the one hand, solicitors need to take great care to avoid making assumptions that a person lacks mental capacity because of their disability or their advanced age. As Gleeson CJ wrote in *Easter v Griffith* (1995) 217 ALR 284, at 290, in the context of testamentary mental capacity but seemingly applicable to all instances of challenged mental capacity: "a determination that a person lacked (or has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter". This suggests that a conclusion about lack of mental capacity should not be "produced by inexact proofs, indefinite testimony, or indirect inferences": *Briginshaw v Briginshaw* [1938] HCA 34 per Dixon J.

On the other hand, there are certain indicators of a lack of mental capacity which should cause "warning bells to go off" if a solicitor becomes aware of them.

In some cases, the signs of a person's lack of mental capacity will be straightforward - they may be severely disoriented and confused about where they are and clearly unable to comprehend what is being said to them or to communicate in a rational way.

However, in other cases, it will not be obvious that a person may lack mental capacity. Many people with age-related cognitive disabilities may present extremely well to people who do not know them well and can appear capable.

It will only become apparent on closer, sometimes expert, examination that their mental capacity is impaired. A person with dementia may have excellent long term memory and be oriented in time and space but have poor short term memory with deficits in their judgment or ability to plan. They may be able to hold intelligent, lucid and entertaining conversations but not remember any details of that conversation a short period later.

There are some general warning signs or 'red flags' that point to the need for further investigation but they are not exhaustive and should not be used as grounds for a definite diagnosis.

These include¹⁷:

- A client demonstrates difficulty with recall or has memory loss
- A client has ongoing difficulty with communications

17. The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) at above n1 at page v and pp13-16 at http://www.apa.org/pi/aging/diminished_capacity.pdf

- A client demonstrates a lack of mental flexibility
- A client has problems with simple calculations which they did not have previously
- A client is disoriented
- There is a sense that “something about the client has changed”, including deterioration in personal presentation, mood or social withdrawal
- A client is in hospital or a residential aged care facility when instructions are taken
- A client has changed solicitors several times over a short period, particularly if there has been a change from a solicitor who has advised the client for many years
- A client is accompanied by many other friends, family or carers to interviews with the solicitor but is not given the chance to speak for themselves
- A client shows a limited ability to interact with the solicitor
- A client shows a limited ability to repeat advice to the solicitor and ask key questions about the issues.

Appendix B is a Capacity Worksheet developed in the United States which gives more examples of “warning signs” that mental capacity may be an issue.

6. Communication with client

Communication with clients – approach and questions

It is vital that a solicitor approaches their consultation with their client in a way which will help the solicitor gain as much useful information as possible about whether the client has mental capacity to instruct a solicitor or make a legal decision.

There are a number of techniques which solicitors can use to provide a comfortable environment for clients which maximises their ability to understand the discussion and to accommodate any disabilities or impairments they may have.¹⁸ These include giving clients more time to read documents, putting a client at ease and providing aids where the client has hearing or vision impairments.

Appendix C discusses some techniques which solicitors can use to assist clients to be at their best during a consultation with their solicitor.

The way in which questions are put to the client and their responses, both verbal and non-verbal, will also give a crucial indication of their ability to understand what is being discussed and how it affects them and their interests.

When asking questions, it is important to remember¹⁹:

- **Where possible, ask open-ended questions rather than questions which can be answered by “Yes” or “No”**
Such as: What sort of decisions will your attorney be able to make for you?
- **Do not ask leading questions which suggest the answer**
Such as: You probably would rather have someone in your family look after your money than a

18. The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) above n1 at pp27-30 at http://www.apa.org/pi/aging/diminished_capacity.pdf

19. *Brown v Wade* [2010] WASC 367.

public official wouldn't you?

- **Frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker**

Such as: Will anyone else be affected by the contract or benefit from the contract? Who? Tell me about some of the important parts of the contract.

- **It is important to ensure it is the person being assessed who answers the questions**

In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.

- **Take more time**

Take more time so that the client is comfortable with the process of making legal decisions and is confident in giving instructions.

7. Solicitor's records of initial mental capacity assessment

It is fundamental that solicitors take thorough, comprehensive and contemporaneous file notes of any consultation with clients where mental capacity is in issue or where the solicitor is exploring this issue through questioning and by observing the client.²⁰

These notes will be invaluable if the issue of mental capacity is subsequently raised in legal proceedings where the question of the client's mental capacity is challenged.

These challenges may not be made for some years after a solicitor has taken instructions, as is often the case when wills are disputed many years after they have been made.

A solicitor's notes may also be of assistance to any professional clinician who is engaged to undertake a professional assessment of the client's mental capacity.

Rule 28(3) of the LPCR provides that:

Subject to subrule (4), a practitioner or a law practice may destroy or dispose of documents held by the practitioner or law practice relating to a matter if a period of 7 years has elapsed since the practitioner's or law practice's engagement in the matter was completed or terminated except where there are client instructions to the contrary.

Rule 28(4): A practitioner must not deal with or destroy any title deed, will, original executed agreement or any document or thing held by the practitioner for safe keeping for a client or former client other than in accordance with —

- (a) the instructions of the client or former client; or*
- (b) the instructions of another person authorised by law to provide those instructions; or*
- (c) an order of a court.*

The Law Society's Ethical Guidelines Part 14 provide that a file should not be destroyed without giving consideration to the statutes that might impact on the subject matter of the file.

