

**GUIDELINES FOR SOLICITORS PREPARING AN  
ENDURING POWER OF ATTORNEY**

**Law Society of NSW, December 2003**

The following guidelines are intended to assist solicitors who are advising clients who wish to draw up an enduring power of attorney or who are asked to certify and witness the execution of an enduring power of attorney. The guidelines set out general points for consideration. They have been prepared by the Law Society of New South Wales.<sup>1</sup> There have been significant changes to the law relating to the certifying and witnessing of enduring powers of attorney arising from the coming into force of the *Powers of Attorney Act 2003*.<sup>2</sup>

## **1. SOLICITOR'S OBLIGATIONS UNDER THE POWERS OF ATTORNEY ACT 2003**

A solicitor may be asked by a client to prepare an enduring power of attorney and/or to complete the certificate attached to the enduring power of attorney as required by section 19 of the *Powers of Attorney Act 2003*.

In both cases, the solicitor has an obligation under the Act to explain the nature and effect of the enduring power of attorney to the donor and to be satisfied that the donor has the mental capacity to make the enduring power of attorney. The *Powers of Attorney Act* requires that an enduring power of attorney must have endorsed or attached to it a certificate completed by a prescribed witness, including a solicitor (or barrister), in which the prescribed witness states that they:

1. Explained the effect of the instrument to the donor before it was signed; and
2. The donor appeared to understand the effect of the power of attorney

A solicitor should only complete this certificate if the solicitor has explained the effect of the power of attorney to the donor directly. The explanation should be made directly to the donor and not to third parties purporting to act on the donor's behalf.

It is not sufficient for the solicitor to simply explain the effect of the power of attorney to the donor. The solicitor must also be satisfied that the donor appeared to understand the explanation about the effect of the power of attorney before the solicitor can sign the required certificate.

These guidelines suggest the types of matters which a solicitor should canvass with a client in explaining the effect of a power of attorney together with the steps which a solicitor should take to be satisfied that the donor appeared to understand this explanation, especially where this may be in doubt.

## **2. WHO IS THE CLIENT?**

Where a solicitor is instructed to prepare an enduring power of attorney the donor is the client. In carrying out the terms of the power, the client's interests are paramount and remain so after the client has become mentally incapable.

## **3. TAKING INSTRUCTIONS**

- (a) The solicitor should personally attend the client to obtain instructions for the granting of the power of attorney. This is particularly so in any of the following cases where:
  - (i) instructions are communicated by a third party, whether or not related to the client,
  - (ii) there is no written instruction or confirmation of instructions signed by the client,
  - (iii) the client is of advanced age, or is hospitalized or resides in a nursing home,
  - (iv) the client is suffering any physical disability, or a condition raising the question of mental capacity.

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<sup>1</sup> The Law Society wishes to acknowledge that these guidelines are based on those developed by John Blackwood, formerly of the Guardianship and Administration Board and the Law Society of Tasmania.

<sup>2</sup> The *Powers of Attorney Act 2003* (NSW) commences on 16 February 2004.

- (b) The solicitor should seek instructions directly from the donor and advise the donor in the absence of the proposed attorney.
- (c) If the solicitor suspects that instructions may have been given under duress or undue influence, further enquiries must be made and these suspicions allayed before accepting instructions.
- (d) The solicitor **must not** accept instructions where the solicitor is aware that the donor does not have capacity to grant the enduring power of attorney.

