Representation before mental health tribunals

Practice note • 12 Dec 2019 • 30 minutes read

This practice note includes detailed advice on:

- communicating with and taking instructions from your client
- your duties of confidentiality and disclosure
- the representation of children and young people
- good tribunal practice

References to professional rules are based on the SRA Standards and Regulations.

This practice note is the Law Society's view of good practice in this area, and is not legal advice. For more information see the legal status.

1. Introduction

1.1. Who should read this practice note?

All practitioners who represent clients before the First-Tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal for Wales.

Unless otherwise specified, references to 'the tribunal ' include both tribunals.

2. The right to legal advice and representation before the tribunal

The right of access to a court is a fundamental right at common law under the European Convention on Human Rights (ECHR) and is guaranteed by Article 6 of the convention.

Article 5(4) of the convention (PDF 1.2mb) further guarantees the right to legal representation.

When an individual is detained on the grounds of mental disorder, Article 5(4) requires that effective legal representation is provided by the state, free of charge, unless there are 'special circumstances'.

To comply with the state's obligations under Article 5(4), any legal representation that is provided must be 'effective'. That means the legal representative must be suitably qualified and experienced (although not necessarily a qualified lawyer) and must have adequate time

and facilities to prepare the case, including sufficient opportunity to visit the client and take instructions.

'Special circumstances' do not include the fact that the detainee's prospects of release are poor or that the detainee has the means to instruct his own lawyers. Even if representation is available (whether at the detainee's or the state's expense) the state must still ensure the detainee is represented unless satisfied that he or she has capacity and has made an informed choice not to be represented. See for example Megyeri v Germany (1992) 15 EHRR 584.

In England and Wales, public authorities have duties under the Human Rights Act to ensure that detained patients are represented. In practical terms, this will mean that a tribunal should consider appointing a legal representative for an unrepresented patient under rule 11(7) of the First-Tier Tribunal rules in England or rule 13 in Wales, even where the detainee has chosen not to be represented, unless satisfied that the individual has capacity to make that choice.

See 8.1 Legal and other requirements for further details.

2.1. The role of the hospital

Under the English and Welsh codes of practice, hospital managers must ensure that patients are told how to contact a suitably experienced representative (paragraph 12.6 and paragraph 26.5, respectively). The way in which hospitals assist clients to obtain legal representation varies widely.

Under Section 132 of the Mental Health Act 1983 (MHA 1983), hospital managers must ensure that a patient understands 'what rights of applying to a tribunal are available to him in respect of his detention', which would include advice on the right to be legally represented. This information is contained in a leaflet which should be given to patients upon admission.

A list of mental health legal practitioners can be provided by the ward or the mental health act administrator to patients. The tribunals in both England and Wales also hold a list of accredited practitioners, as does the Law Society.

You are advised to contact the mental health act administrator at hospitals to check if you or your firm have been included in the list of representatives available to represent detained patients. Details of firms that employ a qualified practitioner in England and Wales can be found using the Law Society's online Find a Solicitor service.

See also a list of Law Society accredited representatives, which is updated monthly.

2.2. Independent mental health advocates

The role of an independent mental health advocate (IMHA) is to help qualifying patients understand the legal provisions to which they are subject under the MHA 1983, and the rights and safeguards to which they are entitled. IMHAs can accompany patients to tribunal and hospital managers' hearings and may speak on their behalf (with the prior permission of the deputy chamber president) if they are not legally represented. The IMHA may also assist patients to exercise their rights (for example, helping them complete an application to the tribunal).

IMHAs are not the same as legal representatives and are not expected to take over duties currently undertaken by solicitors or other legal practitioners. The following patients are entitled to have access to an IMHA:

- patients detained under the MHA 1983, even if they are currently on leave of absence from hospital, apart from those patients detained under sections 4, 5(2), 5(4), 135 or 136
- patients subject to guardianship under the act
- a community patient.

A patient will also qualify for the assistance of an IMHA if:

- they discuss with a registered medical practitioner or approved clinician the possibility of being given a form of treatment to which section 57 applies
- not having attained the age of 18 years and not being a qualifying patient they discuss with a registered medical practitioner or approved clinician the possibility of being given a form of treatment to which section 58A applies.

In England the tribunal has issued guidance on the role of IMHAs.

You should note that in Wales, all psychiatric in-patients have the right of access to an IMHA following implementation of the Mental Health (Wales) Measure 2010, part 4. Additional guidance to the measure is available under the code of practice to parts 2 and 3 of the Mental Health (Wales) Measure 2010.

2.3. Receiving referrals

You must comply with the seven SRA principles when seeking to obtain new instructions. You should also read and abide by any code of conduct issued by the relevant trust or hospital.

If you are a member of the Mental Health Lawyers Association (MHLA) you should look at clause 3 of the MHLA Code of Conduct, which deals with facilitating referrals.

You may:

- contact the mental health act administrator of the hospitals in your area to express willingness to accept referrals for tribunal representation
- contact IMHA service providers in your area to express willingness to accept referrals for tribunal representation.

