

Guidance Statement No. 10 – Power of attorney (solicitor attorney remuneration) (Published 31 January 2018)

1. Introduction

1.1. Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

1.2. What is the issue?

Challenges arise for solicitors who are acting as an attorney, or acting as both a solicitor and attorney in financial matters, for a principal. This Guidance Statement seeks to address the following issues:

- an attorney's right to remuneration;
- conflicts that arise when acting as both a solicitor and an attorney.

1.3. Status of this Guidance Statement

This Guidance Statement is issued by Queensland Law Society ('QLS') for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of this Guidance Statement it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct. This Guidance Statement represents a standard of good practice and is endorsed by the QLS Ethics Committee.

2. Relevant principles

The *Powers of Attorney Act 1998* (Qld) ('POAA') regulates powers of attorney in Queensland. An attorney must:

- act honestly and with reasonable due diligence to protect the principal's interests;¹
- avoid conflict transactions² or acting with undue influence;³
- act subject to the terms of the power of attorney document.⁴

¹ *Powers of Attorney Act 1998* (Qld), s 66.

² *Ibid* s 73.

³ *Ibid* s 87.

⁴ *Ibid* s 69.

An attorney for a 'financial matter'⁵ must keep and preserve accurate records and accounts of all dealings and transactions made under the power.⁶ An attorney can be ordered by the court to pay compensation to the principal if the attorney fails to comply with POAA.⁷ When acting under a power of attorney, the attorney must take into account and act in accordance with the principles set out in Schedule 1 of the POAA.

3. Acting as both a solicitor and attorney

While acting as an attorney is work that a solicitor may do, and is work that can be incidental to legal practice, it is not itself legal work and may be performed by a person who is not a solicitor; it is not 'engaging in legal practice' as that phrase is used in the *Legal Profession Act 2007* (Qld). As a result, it is inappropriate to charge such work on a legal professional scale. Examples of such 'attorney work' may include:

- claiming a principal's Medicare benefit;
- paying the principal's outstanding bills on time;
- ensuring that the principal has accommodation, care and support that is appropriate to their needs.

A solicitor attorney must not only act in the client's best interests but must ensure that their actions as an attorney conform with the general principles and statutory provisions contained in the POAA.

An attorney for a 'financial matter'⁸ may only enter into a 'conflict transaction'⁹ if the principal authorises the transaction.¹⁰ A 'conflict transaction' would include a situation where the attorney, being a professional adviser, charges for their services. As a result, acting as *both* a solicitor (for a fee) and attorney is a 'conflict transaction' and cannot proceed unless the principal authorises the transaction.¹¹ In *Re PLC*¹² the attorney's decision to instruct his own firm to undertake a personal injury claim on behalf of the principal represented a clear breach of section 73 of the POAA.¹³

If the principal does not have capacity to provide such authority then the appropriate action would be to apply to the court for a direction.¹⁴ The court may also make orders authorising an attorney to undertake a transaction that the attorney may not otherwise be entitled to undertake.¹⁵

3.1. Obtaining the right to remuneration as either an attorney or solicitor

Include clear authorisation in the power of attorney

Both a general power of attorney and an enduring power of attorney must be substantially granted in the approved form.¹⁶ The approved forms do not include a standard clause on

⁵ Ibid sch 1, pt 2.

⁶ Ibid s 85.

⁷ Ibid s 106.

⁸ Ibid sch 1, pt 2.

⁹ Ibid s 73(2).

¹⁰ Ibid s 73.

¹¹ *Re PLC* [2006] QGAAT 89 [45] & [47].

¹² [2006] QGAAT 89.

¹³ *Re PLC* [2006] QGAAT 89 [45] & [47].

¹⁴ *Powers of Attorney Act 1998* (Qld), s 118.

¹⁵ Ibid s 118(2).

¹⁶ *Powers of Attorney Act 1998* (Qld), ss 11, 44 & 161; Approved forms can be accessed at the Queensland Government, 'Power of Attorney' (20 November 2017) The Queensland Government website

remuneration, but do allow for the inclusion of additional terms. It is recommended that a clause about remuneration be included.

