IN ADVICE

- ADVICE FOR SOLICITORS
- PRACTICE NOTES
- PRACTICE ADVICE SERVICE
- ANTI-MONEY LAUNDERING
- REGULATION
- RISK AND COMPLIANCE
- DIVERSITY AND INCLUSION
- LIBRARY SERVICES
- HELPLINES FOR SOLICITORS
- ADVICE ARTICLES AND CASE SUMMARIES

Representation before mental health tribunals

30 September 2011

Contents

Related content

> Practice Advice Service

Previous Versions

Previous versions of this page are available below:

> 1 September 2009

1. Introduction

1.1 Who should read this practice note?

All legal practitioners who represent clients before the First-tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal for Wales including those practitioners who are members of the Law Society's Mental Health Review Tribunal Accreditation Scheme.

This includes solicitors, legal executives, trainee solicitors and solicitors' clerks who are members of the scheme.

Top of page

1.2 What's the issue?

The Solicitors Regulation Authority (SRA) are implementing Outcomes-focused regulation (OFR) in October 2011. OFR is a move away from a rules-based approach to one that focuses on high-level outcomes governing practice and the quality of outcomes for clients.

The SRA have published a Handbook, which sets out all the SRA's regulatory requirements. It outlines the ethical standards that the SRA expects of law firms and practitioners and the outcomes that the SRA expects them to achieve for their clients.

The SRA Handbook includes a Code of Conduct (the 'SRA Code'), which replaces the Solicitors' Code of Conduct 2007 (the '2007 Code'). The Code establishes outcomes-focused conduct requirements and each chapter outlines outcomes and indicative behaviours (IB's).

An overview of OFR can be found on the Law Society's website. This provides information on what the SRA Handbook contains, including a summary of the chapters in the Code of Conduct and a summary of the reporting requirements included throughout the Handbook.

The SRA Handbook and Code will be in force from 6 October 2011. The Solicitors' Code of Conduct 2007, and all of its rules and guidance, will not apply to conduct after that date and will cease to have any effect, save in respect of any review by the SRA of conduct taken prior to 6 October 2011 to which the 2007 Code will still be applied.

If you are a member of the Law Society's Mental Health Review Tribunal Accreditation Scheme you are authorised to advise and represent clients who have been detained under the Mental Health Act 1983 (the MHA 1983), before the relevant tribunal (ie the Tribunal in England or the Tribunal in Wales).

Importantly, the provisions of the Mental Health Act 1983 (the MHA 1983) have been qualified by the following legislation, statutory instruments and Codes of Practice, which came into force in November 2008:

- The Mental Health Act 2007
- The Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (for England)
- The Practice Direction on reports issued 30/10/08 (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)

It is important that you familiarise yourself with which rules apply, depending on whether you practise in England or Wales.

For more information see 8.2 Legal and statutory requirements

This practice note provides advice on good practice and how legal practitioners can provide effective legal advice and representation on behalf of their clients before the Tribunal. This includes advice on the following:

- how clients can access your services from hospital, including the rules regarding facilitating referrals
- what happens if the client does not have the capacity to instruct you
- what constitutes the best interests of the client

- your duty of confidentiality
- non-disclosure of documents to the client
- avoiding delay at the tribunal

Unless otherwise specified, 'Tribunal' refers both to the First-tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal for Wales.

Please note that where reference is made to professional rules these are based upon the SRA Code. This practice note has been updated to reflect the provisions of the new Solicitors' Handbook and the implementation of outcomes-focussed regulation as introduced in October 2011.

See 8.1 Professional conduct for more information

Top of page

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. Moreover, Article 5(4) of the Convention further guarantees the right to legal representation.

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

'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 in fact represented unless satisfied that he or she has capacity and has made an informed choice not to be represented.

In England and Wales, public authorities will owe 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, even where the detainee has chosen not to be represented, unless satisfied that the individual has capacity to make that choice or where the period of detention is particularly short.

To comply with 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.

See 8.2 Legal and statutory requirements for further details.

Top of page

2.1 The role of the hospital

There is currently no duty upon hospitals to ensure that all clients who wish to be represented at the Tribunal are put in touch with a legal practitioner. The way in which hospitals assist clients to obtain legal representation varies widely.