You must not approach clients on hospital wards without prior appointments to obtain referrals. You should also be mindful of the potential for a conflict of interest to arise should you provide gifts or incentives to members of hospital staff.

If you are in doubt as to how to resolve any issue relating to referrals or gifts, you should contact the SRA professional ethics helpline on **0370 606 2577**.

If a patient approaches you on a ward seeking representation then you should check with the mental health act administrator to ascertain whether that patient is already legally represented.

If the patient is not already represented, or the mental health act administrator does not know whether or not the patient is legally represented, you can leave your details and invite the patient to contact you for an appointment.

You can take instructions immediately in emergency situations after first checking with the mental health act administrator as to whether the patient is legally represented. Examples of emergency situations include section 2 patients where a date has already been set for a hearing or the time limit for appealing is very close.

2.4. Change of solicitor

Under the regulation 23(4) Civil Legal Aid (Procedure) Regulations 2012, you must not provide legal help to a client who has received legal help for the same matter from another supplier within the preceding six months.

The exceptions to this are:

- there has been a material change in relevant circumstances since the initial determination
- the individual has reasonable cause to be dissatisfied with the services provided under the initial determination
- the individual's usual residence has changed since the initial determination and, as a result, effective communication between the individual and the provider is not practicable
- the provider named in the initial determination has confirmed in writing that no remuneration will be claimed under arrangements made by the lord chancellor under section 2(1) of the act in respect of any services provided under the initial determination.

Where a patient requests a change of solicitor, you should record brief reasons in a file note as to why the patient is seeking to change their legal representative to you. You should write to the firm currently instructed and ask if they object to the change of solicitor.

2.5. Appointing a representative

The tribunal can exercise its power to appoint a representative:

- in England under Rule 11(7) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the FTT Procedure Rules 2008)
- in Wales under Rule 13(5) of the Mental Health Review Tribunal for Wales Rules 2008 (the Tribunal (Wales) Rules 2008).

See 8.2 Legal and other requirements.

The tribunal may exercise this power when a patient either:

- states they want to be represented or does not want to conduct their own case
- lacks the capacity to appoint a representative but the tribunal believes that being represented is in the patient's best interests.

A refusal of representation from a client with capacity to make that decision cannot be overridden. See 4.1 Clients with capacity.

The upper tribunal has the power to appoint a representative for the patient under rule 11(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (UT Rules 2008) in the same circumstances as the tribunal.

The MHA 1983 does not provide for a litigation friend to be appointed for a person who lacks capacity to give instructions to a representative.

For more information, see 4.2 Clients without capacity.

3. Communication with the client

Tailoring the way in which you communicate with clients who have mental health problems is crucial in providing effective representation. The tribunal process can be a daunting process for patients who will often require increased levels of client care, including attendance time, well ahead of significant milestones in their case.

A report by the Administrative Justice and Tribunals Council (PDF 783 KB) provides useful analysis and information for you to consider when preparing for and undertaking hearings before the tribunal.

You should:

- be alert to, and seek to overcome, communication challenges which the client faces, including those arising from:
    - lack of capacity or use of medication
    - hearing difficulties
    - learning difficulties
    - language barriers or other cross-cultural issues.
- present information in a clear and straightforward manner, avoiding complicated forms and overly legalistic language
- allow extra time to explain issues in the case to clients and, if necessary, attend clients well ahead of a hearing to minimise confusion on the day of the hearing
- ensure clients have timely access to necessary information on their case, for example, expert reports where necessary.

3.1. Initial contact with the client

You should make initial contact with the client in a timely manner, to take instructions and give initial advice. You should advise clients on:

- their rights as a detained patient
- the issue of consent to treatment
- entitlement to legal aid
- the strengths and weaknesses of their case
- hearing procedures
- tribunal powers
- timescales
- their right to independent advocacy assistance.

You should also consider whether or not to request that the secretary of state exercise his discretion to refer the case to the tribunal if the patient has not applied to the tribunal within the relevant period. You may not be able to communicate all the information above in one meeting - it depends on the unique circumstances of each client. You should refer a client to another specialist legal adviser if you lack expertise on other significant issues for which they might need legal advice. Importantly, this is a requirement of legal aid contracts (see the 2015 Standard Civil Contract specification general rules). Examples of common significant issues include:

- family
- welfare benefits
- debt
- housing
- crime
- public law
- discrimination
- human rights
- community care
- clinical negligence
- immigration.

Legal aid changes have severely restricted or terminated funding in many of these areas. In some cases it may be appropriate to refer clients to Citizens Advice.

You should maintain regular contact with the client, and be willing to adjust the level of contact depending on the client's mental health condition. The client's clarity may change during the case as a result of changing mental health or medication.

You should aim to make contact with clients in person as much as possible, rather than relying on telephone or written communication. If your first referral is from a member of staff at the hospital or an IMHA you should try and speak to the client before your first attendance to reassure them that you will be coming to see them.