The principal must expressly authorise the attorney to engage, for the provision of legal services to the principal, the attorney (in their role as a solicitor) or the legal practice of the attorney (even when that practice is incorporated). The provision must therefore be clearly worded and set out the basis of the remuneration which can be charged for legal services.

If any non-legal services are to be remunerated, those services must not be charged on the same basis as the professional charges the attorney would render in their role as a solicitor. Solicitors may wish to rely on the *Public Trustee (Fees & Charges Notice)*,¹⁷ as it represents a remuneration scale, applicable when an attorney is undertaking non-legal work for a principal, which has been determined by informed consultation and which may therefore contain comparable items for work done by a solicitor acting purely as an attorney.

Despite the inclusion of express authorisation, the court (or the tribunal, in the case of an enduring power of attorney)¹⁸ may nevertheless intervene to determine whether a power of attorney is valid.¹⁹

What if the power of attorney is silent on remuneration?

The attorney may apply to the court for advice, directions or recommendations in this situation.²⁰

3.2. Right to reimbursement for out of pocket expenses as an attorney

As the principal's agent, the attorney is indemnified for out of pocket expenses reasonably incurred when carrying out their duties as an attorney, even where the power of attorney document is silent as to reimbursement.

3.3. Duties as both solicitor and attorney

Merely because a solicitor has attended to certain work with the approval of a principal having capacity, does not mean that continuing in that work past the point of the principal's incapacity will be acceptable. In *LSC v Towers*,²¹ a solicitor was appointed as attorney for a principal and continued to do work for the principal after the principal lost capacity, including continuing to charge for some non-professional attendances at his professional rate (which the principal previously had accepted). In that case, the Chief Justice noted that:

"It is not to the point that (the principal) had previously accepted charging at the level which the respondent continued to apply. The incapacity having taken over, the respondent should have been scrupulous to ensure his charges as attorney would withstand rigorous independent scrutiny".²²

<https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/power-of-attorney-and-making-decisions-for-others/power-of-attorney>.

¹⁷ *Public Trustee (Fees & Charges Notice) (No. 1) 2016* (Qld).

¹⁸ *Powers of Attorney Act 1998* (Qld), s 109A.

¹⁹ *Powers of Attorney Act 1998* (Qld), s 113.

²⁰ *Ibid* s 118.

²¹ *Legal Service Commissioner v Towers* [2006] LPT003 [50].

²² *Ibid*.

In *Legal Services Commissioner v Richardson*²³ the solicitor:

*“deliberately used the powers of attorney to obtain certificates of title so that he could claim a possessory lien over them and in doing so improperly preferred his own interests to those of his client. In a situation where he found himself in a position of conflict he should have made full disclosure to the client and sought instructions”.*²⁴

The solicitor’s failure to do so resulted in a finding that he had acted dishonestly and had entered into a conflict transaction.

4. Enduring powers of attorney

A person may only appoint an enduring power of attorney if that person has the capacity to do so. The definition of capacity as set out in the POAA is:

“capacity, for a person for a matter, means the person is capable of—
(a) understanding the nature and effect of decisions about the matter; and
(b) freely and voluntarily making decisions about the matter; and
*(c) communicating the decisions in some way.”*²⁵

The decision to appoint a solicitor as an attorney must therefore be free from the coercive influence of the solicitor. Solicitors must ensure that they act in the best interests of their clients and must consider whether in the circumstances it is appropriate to be appointed as a client’s attorney.

In relation to an enduring power of attorney, there is also a statutory presumption of undue influence in the principal’s favour if a transaction is between a principal and the attorney or a close friend, business associate or relation of the attorney.²⁶

In order to rebut this statutory presumption, a prudent solicitor attorney should recommend to a client the desirability of obtaining independent legal advice as to whether the solicitor is the best person to be appointed as the client’s attorney and accordingly, may be required to present relevant, cogent and admissible evidence in order to dispel this presumption.

5. More Information

Solicitors are also referred to the *Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Solicitors, Queensland Law Society, June 2014*.

For further assistance please contact an Ethics Solicitor in the QLS Ethics Centre on **07 3842 5843** or ethics@qls.com.au.

²³ [2009] LPT 17.

²⁴ Ibid [65].

²⁵ *Powers of Attorney Act 1998* (Qld), sch 3.

²⁶ Ibid s 87.