

# ELDER ABUSE OF CLIENTS

## WHAT SUPPORT CAN SOLICITORS OFFER?

As solicitors, unfortunately from time to time we encounter clients who may be being abused. Anyone can be abused, but there is increased awareness of abuse of vulnerable elderly people. Elderly clients can have a higher incidence than other clients of disability, cognitive impairment and poor mental health, which are some of the markers of vulnerability. Elderly clients are also more likely to be dependent on others. The abuse may not manifest as physical abuse; it may be psychological abuse, which includes emotional abuse, or financial abuse, which includes theft and improper use of assets or money.

### Commonly occurring situations that may indicate elder abuse

The following common situations may indicate elder abuse is taking place:

1. a client's attorney is acting beyond their authority, particularly where it does not benefit the client;
2. a client is transferring property for little or no consideration (including by way of a gift);
3. a client is due to receive a large sum of money and wishes to have it paid to another person, such as a relative;
4. a relative or friend insists on being present at appointments with you, especially where the client might need an interpreter;
5. although the client has assets, their expenses are not being paid, or they report losing money/valuables or being charged for services/overcharged in circumstances where this would be unexpected, such as a relative shopping on behalf of a client;
6. a client presents with bruises, or displays fear or anxiety;
7. a vulnerable client suddenly changes to a new solicitor;
8. a client asks you to be their attorney or guardian because they do not trust anyone else;
9. the matter involves financial transactions that cannot be readily explained; or
10. the client is experiencing social isolation and dependence, usually dependence upon an adult child.

It may not be immediately obvious that the abuse is occurring. There could be behavioural changes such as nervousness, lack of self-confidence or avoidance of social contact, which may be indications of abuse.<sup>1</sup> There may be further indications of abuse in these situations if the client's mental capacity is in doubt.

### What can you do?

As a solicitor you must be mindful of your ethical obligations under the Australian Solicitors' Conduct Rules (**Conduct Rules**). Under the Conduct Rules there are fundamental obligations to 'act in the best interests' of the client (Conduct Rule 4) and follow the client's 'lawful, proper and competent instructions' (Conduct Rule 8). Importantly, you 'must not disclose any information which is confidential to a client' unless an exception such as consent applies (Conduct Rule 9). The relevant Conduct Rules are reproduced in **Appendix 2**.

If you suspect there is elder abuse, you must act sensitively and consider that your client's affairs are confidential.

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<sup>1</sup> See further N Ries, 'Identifying and Acting on Elder Abuse - A Toolkit for Legal Practitioners' (2019), [www.uts.edu.au/sites/default/files/article/downloads/Elder%20Abuse%20Toolkit.pdf](http://www.uts.edu.au/sites/default/files/article/downloads/Elder%20Abuse%20Toolkit.pdf); NSW Law Society, 'When a client's mental capacity is in doubt – a practical guide for solicitors' (2016), <https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf>.

The following steps may help you to help your client and any other solicitors involved:

1. If possible see the client in person and on their own.
2. If the client requests a support person, ensure that person has no interest in the transaction or issue.
3. Ensure that the client has mental capacity.<sup>2</sup>
4. Accept that your role is to provide advice but not to make decisions for the client.
5. Obtain consent from the client to notify a 'safe' person if you develop concerns that they are being abused.
6. Obtain the client's consent to provide information to a tribunal if someone makes an application for the appointment of a guardian or manager. Note that making such an application yourself could cause a conflict with the client's interests.
7. Be aware of agencies such as NCAT, the police and the Ageing and Disability Commission (**ADC**) and of the assistance they can provide. A contact list is set out in **Appendix 1**.
8. Consider providing the client with information on the abuse of older people and steps they can take. Downloadable resources, including factsheets and brochures, are available on the ADC, Seniors Rights Service, and Relationships Australia NSW websites.
9. Do not feel pressured to become a client's attorney, guardian or interpreter. This is not part of your role as a solicitor and may cause conflict with your client's interests. Understand the appropriate alternatives, for example a trustee company or a qualified interpreter.
10. Encourage the client, in appointing an attorney or guardian, to choose someone who:
  - is trustworthy, diligent, wise, responsible, prudent, confident and decisive;
  - is willing to act in the role;
  - has adequate time and availability to devote to the role; and
  - understands the client's needs and values.

