

# Powers of Attorney: Dealing with Attorneys

## Introduction

These guidelines have been published to assist solicitors in dealing with common ethical issues relating to powers of attorney. The guidelines apply to powers of attorney in general, but it is noted that since 1 September 2015 statutory powers of attorney created in Victoria come under one of four headings:

1. General non-enduring power of attorney;
2. General non-enduring power of attorney for security;
3. Supportive attorney appointments;
4. Enduring power of attorney:
  - a. For personal matters; or
  - b. For financial matters; or
  - c. For matters specified in the instrument of appointment.<sup>1</sup>

Enduring powers of attorney and guardianship made before 1 September 2015 continue to be valid under the *Powers of Attorney Act 2014* (Vic) (*the Act*).<sup>2</sup>

## Who is the Client?

Solicitors should remember that where an attorney is instructing the solicitor, it is in fact the principal who is the client.<sup>3</sup> The role of an attorney is merely to represent the principal, the attorney does not replace the principal as client.<sup>4</sup> The attorney has fiduciary obligations to the principal,

and the solicitor has a duty to ensure such obligations are met.<sup>5</sup> A solicitor has a fundamental ethical duty to act in the best interests of their client, the principal.<sup>6</sup>

## Duty of Attorney

An enduring power of an attorney ordinarily has a wide scope and provides authority to “do anything on behalf of the person that the person can lawfully do”.<sup>7</sup> The duties of an attorney, outlined within the *Powers of Attorney Act 2014* (Vic), are to:

- (a) Act honestly, diligently and in good faith;
- (b) Exercise reasonable skill and care;
- (c) Not use the position for profit unless permitted;
- (d) Avoid acting where there is or may be a conflict of interest unless authorised;
- (e) Not disclose confidential information;
- (f) Keep accurate records and accounts.<sup>8</sup>

Importantly, an attorney under an enduring power must keep their property separate from that of the principal, unless the property is jointly owned or acquired by the principal and the attorney.<sup>9</sup>

## Decision Making Capacity

Unless there is evidence to the contrary, a person is presumed to have capacity.<sup>10</sup>

Capacity exists where a person is able to:

- (a) Understand the information relevant to the decision and the effect of the decision; and

<sup>1</sup> *Powers of Attorney Act 2014* (Vic) s 22(2).

<sup>2</sup> Some provisions of the *Powers of Attorney Act 2014* (Vic) apply to old powers of attorney and guardianship. See ss 141-143.

<sup>3</sup> Russel Cocks, *Ethics Handbook*, (Law Institute of Victoria, 1<sup>st</sup> ed, 2004) 26.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015* (Vic), r 4.1.

<sup>7</sup> *Powers of Attorney Act 2014* (Vic) s 22(1).

<sup>8</sup> *Ibid* s 63.

<sup>9</sup> *Ibid* s 69.

<sup>10</sup> *Powers of Attorney Act 2014* (Vic) s 4(2).

- (b) Retain that information to the extent necessary to make the decision; and
- (c) Use or weight that information as part of the process of making the decision; and
- (d) Communicate the decision and the person's views and needs as the decision in some way, including by speech, gestures or other means.

A solicitor may assess that their client has decision making capacity in some matters, though lacks capacity in other matters. For more information on capacity see the *LIV Capacity Guidelines and Toolkit 2020*.<sup>11</sup>

## Duty to Consult

If a principal has decision making capacity as to a matter, it is prudent for a solicitor to consult the principal and confirm the extent of the attorneys' authority.

The Act provides that, where an attorney under an enduring power is exercising a power, carrying out a function or performing a duty on behalf of a principal who does not have capacity, the attorney must give *'practicable and appropriate support to enable the principal to participate in decisions affecting the principal as much as possible in the circumstances'*.<sup>12</sup> Further, in circumstances where the attorney is making a decision on behalf of a principal who does not have capacity, the attorney must *'take any steps that are reasonably available to encourage the principal to participate in decision making'*.<sup>13</sup> The solicitor should support this wherever possible.

## Should you hand over the principal's original will on the request of an attorney?

A solicitor who has been instructed by the principal to hold a will for safe custody may be asked by an attorney to hand over the original will. Upon receiving such a request, the solicitor should confirm that it is the wish of the principal for this to occur. However, if the principal lacks capacity, the solicitor should not hand over the original will to the attorney.

The Ethics Committee has ruled that a solicitor is entitled to refuse to release papers, documents and files (including wills) held by the solicitor on the principal's behalf, where the principal would likely not have authorised the direct release of such information.<sup>14</sup> However, where there is information in the possession of the lawyer that is required in the fulfilment of the exercise of the powers of attorney then the lawyer may release such information, with a clear reminder to the attorney of the confidentiality of such matters.

A solicitor owes an ongoing duty of confidentiality to their client, the principal.<sup>15</sup> Thus, the solicitor must ensure that the principal's will is disclosed to the attorney only where the attorney's request is justified. This principle is reflected below:

*The request is, on the face of it, beyond the power conferred on the attorney. It should be declined unless the attorney can justify the request by satisfying the practitioner that production or inspection of the will, or providing information about its contents, is required for the purpose for which the power of attorney has been granted, namely management of the principal's affairs.*<sup>16</sup>

If a question remains as to whether the solicitor should provide a copy of the will an attorney or the solicitor may make application to VCAT as to whether to make a copy of the will available.<sup>17</sup>

For more information, see *'Should you hand over a copy of a will to an attorney under power?'*.<sup>18</sup>

## Conflict Transactions

An attorney must not enter into a transaction which puts into conflict:

- (a) The duty of the attorney to the principal; and
- (b) The interest of the attorney, or a relative, business associate or close friend of the attorney.<sup>19</sup>

<sup>11</sup> Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit Concise Edition*, (2020).

