**The following questions should assist you to prepare an enduring power of attorney for a client**

1. **CLIENT IDENTITY AND CAPACITY**

**Did you verify the client’s identity?**

**Did you see the client alone?**

To minimise the risk of undue influence it is preferable to see the client alone. If another person is present make a file note of the person’s name and relationship to the client and the reason for their presence.

**Did the client need an interpreter?**

If so, use a qualified interpreter (not a family member or friend) and keep a record of the interpreter’s name and qualification.

**Did you explain the effect of the power of attorney?**

This is required for the certificate for the purposes of section 19 of the *Powers of Attorney Act 2003*. In particular, the client should understand:

1. That the document is only effective while the client is alive and has no effect after their death;
2. That they can revoke (cancel) the power at any stage, as long as they have mental capacity;
3. That the power that they are giving another person (the attorney) will extend after the client has lost the mental capacity to revoke (cancel) the enduring document;
4. That they must appoint the attorney of their own free will and without any undue influence on the part of a third party;
5. That they are giving power to another person to manage their financial affairs, and this power includes things like:
	1. buying and selling property on their behalf (including their own home);
	2. depositing and withdrawing money from their account/s; and
	3. buying and selling shares with their money.

**Did the client appear to understand the effect of the power of attorney?**

This is required for the section 19 certificate. If you are not satisfied as to the client’s understanding, consider obtaining a medical opinion, and do not give the certificate[[1]](#footnote-1). It is recommended that you ask open-ended questions (examples include: Why do you want to appoint someone as your attorney? Tell me about your family and friends. Who do you want to appoint as your attorney/s and why are you choosing them? What sort of decisions will your attorney be able to make?) and record the questions and the client’s answers in a file note. It is recommended that you discuss with your client the importance of choosing an attorney who is trustworthy and responsible, and discuss the extent of the proposed attorney’s qualifications for the role, either because of their prior knowledge and involvement in the client’s affairs or by reason of having appropriate skills and experience.

1. **COMPLETING THE FORM**

**Are you using the current form?**

The form should be the prescribed form 2 under schedule 2 of the *Powers of Attorney Regulation 2016* (NSW). Example forms are available at: <http://www.nswlrs.com.au/__data/assets/pdf_file/0010/187282/Enduring_PoA.pdf>

**If the client wants to appoint more than one attorney are they to be appointed jointly or jointly and severally?**

**If the attorneys are to be appointed jointly, is the power of attorney to continue if one of the attorneys dies, resigns or otherwise vacates office?**

**If the client wants to appoint more than one substitute attorney, are they appointed jointly or jointly and severally?**

If jointly, and the client does not want the power to terminate on the death, resignation or vacation of office of one of them, the form will need to be amended to specify that the appointment is not to be terminated in those circumstances.

**Does the client want to impose conditions or limit the powers of the attorney(s)?**

As a power of attorney is construed strictly, any condition or limitation will need to be drafted with precision.

**Does the client want the attorney(s) to have additional powers (e.g. authority to give reasonable gifts, to confer benefits on the attorney to meet reasonable living and medical expenses, or to confer benefits on other persons to meet reasonable living and medical expenses)?**

If there is more than one attorney appointed, or if a substitute attorney is appointed, the form will need to be modified to make it clear whether all or only some attorneys are to have these authorities.

**Did the client decide when the power should take effect?**

The earliest commencement for an enduring power of attorney is when the attorney accepts the appointment but the client may wish to choose a later event.

**Has the power of attorney been signed and witnessed?**

**Have you completed the certificate under section 19 of the *Powers of Attorney Act 2003*?**

**Have you made arrangements for acceptance by the attorney(s)?**

An enduring power of attorney cannot operate until the attorney accepts the appointment.

1. **OTHER MATTERS**

**Does the client wish to authorise the attorney to obtain the client’s will or a copy of it or receive information from the will?**

If so, that authority could be included in the enduring power of attorney. In the absence of this authority, as there is currently no clear statutory provision or judicial statement in NSW that permits access by an attorney to a copy of a will of a person who has an incapacity, the attorney may not be able to access the will or its contents.

**Does the client wish to revoke any other pre-existing powers of attorney?**

If so, a revocation should be completed by the client and provided to the previous attorney.

**Should the enduring power of attorney be registered?**

The attorney will not be able to undertake any land dealings unless the enduring power of attorney is registered.

1. **SOLICITOR AS ATTORNEY**

It is not usual for a client to appoint their solicitor as their attorney, although there may be some circumstances where a client would wish to do so. If you are considering accepting appointment as an attorney, consider the provisions of Rule 12 of the Solicitors’ Conduct Rules, which are available at: <https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf>.

It is suggested that, as a minimum, the client should be referred to another legal practice for independent legal advice and before the power of attorney is signed the client should be informed in writing of the fees that would be charged for acting as an attorney.

1. For more information in relation to mental capacity issues, see Appendix A of The Law Society of NSW’s guidelines on ‘When a client’s mental capacity is in doubt’, available at: <https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf> [↑](#footnote-ref-1)