#### **4. CAPACITY TO MAKE AN ENDURING POWER OF ATTORNEY**

If during the course of taking instructions, the solicitor becomes aware of any doubts about the donor's capacity to make the power of attorney, the solicitor has an obligation to pursue this further before the instrument is executed. In meeting this obligation the following steps must be followed:

- (a) The solicitor should refer to the *Guidelines for Assessing Competence for Granting an Enduring power of attorney* (Appendix A) for an understanding of the level of competence required and suggested approaches to questioning the client to explore their level of understanding of explanations provided.
- (b) Where a solicitor is aware that the donor is the subject of medical care for a condition which may affect mental capacity, or is in hospital, or is in an aged care facility, the solicitor must check this with the donor's doctor or other relevant health care professional and either obtain a report or make a note confirming how they decided that the donor has the mental capacity to execute an enduring power of attorney.
- (c) In respect of obtaining the doctor's report, this should be raised with the client and explained in terms of protecting the client's best interests to ensure that the power of attorney is validly made. After obtaining the client's consent, the solicitor should contact their client's doctor or health professional for information about their mental capacity. The client's consent should cover the disclosure of health information by the doctor or health professional to the solicitor. If consent is not obtained the health professional may not disclose the information on the basis of privacy legislation.
- (d) The solicitor should inform the doctor that a person who grants an enduring power of attorney must be able to understand the significance and effect of making an enduring power of attorney. A copy of the *Guidelines for Assessing Competence for Granting an Enduring power of attorney* should be provided to the doctor (Appendix A).
- (e) If the doctor is of the opinion that the donor has capacity the doctor should make a record to that effect which should be filed in the solicitor's office with the papers relating to the execution of the enduring power of attorney. (It is also recommended that the doctor makes a contemporaneous file note as to the donor's capacity at the time of the donor's signing the enduring power of attorney).
- (f) If the doctor's opinion is that the client lacks capacity, then this should be discussed with the client. The doctor and the solicitor should keep separate file notes and records of this opinion. The solicitor should refer to the Law Society's Client Capacity Guidelines (September 2003) for information about how to proceed and the options available. If the client disputes the assessment and insists that the solicitor proceed on instructions, the solicitor should refer to the Client Capacity Guidelines on when a solicitor should cease to act where a client lacks capacity.

## 5. ADVICE TO DONOR

The extent of advice given to a client about a power of attorney will vary according to the needs of the client and the circumstances of each particular case. However, there are certain fundamental matters which a solicitor should explain to their client and which the client must understand in order to competently grant an enduring power of attorney.

In view of the powers and responsibilities conferred on the attorney, the matters to be explained and understood are:

- (i) the donor may, in the document, specify or restrict the power to be given to the attorney<sup>3</sup> and may instruct the attorney about the exercise of the powers. (For practical purposes it may be preferable to preserve the donor's instructions about the exercise of the powers in a separate document rather than in the body of the power of attorney. The reasons for this are discussed briefly in paragraphs 5(b) & (c) below.);
- (ii) the power begins when authorized by the donor and accepted by the attorney or when the donor loses their mental capacity if this is specified, or at such other time as provided in the instrument;
- (iii) subject to any directions contained in the power, the attorney will be able to do anything with the donor's property which the donor could have done;<sup>4</sup>
- (iv) the types of actions or things the attorney will be authorised to do by the power of attorney without further reference to the donor;
- (v) the donor may revoke the enduring power of attorney at any time when<sup>5</sup> they have the mental capacity to do so;
- (vi) the power the donor has given continues even if the donor subsequently loses their mental capacity;
- (vii) the donor is unable to oversee the use of the power if they subsequently lose mental capacity.

These matters and others are discussed in more detail below.

### (a) Choice of Attorney.

The choice of attorney is a personal decision for the donor, but it is important for the solicitor to advise the donor of the various options available, and to stress the need for the attorney to be absolutely trustworthy, since on appointment the attorney's actions will be subject to little supervision or scrutiny. For special considerations where the solicitor is proposed as the attorney see 7. below.

As an enduring power of attorney does not operate unless it is accepted by the attorney, the donor should discuss their plans with the proposed attorney. It is important to ensure that the attorney is willing and available to act if required and, in the case of the proposed appointment of more than one attorney, is prepared to co-operate and communicate with other appointed attorneys to best protect the donor's interests.

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<sup>3</sup> For example that the attorney's power is restricted to the sale of real property and the investment or disposition of the proceeds of sale.