In some, the task is undertaken by the Mental Health Act Administrator, in others by social workers or by ward staff. Section 132 of the MHA 1983 requires hospital managers to 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 as to his right to be legally represented.

A list of mental health legal practitioners can be provided by the ward or the Mental Health Act administrator in each location. In Wales, the MHRT office in Cardiff maintains a list of accredited solicitors.

Details of firms that employ a qualified practitioner in England and Wales can be found using the Law Society's online solicitor search .

Top of page

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. IHMA's can accompany patients to Tribunals and hospital managers' hearings and speak on their behalf. The IMHA may also assist patients to exercise their rights.

Legal practitioners can increasingly expect referrals from IMHA's, as the role of the IMHA's becomes more established. However, IMHA's are not the same as legal representatives and are not expected to take over duties currently undertaken by solicitors or other legal practitioners.

Qualifying patients must have access to an IMHA. Qualifying patients are those patients who are:

- 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
- subject to guardianship under the act; or
- a community patient.
- A patient will also qualify for the assistance of an IHMA 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; or
- 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.

Top of page

2.3 Facilitating referrals

In your capacity as an accredited representative you may wish to facilitate referrals. You should be mindful of how you go about doing so and the following practical advice is intended to assist in this process:

You may:

- contact the Mental Health Act administrator of the hospitals in your area to express willingness to accept referrals for tribunal representation
- enquire about the procedures for appointing representatives for clients who lack the capacity to apply to the tribunal or to instruct a solicitor

You should not:

- approach clients on hospital wards without prior appointments to obtain referrals
- offer any form of remuneration for referral of work

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 are free to leave your details and invite the patient to contact you for an appointment.

You are free to take instructions immediately in emergency situations after first checking that no other legal practitioner has been approached. 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.

Top of page

2.4 Change of solicitor

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. This rule is contained within the Legal Services Commission Funding Code (November 2009) , (PDF).

The exceptions to this are where this has been permitted under a contract or where either:

- there is a gap in time and circumstances have changed materially between the first

and second occasions when the legal help was sought, eg a reconciliation which has failed

- the client has reasonable cause to be dissatisfied with the service provided by the first supplier
- the client has moved a distance away from the first supplier and communication is difficult
- the first supplier has confirmed that they will be making no claim for payment for the legal help

Where a patient requests a change of solicitor, you should record brief reasons as to why the patient is seeking to change their legal representative.

Top of page

2.5 Appointing a representative

Patients may authorise a representative to act for them in the proceedings; alternatively, 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 statutory 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 cannot be overridden. See 4.1 Taking instructions from 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 (the 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.

There is no provision for a litigation friend to be appointed to represent the client's best interests in tribunal proceedings.

For more information see 4.2 Taking instructions from clients without capacity

Top of page

3 Communication with the client

Communicating well with clients who have mental health problems is crucial in providing effective representation. In general to communicate well, 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.

Top of page

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 all of the following:

- the strengths and weaknesses of their case
- timescales
- tribunal powers
- hearing procedures

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. Examples of common significant issues include welfare benefits, debt, housing and crime.

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.

In addition, you should aim to make contact with clients in person as much as possible, rather than relying on telephone or written communication.

Top of page

3.2 Client care letters

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

Chapter 1 of the SRA Code of Conduct 2011 (Client Care) outlines client care requirements.

Chapter 1 provides that solicitors must provide a proper standard of service, which takes into account the individual needs and circumstances of each client. 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.

Chapter 1 should be interpreted in reference to the ten mandatory principles in the SRA Handbook. These principles apply to all those the SRA regulates and to all aspects of practice.

See 8.1 Professional requirements for further information

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 vital tool for focusing the client on the exact parameters of a retainer
- 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 and whether they are likely to be distressed by correspondence.

In the case of clients who lack capacity it may be inappropriate to send the client a client care letter. Instead, 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. In this instance, you should also record the client's capacity at that time.

If an IMHA or independent mental capacity advocate (IMCA) is involved, you may wish to make them aware of the contents of the client care letter, subject to client confidentiality issues (see below).

For more information see Client care letters practice note in 8.3 Further products and support

Top of page

4. Taking instructions

4.1 Clients with capacity

The following guidance applies where a patient with capacity has instructed you

directly or you have been appointed to represent them under r 11(7)(a) FTT Rules 2008 or r 13(5)(a) of the Tribunal (Wales) Rules or r 11(7)(a) UT 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 (s 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'.

The threshold for capacity to provide instructions is not high, and people severely affected by a mental disorder may still be able to provide instructions if you explain matters simply and clearly.

The question 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. If you are unable to form an opinion you should obtain expert evidence as to the client's litigation capacity by reference to the test in Masterman-Lister . It will usually be inappropriate to seek the views of the client's responsible clinician (RC) because of the risk of a conflict of interest where the client is seeking discharge against the objections of the RC. In these circumstances you should seek an opinion from an independent expert.

You must attempt to take instructions from the patient 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 his/ her best interests may be evidence that they lack capacity.

Where you believe your client's instructions are unrealistic or contrary to their best interests you should discuss with the client an alternative and more realistic line of challenge if the initial approach chosen by the client does not appear likely to succeed.

You may only pursue this alternative line if the client agrees. Your duty to act in accordance with the client's instructions takes precedence over your duty to act in his/her best interests.

See 5.2 Conflicts between instructions and the best interests of clients

This duty is subject to two exceptions. These are where you believe the client's instructions are affected by either duress or undue influence: see IB(25) acting for a client when there are reasonable grounds for believing that the instructions are affected by duress or undue influence.In these circumstances solicitors should not act without satisfying themselves that they represent the client's wishes.

In those circumstances you must not act on those instructions until you have satisfied yourself that they represent the client's wishes. If you remain concerned you may wish to ask the Tribunal to appoint you under rule 11(7) of the FTT Rules, the Tribunal (Wales) Rules or the Upper Tribunal Rules.

The Tribunal's power to appoint a solicitor under rule 11(7) was considered in AA v Cheshire and Wirral Partnership NHS Foundation Trust [2009] UKUT 195 (AAC) . Notably, the court provided the following guidance:

If appointed, the solicitor has the same duties as a litigation friend in the courts so you will exercise your judgement and advance any argument that you consider to be in the patient's 'best interests' and which will not necessarily involve arguing for discharge. In this regard you should note the following points:

- You can, and must, refuse to advance an argument which is not 'properly arguable', despite instructions to do so, consistent with the duty in the Solicitors' Code 2007, para 11.01(3): see Buxton v Mills-Owens [2010] EWCA Civ 122 , para 43. However a submission may be 'properly arguable' even if it has few, if any, prospects of success (ibid, para 43). It will depend upon the context and your judgment. Given the 'least restrictive alternative' principle in s 1(6) of the Mental Capacity Act 2005 it would be in a rare case that to seek a client's discharge in accordance with his or her express wishes would not be 'properly arguable', although it will be a matter for your judgment in each case.
- You are not permitted to advance submissions contrary to your client's instructions on the basis that you believe it to be in the client's best interests to do so. Although in

AA v Cheshire and Wirral Partnership NHS Foundation Trust & Others [2009] UKUT 195 (AAC), para 20, Judge Rowland suggested that you may, or must, advance submissions contrary to your instructions where you believe it to be in the client's best interests, the Law Society has obtained Counsel's advice which suggests that this is not a correct statement of the law.

- However, where you are instructed to take steps that you perceive to be contrary to the client's best interests you may withdraw from the case on the grounds of professional embarrassment (Solicitors' Code 2007, Rule 3). If you decide to continue to represent the client you should make sure you keep a record of the client's instructions and the advice you have given.

See 5.2 Conflicts between instructions and the best interests of clients for more information

Top of page

4.2 Clients without capacity

Rule 2.01 of the Solicitors' Code 2007 and the guidance precludes you from acting for a client who lacks capacity.

Unless you are instructed by a properly authorised third party, such as a court-appointed deputy or the donee of a power of attorney, you cannot act for such a client unless the relevant Tribunal has appointed you to act under the First-tier Tribunal Rules, Tribunal (Wales) Rules or the Upper Tribunal Rules.

For further information see 2.5 Appointing a representative

However, given that you must assume your client has capacity unless the contrary is established and that the threshold for litigation capacity is a low one, it is unlikely you will be precluded from accepting instructions directly or by way of a referral unless the client manifestly lacks litigation capacity.

If, having accepted instructions, it subsequently transpires your client does lack litigation capacity, or where the client's litigation capacity is fluctuating, then the prudent course of action will be to request the Tribunal to appoint you to act for the client.

Even where a client lacks capacity their wishes and feelings are nevertheless relevant and you must still give weight to the wishes that your client expresses. The closer the patient is to having capacity, the greater the weight you must give to their wishes.

Where the client lacks the ability even 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
- remember the patient'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.

You should not automatically argue for discharge if you are unable to ascertain the patient's wishes.

Top of page

5. Your duties towards your client

5.1 Duty to act in the best interests of clients

Solicitors must act in the legal best interests of each client, under rule 1.04 of the Solicitors Code of Conduct 2007 .

This should not be confused with the best interests test under the Mental Capacity Act 2005, which encompasses wider best interests issues.

See 8.1 Professional conduct and 8.2 Legal and statutory requirements

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

- advising clients of the likelihood of being discharged
- advising clients on possible steps towards discharge
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- advising clients in respect of disclosure issues
- advocating the client's views or wishes to the tribunal
- 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.

However, this duty is subject to your overriding duty to act upon the client's instructions.

Top of page

5.2 Conflicts between instructions and the best interests of clients

Where there is a conflict between the instructions you are given by the client and your judgment as to what is in the client's best interests you may be justified in acting contrary to your instructions.

5.2.1 If the instruction is not in your client's clinical best interests

If the client tells you to make a submission - such as to seek the clients release - or admit an item of evidence, then you must do so even if it is not in the client's clinical best interests if it is nevertheless in the client's best legal interests. You are concerned with the client's best legal interests, not their best clinical interests.

For example in RM v. St. Andrew's Healthcare [2010] UKUT 119 (AAC) the Upper Tribunal ruled that documents revealing the patient was being covertly medicated should be disclosed to the patient because his fair trial rights (best legal interests) required it, even though it was accepted it was likely to adversely affect his health (best clinical interests). If you make judgments based on your client's best clinical interests you will be at risk of acting in conflict with your duty to protect the client's best legal interests.

5.2.2 If the instruction is not in your client's best legal interests (client lacking capacity)

If the client tells you to make a submission or admit an item of evidence where that is not in the client's best legal interests then you will have to strike a balance between the prejudice that will be caused to the client's case and the weight that can appropriately be given to their wishes, bearing in mind that the closer the patient is to having capacity the greater the weight that must be attached to their wishes.

If the balance comes down in favour of protecting the client's legal interests then the solicitor can refuse to follow the client's instructions. It may be that in those circumstances a submission will not be 'properly arguable' and you are not permitted to advance it in any event, applying the test in Buxton v Mills-Owens [2010] EWCA Civ 122, para 43 .

If the client tells you not to make a submission or not to admit a piece of evidence where that is contrary to the client's best legal interests then the position is more difficult.

You are entitled to act contrary to the client's wishes in those circumstances if, having carried out the balancing exercise referred to above, you conclude that the prejudice to the client's legal interests is sufficiently grave to outweigh their instructions.

In those circumstances you should advance the submission without reservation. In AA Judge Rowland suggested that in such circumstances it may be appropriate for an advocate to 'raise' an argument with the Tribunal but without developing it.

However, as Dyson LJ observed in Buxton v Mills-Owens, para 45, 'if an advocate considers that a point is properly arguable, he should argue it without reservation. If he does not consider it to be properly arguable, he should refuse to argue it'.

However, this is subject to a further difficulty, namely that you would not be entitled to make the submission or admit the evidence if that would involve a disclosure in breach of the client's right to legal professional privilege, which is absolute; see below, para 4.7. 12

There may be other situations not covered by this guidance. If in doubt you should seek

further professional guidance from the Solicitor's Regulation Authority's Professional Ethics helpline (see 8.3 Further products and support).

Top of page

5.3 Duty of confidentiality

Rule 4.0 of the Solicitors' Code of Conduct requires solicitors to keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by the client or former client.

Exemptions to Rule 4.0 are set out in the guidance to the code. These include the ability for solicitors to reveal confidential information where:

- they believe it is necessary to prevent the client or a third party committing a criminal act that they reasonably believe is likely to result in serious bodily harm
- a child is the client and they reveal information indicating continuing sexual or other physical abuse but they refuse to allow disclosure of such information
- the client discloses abuse of a child either by themselves or by another adult, but refuses to allow any disclosure

Solicitors must consider whether the threat to the client, another person or the child, is sufficiently serious to justify a breach of the duty of confidentiality.