In addition, an attorney should be capable of deciding on legal and financial issues, and a guardian should be capable of deciding on the client's personal issues. Finally, the attorney and guardian should be able to work with each other.

11. Be mindful of what you may disclose to a new solicitor about the client and their affairs. Typically, you will only be able to disclose information about the client if they have consented.
12. If you are asking for your client's file from their previous solicitor, provide clear and sufficient authority from your client to that solicitor for the file.

Further guidance is provided in the Scenarios set out in **Appendix 3**. Other options include calling the Law Society Ethics Helpline on 9926 0114 or seeking the guidance of the Ethics Committee.<sup>3</sup>

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<sup>2</sup> See further NSW Law Society, 'When a client's mental capacity is in doubt: a practical guide for solicitor' (2016), <https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf>.

<sup>3</sup> [www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/ethics/committee-guidance](http://www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/ethics/committee-guidance).

## **APPENDIX 1 - Key contacts to obtain assistance for older people in relation to abuse, neglect or exploitation**

### **NSW Police**

For urgent assistance, call 000. The NSW Police Force also has Crime Prevention Officers (including some Aged Crime Prevention Officers) who can provide advice and assistance to people to improve their safety; and specialist officers, such as Domestic Violence Liaison Officers, to respond to specific issues.

### **NSW Ageing and Disability Commission**

The NSW Ageing and Disability Commission responds to inquiries and reports about adults with disability and older people in NSW who are subject to, or at risk of, abuse, neglect and exploitation. The ADC operates the Ageing and Disability Abuse Helpline, which provides information, advice, referrals and support, including guidance about steps that can be taken to improve the person's safety and welfare. The ADC can also make inquiries and investigate reports, and can take further action to safeguard the person. Anyone can contact the Helpline – callers do not have to make a report; they can opt just to obtain advice about options available to them. Callers can remain anonymous if they prefer.

Ageing and Disability Abuse Helpline: 1800 628 221 (Monday to Friday, 9am–5pm)

Email: [NSWADC@adc.nsw.gov.au](mailto:NSWADC@adc.nsw.gov.au)

Website: [www.adc.nsw.gov.au](http://www.adc.nsw.gov.au).

### **Seniors Rights Service**

The Seniors Rights Service is a community organisation that provides free and confidential telephone advice, aged care advocacy and support, legal advice, and education forums to seniors in NSW.

Telephone: 1800 424 079 (Monday to Friday, 9am–4.30pm)

Email: [info@seniorsrightsservice.org.au](mailto:info@seniorsrightsservice.org.au)

Website: [www.seniorsrightsservice.org.au](http://www.seniorsrightsservice.org.au).

### **Relationships Australia NSW**

Relationships Australia provides a range of services, including counselling and the Let's Talk Elder Support and Mediation Service, which can help older people and their families to prevent or resolve conflict, make decisions, and plan for the future.

Telephone: 1300 364 277

Email [enquiries@ransw.org.au](mailto:enquiries@ransw.org.au)

Website: [www.relationshipsnsw.org.au](http://www.relationshipsnsw.org.au).

### **Crisis support**

- **Lifeline** – 24-hour crisis support and suicide prevention line.  
Telephone: 13 11 14; text 0477 13 11 14 (6pm – midnight)  
Website: [www.lifeline.org.au](http://www.lifeline.org.au).
- **1800 Respect** – national 24-hour sexual assault and domestic family violence counselling service.  
Telephone: 1800 737 732  
Website: [www.1800respect.org.au](http://www.1800respect.org.au)
- **NSW Domestic Violence Line** – 24-hour telephone crisis counselling and referral service for women.  
Telephone: 1800 65 64 63  
Website: [www.facs.nsw.gov.au/domestic-violence/helpline](http://www.facs.nsw.gov.au/domestic-violence/helpline).