<sup>4</sup> The attorney is deemed to be a trustee of the donor's property and must exercise the powers granted to protect and benefit the donor's interest.

<sup>5</sup> In order to revoke an enduring power of attorney the donor must have the same degree of capacity as the donor had when the power was made.

(i) More than one attorney.

A donor may appoint more than one attorney to act either jointly, severally or jointly and severally. The differences between 'joint', 'several' and 'joint and several' should be explained to the donor namely:

that 'joint' attorneys must all act together and cannot act separately, the donor should be advised that a joint appointment will terminate if the appointment of one of the attorneys is revoked or any one of the attorneys disclaims, dies, becomes bankrupt or physically or mentally incapable of acting as an attorney (see section 46(1) of the *Powers of Attorney Act 2003*). However, under section 36(4)(d) of the *Powers of Attorney Act 2003* the Guardianship Tribunal and the Supreme Court have jurisdiction to revive an enduring power of attorney in certain circumstances.

that 'joint and several' attorneys can all act together but can also act separately if they wish. The donor should be advised that, where there is a joint and several appointment, the disclaimer, death, bankruptcy or incapacity of one attorney to act or the revocation of appointment of one of the attorneys will not automatically terminate the power. (See section 46(2) of the *Powers of Attorney Act 2003*).

(ii) Flexible options

The donor may have to make difficult choices as to which family member(s) to appoint as his or her attorney, or whether to appoint a professional trustee such as the Public Trustee or a statutory trustee company. It is possible to allow some flexibility, as in the following examples:

The donor may wish to appoint a family member and a professional to act jointly and severally with, for example, the family member dealing with day-to-day matters, and the professional dealing with more complex affairs. It should be noted that the Public Trustee or a statutory trustee company should not be appointed as a co-attorney without prior consultation.

The donor may wish to appoint his or her spouse as attorney, with provision for their adult child(ren) to take over as attorney(s) should the spouse die or become incapacitated. One way to achieve this is for the donor to execute two enduring powers of attorneys: the first appointing the spouse as attorney, and the second appointing the child(ren) with a provision that it will only come into effect if the first power is terminated for any reason. Alternatively, the donor could appoint everyone to act jointly and severally, with an informal understanding or separate written instructions that the children will not act while the spouse is able to do so.

The donor may wish to appoint his or her three adult children as attorneys to act jointly and severally, with a condition that anything done under the power should be done by at least two of them.

(b) General or limited authority.

Powers of attorney can cover all assets for an indefinite period. Also they can be limited to particular assets for a particular period. The *Powers of Attorney Act 2003* also creates further possibilities of limiting powers in respect of benefits to the attorney and third parties.

Enduring powers of attorney are intended to be used when a person has lost capacity – accordingly, it is preferable that they not be limited to periods of time or only some of the donor's assets.

The new short form of power of attorney provides a catalyst to obtain instructions on various limitations which can be created. The donor must be clear that they can instruct the attorney about the exercise of the power. It may be preferable that specific directions are in writing in a separate document, balancing the needs for a flexible approach to long term asset management with the donor's particular wishes. The

reason for putting such directions in a separate document is that if these conditions are preserved in the power of attorney itself, certain third parties may need to be satisfied that all conditions have been met before accepting an action of the attorney. As such, it may hinder the attorney in the exercise of their powers.

Donors should be advised that if a power of attorney is limited by assets and/or time, it may be necessary for the Guardianship Tribunal or the Supreme Court to appoint a financial manager. This appointment will suspend the power of attorney. However, under the *Powers of Attorney Act 2003*, both the Guardianship Tribunal and the Supreme Court may, in limited circumstances, vary the term of a power conferred by a Power of Attorney.<sup>6</sup>

(c) When the power is to come into operation.

The donor must understand when the power is to come into operation. An enduring power of attorney does not confer authority on an attorney until the attorney accepts the appointment by signing the power of attorney.

The power of attorney form provides the donor with several options for the commencement of the power of attorney including commencement from specified dates or from when the attorney considers that the donor requires assistance in managing their affairs.

