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De-risking client financial decision making in estate planning

Great problems from little statements grow...





Your presenters



MICHAEL PERKINS

Michael Perkins is a founder of the multi-disciplinary law firm Autonomy First Lawyers with over three decades of experience in trusts, estates and private client practice. Michael has received TEP Designation from the Society of Trust and Estate Practitioners (STEP). His practice focusses on helping clients build a sustainable and inclusive future for themselves, their supporters and successors, in the areas of Private Client Wealth Conservation, Governance and Succession, Business Structuring, Estate Planning & Administration, Probate, Estate Administration & Disputes, Corporate & Commercial Operations.



BERNIE WALRUT

Bernie commenced practice as a tax and commercial solicitor in 1974. Bernie went to the Bar in 2007. Bernie primarily undertakes advice work in the areas of taxation, trusts and estates, succession planning, commercial and valuation matters. He appears in the Supreme Court, Federal Court and tribunals exercising jurisdiction in such matters. Bernie holds, in addition to his law degree, Masters in Aquaculture (MAq), Information Technology (MIT), Tax (MTax) and Law (LLM) and a PhD from the University of British Columbia.







Structure of this session

- Introduction to business system collaboration
- Is your Power of Attorney fit for purpose?
- A deeper dive and refresh on powers of attorney Bernie Walrut
- Unpacking the ethics of service delivery.
 Considering Managed Discretionary Accounts (MDA) – under what assumptions are they not problematic?
- Questions and unpacking other issues such as what happens to an MDA on death.





Collaborative Working - Core Idea

Reference

https://www.instituteforcollaborativeworking.com/resources/Documents/icw_future_report_web.pdf

Core Outcome

Aligned multiple professionals including financial planners and lawyers, engaged concurrently to work to achieve agreed client outcomes eg the creation of lifetime representation to facilitate the management of the client's financial affairs, mitigate abuse and coercion risk in the management of those affairs, and achieve other outcomes as agreed with the client.

Collaborative Working Purpose

Facilitates businesses coming together to co-create and deliver new shared value products and services that meet, and in many cases exceed, customer expectations.

Critical Success Factors

Collaborative leadership, vision and values and relationship management.

Without these core principles and practices in place, organisations do not have the key ingredients to achieve sustainable long-term collaborative success.

FPA Code of Ethics - Know your limits and get help where needed.

Principle 2: Integrity

Principle 5: Professionalism





Collaborative Working – Core Activities

Collaborative culture,
desired ideals, customs &
behaviours

The right leadership style
Mission, values & vision
Context & Parameters

Arrangements and interactions through a structured approach

Clearly defined & understood strategic objectives

Organisational capability & collaborative ability

Personal behaviours that build trust.

Communication

Working environment, setting, features, conditions.

Supporting tools and assets, including people.

Accommodating individuals' styles & preferences in teams.





Establishing a Power of Attorney - a collaborative engagement

FASEA Standard 1 – Comply with your legal obligations and not seek to avoid them.

What is your client's expectation of you? How is this dealt with in your FSG?

Ethics reflection

How does your knowledge relate to the outcome sought by the client and the knowledge of other professionals engaged on this job?

Do you have critical knowledge other professionals need to complete their work for the client? To whom is this communicated and when?

FPA Ethics Code

Principle 1: Client First Principle 2: Integrity

Principle 4: Fairness Principle Principle 5: Professionalism Principle 7: Confidentiality





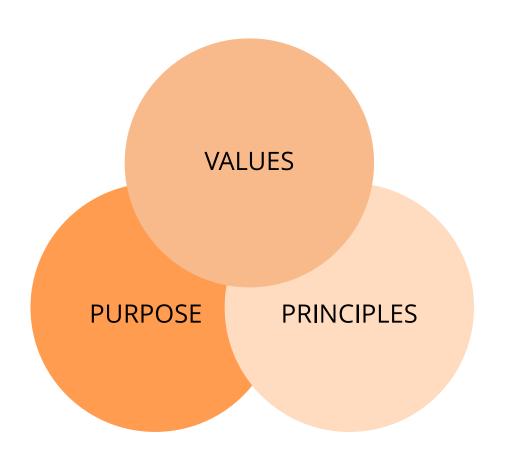
Mechanics of Ethics

- Whose values drive the representation?
- Representation as collaboration or agency?

