



The Law Society

**REPRESENTATION AT
MENTAL HEALTH REVIEW TRIBUNALS
GUIDELINES FOR LEGAL REPRESENTATIVES**

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The Law Society

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REPRESENTATION AT MENTAL HEALTH REVIEW TRIBUNALS GUIDELINES FOR LEGAL REPRESENTATIVES

1. The following guidelines are intended to assist solicitors, legal executives, trainee solicitors and solicitors' clerks who are involved in the representation of patients before the Mental Health Review Tribunal (MHRT). Most of those involved in this area of work will be members of the Law Society's Mental Health Review Tribunal Panel and will therefore have fulfilled the selection criteria for membership of the panel (set out in Appendix A). Since MHRT work is not exclusive to Panel members, the guidelines will also be of assistance to other legal representatives.
2. The guidelines have been prepared by the Law Society's Mental Health and Disability Sub-Committee, in consultation with the Professional Ethics Division. In particular, the Law Society is keen to ensure that patients' representatives maintain the highest possible standards in the preparation, presentation and conduct of their client's case before the tribunal. Since patients will rarely raise concerns about the performance of their representatives, legal representatives have an obligation to ensure that proper standards are maintained.

Referral of cases

3. The current law and procedures remain silent on the allocation of responsibility to ensure that all patients who wish to be represented at the MHRT are put in touch with a competent representative. The way in which hospitals assist patients to obtain legal representation varies widely. In some, the task is undertaken by the Mental Health Act Administrator, in others by social workers and also by ward staff. The Law Society, supported by the Mental Health Act Commission, makes every effort to ensure that, whatever arrangements are made, all detained patients are given access to the current Law Society's MHRT panel list (updated annually), and are offered a choice of independent and competent representatives.
4. In seeking referrals, solicitors may wish to make contact with the Mental Health Act Administrators of the hospitals in their area where patients may be detained under the Mental Health Act, informing them of their willingness to accept referrals for tribunal representation. Solicitors may also wish to enquire about the procedures for appointing representatives for patients who lack the capacity to apply to the Tribunal or to instruct a solicitor. However, the Law Society would not condone solicitors approaching patients on hospital wards without prior appointments in order to obtain

referrals.

5. In considering whether to accept referral of a particular case, solicitors should bear in mind whether the pressure of other work will prevent them being able to deal with the case promptly. In urgent cases where the patient is detained under section 2, solicitors should be prepared to refuse the referral, rather than risk causing delay or being inadequately prepared.

Avoiding delay

6. Solicitors should take all possible steps to ensure that tribunal hearings are not delayed, for example by requesting independent reports at the earliest opportunity and confirming in advance the availability of the independent expert. Applications for adjournments should be avoided wherever possible, and should only be made on the client's instructions and not initiated by the solicitor. It should be noted that tribunals frequently refuse applications for adjournment, especially those made at the last minute. If it appears that an adjournment is unavoidable, an application should be made as early as possible, setting out the reasons. Where the delay is caused by late reports from the RMO, solicitors are advised to use the hospital complaints procedure, or to ask the Tribunal for directions.
7. If it appears likely that the patient may withdraw his/her application to the MHRT, the Tribunal office should be notified immediately since withdrawal must be authorised by the Tribunal. It may also be possible to reschedule other cases to maximise the use of time available to the MHRT.

The role of the legal representative

8. Questions have been raised with the Law Society by solicitors, relatives and professionals concerned with the care of detained patients as to whether solicitors representing patients at the MHRT should act in accordance with the patient's instructions, or whether their role is rather to act in the patient's "best interests". This is a matter for the professional judgement of the solicitor, taking account of the following points:
 - (i) Patients may wish to conduct their own case and put their own views and representations to the Tribunal. Alternatively, the patient may authorise a representative to act for him/her in the proceedings. Either way, it is the patient's views or wishes which should be represented to the Tribunal. **Thus a legal representative should act in accordance with the patient's**

instructions. There is no provision in the Mental Health Act 1983 (unlike the Children Act 1989) for any person to be appointed to represent the patient's "best interests" in the proceedings.

- (ii) In accordance with the Solicitors Practice Rules 1990, Rule 1(c), solicitors have a general duty at all times to act "in the best interests of the client". This includes a requirement to give clients their best advice, which in MHRT cases might include a realistic assessment of the likelihood of the patient being discharged or advice on possible steps towards discharge, but the client has the right not to accept that advice.
- (iii) It is recognised that some patients detained under the Mental Health Act 1983 will not have the mental capacity to give clear instructions to their solicitor. It can generally be assumed that in applying to the MHRT, the patient is asking the Tribunal to review the grounds for her/his compulsory detention under the Mental Health Act, since that is the purpose of the MHRT.

In cases of patients who have not, of their own accord, applied to the MHRT but whose cases have been automatically referred, some patients may not wish for their cases to be examined, others may not be aware of the Tribunal hearing or its implications. In such cases, the Law Society advises that the solicitor should seek to take instructions as best s/he can and act in accordance with the patient's instructions. If clear instructions cannot be obtained, the solicitor should prepare the evidence on behalf of the patient as in any other case, defending primarily the patient's interest in liberty and treatment in the least restrictive setting. However, if the patient is clear that s/he does not wish to be represented, the solicitor should inform the Tribunal Office of the patient's views, and should not continue to act, unless appointed by the Tribunal.