## **APPENDIX 2 - Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (extracts)**

### **4. Other fundamental ethical duties**

4.1. A solicitor must also:

- 4.1.1. act in the best interests of a client in any matter in which the solicitor represents the client,
- 4.1.2. be honest and courteous in all dealings in the course of legal practice,
- 4.1.3. deliver legal services competently, diligently and as promptly as reasonably possible,
- 4.1.4. avoid any compromise to their integrity and professional independence, and
- 4.1.5. comply with these Rules and the law.

### **8. Client instructions**

8.1. A solicitor must follow a client's lawful, proper and competent instructions.

### **9. Confidentiality**

9.1. A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

- 9.1.1. a solicitor who is a partner, principal, director, or employee of the solicitor's law practice, or
- 9.1.2. a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

9.2. A solicitor may disclose information which is confidential to a client if:

- 9.2.1. the client expressly or impliedly authorises disclosure,
- 9.2.2. the solicitor is permitted or is compelled by law to disclose,
- 9.2.3. the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,
- 9.2.4. the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,
- 9.2.5. the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or
- 9.2.6. the information is disclosed to the insurer of the solicitor, law practice or associated entity.

### **12. Conflict concerning a solicitor's own interests**

12.1. A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor, except as permitted by this Rule.

## **14. Client documents**

**14.1.** A solicitor with designated responsibility for a client's matter, must ensure that, upon completion or termination of the law practice's engagement:

14.1.1. the client or former client, or

14.1.2. another person authorised by the client or former client, is given any client documents, (or if they are electronic documents copies of those documents), as soon as reasonably possible when requested to do so by the client, unless there is an effective lien.

**14.2.** A solicitor or law practice may destroy client documents after a period of 7 years has elapsed since the completion or termination of the engagement, except where there are client instructions or legislation to the contrary.

## **33. Communication with another solicitor's client**

**33.1.** A solicitor must not deal directly with the client or clients of another practitioner unless:

33.1.1. the other practitioner has previously consented,

33.1.2. the solicitor believes on reasonable grounds that:

(i) the circumstances are so urgent as to require the solicitor to do so,  
and

(ii) the dealing would not be unfair to the opponent's client,

33.1.3. the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom, or

33.1.4. there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.

## APPENDIX 3 - Scenarios

### Scenario 1

A long-standing client, who is elderly and widowed with two adult children, comes to see you to update an enduring power of attorney. The previous EPOA appointed both children to act jointly and has been in place for many years without any issues. On this occasion, the client is accompanied by their neighbour (who made the appointment on behalf of the client). The client seems frailer than usual and barely recognises you. You don't know what the client wants to do at this point.

You ask to see the client on their own, but the neighbour refuses to allow this, stating that they need to be there to support the client and explain the situation. You refuse to undertake any work if you cannot see the client on their own and you explain the reasoning behind this to the client and the neighbour. The neighbour convinces the client to leave your office.

Three days later, you receive an authority to release from another solicitor in relation to the previous EPOA.

Can you share your concerns with the new solicitor?

You must comply with your confidentiality obligation. While you may have concerns and believe the new solicitor should be alerted, you owe your client confidentiality in relation to their legal affairs. Unless one of the other exceptions to Conduct Rule 9 applies, it is the client's decision as to whether you may disclose information to their new solicitor.

If you are concerned about the validity of the authority on mental capacity grounds, remember that the new solicitor has had to do their own mental capacity assessment. They must not send an authority without their holding competent instructions.

Under Conduct Rule 14, the client is entitled to the client documents in their file. Generally, these documents would not include aide memoirs such as file notes, but on this point see *Wentworth v De Montfort* (1988) 15 NSWLR 348 per Young J.

What other action could you take?

You might want to try to talk to your former client. However, you would need to consider the no-contact rule as they are now another solicitor's client.

Contacting attorneys or other substitute decision makers may also raise issues of confidentiality.<sup>4</sup>

What other action could you have taken?