FASEA Standard 2 – You must act with integrity and in the best interests of your clients.

This a requirement for you to proactively elicit information from your client about, and to consider, the broader, long-term needs and likely future circumstances of your client.

FASEA Standard 3 - You must avoid any conflict of interest.







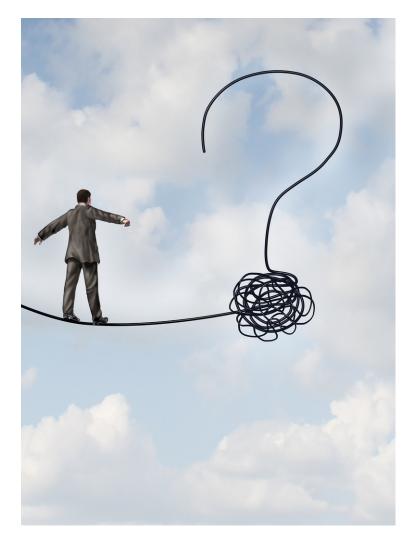
Risk landscape of the client

How do these risks impact the client's job to be done?

- Cash flow
- Debt management
- Investment
- Risk management
- Estate planning
- Structures

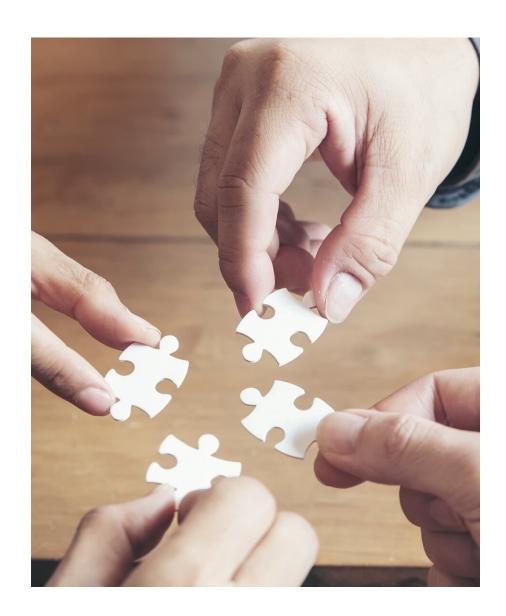
Who contributes to the management of these risks and how should this be approached?

Collaboration is a method of shaping the professional's knowledge, skill and experience to the client's job to be done.









This is built on a common understanding of the client's objectives for:

- wealth conservation
- estate governance and administration
- succession of management and ownership of the estate over time

with the help of all professionals engaged by the client to assist in the management of their affairs.

FASEA Standard 4 applies. How is informed consent to be evidenced?

The client's vision and values should drive collaboration in estates practice.

"I want a Power of Attorney"

What risks is your client creating and managing with this statement?

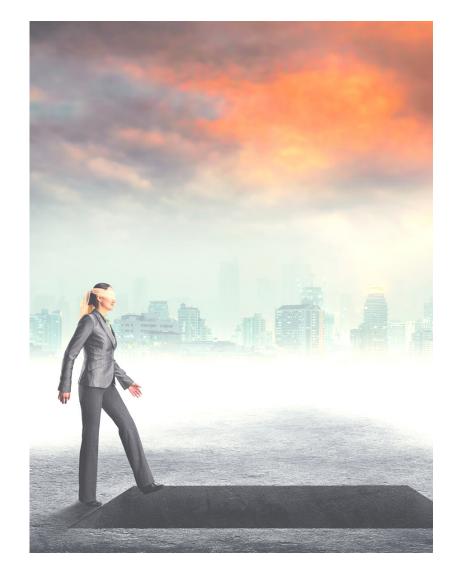
Is your client's Power of Attorney fit for purpose?

Powers of Attorney should not be instruments of financial abuse, and yet they often are...

Consider the impact of FASEA Standard 6 on a Power of Attorney not fit for purpose to manage the financial product you recommend.