If your client is not detained but lives in the community then you should offer them an appointment at your office. If they are unable to attend your office you should consider what arrangements can be made to meet your client in private at a venue that is appropriate to your client's needs and is safe for you both.

You should be aware that your correspondence, although addressed to the client, may find its way on to the client's medical notes, thereby breaching solicitor/client confidentiality. It will sometimes be appropriate to visit the client rather than send correspondence by post. If you do so, you should read out the correspondence, offer the client a copy to keep and make a note on your file accordingly. If you find that your correspondence has been put into your client 's records, you should check with your client whether they object to this and if so raise it with staff on the ward.

You must not disclose to the client any documents sent to you by the Tribunal Service or the Tribunal Secretariat in Wales which is marked 'not for disclosure'. You may only disclose such documents to your client if the tribunal authorises you to do so. For more information on disclosure issues see section 5.3.

3.2. Client care letters

Client care letters are especially important when working with clients who have mental health problems. The general rules (set out below) apply but special care and attention may be required.

Paragraphs 3.1 to 3.6 of the SRA Code of Conduct for Solicitors, RELs and RFLs outline client care requirements with regards to service and competence. These paragraphs state that solicitors must provide a proper standard of service, which takes into account the individual needs and circumstances of each client.

Paragraphs 8.6 to 8.11 of the SRA Code of Conduct for Solicitors, RELs and RFLs outline client care requirements with regards to client information and publicity. This includes providing clients with the information they need to make informed decisions about the services they need, how these will be delivered and how much they will cost.

These paragraphs should be interpreted with reference to the seven mandatory SRA principles of the SRA Standards and Regulations 2019.

Your initial letter to the client explaining terms of business is often called the client care letter. It acts as:

- a clear record for you and the client of the instructions given and what will happen next

- a useful guide for your client on your role and responsibilities
- evidence against complaints of insufficient information or inadequate professional service.

You should tailor client care letters to the individual needs of the client, reflecting their communication needs. You should use clear, simple and jargon-free language.

In some cases it may be inappropriate to send a letter, for example if the likelihood of distress to your client is significant. If for any reason you consider it inappropriate to send the client a client care letter, you should retain the letter on file and go through the letter in person with the client when appropriate and as far as their comprehension allows.

You should always record the reason for taking this approach. If an IMHA or independent mental capacity advocate (IMCA) is involved, you may wish to make them aware of the contents of the letter, subject to client confidentiality (see below).

For more information see the practice note on client care letters.

4. Taking instructions

4.1. Clients with capacity

The following guidance applies where:

- a patient with capacity has instructed you directly
- you have been appointed to represent them under r 11(7) (a) FTT Rules 2008 or rule 13(5) (a) of the Tribunal (Wales) Rules or r 11(7) (a) Upper Tribunal Rules 2008; namely where the patient 'states they want to be represented or does not want to conduct their own case'.

You must assume that your client has capacity unless the contrary is established (section 1(2) MCA).

The test of litigation capacity is set out in Masterman-Lister v. Brutton & Co [2003] 1 WLR 1511, namely 'whether the party to legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings'. This is sometimes referred to as the client having capacity to instruct a solicitor. It is important to note, as the Supreme Court made clear in Dunhill v Burgin [2014] 1 WLR 993, that the test must be applied to the claim that the party in fact has, not to the claim as formulated by their lawyers.

The information that a patient is required to understand to instruct a solicitor in the context of an application to a tribunal is not complex and people severely affected by a mental disorder may still be able to provide instructions if you explain matters simply and clearly.

The question of whether the person is able to provide instructions is a judgment that in many cases an experienced mental health advocate will be able to make themselves. In the rare

cases where you are unable to form an opinion you should obtain the opinion of the responsible clinician (RC) - either directly or via the mental health act administrator - as to the client's litigation capacity by reference to the test in Masterman-Lister. You should also ask the RC for his or her opinion of the client 's capacity to appoint you.

If you conclude that your client has the capacity to instruct you, you must take instructions from them and must act in accordance with those instructions, even where they are inconsistent, unhelpful to the case or vary during the preparation of the case, or during the hearing itself. However, the fact that the client's instructions are contrary to their best interests may be evidence that they lack capacity.

You must refuse to advance an argument which is not 'properly arguable', despite instructions to do so, see Buxton v Mills-Owen [2010] EWCA Civ 122, para 45. However, a submission may be 'properly arguable' even if it has few, if any, prospects of success (para 43). It will depend upon the context and your judgment. It is highly unlikely that to seek a client's discharge in accordance with his or her express wishes would not be 'properly arguable', even if it is unlikely to succeed.

If you consider that an argument that your client instructs you to advance is properly arguable, you must advance it without reservation. In other words, you should not advance a submission at the same time as signalling to the judge that you may think that it is weak or hopeless, for example by using coded language such as 'I am instructed that'. Such coded language is well understood as conveying that the advocate expects it to be rejected (Buxton v Mills-Owen at paragraph 44).