20. Atwell v Morgan; Martin v Fletcher [2003] WASC 59; Power v Smart [2019] WASCA 168; Smart v Power [2019] WASCA 106.

8. When to refer and to whom

If there are still doubts about a client's mental capacity after the solicitor's "initial assessment", there may be a need to request a formal mental capacity assessment from a health professional with experience in assessment of cognitive capacity.

There is a range of medical professionals whose role is to undertake mental capacity assessments and they use a variety of methods or tools to complete this task. A solicitor needs to consider the client's particular circumstances and possible disability before making a referral to an appropriate professional.

The crucial question in making a referral is how much experience does the medical professional have in the area of mental capacity assessment of older people or people with a possible mental illness/ intellectual disability/acquired brain injury?

The following types of professionals may be able to carry out a mental capacity assessment:

PROFESSIONAL ASSESSOR	EXPERTISE
Psychiatrist	A medical doctor who specialises in the study, treatment and prevention of mental disorders.
Psychologist	A person engaged in the scientific study of the mind, mental processes and behaviour. They are not medical doctors and are not qualified to prescribe drugs.
Neuropsychologists	A psychologist skilled in conducting assessments that determine the presence or nature of brain dysfunction, for example after a head injury or where dementia is suspected. The assessment is conducted through interview, observation and psychological testing and generally involves the administration of tests of memory, concentration, other thinking skills and language.
Psychogeriatricians	A psychiatrist who specialises in the diagnosis, treatment and prevention of mental disorders occurring in the aged.
Geriatrician	A medical doctor specialising in the diagnosis and treatment of disorders that occur in old age, and with the care of the aged.
Gerontologist	A scientist who studies the changes in the mind and body that accompany ageing and the problems associated with them
Neurologist	A scientist who specialises in the study of the structure, functioning and diseases of the nervous system.
General Practitioner	A medical doctor who treats acute and chronic physical and mental illnesses and provides preventative care and health education to patients.
ACAT (Aged Care Assessment Team)	A multi-disciplinary team of health care workers who assess people in their own home to determine the level of assistance the aged person needs to remain living there independently. The team is also responsible for assessing people for admission into nursing homes. The team is comprised of a nurse, social worker, occupational therapist and physiotherapist and may also include a geriatrician or psychogeriatrician. ACAT's are attached to major hospitals.

9. What to include in the referral letter

A solicitor needs to take great care in drafting the referral letter for a mental capacity assessment. Many medical professionals will have a different approach to the task of mental capacity assessment than the legal approach and will not necessarily understand the specific legal tests which must be satisfied. A general request to provide a report about a client's mental "capacity" might elicit a report which addresses whether a person is able to remain at home and attend to their personal care needs but does not address the central issue about the client's mental capacity to make a particular legal decision.

It is therefore crucial that the referral letter sets out:

- The client's background
- The reason the client contacted the solicitor
- The purpose of the referral - what is the legal task or decision being considered
- The relevant legal standard of mental capacity to perform the task at hand
- Any relevant medical information about the client.

The solicitor should obtain instructions to write to the client's doctor, and, if those instructions are forthcoming, obtain a signed authority for the doctor to provide the information sought by the solicitor.

The solicitor should factor in the potential for delay while waiting for a response from the doctor, and act accordingly if there is the need for prompt action.

If the client is very elderly or ill or about to travel overseas or if there is any other reason to anticipate that they may die or lose capacity, the solicitor should not delay the making of the will.

The solicitor should not rely on the doctor's opinion alone – the solicitor should assess mental capacity, but the doctor's opinion may assist the solicitor to reach a conclusion in that regard.

When a reply is received from the doctor, the solicitor should carefully consider the doctor's report to ensure that it has addressed the issues most useful to the solicitor's assessment of the client's mental capacity. If it doesn't, the solicitor may need to contact the doctor to clarify the situation.

The solicitor should generally proceed to make a will if the client's instructions are sufficiently clear and consistent (or promptly decline to accept instructions if they are not, especially if the client declines to provide an authority to obtain relevant information from the client's doctor).

It may also be useful to invite the medical professional to telephone the solicitor for clarification if needed.

A suggested referral letter is included at Appendix E.

10. How to raise the issue with the client

It will often be a sensitive, if not unpleasant, task to suggest to a client that there may be concerns they do not have mental capacity to make their own decisions. The loss of mental capacity is frightening and stigmatising to most people, and many clients will be offended, angry and defensive when this issue is raised.

Part 11 of the Law Society of Western Australia's Ethical and Practice Guidelines deals with Unwelcome Advice.

However, it may make this task easier if it can be explained to the client in terms of the legal need to make sure that the client's mental capacity is adequate for the task at hand. The formal assessment could be suggested as a kind of "insurance" to protect against possible future legal challenges to the validity of the legal transaction involved.

However, the solicitor must bear in mind there may be unwanted consequences for the client.

11. Making the final legal judgement when the clinical capacity assessment is available

A capacity assessment report sent to a solicitor may conclude that the client is or is not capable of the particular legal task in issue, for example, that they have testamentary capacity. However it is important to remember that these findings are only clinical opinions which are distinct from a legal assessment about mental capacity. They are simply one source of evidence about the issue which the solicitor must consider before finally advising the client.

The solicitor must take time to thoroughly read and understand the report and to clarify any technical terms or language with the report's writer if necessary²¹.

When received, the clinical report should be discussed with the client.

12. When to seek the appointment of a substitute decision-maker

If a client is incapable of providing instructions or making a legal decision, it may be appropriate for a substitute decision-maker to be appointed who can stand in the client's place and ensure their best interests are protected.

