

Objective

To work with competent clients, their supporters and representatives.

Behaviour of Concern

- 1) A client demonstrates difficulty with recall or has memory loss
- 2) A client has ongoing difficulty with communications
- 3) A client demonstrates a lack of mental flexibility
- 4) A client has problems with simple calculations which they did not have previously
- 5) A client is disoriented
- 6) There is a sense that “something about the client has changed”, including deterioration in personal presentation, mood or social withdrawal
- 7) A client is in hospital or a residential aged care facility when instructions are taken
- 8) 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
- 9) 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
- 10) A client shows a limited ability to interact with the solicitor
- 11) A client shows a limited ability to repeat advice to the solicitor and ask key questions about the issues

Baseline Approach

- 1) Assume capacity on a reasoned basis
- 2) Evaluate can the client
 - a) understand the information relevant to the decision,
 - b) retain that information,
 - c) use or weigh that information as part of the process of making the decision, and
 - d) communicate their decision (whether by talking, using sign language or any other means).

Scenarios of Immediate Concern

- e) The agreeable client whose social behaviour is consistent with your experience but resists discussion about their reasons for their requests and is reliant on another party to ‘fill in the gaps’.
- f) The confronting client who is bombastic and argumentative. They may be masking a lack of insight and ability to understand the consequences of their decisions or the impact of decisions on themselves and others.
- g) The client who says, “what would you do if you were me?”.
- h) The client who says, “I am overwhelmed, please sort me out”.

Approach To Exercising Concern (following Ryan v. Dalton)

Having regard to the heightened duty of care professionals and service providers have to vulnerable people under Australian consumer law, increased vigilance is needed to make sure we normally deal with competent clients who are supported or represented appropriately in situations of concern.

The approach set out in Ryan v. Dalton we believe is a prudent baseline for dealing with the vulnerable.

107. It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:

- (1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.
- (2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.
- (3) In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.
- (4) In case of anyone:
 - (a) over 70;
 - (b) being cared for by someone;
 - (c) who resides in a nursing home or similar facility; or
 - (d) about whom for any other reason the solicitor might have concern about capacity,

the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

(5) Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

108. I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely.