



Testamentary Capacity

- Take comprehensive instructions from the will-maker in person, on their own.
-
- Always consider the issue of capacity and satisfy yourself that the will-maker meets the various elements of the test, that is, the will-maker must¹:
 - be aware of and appreciate the significance of the act which the will-maker is embarking upon
 - be aware in general terms of the character, extent, and value of the estate with which the will-maker is dealing
 - be aware of those who might reasonably be thought to have claims upon the will-maker's bounty, and the basis for and nature of those claims
 - be able to evaluate and discriminate between the respective strengths of those claims.
-
- Keep detailed file notes of the:
 - instructions given by the will-maker and the reasons for them
 - explanation given by you before the will-maker signed the will eg. whether you read each clause out to the will-maker and they asked questions or the will-maker read the will themselves
 - what enquiries you made of the will-maker to satisfy yourself that the will-maker had capacity.
-
- If you are in any doubt about capacity, the will-maker should be asked to obtain a medical opinion.
-
- If the client is over a certain age you think is appropriate, and the proposed will is in any way controversial, have a firm policy that medical opinions are always obtained in order to protect the will from possible challenge later.
-
- When you are seeking a medical opinion from a doctor, provide the doctor with a letter, giving the doctor:
 - the client's relevant background and history including personal circumstances, financial circumstances and any relevant legal proceedings on foot
 - relevant details of the legal test required²
 - asking the doctor to give an opinion on:

¹ FN 7, see also LIV [Capacity Guidelines](#)

² See Law Institute of Victoria '[Outline of matters to consider when requesting a medical assessment of a person's cognitive capacity](#)'

CHECKLIST

August 2020



**LP
LC** LEGAL
PRACTITIONERS'
LIABILITY
COMMITTEE

- whether the client is suffering any condition that may affect cognition and if so, what it is
- whether in the doctor's opinion the extent of the cognitive impairment is such that the client is not:
 - aware of the nature and effect of a will
 - aware of the nature and extent of their assets
 - able to assess who are their natural beneficiaries, such as family and personal friends
 - able to understand their obligations to provide for people who are dependent on them
 - able to discriminate between the strengths of the claims of potential beneficiaries
 - able to understand the consequences of their decisions about who they include.