LEGAL PROFESSION BOARD OF TASMANIA

Capacity and contemporaneous file notes

What details are necessary to record about a client's mental capacity?

This guidance note for practitioners provides insight into the proper approach to recording file notes in situations where a client's mental capacity is in question.

Introduction

The Legal Profession Board occasionally receives complaints about issues relating to Enduring Powers of Attorney (EPA). A common issue raised in these complaints more often than not relate to a question about the client's mental capacity.

Complaints in these areas are often raised by family members, revoked powers of attorney or physicians of the client who are concerned about a person's mental capacity in circumstances where a new will is drafted or an EPA is revoked. The concerns that are often raised with the Board focus on the person's ability to:

- Coherently articulate the desired amendments;
- Understand the changes being made and the ramifications of such amendments; and
- Recall making the changes.

Complaints can often result where suspicions arise for example; a person who sought to benefit from the change or revocation was in attendance at the time an EPA was drafted or revoked. It is foreseeable that a person who perceives their family member might be being taken advantage of, or that their entitlement might be being compromised, will assume that something untoward is happening which is likely to lead to a complaint.

Considering the legislative and common law obligations

There are no legislative obligations specifically requiring practitioners to make contemporaneous and detailed file notes in relation to capacity or otherwise. A practitioner is however required to do his or her best to complete their client's business in a competent manner under Rule 10(1)(a) of the *Rules of Practice* 1994. When it comes to drafting or revoking EPAs, this practice ought to be applied with particular vigor given the likelihood they may be challenged at a later date.

A practitioner's obligation to make proper records of a meeting with a client who may have diminished capacity is more clearly set out by the common law.

In circumstances where there is evidence before a court raising concerns about the capacity of a person at the time they signed an EPA, the onus shifts to the party supporting its validity to negate any suspicion.[1] It is also not uncommon that such a challenge will occur years after execution and potentially when the practitioner is no longer practising or available to verify the circumstances surrounding the execution.

The Queensland Tribunal in *Legal Services Commissioner v Ho*[2] relevantly noted that all too often in these areas the practitioner is the only person with first-hand knowledge of the events surrounding the execution of the documents, including the client's instructions.

[1] See *Ghosn v Principle Focus Pty Ltd* [2008] VSC 574; *Kantor and Anor v Vosahlo* [2004] VSCA 235.

[2] [2017] QCAT 95 at [44] – [47].

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It is for this reason that the common law has established an expectation that practitioners retain file notes of communications and document the process used to establish capacity when taking instructions for an EPA.[3]

In short, the expectation on note-taking is a matter of degree: the greater the concern about capacity, the greater the desirability of the practitioner keeping detailed notes.

What information should a file note on capacity contain?

Where a practitioner has been made aware that capacity may be an issue or the practitioner determines at the time there may be a concern about a client's capacity, a practitioner must record accurate details of what happened leading up to the execution of the documents which will be relevant to the task which the court or tribunal undertakes.

At a minimum a practitioner's file note should include the following details:[4]

a) The date, time, length and location of all interviews with the client;

b) The persons who were present for the interview (including the time at which they entered and exited the interview room);

c) The steps the lawyer took in assessing the client's capacity (including all questions and the client's answers to those questions); and

d) Details of any information relevant to a client's capacity that a lawyer has gained from another source i.e. medical professional at the request of the lawyer or volunteered to the lawyer from a third party.

In Tasmania, the Law Society of Tasmania has developed a resource on preparing EPA's and it is recommended that practitioners follow this practice.[5]

That resource can exist as a base from which practitioners can conduct capacity assessments, and along with carefully documenting the scope and limits of the client's retainer and maintaining contemporaneous records of all matters discussed relevant to capacity, a practitioner will be adequately prepared to deal with any questions which may arise at a later date.

Guidance from other jurisdictions

Practitioner's obligations to sufficiently record details in circumstances where a client's capacity is in question have been considered in more depth in other jurisdictions. The Board considers those guidelines to be of assistance to Tasmanian practitioners and recommend they familiarise themselves with them in addition to the Board's Guidance Note and the Law Society of Tasmania's EPA resource.