The State Administrative Tribunal can appoint a guardian and/or an administrator to make substitute decisions for a person with a decision-making disability. However, this should be pursued as a last resort when all other options have been explored.

An administrator and guardian have the authority to give instructions to a solicitor and to initiate, continue or defend legal proceedings on behalf of a represented person. However, it may not be necessary to seek the appointment of an administrator or guardian if a guardian ad litem can be appointed under the rules of the particular court or tribunal involved.

There may be ethical issues involved when a solicitor makes an application for an administrator or a guardian to be appointed for their client. The NSW Court of Appeal has commented that an application that a client is unable to manage his or her affairs should not be brought by solicitors

21. The American Bar Association Commission on Law and Aging and the American Psychological Association, above n1 at pp39-40.

if there is any reasonable alternative: *R v P* [2001] NSWCA 473 at [63]. However, in *P v R*, as no relative, church member or social worker was a reasonable alternative the solicitor was found to have properly brought the defendant's plight before the court and, in doing so, enabled the court to obtain an appreciation of the whole of the defendant's circumstances of disability and vulnerability: *P v R* [2003] NSWSC 819 at [82]. The solicitor was "a person who has gained a close appreciation of the defendant's circumstances and difficulties generally in the course of dealing with her": [81].

Issues of client confidentiality may arise when a solicitor is considering whether to provide information to a court or tribunal about a client's lack of mental capacity. LPCR Rule 9(2) states that a practitioner must not disclose client information to a person other than the client unless the person is —

- (a) an associate of the practitioner's law practice; or
- (b) a person engaged by the practitioner's law practice for the purposes of providing legal services to the client; or
- (c) a person employed or otherwise engaged by an associated entity of the practitioner's law practice for the purposes of providing administrative services to the client.

The exceptions to LPCR rule 9(2) are found in rule 9(3):

(3) Despite subrule (2), a practitioner may disclose client information to a person if —

- (a) the client expressly or impliedly authorises the disclosure of the information to that person or the practitioner believes, on reasonable grounds, that the client has authorised the disclosure of the information to that person; or
- (b) the practitioner is permitted or compelled by law to disclose the information to that person; or
- (c) the practitioner discloses the information to the person in a confidential setting, for the sole purpose of obtaining advice from that person in connection with the firstmentioned practitioner's legal or ethical obligations; or
- (d) the practitioner discloses the information for the purpose of avoiding the probable commission of a serious offence; or
- (e) the practitioner discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or
- (f) the information is disclosed on a confidential basis to a person who is the insurer of the practitioner, the practitioner's law practice or associated entity for the purposes of obtaining or claiming insurance or notifying the insurer of potential claims; or
- (g) the disclosure of the information is necessary to respond to a complaint or a proceedings brought against any of the following —
 - (i) the practitioner;
 - (ii) the practitioner's law practice;
 - (iii) an associated entity of the practitioner's law practice;
 - (iv) a person employed by one of the persons referred to in subparagraphs (i) to (iii).

13. Conclusion

It is fundamental to the solicitor/client relationship that a solicitor must rely and act on instructions of their client. However, where a solicitor considers that key indicators point clearly to a client's lack of mental capacity to give competent instructions, it is their responsibility to explore this issue further. This Guide aims to assist solicitors to take a principled approach to this task which is thorough, thoughtful and respectful of each client's particular circumstances. Solicitors who inform themselves of the issues surrounding client mental capacity and who are aware of the available resources in the area will be better equipped to face the challenges which often arise in this area of practice, while still providing a high standard of legal service to their client.

APPENDIX A

Different mental capacity tests

Decision-specific test for mental capacity

In *Gibbons v Wright* [1954] HCA 17, the High Court of Australia (at 437 per Dixon CJ, Kitto and Taylor JJ) defined a decision-specific test for mental capacity to enter into a contract:

“The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he [or she] is doing by his [or her] participation.”

The same approach was explained as follows in *Scott v Scott* [2012] NSWSC 1541 at [205]:

“It is not, literally, a matter of imposing, or recognising, a different “standard” of mental capacity in the evaluation of the validity of different transactions. What is required, rather, is an appreciation that the concept of “mental capacity” must be assessed relative to the nature, terms, purpose and context of the particular transaction. Nothing more, or less, is required than a focus on whether the subject of inquiry had the capacity to do, or to refrain from doing, the particular thing under review”.

Mental capacity to give instructions to a solicitor for litigation

In *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 Chadwick LJ described the issue when it was necessary to determine the mental capacity to give legal instructions in these terms:

“the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem.”

In *Dalle-Molle by his Next Friend, Public Trustee v Manos and Anor* [2004] SASC 102, Debelle J reviewed the common law in this area and noted at 26:

“The level of understanding of legal proceedings must, I think, be greater than the mental competence to understand in broad terms what is involved in the decision to prosecute, defend or compromise those proceedings. The person must be able to understand the nature of the litigation, its purpose, its possible outcomes, and the risks in costs which of course is but one of the possible outcomes.”

Solicitors ought to obtain evidence that a client:

- is able to understand the nature of the dispute and the remedies sought; and
- is able to comprehend and appreciate legal advice as to steps in the proceedings, including whether the claims should or should not be settled out of court for a particular sum.

If a court proceeds to dispose of a matter in circumstances where a party did not have the mental

capacity to handle their own affairs in the litigation, the proceedings become susceptible to challenge on the grounds of irregularity. Courts have procedures for the appointment of a representative to conduct court proceedings in specified circumstances.