If there is uncertainty or dispute about whether the donor has lost mental capacity then this may be established by assessment of the donor by a suitably qualified specialist. If there are legitimate grounds for querying or disputing such an assessment, the attorney or other interested party may apply to the Guardianship Tribunal or the Supreme Court for a declaration of incapacity. However, it is worth noting that, the more subjective the requirement that triggers the commencement of the power of attorney, the greater the prospect that difficulties will arise in dealing with third parties seeking confirmation that these requirements have been met.

The attorney may also assume control on the request of the donor if the donor still has mental capacity at that time.

If the donor does not wish the power to be exercisable immediately the donor can instruct their solicitor not to release the power to the donee until requested to do so or the donor loses capacity.

(d) The donor's property and affairs.

Solicitors should ask the donor about any property or affairs likely to cause problems in the future, and should be aware of the general nature and extent of the donor's assets. This will be important where Schedule 3 prescribed expressions are in the power. It is also important to be aware of any assets in other states or overseas to ensure that proper arrangements can be made for the attorney to deal with those assets. The New South Wales power of attorney in statutory form, especially if it is to operate as an enduring power, may not be effective in dealing with assets outside the jurisdiction.

(e) Disclosure of the donor's will.

Solicitors are under a duty to keep their clients' affairs confidential. However, it is helpful for attorney(s) acting on an enduring power of attorney to know about the contents of a donor's will to effectively manage the financial affairs of the donor. The *Power of Attorney Act 2003* protects the interests of specific devisees to property in a will, which has been sold by an attorney in the donor's lifetime. The effect of the new legislation will be to make it very desirable for an attorney to hold a copy of the will once the donor has lost capacity.

The question of disclosure of the donor's will should be discussed at the time of making the enduring power of attorney, and advice given in respect of the provisions of the Power of Attorney Act. Instructions should be obtained as to whether disclosure is denied, or the circumstances in which it is

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<sup>6</sup> s.36(4)(a), Powers of Attorney Act 2003.

permitted. For example, the donor may agree that the solicitor can disclose the contents of the will to the attorney, but only if the donor no longer has mental capacity and the solicitor thinks that disclosure of the will is necessary or expedient for the proper performance of the attorney's functions. This would generally be required where the last will discloses specific gifts of valuable property.

In the absence of this authority, the will is a document outside the scope of the attorney's authority. However, enquiry can be made of the solicitor by the attorney as to whether a proposed disposal of an asset will raise issues in relation to the will.

- (f) Medical evidence.

It may be worth asking the donor to give advance consent in writing authorizing the solicitor to contact the donor's doctor or any other medical practitioner if the need for medical evidence should arise at a later date for example, to assess whether the donor has lost the capacity to manage his or her property and financial affairs.

## **6. THE POWERS AND DUTIES OF THE ATTORNEY**

Solicitors may be in a position to also inform the attorney of the powers and duties that arise when the attorney accepts that role under an enduring power of attorney. It will be of benefit to the donor if the attorney is aware of his or her responsibilities. Such responsibilities include:

- (i) obeying the donor's instructions. These instructions may be given in contemplation of granting the enduring power of attorney, at the time of granting the enduring power of attorney or after granting the power of attorney provided the donor still has capacity. Such instructions should be in writing if possible and preferably separate from the power of attorney itself.
- (ii) protecting the interests of the donor and acting in their best interests keeping the donor's and the attorney's funds separate.
- (iii) not giving gifts or conferring a benefit on themselves or a third party unless expressly authorised to do so by the power of attorney. The power of attorney may authorise the attorney to give particular types of gifts or benefits by the inclusion of one of the statutory "prescribed expressions" set out in Schedule 3 of the *Powers of Attorney Act 2003*. If the 'prescribed expression' is used, the attorney is only authorised to give the kinds of gifts or benefits which are listed in that Schedule. Such gifts or benefits must be reasonable in the circumstances, taking into account the donor's finances and the size of the donor's estate.
- (iv) keeping any property received on behalf of the donor in safe-keeping.
- (v) keeping an adequate accounting of any dealings with the donor's assets.
- (vi) avoiding abusing his or her position as attorney to make a profit or causing a conflict between their duty to the donor and their own interests.