Problem: Banks are not accepting Powers of Attorney at face value





Quote from Australian Bankers Association Power of Attorney Fact Sheet 2019:

"Banks encounter problems with some powers of attorney because they weren't set up to cover different types of transactions. If you need someone to make decisions about financial and property transactions, such as the sale of your home, you should make sure the power of attorney allows both types of decisions."

Australian Banking Association Industry guidelines about Powers of Attorney dated October 2020 state:

"While powers of attorney arrangements are an important tool for protecting a customer's future financial circumstances, some attorneys may misuse this power, either inadvertently or deliberately. Banks have an important role to play in establishing that attorneys are properly authorised to undertake transactions on behalf of their principal."





What does your business model allow you to do when dealing with a client's objectives for...





Succession

...are you a referrer, collaborator or excluder when you are dealing with these issues?





Financial Planner Business Models

Client outcomes focused

- Helping clients to achieve their overall objectives through more effective use and administration of their resources including financial assets.
- Practicing from a client's rights centred point of view
- See Measuring What Matters framework and Human Services Outcomes framework operating in. each state of territory
- Responds to complexity of client overall situation and their self defined objectives.
- Founded on the Ethics of Care
- Practicing the National Decision Making Principles.

Client financial resources focused

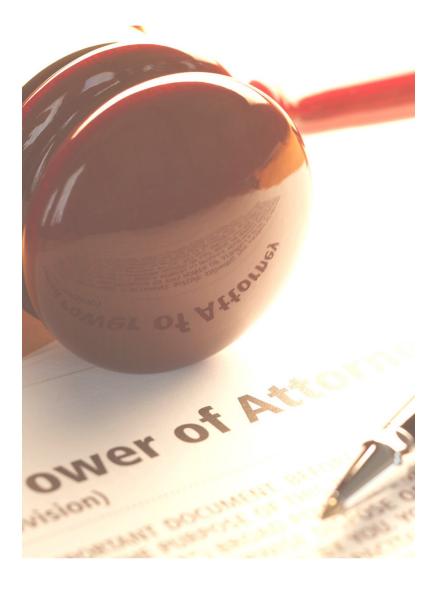
- Mediate access to financial products and services
- Improve financial outcomes for clients
- Founded on disciplinary representation and advocacy
- Best interest based?
- Statement of Advice and investment reviews are key service values.
- Aged care transitions and superannuation test the application of financial planning knowledge to client life changes
- Where does estate planning fit in this business model?



- To help clients manage the risk of dealing with their disability, death or absence from the jurisdiction in which their assets are located.
- To help clients manage the effect of ageing or cognitive decline?
- To facilitate the sharing of estate governance and administration responsibility between a person, their helpers and supporters?
- Some or all of the above? How do we capture the purpose of a Power of Attorney in its terms? Make the document longer?

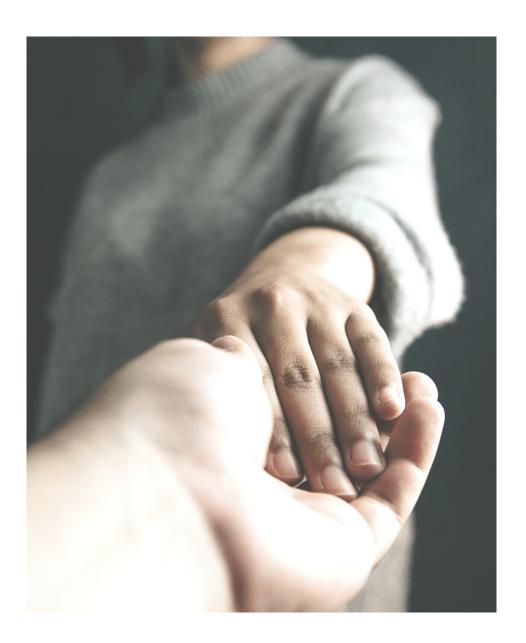












What is your role as a Financial Planner?

- To tick the box 'I have told the client they need a Power of Attorney'?
- To help the client arrange a method of managing their affairs?
- To facilitate the client to work with products you choose (eg Managed Discretionary Account)?
- To facilitate a client's delegation of financial management functions to family, supporters and helpers.
- Where do these activities sit in your Financial Services Guide? FASEA Standard 4 distinguishes advice from services. How do you make this distinction to the client?