Order 70 of the WA Supreme Court Rules applies to both the Supreme and the District Courts and sets out procedures for litigants who are infants or who are persons in respect of whom a guardianship order or an administration order has been made under the *Guardianship and Administration Act 1990* (WA).

The rules also allow for the court itself to declare a person to be incapable and therefore susceptible to the provisions of Order 70, but practice directions in the District Court mean that the court will not undertake such an assessment itself but will leave the assessment to be made under the *Guardianship and Administration Act 1990* (WA). The Supreme Court rarely makes such declarations.

If there will be at the end of the day, a sum of money for the benefit of a client, a separate question of capacity arises, namely is he or she capable of managing, unaided, the judgment sum. If there is already a next friend appointed, Order 70 rule 12 procedures will automatically apply.

Mental capacity to manage affairs (section 64 Guardianship and Administration Act 1990 (WA))

Section 64 of the *Guardianship and Administration Act 1990* (WA) provides that in order to make an administration order the State Administrative Tribunal must be satisfied that a person is unable, by reason of mental disability, to make reasonable judgments in respect of matters relating to all or any part of his estate and is in need of an administrator of his estate. The making of an order pursuant to this section is subject to section 4 of the Act which sets out the principles which must be observed by the State Administrative Tribunal in dealing with proceedings commenced under the Act namely:

1. The primary concern of the State Administrative Tribunal is the best interests of the person the subject of the application.
2. Every person shall be presumed to be capable of:
 - (a) looking after his own health and safety;
 - (b) making reasonable judgments in respect of matters relating to his person;
 - (c) managing his own affairs; and
 - (d) making reasonable judgments in respect of matters relating to his estate, until the contrary is proved to the satisfaction of the State Administrative Tribunal.
3. A guardianship or administration order shall not be made if the needs of the person can be met by less restrictive means and a plenary guardian shall not be appointed if the appointment of a limited guardian is sufficient.
4. An order appointing a limited guardian or an administrator should impose the least restrictions on the person's freedom of decision and action and where possible the State Administrative Tribunal should seek the views and wishes of the person concerned.

'Mental disability' is defined in section 3 of the Act to include 'an intellectual disability, a psychiatric condition, an acquired brain injury and dementia'. The judgment of EM Heenan J in *S v State Administrative Tribunal No 2* [2012] WASC 306 demonstrates not only the need for the State Administrative Tribunal to apply these principles but that an administration order cannot be made unless the terms of section 64 have been satisfied. The decision also pointed out that Section 32 of the *State Administrative Tribunal Act 2004* provides that the State Administrative Tribunal is bound by the rules of natural justice.

Testamentary capacity

The formula for determining testamentary capacity is stated in the judgment of the Court (Cockburn CJ, Blackburn, Mellor, and Hannen JJ) delivered by Sir Alexander Cockburn in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 as follows:

“It is essential to the exercise of such a 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 had been sound, would not have been made.”

The recent restatement of these principles by Derrick J at page 39 in *Power v Smart* [2018] WASC 168 was approved by the Full Court on appeal (*Smart v Power* [2019] WASCA 106).

Mental capacity to make a power of attorney

In *Scott v Scott* [2012] NSWSC 1541 Lindsay J stated the following approach to the assessment of mental capacity to make a power of attorney:

“Attention must be focussed on all the circumstances of the case, including the identities of the donor and donee of a disputed power of attorney; their relationship; the terms of the instrument; the nature of the business that might be conducted pursuant to the power; the extent to which the donor might be affected in his or her person or property by an exercise of the power; the circumstances in which the instrument came to be prepared for execution, including any particular purpose for which it may ostensibly have been prepared; and the circumstances in which it was executed: [199].

An exploration of all the circumstances of the case will, not uncommonly, call for consideration of events leading up to, and beyond, the time of execution of the disputed power of attorney, as well as on the focal point of the time of execution itself. A longitudinal assessment of mental capacity, along a time line extending either side of the focal point, may be necessary, or at least permissible, in order to examine the subject’s mental capacity in context. Medicos and lawyers, alike, tend to embrace that approach. It is difficult to do otherwise. Context has a temporal as well as spacial and relational dimensions: [200].

*...Where an Enduring Power of Attorney confers on an attorney power to dispose of the principal’s property to or for the benefit of the attorney or third parties, the nature and degree of mental capacity required to grant such a power may approximate that required for the making of a valid will. In that event, the “standard” laid down by *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565 might apply or be approximated: [202].*

An Enduring Power of Attorney limited in its terms, or effect, to authorisation of acts for the benefit of the principal may require consideration of factors different from those considered upon an assessment of mental capacity for the making of a valid will”: [204].

On the other hand, Curthoys J would appear to have applied a higher standard where in *Wells* (supra) he adopted the statement of Barratt J in *Szozda v Szozda* (ibid.) in which he quotes a passage from the decision of the Queensland Guardianship and Administrative Tribunal in *Re HAA* [2007] QGAAT 6 at 34:

"Expert medical opinion provided to (and which appears to have been accepted by) the Court in *Adult Guardian (Re Enduring Power of Attorney of Vera Hagger) v Vera Hagger, Declan James Barry and Albert Craig Ray SC Qld No 1083 of 2001 (Unreported)*, was that an Enduring Power of Attorney was both more unfamiliar and more complex (for most members of the community) than a will. Accordingly, a higher cognitive ability and therefore standard of capacity would be required for an Enduring Power of Attorney."