Where you believe your client's instructions are unrealistic or contrary to their interests you should discuss with the client an alternative and more realistic line of challenge.

You may pursue this alternative line only if the client agrees. Your duty to act in accordance with the client's instructions takes precedence over your duty to act in what you perceive to be their best clinical interests. Therefore if your client wishes you to argue for their discharge you should do this, even if in your view your client needs hospital treatment.

Paragraph 3.1 of the SRA Code of Conduct for Solicitors, RELs and RFLs states that “if you have reason to suspect that the instructions do not represent your client’s wishes, you do not act unless you have satisfied yourself that they do. However, in circumstances where you have legal authority to act notwithstanding that it is not possible to obtain or ascertain the instructions of your client, then you are subject to the overriding obligation to protect your client’s best interests.”

In those circumstances you must not act on those instructions until you have satisfied yourself that they represent the client's wishes.

As an advocate, you are responsible for decisions about the manner in which you put your client's case to the tribunal, and you must bear in mind your professional responsibilities to the court - in this case the tribunal - as well as to the client. See [R v Farooqi and others [2013] EWCA Crim 1649].

4.2. Clients without capacity

You must assume that your client has capacity to give you instructions unless the contrary is established. Nevertheless, there will be occasions on which you will not be able to accept instructions directly, or by way of a referral, because the client lacks capacity to instruct you. You may form this view if, for example, the client is profoundly learning disabled and cannot appreciate that they are detained under the MHA 1983.

If you think that your client lacks capacity to instruct you then you cannot act for this client unless either:

- you are instructed by a properly authorised third party, such as a court-appointed deputy or the donee of a power of property and affairs power of attorney
- the relevant tribunal has appointed you to act under the First-Tier Tribunal Rules, Tribunal (Wales) Rules or the Upper Tribunal Rules.

See above: 2.5 Appointing a representative.

As set out at paragraph 2.5, the tribunal can appoint a solicitor for a patient if satisfied that the patient lacks capacity to appoint a representative. In YA v Central and NW London NHS Trust and others [2015] UKUT 0037 (AAC), Charles J held that to have capacity to appoint a representative a patient must be able to appreciate his or her ability to conduct the proceedings unaided. The appointment by the tribunal operates as a retainer for the client.

An appointment by the tribunal does not mean that you are also appointed to act as the client's litigation friend. You should not automatically assume that guidance that may have been prepared for the use of a litigation friend in other court proceedings applies to you as a representative.

Although there is some overlap between capacity to appoint a representative and capacity to litigate, you should not assume when you are appointed that the patient will lack capacity to give instructions on all matters which relate to the application.

Once appointed by the tribunal, you have a heightened responsibility to identify and then to act in the interests of the client. The duty to act in the client's best interests is set out in principle 1 of the SRA Code of Conduct 2011 and applies to clients with or without litigation capacity.

In YA v CNWL (above) at paragraphs 13-16, Charles J considered the responsibilities of a representative who has been appointed by the tribunal. He said:

- the representative must promote the best interests of the patient
- in respect of matters where the patient has capacity to instruct the representative, the representative should follow those instructions
- where the patient lacks capacity to give instructions in relation to some matters the representative must ascertain the patient’s views and wishes
- once the representative has ascertained the patient’s views and wishes, then if the representative does not consider that the argument the patient wishes to put forward is

in the patient's best interests, or where the patient wishes to put forward an unarguable point, the representative should:

  - explain the patient's views and wishes to the tribunal, alerting the tribunal to the fact that there is a divergence between the representative and the patient
  - invite the Tribunal to hear from the patient
  - advance such arguments as he or she properly can in support of the patient's wishes.

- where there is no divergence between what the patient wishes to argue and what the representative considers to be in his or her best interests, then the representative should advance all arguable points to test the basis for detention in hospital.

Where the client lacks the ability to express their wishes, you should:

- ensure that the tribunal receives all relevant material so that it can determine whether the criteria for continued detention are satisfied
- test the criteria for continued detention
- remember your client's right to treatment in the least restrictive setting and alert the tribunal to possible alternatives to detention under the MHA 1983, such as community treatment Orders (CTOs) and guardianship
- In the case of a patient who is unable to consent to be detained for purposes of assessment or treatment in hospital but appears to be compliant, you may wish to consider whether the Deprivation of Liberty Safeguards (DoLS) regime under schedule A1 to the Mental Capacity Act 2005 (MCA 2005) might provide a better and less restrictive way of ensuring that your client receives treatment or assessment in hospital (see AM v SLAM NHS Foundation Trust [2013] UKUT 365 (AAC)).

You should not automatically argue for discharge if you are unable to ascertain the patient's wishes, but you are obliged to test the criteria for detention.

Separate considerations arise if the client is adamant that they do not wish to be represented by you, notwithstanding your appointment by the tribunal under rule 11(7) (b), the tribunal having assessed the client as lacking capacity to appoint a representative.