4 Modalities of Ethical Professional Practice



ADVERSARIAL ADVOCATE

Not relevant to financial planning?



RESPONSIBLE PROFESSIONAL

Role in facilitating the public administration of your profession's purpose according to law and the public interest



MORAL ACTIVIST

Focus on social and community – counselling and public interest outcomes for your client



ETHICS OF CARE

Responsible to people, communities and relationships. Practicing from the client's point of view.





Practicing on the right side of the brain

You need to practice on both sides of your brain, as permitted by your business model.

Adversarial Advocate and Responsible Professional (Left)

V.

Moral Guardian and Ethics of Care (Right) – Note FASEA Standard 6 and considering 3rd party impacts.







What limits our ability to work with a client?



Should we simply say...

- I can only act with the legal and competent instructions of my client
- I practice the National Decision Making Principles where necessary
- I support and safeguard the will and preference of my client
- I practice the Ethics of Care where appropriate







Are you engaging with a competent client?

Signs of a competent decision maker

- a person's ability to understand and retain information relevant to the particular decision that needs to be made
- using or weighing up that information to come to a decision; and
- communicating that decision in some way.





Four key issues for decision about the role of an attorney



Representation (who has my talking stick)



Family (who am I connected to and who will support or talk for me)



Finances (what do I have, how are my resources to be managed and what financial products do I need to use)



Future (what do I want my future to be like - a work in progress – who do I rely on to help?)







A Lawyer's Perspective

Complexity Limits and Context – Powers of Attorney on the National Stage

Dr Bernie Walrut Murray Chambers, Adelaide

FASEA Standard 10 – you must have a high level of skill supporting the advice and services you provide.



A Power of Attorney is on its face a very simple document.

An Enduring Power of Attorney (EPA) has become an important tool in any estate planning and management of a client's affairs.

An EPA requires, in most jurisdictions, little text and some formalities, the simplicity of the EPA is often beguiling.

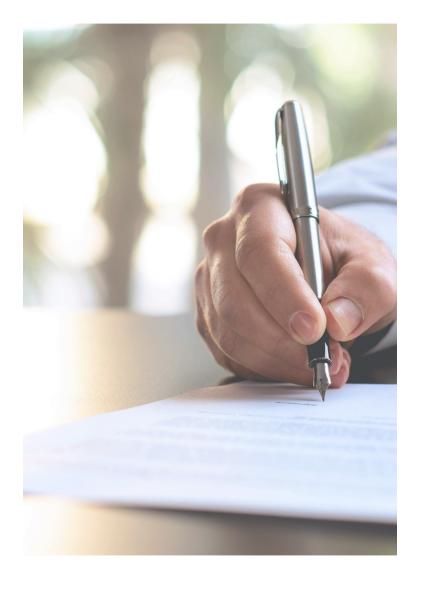
An effective EPA in a Federal system with a highly mobile population is challenging

The use of an EPA needs to be considered in the context of the broader state of the client's affairs and its use (e.g. MDAs, BDN etc).

This part of the presentation is therefore a brief description of some of the issues and matters you may need to consider when working with a client and their lawyer in preparing an effective EPA, and the ongoing management using an EPA.











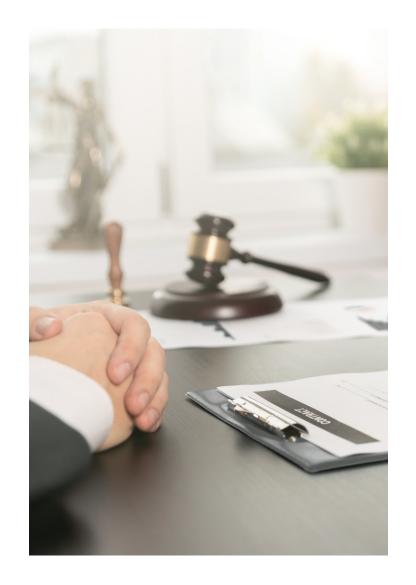
Nature of Power and Agency Introduction

A power of attorney is a formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes (Gregory v Turner (2003) 1 WLR 1149 [61]-[67])

Dal Pont highlights three characteristics:

- A formal legal document
- Effects a relationship where one person represents another
- The extent of the relationship is defined by the document including limits

The law applicable to a power of attorney is that of agency.







Limits on Extent of Authority



COMMON LAW

- The express powers
- An agent cannot delegate
- Personal appointments
- Statutory authority granted to a person
- Matters of personal concern
- Trustee
- Executors
- Statutory rights
- Personal privileges





Limits on Extent of Authority



COMMON LAW

- Wills
- Gifts
- Litigation
- Voting
- Superannuation Binding death benefits
- Matters of health and welfare
- Powers for use interstate
- Powers for use overseas
- Temporal parameters





Capacity and Nature



COMMON LAW POWERS



GENERAL POWERS



the statutory general powers are much broader and usually provide that the grantor may appoint an attorney to do on behalf of the grantor anything that the grantor may lawfully authorise an attorney to do subject to expressed limitations



ENDURING POWERS

an EPA usually survives incapacity

some provide that the attorney may do on behalf of the grantor anything that the grantor may lawfully authorise an attorney to do subject to express limitations or confined to financial matters,

others provide for appointments in respect of financial matters and certain other matters such as personal and health matters subject to express limitations





Capacity and Nature - Powers by State and Territory

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
General power of attorney	✓	✓	✓	✓		✓		✓
Enduring power to do anything the grantor can do	✓	✓		✓	✓	✓	✓	
Enduring power for financial, personal, health etc matters			✓					✓
Recognition of interstate enduring powers	✓			✓	✓	✓	✓	
Enduring power may be made by grantor outside jurisdiction			✓			✓		✓

Notes

- 1 Query the effect of section 77 of the Queensland Powers of Attorney Act 1998 that states "To the extent an enduring document does not state otherwise an attorney is taken to have the maximum power that could be given to the attorney by the enduring document."
- 2 The Northern Territory allocation is based on the Northern Territory Powers of Attorney Act 1980 (NTPAA) to the extent it operates and the Northern Territory Advance Personal Planning Act 2013 (NTAPPA) in respect of enduring powers.
- 3 Recognition of an interstate enduring power in Western Australia is subject to the State Administrative Tribunal recognising such an enduring power as an enduring power for the purposes of the Western Australian legislation.





Restrictions on Appointment - EPA - By State & Territory

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
Grantor must be 18 years and over		✓	✓		✓			✓
Attorney must be 18 years and over		✓	✓		✓		√ 2	✓
Not insolvent under administration		✓						
Not a bankrupt or taken advantage of the laws of bankruptcy - attorney for financial matters			✓					
Financial matters attorney not convicted of dishonesty offence unless disclosed in instrument		✓						
Not a care worker of the grantor		✓						
Not a care worker of the grantor for the last three years			✓					
Not a health worker of the grantor		✓						
Not a health provider of the grantor		✓	✓					
Not an accommodation provider of the grantor		✓						
Not a service provider for a residential service where the grantor is resident			✓					
Financial matters may be the Public Trustee or a company under the Trustee Companies Act 1968 (Qld)			✓					
Not a corporation other than Public Trustee or recognised trustee company								✓

Notes

¹ The Northern Territory allocation is based on the NTPAA to the extent it operates and the NTAPPA in respect of enduring powers

² In the Northern Territory an advanced personal plan may appoint an appointee under the age of 18 years if it takes effect on the person attaining their majority





Nature and Extent - Statutory Restrictions on Enduring Attorneys - By State & Territory 1

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
May not exercise powers of trustee								
May not make gifts unless expressly authorised or subject to various statutory limitations	/					✓	/	·
May not make delegate unless expressly authorised	/							
May not make delegate (some whilst grantor impaired and some unless the instrument provides to the contrary)		✓						✓
May not make a will (or revoke it)		✓					✓	✓
May not revoke an (enduring) power of attorney or power or advance care plan		✓					✓	✓
May not vote at a Federal, State or Territory or local government election or referendum		✓					✓	✓
May not consent to a marriage or divorce or separating or entering or terminating a personal relationship		✓				✓	*	✓
May not consent to a sexual relationship		✓						
May not make a decision about the care or well being of a child of the grantor		✓						
May not make a decision about the adoption of a child of the grantor under eighteen years		1				~	/	
May not enter a surrogacy arrangement on behalf of the grantor		~					•	~
May not consent to the making of or discharge of substitute parentage order on the grantor's behalf		~						
May not manage the estate of the grantor on the death of the grantor		~						
May not consent to an unlawful act		4						
May not deal with the place or person where or with whom the grantor lives						•		
May not deal with whether the grantor works and matters relating to such work						*		





Nature and Extent - Statutory Restrictions on Enduring Attorneys - By State & Territory 2

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
May not deal with whether the grantor undertakes education or training and its type						✓		
May not deal with whether the grantor applies for a licence or permit (other than a business permit)						✓		
May not deal with day-to-day matters relating to diet, recreation, hobbies, companions, pet ownership, sexual expression, dress, hairstyle						✓		
May not deal with persons with whom the grantor associates or clubs, associations or political parties that the grantor may join						✓		
May consent to the making or discharge of a parentage order						1		
May not deal with health care of, or the withdrawal of health care of the grantor						1		
May not receive a personal benefit (some unless expressly permitted by instrument or an excepted transaction)						1		✓
May not enter into transactions where the attorney, a relative, business associate or close friend has a conflict of interest or the actions conflict with another duty unless permitted by instrument or an excepted transaction						✓		✓
May not exercise the grantor's rights as an accused person in relation to a criminal investigation or criminal proceedings							✓	
May not exercise any power in relation to restricted health matters, sterilisation, termination of a pregnancy, removal from the grantor of non-regenerative tissue and health care action prescribed by regulation							✓	✓
May not consent to electroconvulsive therapy or psychiatric surgery; and health care prescribed by regulation								✓

Notes

- 1 The foregoing does not include any common law restrictions to the extent they may apply
- 2 The Northern Territory allocation is based on the NTPAA to the extent it operates and the NTAPPA in respect of enduring powers.
- 3 In Tasmania an enduring power does not extend to personal matters, meaning the private life, lifestyle or health of the grantor. The foregoing is based on that that.
- 4 The separating or entering or terminating of a personal relationship is an extra exclusion in Tasmania.
- 5 In the Northern Territory it does not include revoking a power of attorney or advance personal plan or anything similar in another jurisdiction





Termination - Statutory Provisions as to Termination of EPAs by State & Territory

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
Terminates by its terms		✓	1				1	
Terminates on the death of grantor		✓	/			✓		1
Terminates on the revocation by grantor	1	✓	/			✓		/
Terminates on the death of attorney	/	✓				✓	/	1
Termination by resignation of attorney though that is sometimes limited		✓		/	✓			✓
Terminates on the bankruptcy of the grantor etc					✓	✓		
Terminates on the bankruptcy of attorney or in some taking advantage of such laws where financial powers or report to Tribunal	✓		✓			✓		✓
Terminates by reason of any physical or mental incapacity, ceases to have the capacity to continue to act as an Attorney	✓	✓	✓			✓		
Termination by Supreme Court or Tribunal	/			✓		/	✓	
Termination on the appointment of an alternative attorney		✓						
Termination by later enduring power some, unless expressed to the contrary		/	1					
Terminates on the grantor's marriage or civil partnership or union, unless a contrary intention is expressed to the extent the power is given to a person who is not the spouse or civil partner			✓					✓
Terminates on the divorce or ending of a civil partnership or union sometimes to the extent it gives power to the divorced spouse or previous civil partner			✓			✓		✓
Terminates to some extent where the attorney becomes a paid carer, a health provider, or a service provider for a residential service			✓					

Notes

^{*} The Northern Territory allocation is based on the NTPAA to the extent it operates and the NTAPPA in respect of enduring powers