In the English case of *Re K* (1988) 1 Ch. 310 at 316, the Court listed four points that a person should understand before making a power of attorney:

"Firstly, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

Mental capacity to consent to medical treatment

The *Guardianship and Administration Act 1990* (WA) makes provision for substitute consent for medical treatment if an adult (over 18 years of age) is incapable of consenting to that treatment.

Section 43(1) of the *Guardianship and Administration Act 1990* (WA) states:

- (1) Subject to section 4, where the State Administrative Tribunal is satisfied that a person in respect of whom an application for a guardianship order is made under section 40 —
 - (a) has attained the age of 18 years;
 - (b) is —
 - (i) incapable of looking after his own health and safety;
 - (ii) unable to make reasonable judgments in respect of matters relating to his person; or
 - (iii) in need of oversight, care or control in the interests of his own health and safety or for the protection of others;
 - (c) is in need of a guardian,
the Tribunal may by order declare the person to be in need of a guardian, and if it does so shall appoint —
 - (d) a person to be a plenary guardian or a limited guardian and, if it is expedient, a person to be an alternate guardian; or
 - (e) persons to be joint plenary guardians or joint limited guardians, as the case may require, of the person in respect of whom the application is made.

- (2) Part 9D of the *Guardianship and Administration Act 1990* (WA) deals with treatment decisions for a person under legal incapacity (referred to as 'the patient') where a patient cannot make reasonable

judgments in respect of any proposed treatment. Section 110ZJ which is subject to the provisions in this Part relating to urgent treatment provides a hierarchy of decision making. If the patient has made an advance health directive containing a treatment decision in respect of the proposed treatment, whether or not the treatment is provided must be in accordance with that treatment decision. If there is no such treatment decision contained in an advance health directive then if the patient has appointed an enduring guardian who is authorised to make a treatment decision and is reasonably available and is willing to make the treatment decision then the treatment decision must be decided by the enduring guardian. Similarly, where there is no advance health directive or enduring guardian, but there is a guardian, the treatment must be as decided by the guardian. Where none of the above apply the person responsible for making the treatment decision are those listed in Part 9C which provides for persons responsible for patients. Section 110ZD provides a list of persons. Firstly, the patient's spouse or de facto partner (if living with the patient), then the patient's nearest relative who maintains a close relationship with the patient being in order of priority, the spouse or de facto partner, a child, parent or a sibling and failing a relative, the primary provider of care and support for the patient who is not remunerated for providing care and support other than receiving a carer's benefit for providing home care. Finally, if there is no such person, any other person who maintains a close personal relation with the patient as defined in the section. All persons responsible for making treatment decisions must have attained 18 years, be of full legal capacity, be reasonably available, be willing to make the treatment decision and must act according to the person's opinion as to the best interests of the patient. Section 110ZG enables the State Administrative Tribunal to make a declaration that a person is unable to make a treatment decision and identify the person responsible for making the treatment decision.

See also WA Health Consent to Treatment Policy 2016, Department of Health WA.

Mental capacity to make health-related privacy decisions under the *Mental Health Act 2014 (WA)*.

Section 15 of the *Mental Health Act 2014 (WA)* relates to “Determining capacity to make decisions” and provides that:

- (1) For the purposes of this Act, a person has the capacity to make a decision about a matter relating to himself or herself if another person who is performing a function under this Act that requires that other person to determine that capacity is satisfied that the person has the capacity to —
 - (a) understand any information or advice about the decision that is required under this Act to be provided to the person; and
 - (b) understand the matters involved in the decision; and
 - (c) understand the effect of the decision; and
 - (d) weigh up the factors referred to in paragraphs (a), (b) and (c) for the purpose of making the decision; and
 - (e) communicate the decision in some way.
- (2) For the purposes of this Act, a decision made by a person about a matter relating to himself or herself must be made freely and voluntarily.

Mental capacity to consent to marriage

In *Babich & Sokur and Anor* [2007] FamCA 236, Justice Mullane stated:

“the Australian test requiring that for a valid consent a person must be mentally capable of understanding the effect of the marriage ceremony as well as the nature of the ceremony [244] ... It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences [249] ... a valid consent involves either a general understanding of marriage and its consequences, or an understanding of the specific consequences of the marriage for the person whose consent is in issue [251].”

APPENDIX B

Capacity worksheet for lawyers

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, by the ABA Commission on Law and Aging and American Psychological Association (2005).*

Please read and review the handbook prior to using the worksheet.

Client Name:

Date of Interview:

Solicitor:

Place of Interview:

A. Observational signs

COGNITIVE FUNCTIONING	EXAMPLES
Short-term Memory Problems	<ul style="list-style-type: none">• Repeats questions frequently• Forgets what is discussed within 15-30 min• Cannot remember events of past few days
Language Communication Problems	<ul style="list-style-type: none">• Difficulty finding words frequently• Vague language• Trouble staying on topic• Disorganised• Bizarre statements or reasoning
Comprehension Problems	<ul style="list-style-type: none">• Difficulty repeating simple concepts• Repeated questioning
Lack of Mental Flexibility	<ul style="list-style-type: none">• Difficulty comparing alternatives• Difficulty adjusting to changes
Calculation/Financial Management Problems	<ul style="list-style-type: none">• Addition or subtraction that previously would have been easy for the client• Bill paying difficulty
Disorientation	<ul style="list-style-type: none">• Trouble navigating office• Gets lost coming to office• Confused about day/time/year/season