If on meeting the client you think that he or she has capacity to appoint you, then you should alert the tribunal and ask for the appointment to be discharged. It is then the client's decision whether to instruct you or not.

If you consider that the client lacks capacity to instruct you but think the client is hostile to being represented by you, then in some cases you should consider informing the tribunal and requesting the appointment to be discharged. This may be appropriate where:

- attempting to represent the client would cause them distress or interfere with their ability to participate in proceedings
- the client's hostility is such that you cannot fulfil your professional obligations to them

- continuing to attempt to represent the client puts your safety at risk and the risk cannot be managed using local policies at the unit where the client is detained.

For further guidance on obtaining copies of the medical records of a client lacking capacity see section 6.2 Access to medical records.

5. Your duties towards your client

5.1. Duty to act in the best interests of clients

Solicitors must act in the best interests of the client under principle 7 of the SRA Principles. This duty arises whether the client has litigation capacity or not. It is important to note that the term 'best interests ' here does not necessarily mean the same as 'best interests' for the purposes of the MCA 2005.

See Professional conduct in the Legal status box above and 8.1 Legal and other requirements

Aspects of the duty to act in the client's best interests will include:

- advising clients of the likelihood of being discharged
- advising clients on possible steps towards discharge
- advising clients in respect of disclosure issues
- following the instructions of a client with capacity to instruct you or communicating the views or wishes of a client without capacity to instruct you
- advising on aftercare
- advising on other related issues, for example, compulsory treatment provisions, alternatives to detention such as CTOs and guardianship
- advising on the possibility and consequences of the patient withdrawing the application to the tribunal.

5.2. Where conflicts may arise

Conflicts may arise because of the nature of the information that you have access to as a representative (regardless of your client's capacity to give you instructions). For example, in RM v. St. Andrew's Healthcare [2010] UKUT 119 (AAC), the Upper Tier Tribunal ruled that documents revealing the patient was being covertly medicated should be disclosed to the patient because his fair trial rights (which the Upper Tier Tribunal referred to as his best legal interests) required it, even though it was accepted it was likely to affect his health adversely (which the Upper Tier Tribunal referred to as the patient's best clinical interests).

There may be other situations not covered by this practice note. If you are in doubt you should seek guidance from the SRA's professional ethics helpline.

5.3. Duty of confidentiality

Confidential information

This duty is covered in paragraph 6.3 of the SRA Code of Conduct for Solicitors, RELs and RFLs, stating "you keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents".

The SRA has released useful further guidance on the disclosure of client's confidential information which you should read. You must achieve outcome 4.1 which requires solicitors to keep the affairs of clients and former clients confidential, except where disclosure is required or permitted by law or the client consents.

For more specific guidance as to how you should approach particular situations you may encounter you should contact the SRA professional ethics helpline.

Privileged information

You should not disclose information passed to you in circumstances giving rise to a duty of legal professional privilege, which is absolute (see R v Derby Magistrates ex p B [1996] AC 487, L (a minor) [1997] AC 17 (see 24B-G) and B v Auckland Law Society [2003] 2 A.C. 736).

If you find yourself in this situation - for example, if disclosure of privileged information has been made mistakenly - you should contact the SRA 's professional ethics helpline for advice on 0370 606 2577.

Duties of disclosure and circumstances where non-disclosure may be appropriate

Paragraph 6.4 of the SRA Code of Conduct for Solicitors, RELs and RFLs deals with the issue of disclosure:

"Where you are acting for a client on a matter, you make the client aware of all information material to the matter of which you have knowledge, except when:

- the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security of the prevention of crime;
- your client gives informed consent, given or evidenced in writing, to the information not being disclosed to them;
- you have reason to believe that serious physical or mental injury will be caused to your client or another if the information is disclosed; or
- the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed."

The tribunal can withhold disclosure of documents from a patient if disclosure is likely to cause serious harm to the patient or another person and it is proportionate to do so. In

England, this is possible under rule 14, Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. In Wales, this is possible under rule 17, Mental Health Review Tribunal for Wales Rules 2008.

Under these rules, the information can be disclosed to the solicitor on the basis that they do not disclose it to anyone else, including the client. Rule 14 (6) (England) and rule 17 (5) (Wales) prohibits the representative from disclosing documents or the information they contain either directly or indirectly to anyone else, including the representative's client.

The rule does not prohibit the representative from informing the client that the representative has a document or information that cannot be disclosed to the client, provided that the representative does not thereby indirectly disclose to the client the information which is being withheld.

If the tribunal has made such a direction then your duty to disclose the information to the client is over-ridden by this legal restriction (see IB4.4). This can be a difficult situation for you to manage. If documents are disclosed to you on this basis you should either:

- consider requesting an earlier hearing which the client does not attend
- consider dealing with disclosure as a preliminary issue without the client on the day of the hearing
- consider making an application for the issue to be considered by a salaried tribunal judge on the papers before the hearing.