Elder Abuse and Enduring Power of Attorney

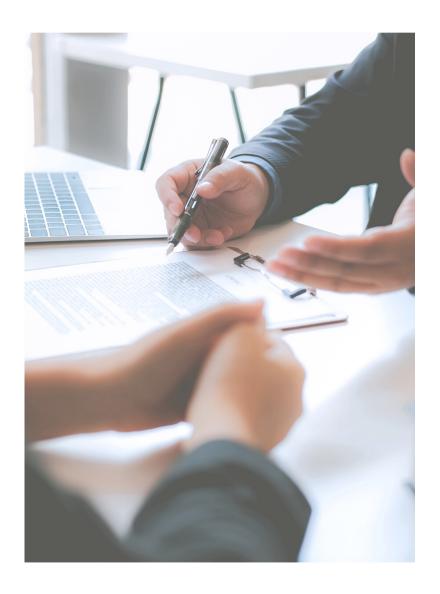
- Simply no information as to the extent of financial abuse by attorneys
- Based on Helpline date in Queensland 65% of elder abuse is financial abuse
- Estimate that \$1.8 billion inappropriately obtained from older people
- Misuse and abuse of enduring powers is a major contributor
- Various reports and comments ALRC, SA, Age
 Discrimination Commissioner describe some of the issues and some of the risk factors
- Attorneys General's Consultation Paper Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney
- Some proposals to address
- Abuse matters are finding their way to the Courts





Some Practical Issues

- Know the client
- Know the attorney(s)
- Know the assets
- Know the states and territories that the client, assets and attorneys may be involved with
- What type of power should be used
- Know the socio economic and cultural influences
- Know the limits that should be imposed on the attorney
- Be alive to conflicts, the fiduciary obligations and recompense
- Know who the power is to be used with
- Try to anticipate the situations where it may need to be used (e.g. MDAs, BDNs etc)
- If in constant contact be alert to change in circumstances that may impact
- Watch for the potential for Elder Abuse
- This can all impact the efficacy of an Attorney being able to manage the financial assets of the client.









Managed both your competence and that of the client.

See also FASEA Standard 9



Reflection:
When is a power of delegation necessary and where is it prohibited?



Always consider the impact of representation on others including dependents.

Note FASEA Standard 6





Indicators of vulnerability

- children and seniors
- people with impaired intellectual or physical functioning
- people from a low socio-economic background
- people who are Aboriginal or Torres Strait Islanders
- people who are not native speakers of the local language
- people with low levels of literacy or education
- people subject to modern slavery, which involves human exploitation and control, such as forced labour, debt bondage

https://www.acnc.gov.au/tools/topic-guides/vulnerable-people

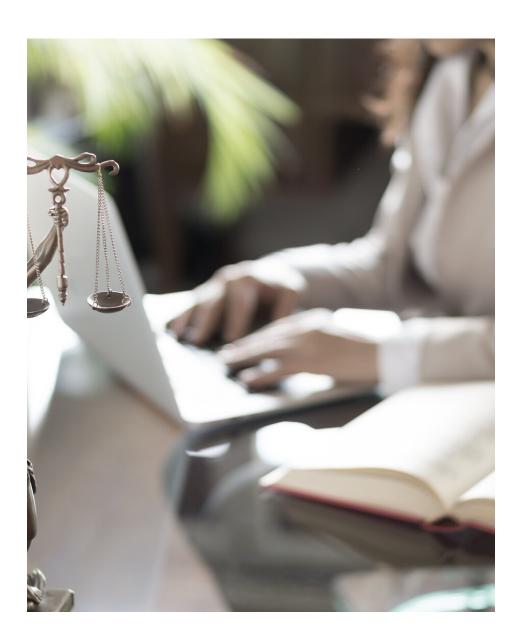
• Vulnerable people are defined as a people aged under 18 or other individuals who may be unable to take care of themselves or are unable to protect themselves against harm or exploitation.

Contrast:

• Commercial parties able to self-protect from financial loss (for example through contract) have been found not vulnerable and hence have been owed no duty of care.







Principles for good practice

- 1. Respect the will and preference of your donor/client including extending to them the dignity of risk.
- 2. Be confident of the reasons by which you conclude (not assume) you are dealing with a competent person.
- 3. Be cognitive responsive in your dealings with your donor/client. Understand the wellbeing expectations of your donor/client.
- 4. Know the property and intentions you are responsible for if you are a representative. Know the limit of your power and the nature of your accountability.





Downloads

Tools to help you in practice are available at the download page of our website They are available with a creative commons 4.0 attribution licence



We are pleased to offer you a set of free downloadable resources to make it easier to access the support we can provide.

You can choose to use some resources to give to clients when they brief you. Other resources can be used to develop your skills and guide the conversations you have with your clients, referrers and collaborators.







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