EMOTIONAL FUNCTIONING	EXAMPLES
Emotional Distress	<ul style="list-style-type: none">• Anxious• Tearful/distressed• Excited/pressured/manic
Emotional Lability	<ul style="list-style-type: none">• Moves quickly between laughter and tears• Feelings inconsistent with topic
Delusions	<ul style="list-style-type: none">• Feels others out “to get” him/her, spying or organized against him/her• Fearful, feels unsafe
Hallucinations	<ul style="list-style-type: none">• Appears to hear or talk to things not there• Appears to see things not there• Misperceives things
Poor Grooming/Hygiene	<ul style="list-style-type: none">• Unusually unclean/unkept in appearance• Inappropriately dressed
Other Observations/Notes of Functional Behaviour	
Other Observations/Notes on Potential Undue Influence	

MITIGATING/QUALIFYING FACTORS AFFECTING OBSERVATIONS	WAYS TO ADDRESS/ACCOMMODATE
Stress/Grief, Depression, Recent Events Affecting stability of client	<ul style="list-style-type: none"> • Ask about recent events, losses • Allow some time • Refer to a mental health professional
Medical Factors	<ul style="list-style-type: none"> • Ask about nutrition, medications, hydration • Refer to a physician
Time of Day Variability	<ul style="list-style-type: none"> • Ask if certain times of the day are best Try mid-morning appointment
Hearing and Vision Loss	<ul style="list-style-type: none"> • Assess ability to read/repeat simple information • Adjust seating, lighting • Use visual and hearing aids • Refer for hearing and vision evaluation
Educational/Cultural/Ethnic Barriers	<ul style="list-style-type: none"> • Be aware of race and ethnicity, education, long-held values and traditions

B. Relevant legal elements

The legal elements of mental capacity vary somewhat among states and should be modified as needed for your particular state.

GENERAL LEGAL ELEMENTS OF MENTAL CAPACITY FOR COMMON TASKS	NOTES ON CLIENT'S UNDERSTANDING/APPRECIATING/FUNCTIONING UNDER ELEMENTS
Testamentary Capacity [Insert elements of relevant tests]	
Contractual Capacity [Insert elements of relevant tests]	
Mental capacity to give gifts [Insert elements of relevant tests]	
Other Legal Tasks Being Evaluated and Capacity Elements	

C. Task-specific factors in preliminary evaluation of mental capacity

THE MORE SERIOUS THE CONCERNS ABOUT THE FOLLOWING FACTORS	THE HIGHER THE FUNCTION NEEDED IN THE FOLLOWING ABILITIES
Is decision consistent with client's known long-term values or commitments? Is the decision objectively fair? Will anyone be hurt by the decision? Is the decision irreversible?	<ul style="list-style-type: none"> • Can client articulate reasoning leading to this decision? • Is client's decision consistent over time? Are primary values client articulates consistent over time? • Can client appreciate consequences of his/her decision?

D. Preliminary conclusions about client mental capacity

After evaluating A, B and C above:

<ul style="list-style-type: none"> • Intact No or very minimal evidence of diminished mental capacity 	Action: Proceed with representation and transaction
---	---

<ul style="list-style-type: none"> • Mild problems Some evidence of diminished mental capacity 	<p>Action:</p> <ol style="list-style-type: none"> 1. Proceed with representation/transaction, or 2. Consider medical referral if medical oversight lacking, or 3. Consider consultation with mental health professional, or 4. Consider referral for formal clinical assessment to substantiate conclusion, with client
<ul style="list-style-type: none"> • More than mild problems Substantial evidence of diminished mental capacity 	<p>Action:</p> <ol style="list-style-type: none"> 1. Proceed with representation/transaction with great caution, or 2. Consider medical referral if medical oversight lacking, or 3. Consider consultation with mental health professional, or 4. Consider referral for formal clinical assessment to substantiate conclusion, with client consent.
<ul style="list-style-type: none"> • Severe problems Client lacks mental capacity to proceed with representation and transaction 	<p>Action:</p> <ol style="list-style-type: none"> 1. Referral to mental health professional to confirm conclusion 2. Do not proceed with case; or withdraw, after careful consideration of how to protect client's interests 3. If an existing client, consider protective action consistent with MRPC 1.14(b)

Case notes

Summarise key observations, application of relevant legal criteria for mental capacity, conclusions and actions to be taken:

APPENDIX C

Techniques lawyers can use to enhance client mental capacity

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, American Bar Association Commission on Law and Aging and American Psychological Association (2005). An excerpt from this publication is provided below.

Notes: Attorneys should be read in the WA setting as meaning lawyers. 'Capacity' should be read as referring to mental capacity.

Techniques lawyers can use to enhance client mental capacity

Clients with evidence of diminished capacity may still be able to make or participate in making a legal decision. The Comment to Model Rule 1.14 notes that “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.” How can a lawyer maximize the capacity of an older client who may be limited by one or more of the cognitive, emotional, behavioral, or mitigating factors.

This chapter highlights practical techniques that lawyers can use to accommodate sensory and cognitive changes that become more prevalent with age, and to engender the trust and confidence of older clients with diminished capacity.

This chapter describes an approach of “gradual counseling” by which the attorney may help the client to understand and make choices through a process of clarification, reflection, and feedback that is respectful of client values.

A key message of this chapter is that attorneys must be sensitive to age-related changes without losing sight of the individuality of each older person. Although functional limitations do increase with age, most older adults do not have physical, sensory, or cognitive impairments. Therefore, one must not assume impairments in older clients, but one must be prepared to address these issues when they arise. Moreover, attorneys should examine their own attitudes toward aging to ensure that “ageism” does not inadvertently influence their judgments about client capacity.