Dorset Healthcare NHS Foundation Trust v MHRT (2009) UKUT 4 (AAC) gives guidance on when a responsible authority can resist disclosure of confidential third-party information or when a solicitor wishes to disclose such information to their client.

If you request full access to your client's medical records, the responsible authority should disclose all documents to you subject to an undertaking, if necessary, not to disclose certain specific third-party documents to the patient.

If in 'exceptional circumstances' the responsible authority refuses even to disclose documents to the solicitor, they must show that it is appropriate to do so by serving a skeleton argument to the tribunal office and the tribunal must make a ruling.

You should seek permission from the tribunal to disclose to your client any documents disclosed to you if you consider that it may improve the prospects of a successful outcome. In other words, if the documents are 'material to the client's matter' for the purpose of IB4.4.

You should set out your reasons for disclosure by way of a skeleton argument. In RM v. St Andrew's Healthcare [2010] UKUT 119 (AAC), also referred to in paragraph 5.2.1 above, the Upper Tribunal ruled that in deciding whether disclosure should be ordered the overriding consideration must be to ensure that the patient has a fair hearing, and that this must take precedence over any concerns that disclosure will harm the patient's health. It would follow that the requirement of a fair hearing can often override considerations of third-party confidentiality.

Where a request or refusal of request is not resolved, either party can apply to the tribunal for an order under rule 5 (d). This can be heard as a preliminary issue on the day of the hearing or a decision can be taken before the hearing following written or oral submissions.

The Upper Tribunal has stressed the desirability of dealing with disclosure issues between the parties without the need to involve the tribunal.

Please note that the guidance above with regard to disclosure, which arises from the Dorset case, is limited to those cases where there are ongoing proceedings in the tribunal. In other circumstances, if a trust or other body holding data on your client provides you with material that is relevant to your client's case then you must disclose it to the client unless any of the circumstances in paragraph 6.4 of the SRA Code of Conduct for Solicitors, RELs and RFLs apply.

6. Good tribunal practice

6.1. Avoiding delay

The tribunal's overriding objective is to deal with cases fairly and justly. This includes avoiding delay, so far as compatible with proper consideration of the issues.

Often delay can be caused by late reports from the responsible authority. In this situation it is the responsibility of the mental health act administrator to secure reports and submit them to the tribunal within the time limit. The tribunal in turn is responsible for issuing directions where reports are late. You should keep an eye on time limits for the submission of reports and ensure that the tribunal issue appropriate directions when it is necessary.

Once statutory reports are received you should ensure they comply with the President's Practice Direction (PDF 125 KB). In Wales you need to ensure that they comply with the requirements set out in the schedule to the Mental Health Review Tribunal for Wales Rules 2008.

These objectives are stated in rule 2, the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 and rule 3 of the Mental Health Review Tribunal for Wales Rules 2008. This is also the case in the Upper Tribunal as stated in rule 2, The Tribunal Procedure (Upper Tribunal) Rules 2008.

See 8.1 Legal and other requirements.

You should take all appropriate steps to ensure that tribunal hearings are not delayed.

6.2. Access to medical records

You should examine the section papers as soon as possible after your appointment as this will enable you to scrutinise the legality of your client's detention. For this you will require your client's signed consent authorising you to have access to your client's medical records. This requires the approval of the RC. In some hospitals this will be arranged via the mental health act administrators but practice varies across hospitals.

You must read your client's medical records. These include documents such as progress notes, prescription charts, minutes of ward or Care Programme Approach (CPA) meetings, and records held in the community. Again, the means by which you can obtain access will vary across hospitals.

If your client lacks capacity to consent to your access to their section papers or records then you should ask the RC to agree to disclosure on the basis that it is in their best interests to have their case properly prepared. If you cannot resolve this issue with the RC you should apply to the tribunal using the CMR1 form for an order for disclosure under rule 5 (d). In Wales you should apply for an order under rule 5 (c).

Care and Treatment Reviews

If you are providing advice or representation to a client with a learning disability who is detained in a hospital or other setting you should be aware of the introduction, in England but not in Wales, of care and treatment reviews (CTRs).

CTRs are an independent review of an individual's care and treatment aimed at improving their care and reducing admissions and unnecessarily lengthy stays in hospitals. They are reviews led by the responsible commissioner working together with an individual or family member with experience of learning disability services ('expert by experience'), an independent clinical expert and the care service provider.

The review should focus on four specific areas of care: the person's safety, the quality of their care, whether a forward looking care plan is in place and, importantly, whether care and treatment could be provided in a community setting.

CTRs should be carried out either:

- in the community when hospital admission is being actively considered
- within 10 working days of admission if no community CTR has been possible
- at six-monthly intervals for those who remain in specialist mental health and learning disability hospitals.