<sup>12</sup> *Powers of Attorney Act 2014* (Vic) s 21(1)(b).

<sup>13</sup> *Ibid* s 21(2)(b).

<sup>14</sup> LIV Ethics Committee Ruling R4839, April 2014 <<https://www.liv.asn.au/LIV-Home/For-Lawyers/Ethics/Ethics-Committee-Rulings/>>.

<sup>15</sup> *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015* (Vic), r 9.

<sup>16</sup> Ken Aiken, 'Enduring Powers and Wills' (1999), 73(12) *Law Institute Journal* 94.

<sup>17</sup> *Powers of Attorney Act 2014* (Vic) Div 7.

<sup>18</sup> Donna Cooper, 'Should you hand over a copy of a will to an attorney under power?' *Law Institute of Victoria* (Blog Post, 04 October 2018), <<https://www.liv.asn.au/Staying-Informed/>>.

<sup>19</sup> *Powers of Attorney Act 2014* (Vic) s 64(1).

There are limited situations in which an attorney may be permitted to enter into a conflict transaction.<sup>20</sup>

## Can an attorney sell or mortgage a property?

Subject to its terms, an enduring power of attorney for financial matters includes the power to sell and mortgage a property. The solicitor should endeavour to ensure the attorney does not breach their fiduciary duty to act in the best interest of the principal, and exercises the standard of care that an ordinary person would when managing their own affairs.<sup>21</sup>

## Gifts

The general principle is expressed as:

*A court will not construe a power of attorney to authorise the attorney to gift the principal's property (whether to the attorney or to another person) unless the power expressly authorises the attorney to do so.*<sup>22</sup>

The Act provides, that an attorney may make a gift of the property of the principal in circumstances where it is reasonable to do so, and the gift is to a “relative or a close friend of the principal and is of a seasonal nature or for a special event”.<sup>23</sup> In addition, donations of the kind which the principal may be reasonably expected to make are permitted. Subject to the requirement that it be reasonable, it is possible for the recipient of a gift to be the attorney, a relative or close friend of the attorney, or a person who is connected with the attorney.<sup>24</sup> The power of an attorney to gift property is ‘qualified by a fiduciary obligation and an obligation to exercise the power bona fide and not for an improper, foreign purpose, such as would amount to a fraud on the power’<sup>25</sup>.

A solicitor should be on alert where an attorney seeks to gift the property of the principal. A solicitor has a duty to act in the best interest of their client, and where the gift is out of the ordinary, or of a significant sum or value, a

solicitor should make further enquiries of the attorney so as to protect the property of their client.

## The duty of a solicitor when an attorney acts *ultra vires*

Where the solicitor assesses that the client has capacity, and the client has instructed the solicitor that an attorney has acted without their knowledge or consent, there are a number of avenues a solicitor may pursue on the behalf of their client. The ‘Assets for Care’ booklet produced by Seniors Rights Victoria provides further information regarding the responsibilities of an attorney and the actions a solicitor may take.<sup>26</sup>

Where the client does not have capacity for a matter and the solicitor suspects an attorney is acting beyond their power, it is the duty of the solicitor to make further enquiries to protect the interests of their client - the principal - and ensure the proposed exercise of the power is in the client’s best interests.

A solicitor should keep front of mind that “A prudent solicitor, when he or she sees the red light, makes enquiries.”<sup>27</sup> The Act further provides that in relation to Enduring Powers of Attorney where the commencement of the power is dependent on the principal losing capacity, those dealing with an attorney should seek evidence, such as a medical certificate, to demonstrate that the principal does not have capacity.<sup>28</sup>

A solicitor has a duty to warn an attorney of the risks associated, in the event the attorney proposes to act beyond their power.<sup>29</sup> If the attorney persists, it would be prudent for the solicitor to decline to act.<sup>30</sup> Further, the Ethics Committee has previously ruled that, where an attorney provides instructions not in the best interests of the principal (their client), the firm should cease to act.<sup>31</sup>

Solicitors must be diligent in protecting the interests of the principal. A solicitor may be personally liable

<sup>20</sup> Ibid s 65.

<sup>21</sup> Ibid s 207.

<sup>22</sup> Ibid s 168.

<sup>23</sup> Powers of Attorney Act 2014 (Vic) s 67(1).

<sup>24</sup> Ibid s 67(2).

<sup>25</sup> *McFee v Reilly* [2018] NSWCA 322 [26].

<sup>26</sup> Seniors Rights Victoria, *Assets for Care*, 2012, 59.

<sup>27</sup> *Yaktine v Perpetual Trustees Victoria Ltd* [2004] NSWSC 1078 (Young CJ); Peter Whitehead, “A Review of the Response of the Courts and NSW Guardianship Tribunal to cases of Financial Abuse” (2008) 5 *Elder Law Review* 9.

<sup>28</sup> Powers of Attorney Act 2014 (Vic) s 39(4).

<sup>29</sup> *Reilly v Reilly* [2017] NSWSC 1419 at [405].

<sup>30</sup> Ibid.

<sup>31</sup> LIV Ethics Committee Ruling R4282, September 2005 <<https://www.liv.asn.au/LIV-Home/For-Lawyers/Ethics/Ethics-Committee-Rulings/>>.

where an attorney's exercise of power is found to be outside the scope of their authority.

## How can we help you?

Visit the Ethics & Practitioner Support Department's website at <https://www.liv.asn.au/Ethics>

These are guidelines only and do not have the force of law. A solicitor must comply with the *Legal Profession Uniform Law and Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and any other applicable rules or legislation.

To discuss concerns about dealing with attorneys, contact the Ethics & Practitioner Support Department on (03) 9607 9336.

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