In summary the following guidelines require that a practitioner:

Law Institute of Victoria Guidelines:[6]

- Take detailed file notes and document the process used to establish capacity.
- Where possible, note all questions and answers – ideally verbatim.
- Include opinions of other witnesses about the client's capacity.
- Include basic information about the date, the time of the interview, who was present, the length of the interview and the location.

Queensland Law Society Guidelines:[7]

Practitioners should maintain thorough, comprehensive and contemporaneous file notes of any consultation with the client and relevant interactions with third parties (such as medical professionals and information volunteered by third parties.)

[3] See *Legal Profession Complaints Committee v Wells* [2014] WASAT 112; *Legal Services Commissioner v Given* [2015] QCAT 225; *Legal Services Commissioner v Ho* [2017] QCAT 95; and *Legal Services Commissioner v Penny* [2015] QCAT 108.
[4] n.2
[5] Law Society of Tasmania, *Important Considerations for Solicitors Preparing an Enduring Power of Attorney* (2019).
[6] Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking instructions when a client's capacity is in doubt* (2016) at 4 (part 4(c)).
[7] Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (2014) at 10 (part 1.5(g))

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Law Society of Western Australia Guidelines:[8]

Practitioners take thorough, comprehensive and contemporaneous file notes of any consultation with clients where capacity is in issue or whether the solicitor is exploring this issue through questioning and by observing the client.

In relation to seeking a medical opinion where a practitioner thinks capacity may still be in question, a practitioner must seek instructions from their client (where possible) and be specific about the information required in any referral for a professional report. It is also essential that practitioners conduct their own capacity assessment and avoid relying solely on the doctor's opinion alone.

Law Society of New South Wales Guidelines:[9]

The doctor and the practitioner should keep separate file notes and records of the doctor's opinion about the client's capacity. Furthermore, a copy should be retained on the practitioner's file relating to the execution of the enduring power of attorney.

Disciplinary findings in Tasmania

In 2019, the Board made a finding of unsatisfactory professional conduct in relation to a practitioner's failure to take a contemporaneous and detailed files note in circumstances where he had prior notice his client may have lacked capacity.

The Board held that although the practitioner was considered generally competent and diligent, the importance of making a proper record, in circumstances involving potential capacity issues, is such that in the public interest a finding against the practitioner was appropriate.

It is expected that practitioners working in areas of law involving EPA's remain up to date on the standards and practices from other jurisdictions. The Board's decision demonstrates that ignorance of proper practices or expected standards are impermissible.

Pragmatic considerations

As can be seen, the Board takes a practitioner's obligations to make proper notes relating to capacity very seriously and failure to reach that expected standard can result in a disciplinary finding. In situations where a complaint is made to the Board, the existence of a file note which follows the recommended practice is likely to refute any questions about capacity and to assist with the assessment and resolution of any complaint about the practitioner's conduct.

Given the breadth of commentary, common law and guidance from other jurisdictions it is recommended that practitioners consider carefully in each individual situation the need to make contemporaneous and detailed file notes leading up to and involving the execution or revocation of EPA's.

Finally, it is recommended practitioners consider the adequacy of their retention policies for files in such circumstances and determine whether it may be appropriate to retain a copy of any file notes on capacity with the document in question in a Safe Custody Packet.

[8] Law Society of Western Australia, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* (2019) at 9-11 (Parts 7 and 9)

[9] Law Society of New South Wales, *Guidelines for Solicitors Preparing an Enduring Power of Attorney* (2003), updated in April 2018, at 4 (e) and (f).

Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

We are located at Level 3,
147 Macquarie Street
Hobart Tasmania.

Website:
www.lpbt.com.au

Postal address:
GPO Box 2335,
Hobart 7001

Telephone:
(03) 6226 3000

Email:
enquiry@lpbt.com.au

Fax:
(03) 6223 6055

The normal hours of opening at our office are between 9:00am and 5:00pm on weekdays.

LPBT Legal Profession Board of Tasmania