- (iv) This approach has been endorsed by the Law Commission in its report on Mental Incapacity (Law Com No 231, HMSO, March 1995), which recommended the introduction of a statutory framework setting out an integrated scheme for decision-making on behalf of people who lack capacity to make their own decisions. Although the proposed Mental Incapacity Bill has not yet been implemented, the principles underlying the new scheme are already being adopted as good practice. These are primarily that people should be enabled and encouraged to take for themselves those decisions which they are able to take, and secondly that anything done for, or any

decisions made on behalf of a person who lacks capacity shall be done in his/her best interests. In deciding what is in a person's best interests, regard shall be had to:

- (a) the person's past and present wishes and feelings and the factors s/he would consider if able to do so;
- (b) the need to encourage the person to participate, or to improve his/her ability to participate as fully as possible, in anything done for him/her or in the decision-making process;
- (c) the views of other people whom it is appropriate or practicable to consult; and
- (d) whether the purpose for which any action or decision is required can be achieved in a manner less restrictive of the person's freedom of action.

The Law Society suggests that these principles are relevant to the representation of patients who lack capacity to give their own instructions.

9. It should be acknowledged that there are no 'hard-and-fast' correct answers to some of the ethical and moral questions raised in representing patients who are detained under the Mental Health Act 1983. However, in general, the solicitor's role is to act on the patient's instructions, advocating the patient's views and wishes, even if those may be considered bizarre or contrary to the patient's best interests. It is for the Tribunal to decide, on the basis of the evidence before it from the patient, and from all the professionals purporting to act in the patient's best interests, whether the statutory criteria set out in the MHA 1983 are met.

Automatic references and patients who lack capacity

10. In most proceedings, where the client is wholly incapable of giving instructions, a next friend or guardian ad litem (eg the Official Solicitor) is appointed to act on the client's behalf. However, the Official Solicitor has not traditionally become involved in MHRT cases, and this was one of the reasons behind the establishment of the Law Society's MHRT panel, to provide representation for patients whose case is referred to the tribunal under the provisions for automatic reference introduced in the 1983 Act.
11. In cases of automatic reference, the Law Society takes the view that it is not

appropriate to appoint a next friend or guardian ad litem, since the patient has neither made the application, nor is s/he defending the proceedings, as the MHRT proceedings were started by reference rather than by application. If the patient does not wish or is unable to conduct his/her case or instruct a representative, the tribunal has power to appoint a representative under the MHRT Rules (10.3). Also in some cases, it has become the practice of hospital managers to facilitate the appointment of a representative by asking a solicitor to act. A solicitor asked by the Tribunal Office or by hospital managers to represent the patient in such cases is not instructed by the Tribunal or the managers, but is in fact acting without instructions.

12. It would seldom serve any constructive purpose for the solicitor to step down in favour of a guardian ad litem, as a guardian will not be in any better position to determine the interests of the patient. The use of an experienced representative on the Law Society's MHRT panel, with the general oversight of the tribunal, is thought to be a sufficient safeguard in most cases, particularly if the representative takes account of the guidelines set out in paragraph 8 above.

Duty of confidentiality

13. One particular matter which raises both ethical and moral issues concerns the solicitor's duty of confidentiality when acting for people whose capacity is impaired. The starting point must be that a solicitor is under a duty to keep confidential a client's affairs, (see Principle 16.01, *The Guide to the Professional Conduct of Solicitors*) although there are certain exceptions to this duty which are mainly statutory exceptions or cases where the client has consented that information may be disclosed. These exceptions set out in the commentary to Principle 16.02 may be applicable in mental health cases as in any other case.
14. The Law Society suggests that, as indicated in the Law Commission's report, the solicitor's duty of confidentiality is replaced by a duty to act in the client's best interests, in cases where the client becomes incapacitated and therefore cannot give or withhold consent to the disclosure of information. Solicitors should, so far as possible, make clear to their clients any limits to their duty of confidentiality at the outset, before taking instructions.
15. The Law Society has been asked to set out the principles which should apply in the extremely rare cases where it may be necessary to disclose information without the client's consent. For example, a particular dilemma arises if clients disclose to the solicitor that they intend to do serious harm to themselves or to someone else. When placed in this situation, where the solicitor has concerns as to the client's

mental capacity, and where the client may pose a risk to him/herself or others, the solicitor should first seek advice from the Law Society's Professional Ethics Division in relation to the particular circumstances of the case. Having obtained such advice, where the solicitor feels it is essential and/or in the client's best interests to disclose information confided in him/her by the client, the solicitor should first try to obtain the client's agreement to disclosure. If the client does not agree, but the solicitor still feels that it is necessary to disclose the information, the solicitor should inform the client that he intends to do so and discuss with the client whether s/he should cease to act.

Further information

16. The Mental Health and Disability Law Bibliography available from the MHRT Panel Administrator gives references to books and articles providing further information on mental health law, tribunal procedure and representation at MHRTs.
17. Solicitors may also obtain confidential advice on matters relating to professional ethics from the Guidance Officers in the Law Society's Professional Ethics Division (0870 606 2577) and on practice issues from the Practice Advice Service (0870 606 2522). The Mental Health and Disability Sub-Committee is also willing to consider written requests from solicitors for comments on complex cases.

Penny LettsPD/153/2.1/AF/May 1998

Appendix A**THE LAW SOCIETY
MENTAL HEALTH REVIEW TRIBUNAL PANEL**

The solicitors, legal executives, trainee solicitors and solicitor's clerks who appear on this Panel have been selected by the Law Society. The current selection criteria are as follows:-

- (1) Willingness to prepare cases and to conduct Tribunal hearings personally;
- (2) Either observe or represent a client at:
 - 1 Section 2 hearing
and
 - 1 Section 3 hearing
and
 - 1 Restricted hearing
and
 - 1 other hearing, either restricted or not;
- (3) Attendance at an approved course; and
- (4) Attendance at an interview at which the applicant satisfies the interviewers of his/her suitability for membership of the Panel

All members of the Panel have undertaken to personally represent any patient before the Tribunal where the patient has been referred to them as a member of the Panel.