Reports and notes detailing the CTR and its recommendations may provide valuable information for use by you and/or the tribunal for the purposes of testing the criteria for continued detention or improving the care received by your client. If your client appears to you to be eligible for a CTR and one has not taken place you may request that a review is undertaken with your client's consent. If your client lacks capacity, a best interests decision-making process should be initiated unless you have the power to request one under the authority of a health and welfare lasting power of attorney (LPA).

Requests for a CTR should be made to your client's responsible commissioner, care co-ordinator or responsible clinician. Where you consider it necessary or helpful you may seek to attend the CTR, although this is a matter for your professional judgment.

Detailed information on the policy and guidance applying to CTRs can be found here.

6.3. Independent reports

You should always consider whether it is appropriate to obtain independent evidence. Expert evidence may cover a range of issues such as diagnosis, treatment, placement and activities of daily living. You should also maintain an approved list of experts. Prompt instruction of an expert may reduce the need for adjournments and will ensure that your client has a fair hearing. Further guidance is available in the Mental Health Peer Review guidance (PDF 205 KB).

You should request independent reports as soon as possible and, in restricted cases, send them to the tribunal office and the Ministry of Justice no later than 21 days before the hearing so that the secretary of state can comment on the report.

6.4. Witnesses

You should confirm in advance the availability of all witnesses, including experts, who are expected to attend the tribunal. You should be aware of IB 5.6 which provides that you should not appear as an advocate if you or anyone in your firm will be called as a witness.

6.5. Interpreters

In England, form T110 (application to the First-Tier Tribunal (Mental Health)) and the listing form HQ1, must indicate whether your client will require an interpreter. If you need an interpreter, you should notify the tribunal as early as possible in proceedings. In Wales you should notify the tribunal by email or letter.

6.6. Documents

You should send all relevant documents to the tribunal office no later than seven days before the hearing.

6.7. Pre-hearing medical examination

A pre-hearing examination is indicated in all Section 2 cases. In all other cases you should always consider whether it is appropriate to request a pre-hearing medical examination by the medical member of the tribunal. You must make such a request on form CMR1 (if in England) within the prescribed period (ie 14 days before the date fixed for the hearing).

If your client lacks capacity to make the decision you must consider whether or not it would benefit your client 's case for there to be such an examination. However, if your case is before the Welsh tribunal, the default position is that the tribunal will carry out a preliminary examination.

6.8. Applications for postponements

You should avoid applications for postponements wherever possible. These are frequently postponed in both the English and Welsh tribunal, especially those made at the last minute. Tribunals in both England and Wales frequently refuse applications for postponement,

especially those made at the last minute. Any application for a postponement should be made to the tribunal.

If the tribunal is in England you must use form CMR1 where a request is made for any of the following:

- directions
- postponement
- prohibition of disclosure of information
- wasted costs
- permission to withdraw an application
- other applications.

If you consider that a postponement is in the interests of the client, you should advise the client accordingly, but leave the final decision to the client if the client has capacity to litigate.

If a postponement appears unavoidable, you should apply as early as possible, setting out the reasons.

Where delay is caused by late reports from the responsible authority, if the tribunal has not already issued directions, solicitors should request directions immediately after the breach of the time limits on submission of statutory reports.

6.9. Withdrawing an application to the tribunal

An application can be withdrawn at any time by the client if the tribunal accepts the withdrawal. A reference cannot be withdrawn.

If the client wants to withdraw the application, you should notify the tribunal office using form CMR1 (in England) giving the reasons.

Early notification allows for other cases to be rescheduled and maximises the use of the tribunal's time.

Where the withdrawal is received directly from the patient and that patient is represented, the solicitor will be approached by the tribunal and encouraged to make contact with the client to discuss the request to ensure the patient has not been put under pressure to withdraw.

The patient may make a fresh application for a tribunal within the same period of eligibility.

6.10. Other codes of conduct

Mental Health Lawyers Association (MHLA) code of conduct

The MHLA has adopted a code of conduct. It covers:

- quality of service

- making appointments
- behaviour on the wards
- disputes over representation
- seeking clients
- gifts
- hospital procedures.

NHS mental health trusts - codes of conduct

Some NHS mental health trusts and private hospitals have developed voluntary codes of conduct for solicitors. These codes ask solicitors to:

- contact the ward in advance to inform them of their intention to visit
- produce identification when visiting
- report to the ward office when visiting
- inform a member of staff if they wish to hold an informal meeting with another client whom they are visiting
- respect the operational needs of the unit/ward
- leave the ward following the completion of their appointment with a client.

Solicitors are asked not to:

- make unsolicited visits or telephone calls
- talk to or approach other patients
- hand out publicity materials
- offer gifts or money to service users other than existing clients
- offer gifts to staff.

You should find out whether there is such a code in place at the relevant hospital. If you have any concerns about the code, you should contact the relevant trust.

7. Representing children and young people before the tribunal

The tribunal has established a Child and Adolescent Mental Health Service (CAMHS) panel. Its purpose is to ensure that at least one of the tribunal members has special expertise in dealing with cases where a child is either detained under the Mental Health Act 1983 (MHA 1983) or subject to another order under the act. For the purposes of the CAMHS panel, a child is treated as any person under the age of 18 at the time of the application or reference.