There are steps that you could potentially take following your meeting with the client and the neighbour, and prior to becoming aware that another solicitor is acting. For example, you could attempt to separately contact the client (e.g. by telephone) to check on their situation. The conversation may provide an opportunity to gain their views and wishes; ascertain their current decision-making capacity; and provide information about options for obtaining assistance such as the Ageing and Disability Abuse Helpline. You should check that the client is alone and/or able to talk freely.

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<sup>4</sup> See further NSW Law Society, 'When a client's mental capacity is in doubt – a practical guide for solicitors' (2016), <https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf>.

## Scenario 2

A longstanding, elderly client, recently widowed, attends your office to ensure that their estate planning affairs are in order. They attend on their own and are as sharp as always.

During the course of the meeting, you become aware that the client's child has recently commenced living with them following the child's marriage breakdown. You are aware from previous interactions with the client that the child has some mental health issues and tends to become violent when they become angry. You are aware that the child has lashed out at their parent before, in one of their fits of rage. You notice some deep bruising on the client's arms. When you question the client about it, they open up to you and tell you that the child has been beating them. You strongly advise the client to contact the police and to obtain an ADVO against the child. The client refuses to do so. The client also mentions that the child took the client to another solicitor about two months ago for the purpose of transferring the client's property to the child. The client instructs you that they only agreed to the transfer because their child threatened to beat them up if they did not comply. The beating did not stop, however, despite this.

You conduct a title search and discover that the client's property is now in the child's name. The client is adamant that they do not want to do anything about the property and do not want to contact the police themselves, or have you do so, for fear of retribution on the part of the child and the client's fear of the child being in trouble with the law. You are concerned about the client's welfare in respect of the financial abuse and also the physical abuse.

Is the client's information able to be disclosed pursuant to an exception to Conduct Rule 9, such as Conduct Rule 9.2.4 or 9.2.5?

Two factors could be considered here. Firstly, relying on the exception in Conduct Rule 9.2.4 would involve consideration of whether there is evidence of a serious criminal offence. This is defined in the glossary to the Conduct Rules<sup>5</sup> as an indictable offence, whether or not it can be dealt with summarily. It would include, pursuant to the *Criminal Procedure Act 1986* (NSW), assault, larceny and fraud. The exception in Conduct Rule 9.2.5 might prove more accessible if you were satisfied that you had reasonable concerns about the client suffering deliberate physical violence as opposed to suffering an accident, such as a fall.

The second factor to consider, if you were satisfied that you may be able to rely on either of the exceptions in Conduct Rule 9.2.4 or Conduct Rule 9.2.5, is who/which agency would you disclose the information to. If you suspect that a serious criminal offence has been committed then you might consider contacting police. If you are seeking to rely on the exception in Conduct Rule 9.2.5, you might consider contacting police and/or the ADC. Section 13(4) of the *Ageing and Disability Commissioner Act 2019* (NSW), states that '[i]f a person, acting in good faith, makes a report to the Commissioner in accordance with this section, that person is not liable to any civil or criminal action, or any disciplinary action, for making the report.' This could be relevant, given that the ADC is required to refer to police any reports that may provide evidence of a criminal offence, and that your client has said they do not want that to happen.

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<sup>5</sup> *Serious criminal offence* means an offence that is:

- (a) an indictable offence against a law of the Commonwealth or any jurisdiction (whether or not the offence is or may be dealt with summarily),
- (b) an offence against the law of another jurisdiction that would be an indictable offence against a law of this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction), or
- (c) an offence against the law of a foreign country that would be an indictable offence against a law of the Commonwealth or this jurisdiction if committed in this jurisdiction (whether or not the offence could be dealt with summarily if committed in this jurisdiction).