Lawyers also should be alert to ethnic and cultural factors that might be a barrier to communication, subliminally affecting perceptions of client abilities and behavior.

Finally, attorneys should do everything possible to make their office and their counselling approach “elder friendly” and accessible to individuals with a range of disabilities. Under the Americans with Disabilities Act (ADA), law offices as “public accommodations” are required to make reasonable modifications to their policies, practices, and procedures to make services available to people with disabilities.

Beyond this, many older clients whose impairments do not reach the level covered under the ADA will be aided by the kinds of techniques listed below to optimize their functioning.

A. Engendering client trust and confidence

Attorneys can take steps to build the trust of older clients, allowing them to be at their best during the interview process and bolstering their decision-making ability.

Upon introduction, take time to “**break the ice**” and, if appropriate, make a few brief remarks about areas of common interest such as weather, sports, or mutual connections.

Interview the client alone to ensure confidentiality and to build trust. However, consider the important role support persons can play. If the client is more at ease with a friend or family member in the room, **consider including the support person for a portion** of the interview or at least during an introductory phase. Be sure to talk to the client rather than past the client to the others.

Stress the **confidentiality** of the relationship. Some older adults may be fearful of losing control of their affairs if they divulge information. Assure the client that information will not be shared with others, including family members, without prior consent.

Encourage maximum **client participation** to increase a sense of investment in the process.

Respond directly to the client's feelings and words, making the client **feel respected and valued**, which enhances trust.

Use **encouragement** and verbal reinforcement liberally.

Take **more time** with older clients so they are comfortable with the setting and the decision-making process to be undertaken.

Conduct business over **multiple sessions** to increase familiarity and opportunities for trust building.

B. Accommodating sensory changes

While not all older adults have hearing and vision loss, these deficits are common for a substantial proportion of Americans over the age of 65. Sensory problems, particularly in hearing, sometimes result in older individuals pretending that they know what is under discussion, becoming socially withdrawn, and in some instances, depressed. As stated in Chapter IV, lawyers should not mistake sensory loss for mental confusion. Rather, sensory changes and the older adults' response to them are mitigating factors that should be taken into consideration when assessing signs of diminished capacity.

To address hearing loss

- Minimize **background noise** (e.g., close the office door, forward incoming calls) as individuals with hearing loss have difficulty discriminating between sounds in the environment.
- **Look at the client** when speaking. Many individuals with hearing loss read lips to compensate for hearing loss.
- **Speak slowly and distinctly**. Older adults may process information more slowly than younger adults.
- **Do not** over-articulate or **shout** as this can distort speech and facial gestures.
- Use a **lower pitch** of voice because the ability to hear high frequency tones is the first and most severe impairment experienced by many older adults with compromised hearing.
- Arrange seating to be conducive to conversation. **Sit close** to the client, face-to-face, at a table rather than on the far side of a desk.
- Focus more on written communication to compensate for problems in oral communication. Provide **written summaries** and follow-up material.
- Have auditory **amplifiers** available.

To address vision loss

- Increase **lighting**.

- **Reduce** the impact of glare from windows and lighting as older adults have increased sensitivity to glare. Have clients face away from a bright window.
- **Do not** use **glossy** print materials, as they are particularly vulnerable to glare. Format documents in **large print** (e.g., 14- or 16-point font) and double-spaced as presbyopia (blurred vision at normal reading distance) becomes more prevalent with age.
- Give clients **additional time** to read documents, as reading speed is often slower.
- Give the client adequate **time to refocus** his or her gaze when shifting between reading and viewing objects at a distance, as visual accommodation can be slowed.
- Be mindful of **narrowing field of vision**. A client may not be aware of your presence in the room until you are directly in front of him or her.
- Have **reading glasses** and magnifying glasses available on conference tables.
- Arrange furnishings so **pathways** are **clear** for those with visual or physical limitations.

To accommodate hearing/vision loss, address

- Background noise
- Seating position
- Lighting
- Large print materials
- Hearing and vision aids
- Speaking style and pace

C. Accommodating cognitive impairments

For clients with some evidence of cognitive impairment who may be in the murky gray area of “questionable capacity,” the practical steps suggested below may offer significant support:

- Begin the interview with **simple questions** requiring brief responses to assess client understanding and optimal pace, as reaction time is often slower among older adults, particularly for more complex tasks.
- Conduct business at a **slower pace** to allow the client to process and digest information, as information-processing speed declines with age.
- Allow **extra time** for responses to questions, as “word-finding” can decline with age.
- **Break information** into smaller, manageable segments.
- Discuss **one issue at a time**, as divided attention between two simultaneous tasks, as well as the ability to shift attention rapidly, shows age-related decline.
- **Provide cues** to assist recall rather than expecting spontaneous retrieval of information.
- **Repeat, paraphrase, summarize**, and check periodically for accuracy of communication and comprehension. The importance of repeated testing for comprehension has been documented in research of informed consent procedures showing that comprehension is sometimes incomplete even when individuals state that they understand. This inconsistency is more pronounced among older adults, particularly those with low vocabulary and education levels.
- If information is not understood, incompletely understood, or misunderstood, **provide corrected feedback** and check again for comprehension.