## **7. SOLICITOR-ATTORNEYS**

If a solicitor is to be appointed the attorney, Rule 11.1 of the Revised Professional Conduct & Practice Rules (in relation to wills) provides a useful model in assisting the solicitor to avoid a conflict of interest. This means that the certificate under the *Powers of Attorney Act 2003* in relation to the grant of an enduring power of attorney should be completed by a solicitor entirely independent of the solicitor-attorney.

Where a solicitor is appointed as attorney, or where it is intended that a particular solicitor will deal with the general management of the donor's affairs, a costs agreement should be entered into in accordance with the provisions of Part 11 of the *Legal Profession Act 1987*. Under that Act, a procedure is in place by which a solicitor must render a bill to the client before transferring any moneys held on trust in payment

of costs. If the power of attorney is of an enduring nature, at some point the donor will lack capacity to approve the bills. For this reason, and for the purposes of accountability and avoiding any perception of conflict of interest, a solicitor should be jointly appointed with another person who is not an associate of the solicitor, and arrangements made for that person to approve any bills rendered from time to time.

Solicitors should, again, be mindful of the provisions of Rule 11 of the Revised Professional Conduct & Practice Rules, which is set out in Appendix B.

In a number of cases solicitor-attorneys have disclaimed when it became apparent that the donor's assets were insufficient to make the attorneyship cost-effective. The Law Society's view is that, if solicitors intend to disclaim in such circumstances, they should not take on the attorneyship in the first place, and should advise the donor of the alternatives for financial management: either the possible need for a financial management order in the future; or an approach to the Public Trustee NSW who retains a statutory obligation not to refuse to act in matters just because of low value.

## **8. DRAWING UP AND EXECUTING THE ENDURING POWER OF ATTORNEY**

The prescribed form for a power of attorney is set out in Schedule 2 of the *Powers of Attorney Act 2003*. If clause 2 of that form is not crossed out then the effect is to make the instrument an enduring power of attorney.

The solicitor should provide advice about the scope of the attorney's authority and give options about the kinds of terms, conditions or limitations which could be included. The solicitor should ensure that the donor understands the advice being given by asking that the donor tells the solicitor their understanding of the terms of the power of attorney and the extent of the authority being given to the attorney.

The solicitor should draft the power of attorney in terms which reflect the donor's instructions.

Execution of the power of attorney should only take place after the solicitor has explained the power of attorney to the donor and is satisfied that the donor understands that explanation.

After the donor has signed the power of attorney, the solicitor can complete the required section 19 certificate, unless the solicitor is appointed as the attorney (see above).

The attorney should then sign acceptance of the power of attorney. The instructions of the donor should be sought as to the storage of the instrument. If the donor does not wish the instrument to be used immediately it may be preferable for the solicitor to keep the instrument in safe keeping until such time as the attorney has cause to act upon it.

The power of attorney must be registered at Land and Property Information if it is to be used to execute a conveyance or other deed affecting land, other than a lease for less than three years.



## Appendix A

### GUIDELINES FOR ASSESSING COMPETENCE FOR GRANTING AN ENDURING POWER OF ATTORNEY

#### Introduction

The classic but general statement of the test for competence/capacity/mental capacity is found in the joint judgment of Dixon CJ, Kitto and Taylor JJ in *Gibbons v Wright*<sup>1</sup>:

[T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained.

In *Ranclaud v Cabban*, Young J took the matter a little further in relation to powers of attorney. He noted:<sup>2</sup>

A solicitor is not the alter ego of a litigant. Generally speaking, however, a person retains a solicitor to advise one and one reserves to oneself the ultimate power of making decisions after receiving the solicitor's advice.