### Are you obliged to take that action?

The short answer is 'no'. The exceptions to the principle in Conduct Rule 9 are permissive not compulsive. As a solicitor, you are unlikely to fall foul of s 316 of the *Crimes Act 1900* (NSW) in not reporting the suspected abuse even if you considered it may amount to a serious criminal offence.<sup>6</sup>

### Does the client's attitude towards not contacting the police affect your ability to disclose the information?

The exceptions under Conduct Rule 9 operate independently of each other.

However, the client's attitude may lead to a conflict of interest if you continue to act (Conduct Rule 12), particularly because your fiduciary duty would likely be to disclose that you made the contact.

Also, as with any other situation, you must have some reasonable support for your conclusion that abuse rather than accident is involved. This could be your own experience of elderly clients.

In the above scenario, there is no indication that any of the alleged conduct is accidental. In this case, the client has made disclosures to you that they have been physically assaulted by their child, including current/recent abuse, and they fear retribution by them.

### What other action could you take?

Given the factors at play, it would be helpful to provide your client with information about the ADC and the assistance that can be provided to them by the ADC's Ageing and Disability Abuse Helpline. Among other things, the Helpline can: provide your client with information about options that are available to them; provide non-judgemental advice and support in relation to their situation; make referrals to support services (such as counselling support, in-home support); and let them know about other assistance that the ADC could provide. While your client may not currently be ready to make a report to the police or to take other action, they may be prepared to explore other options for improving their safety and circumstances. Noting that the client is concerned about retribution by their child (and the ADC is required to report potential criminal offences to police), it is important that the client knows they can choose to remain anonymous when they contact the Helpline.

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<sup>6</sup> See further NSW Bar Association, 'Guidance for NSW barristers in the wake of the matter of Lawyer X' (2019), <https://nswbar.asn.au/the-bar-association/publications/inbrief/view/cdb25a7c087884e2216dfe14262d4ccd>.



### Scenario 3

Your client is elderly and very wealthy. She has been a long-standing client of the firm. Your client took a fall and then had a live-in carer who she had met through her church. Eventually your client went into a nursing home. One day your client's live-in carer arrives at your office and asks you for all safe-custody documents, including wills and powers of attorney. The live-in carer informs you that he and your client are going to get married.

You attend the nursing home to meet with your client and her live-in carer is also in attendance. He shouts at your client to wake her up before leaving the room so that you can speak to her alone. Your client is awake long enough to say that she knows what she's doing and is excited to be marrying her fiancé. Your client then instructs you to redraft her will leaving everything to her fiancé and to make him her enduring attorney and enduring guardian.

You attend the nursing home a second time to get the revised documents signed and witnessed. Your client and her live-in carer/fiancé get married but a few weeks later your client dies. The beneficiaries of all previous wills had been charities.

Are there any aspects that would cause you concern? If yes, how could these be handled differently?

The first consideration should be mental capacity. A client has the presumption of having mental capacity and being elderly or in a nursing home does not alter this. You should meet with your client face to face and have an in-depth discussion with her about the changes being made and the circumstances that gave rise to these changes. It is important for you to test her understanding about wills in general and then specifically her will, including its meaning and consequences. You should also talk to her about her ability to maintain her financial affairs.

Perhaps it is worth considering taking a second person from your firm with you for the meeting with your client, particularly to conduct their own mental capacity assessment.

The suggested approach here is set out by Kunc J in *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007:

As part of your capacity questions, ask open questions and, with the client's permission, make enquiries with the nursing home about any diagnosis, behaviours or medication which may affect the client's capacity.

The second consideration is undue influence. You should test this during your face to face meeting with the client. The client should be alone for this meeting. You might consider making some contextual enquiries of the nursing home, of course being careful not to breach confidentiality.

The *Capacity Toolkit*<sup>7</sup> provides useful information including appropriate questions to ask your client.

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<sup>7</sup> N Ries, 'Identifying and Acting on Elder Abuse - A Toolkit for Legal Practitioners' (2019), [www.uts.edu.au/sites/default/files/article/downloads/Elder%20Abuse%20Toolkit.pdf](http://www.uts.edu.au/sites/default/files/article/downloads/Elder%20Abuse%20Toolkit.pdf).