Although the tribunal rules do not make any specific provision in relation to child patients, the solicitor representing a child should always consider the following:

- the wishes and feelings of the child
- the need to ensure that the child is able to participate fully in the proceedings by, for example, requesting that the proceedings are dealt with in as informal manner as appropriate
- any legal issues that are specific to the child, for example the impact of the Children Act 1989 on decision making in relation to the child and the need to identify the child's entitlement to aftercare services under children's legislation and mental health legislation.

The Royal College of Psychiatrists have produced a Guide to Mental Health Tribunals for Young People (PDF 793 KB) which may be a helpful tool in advising younger clients on the tribunal process.

8. More information

8.1. Legal and other requirements

- The Mental Health Act 1983 as amended by Mental Health Act 2007
- The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008
- The practice direction issued 30/10/08 (for England)
- The Mental Health Review Tribunal for Wales Rules 2008 (for Wales)
- The MHA codes of practice (different for England and Wales)
- Mental Capacity Act 2005
- Tribunal Procedure (Upper Tribunal) Rules 2008
- The Equality Act 2010
- Mental Health (Wales) Measure 2010

8.2. Mental Health Accreditation Scheme

The Law Society operates the Mental Health Accreditation Scheme.

If you are a member of the scheme you are authorised to advise and represent clients who have been detained under the MHA 1983, before the relevant tribunal.

Since 1 August 2014, membership of the scheme is mandatory for advocates appearing before the tribunal, other than self-employed counsel, and all legal aid providers must comply with this (see 7.6(b) Category Specific Rules, 2014 Standard Civil Contract Mental Health

Specification). Requirements for membership of the scheme include a good working knowledge of this practice note.

The provisions of the MHA 1983 have been qualified by the following legislation, statutory instruments and codes of practice:

- the Mental Health Act 2007
- the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (for England)
- the Mental Health Review Tribunal for Wales Rules 2008 (for Wales)
- the Mental Health Act codes of practice (different for England and Wales)
- Mental Health (Wales) Measure 2010
- code of practice to parts 2 and 3 of Mental Health (Wales) Measure 2010.

You should familiarise yourself with all of the above and know which provisions apply, depending on whether you practise in England or Wales.

You should also have knowledge of:

- 2014 Standard Civil Contract Mental Health Specification
- Peer review guidance, Mental Health – 3rd Edition, 2011.

Read copies of the relevant practice directions and updates (PDF 125 KB), which all practitioners should be familiar with.

See 8.1 Legal and other requirements for further details.

Find out more about eligibility and membership

8.3. Other products and services

Practice Advice Service

The Law Society 's Practice Advice Service can be contacted on **020 7320 5675** from 9am to 5pm on weekdays.

Solicitors Regulation Authority's Professional Ethics Helpline

Solicitors may obtain further help on matters relating to professional ethics from the Solicitors Regulation Authority's professional ethics helpline on **0370 606 2577** from 9am to 5pm on weekdays.

Law Society publications

- Assessment of Mental Capacity, 4th ed

8.4. Acknowledgements

This practice note has been prepared and updated by the Law Society's Mental Health and Disability Committee. The committee would like to thank the SRA and the Mental Health Lawyers Association for their input into the practice note.

Legal status

Practice notes represent the Law Society's view of good practice in a particular area. They are not intended to be the only standard of good practice that solicitors can follow. You are not required to follow them but doing so will make it easier to account to oversight bodies for your actions.

Practice notes are not legal advice, and do not necessarily provide a defence to complaints of misconduct or poor service. While we have taken care to ensure that they are accurate, up to date and useful, we will not accept any legal liability in relation to them.

For queries or comments on this practice note contact our Practice Advice Service.

SRA Principles

There are seven mandatory principles in the SRA Standards and Regulations which apply to all aspects of practice. The principles apply to all authorised individuals (solicitors, registered European lawyers and registered foreign lawyers), authorised firms and their managers and employees, and to the delivery of regulated services within licensed bodies.

Terminology

Must – a requirement in legislation or a requirement of a principle, rule, regulation or other mandatory provision in the SRA Standards and Regulations. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or regulations.

Should – outside of a regulatory context, good practice, in our view, for most situations. In the case of the SRA Standards and Regulations, a non-mandatory provision, such as may be set out in notes or guidance.

These may not be the only means of complying with legislative or regulatory requirements and there may be situations where the suggested route is not the best route to meet the needs of a particular client. However, if you do not follow the suggested route, you should be able to justify to oversight bodies why your alternative approach is appropriate, either for your practice, or in the particular retainer.

May – an option for meeting your obligations or running your practice. Other options may be available and which option you choose is determined by the nature of the individual practice, client or retainer. You may be required to justify why this was an appropriate option to oversight bodies.

Archived versions

26 May 2016

22 January 2015

29 September 2011

31 August 2009