He then continued on the same page:

Further so far as Powers of Attorney are concerned whilst it may be one thing to be aware that a person under a Power of Attorney may act on one's behalf, where the Power, as in the present case, is a general Power under sec. 163B and Sch. VII of the *Conveyancing Act 1919*. Such a power permits the donee to exercise any function which the donor may lawfully authorise an attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood that she was authorising someone to look after her affairs but also what sort of things the attorney could do without further reference to her.

To be capable of granting an enduring power of attorney, a person (the donor) must understand the nature and effect of the document when explained to them. The person must be able to take in what is being explained to them and be able to demonstrate their understanding by communicating this back to the explainer. A person may be taken to understand the nature and effect of the document if they understand the matters set out below. The matters should be explained to the client by the solicitor instructed by them to draft their power of attorney. The matters to be understood are that:

- (i) the donor may, in the document, specify or restrict the power to be given to the attorney<sup>3</sup> and instruct the attorney about the exercise of the power;
- (ii) the power begins at the time chosen by the donor in the instrument of appointment;
- (iii) subject to any directions contained in the power, the attorney will be able to do anything with the donor's property which the donor could have done;<sup>4</sup>

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<sup>1</sup> (1954) 91 CLR 423, 438.

<sup>2</sup> (1988) NSW ConvR 55-385, 57, 548

<sup>3</sup> For example that the attorney's power is restricted to the sale of real property and the investment or disposition of the proceeds of sale.

- (iv) the types of actions or things the attorney will be authorised to do by the power of attorney without further reference to the donor;
- (v) the donor may revoke the enduring power of attorney at any time when<sup>5</sup> they have the mental capacity to do so;
- (vi) the power the donor has given continues even if the donor subsequently loses his or her mental capacity;
- (vii) the donor is unable to oversee the use of the power if they subsequently lose mental capacity.

In particular cases there may be additional aspects of the power of attorney which must also be understood by the client.

### **Approaches to questioning to explore client capacity**

Questions susceptible to a yes/no answer may be inadequate for the purpose of assessing the donor client's capacity. For example if the matters set out above were mentioned to the donor and the solicitor asked 'Do you understand this?' an affirmative answer would be unlikely to satisfy the tests for capacity. However if the donor was asked 'What will your attorney be able to do?' and 'What will happen if you become mentally incapable?' the donor's answers should indicate whether they understand the nature and effect of the power.

The assessment of a donor's mental capacity may take place at a time when the donor is in a vulnerable situation, for example, because of a recent illness or because the donor has been advised that they can no longer live at home independently. Special care should be exercised in these situations to make certain the donor in fact understands the nature and effect of an enduring power of attorney and is not being subjected to pressure or influence from others.

Solicitors should also refer to the Law Society's Client Capacity Guidelines, September 2003 for further information about communication with clients where capacity may be in issue.

### **Referral for medical opinion or reports**

If there is doubt about the client's capacity to understand any of these matters, an appropriate medical professional should be approached to give an opinion as to the competence/ capacity/ mental capacity of the person to grant a power of attorney. The solicitor should explain this to their client in terms of protecting the client's best interests in ensuring that the power of attorney is validly made. The solicitor should also obtain the client's consent to the disclosure of health information by the doctor or health professional to the solicitor. If consent is not obtained the health professional may not disclose the information on the basis of privacy legislation.

The client's general practitioner will usually be able to give a useful opinion, provided that the person has been the general practitioner's patient for a sufficient period of time to enable the general practitioner to comment on any change in the person's general state of health and mental capacity. Other suitable professionals whose opinions may be sought are:

1. A geriatrician if the person is aged and has memory problems.

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<sup>4</sup> The attorney is deemed to be a trustee of the donor's property and must exercise the powers granted to protect and benefit the donor's interests.

<sup>5</sup> In order to revoke an enduring power of attorney the donor must have the same degree of capacity as they had when the power was made.