- **Provide summary notes** and information sheets to facilitate later recall. Include key points, decisions to be made, and documents to bring to next meeting.
- Schedule appointments **for times of the day** when the client is at peak performance. Peak performance periods change with age and for many older adults **mornings** are often best.
- Provide time for **rest** and bathroom breaks.
- Schedule **multiple, shorter appointments** rather than one lengthy appointment, as older adults may tire more easily than younger adults. Multiple testing sessions can also assist in identifying the client’s performance rhythms and cycles.
- Whenever possible, conduct business in the **client’s residence**. This often makes the client more relaxed, optimizes decision-making, and provides the attorney with clues about “real-world” functioning.

D. Strengthening client engagement in the decision-making process

Linda F. Smith, in her seminal article “Elderlaw: Representing the Elderly Client and Addressing the Question of Competence,” describes a technique of *gradual counselling* that is useful in compensating for age-related differences in memory and problem-solving ability, and when there are questions about mental capacity. It provides a method for inquiring into and understanding the client’s decision-making process, and may assist such clients in thinking through their underlying concerns, goals and values, and choosing a consistent course of action.

“The attorney for the limited client should engage the client in a process of gradual decision-making, which will involve clarification, reflection, feedback, and further investigationGradual counselling requires the attorney to repeatedly refer to the client’s goals and values in assessing each alternative and in discussing the pros and cons of an alternative. This will involve a great deal of clarifying and reflecting of the clients’ thoughts and feelings The attorney should proceed to explain each relevant option and elicit the client’s reactions.”

Smith outlines steps in the process of “gradual counselling” and maintains that if attorneys are vigilant in pursuing these steps with a client of questionable mental capacity, it may assist a limited client in reaching an informed decision.

Gradual counselling	<ul style="list-style-type: none"> • Identify goals • State problems • Ascertain values • Compare options to goals • Give feedback
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- Confirm or reconfirm the client’s basic goal or problem to be solved.
- **Get feedback** from the client to ensure he or she agrees with the lawyer’s statement of the problem. Listen for important client values.
- Ascertain **the most important** values the client expresses. Restate these values and confirm with the client. Recognize that the values of an older client may differ from those of the attorney.

“For example, a young attorney may begin to doubt the competence of her elderly client who does not wish to contest a right to income or benefits or does not wish to take a relatively simple legal action to preserve his assets. However, if the particular client has a limited life expectancy, minimal

need for assets, or an emotional focus upon internal or spiritual things, that client's decision may be quite reasonable. Because the underlying values are so important, throughout the counselling process the attorney should continue to reflect the feelings and thoughts that the client expresses . . . to understand the client's values as fully as possible."

- Describe the best option for attaining the client's goal. Ask for the client's feeling about that option.
- Explain each relevant option, and get the client's reaction. This will enable the attorney to see whether the client understands the information and how the client responds. It will also check for consistency of values. The attorney may need to "present fewer choices and only the most salient features for or against each alternative." This "weeding out" may allow a client of questionable capacity to reach a reasoned judgment.
- Give the client feedback that might be helpful. For example, if the client appears inconsistent in goals or decisions over time, pointing this out may help the client to remember and focus. If a client chooses a course that seems harmful, the attorney could express worry and concern, and get the client's reactions to this.
- Even when there is no clearly enunciated choice by the client, the lawyer still may be able to find capacity for the limited decision at hand from the client's reactions during the course of the session.
- Such a "gradual counselling" approach is respectful of the client's autonomy. Moreover, an attorney taking these steps will be assured that he or she has made a thorough attempt to find client capacity before taking any more precipitous action. However, if despite all of these techniques and accommodations, the client's capacity for the decision or transaction is still questionable, the attorney may need assistance from a clinician.

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APPENDIX D

Resources

The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) at http://www.apa.org/pi/aging/diminished_capacity.pdf

Darzins P, Molloy W and Strang D (eds) 2000 *Who Can Decide: The six step capacity assessment process*, Memory Australia Press: Adelaide

WA Health Consent to Treatment Policy 2016 Department of Health WA at <https://ww2.health.wa.gov.au/About-us/Policy-frameworks/Clinical-Governance-Safety-and-Quality/Mandatory-requirements/WA-Health-Consent-to-Treatment-Policy>

Freedom vs Protection, Office of the Public Trustee (WA)

See also the following websites:

Law Society of WA	http://www.lawsocietywa.asn.au/
The Public Trustee	https://www.publictrustee.wa.gov.au/
Office of The Public Advocate	https://www.publicadvocate.wa.gov.au/

APPENDIX E

Sample letter/s of referral

Dear Dr XXXX

Re: *Client name*

I act for *Client name* and seek a report from you in relation to his/her mental capacity to execute an enduring power of attorney (copy enclosed).

In your opinion, does my client have the mental capacity to understand the following:

- That this document is only effective while my client is alive and has no effect after their death;
- That the client can revoke (cancel) the power at any stage, as long as they have mental capacity;
- That the power that the client is giving another person (the attorney) will extend after the client has lost the mental capacity to revoke (cancel) the enduring document;
- That my client must appoint the attorney of their own free will and without any undue influence on the part of a third party;
- That s/he is giving power to another person to manage their financial affairs, this power includes, but is not limited to:
 - buying and selling property on the client's behalf (including the client's own home);
 - depositing and withdrawing money from the client's account/s;
 - buying and selling shares with the client's money; and
- Finally, that should the attorney abuse the power, they can in effect leave my client destitute. Whilst this is illegal, there is the potential for this to happen and recovery of the money/property may be difficult to achieve.

Thank you for your assistance in this matter.

Yours etc



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