2. An appropriate specialist medical practitioner if the person has acquired brain damage, mental illness or an intellectual disability.
3. A clinical psychologist with experience assessing the capacity of adults with cognitive deficits.

Subject to the client's consent, the medical practitioner or psychologist should also be provided with any of the following material that may be available in relation to the client:

- any medical reports relevant to the person's capacity
- any assessments of capacity carried out by a psychologist
- any assessments of the person's functional capacity carried out by an occupational therapist, a member of an aged care assessment team, or a person with experience in making assessments of functional capacity.

The solicitor should also provide the medical professional with a clear summary of the matters which the donor should understand in order to grant a power of attorney. The solicitor may wish to supply the medical professional with the list of matters numbered (i) – (vii) referred to on the first page of this Appendix and request the medical professional to provide their expert opinion on the person's capacity to appreciate those questions and respond to them, thus either meeting or failing to meet the test for capacity to grant a power of attorney. The solicitor may also need to supplement this list with additional matters particular to the situation. The doctor or other professional should be asked for a report that sets out

- How long the client has been their patient;
- How often, and how recently the doctor has seen the client;
- A brief observation of the client's state of health
- A conclusion that sets out whether the client has the necessary capacity to execute the power of attorney.

Solicitors should also be mindful that legal terminology may not be familiar to some medical professionals and should take care to explain more complicated legal terms or concepts in their assessment requests.

### **Outcome of capacity assessments**

Where a capacity assessment by a medical professional is unequivocal that the client has the mental capacity to grant an enduring power of attorney, the solicitor should advise the client of this finding and continue to draw up the power of attorney as instructed. The solicitor should ensure that a medical practitioner who has tested the donor's capacity makes a file note of his/her findings which is contemporaneous with the donor's execution of the relevant document.

However, if the capacity assessment concludes that the client does not have the requisite capacity to grant an enduring power of attorney, the solicitor must discuss this with the client. If there are alternatives which can be put in place then these should be canvassed, including the appointment of a financial manager through the Guardianship Tribunal. If the client is in hospital or a nursing home, the relevant person in charge of the client's care should be informed, in a general way, of the client's diminished capacity in order to protect the client from possible exploitation by others.

If the client disagrees with the assessment and insists on the solicitor proceeding on the client's instructions, the solicitor should decline to act in those circumstances. Any solicitor with knowledge

of an unfavourable capacity assessment cannot, in good faith, certify that the client appeared to understand the enduring power of attorney which is being executed.

## **Appendix B**

### **RULE 11 OF THE REVISED PROFESSIONAL CONDUCT & PRACTICE RULES**

#### **11. Receiving a benefit under a will or other instrument**

*11.1 A practitioner who receives instructions from a person to draw a Will appointing the practitioner an Executor must inform that person in writing before the client signs the Will -*

*11.1.1 of any entitlement of the practitioner to claim commission;*

*11.1.2 of the inclusion in the Will of any provision entitling the practitioner, or the practitioner's firm, to charge professional fees in relation to the administration of the Estate, and;*

*11.1.3 if the practitioner has an entitlement to claim commission, that the person could appoint an Executor a person who might make no claim for commission.*

*11.2 A practitioner who receives instructions from a person to -*

*11.2.1 draw a will under which the practitioner or an associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the practitioner is also to be appointed executor) and the reasonable professional fees of the practitioner or the practitioner's firm; or*

*11.2.2 draws any other instrument under which the practitioner or an associate will, or may, receive a substantial benefit in addition to the practitioner's reasonable remuneration, including that payable under a conditional costs agreement,*

*must decline to act on those instructions and offer to refer the person, for advice, to another practitioner who is not an associate of the practitioner, unless the person instructing the practitioner is either:*

*11.2.3 a member of the practitioner's immediate family; or*

*11.2.4 a practitioner, or a member of the immediate family of a practitioner, who is a partner, employer, or employee, of the practitioner.*

*11.3 For the benefit of this rule:*

*“substantial benefit” means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.*