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 found yourself in this situation you would be entitled to consider yourself professionally embarrassed, and withdraw.

In general, where solicitors consider that they need to disclose confidential information, they should seek advice from the Solicitors Regulation Authority's Professional Ethics helpline.

See 8.3 Practice advice

If the client discloses to the solicitor that they intend to do serious harm to themselves as this does not fall within the exceptions, guidance must be sought.

Following this, if the solicitor decides to disclose the confidential information, rather than advising the client they have been professionally embarrassed and will cease to act, they 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 they intend to make the disclosure
- explain the client's right to withdraw instructions
- make the disclosure
- provide the client with written details of what has been disclosed to whom and why.

Top of page

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

Rule 4.02 of the Solicitors' Code of Conduct states that a solicitor must disclose to their client all information of which they are aware which is material to that client's matter regardless of the source of the information.

This rule does not apply where the solicitor reasonably believes that serious physical or mental injury will be caused to any person if the information is disclosed to the client.

The responsible authority (NHS Trusts and other authorities holding patients' medical records) 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) 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.

This process may affect the client-solicitor relationship and be difficult for the solicitor to manage. A solicitor to whom documents are disclosed on this basis 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.

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 a solicitor requests full access to their client's medical records, the responsible authority should disclose all documents to the patient's solicitors 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.

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) 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 will generally override considerations of third party confidentiality.

Where a request or refusal of request is not resolved, either party can apply to the tribunal. This can be heard as a preliminary issue on the day of the hearing or in more complex cases a decision can be taken before the hearing following written or oral submissions.

The Upper Tribunal 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 Mental Health Tribunal.

Top of page

6. Good tribunal practice

6.1 Avoiding delay at the tribunal

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

These objectives are stated in Rule 2, the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 and Rule 3 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 8.2 Legal and statutory requirements

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

Top of page

6.2 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 of Tribunal hearings and will ensure your client has a fair hearing.

You should request independent reports as soon as possible and in restricted cases send them to the tribunal office no later than 21 days before the hearing if you would like the Secretary of State to be able to comment on the content of the report

Top of page

6.3 Witnesses

You should confirm in advance the availability of all witnesses, including experts, who are expected to attend the tribunal.

6.4 Interpreters

Hospital administration staff should notify tribunal staff of any special requirements such as the need for an interpreter for the patient. You should also identify whether an interpreter will be required at the hearing as soon as possible.

Top of page

6.5 Documents

You should use your best endeavours to send all documents to the tribunal office no later than seven days before the hearing, and limit the bundle to relevant documents only.

6.6 Applications for postponements

You should avoid applications for postponements wherever possible, and only make them on the client's instructions. The tribunal frequently refuses applications for postponement especially those made at the last minute.

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

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, solicitors should request the tribunal for directions immediately after the breach of the time limits on submission of statutory reports.

If the client lacks capacity to provide instructions, you should notify the Tribunal in writing or if or if a third party such as an attorney or a deputy is instructing you on behalf of the client, then you should discuss it with them.

Top of page

6.7 Withdrawing an application to the tribunal

An application can be withdrawn at any time by the client if the tribunal accepts the withdrawal.

If the client wants to withdraw the application to the tribunal, you should notify the tribunal office immediately in writing, giving the reasons where appropriate. If the client lacks capacity to instruct you about this issue then you should notify the Tribunal office. If you are being instructed by an attorney or deputy attorney you should also discuss it with them.

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.

The patient may apply again for a hearing within the same period of eligibility.

Top of page

6.8 Other codes of conduct

6.8.1 Mental Health Lawyers Association code of conduct

The Mental Health Lawyers Association has adopted a Code of Conduct which covers: quality of service; making appointments; behaviour on the wards; disputes over representation; seeking clients; gifts; and hospital procedures.

6.8.2 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.

Top of page

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 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, eg 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.

Top of page

8. More information

8.1 Professional conduct

The following sections of the Solicitors' Code of Conduct 2007 are relevant to this issue:

- Rule 2.02 - client care
- Rule 4.0 - confidentiality and disclosure
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- Rule 4.02 - duty of disclosure

Please note that where reference is made to professional rules these are based upon the current Code of Conduct. This practice note will be updated to reflect the provisions of the new Handbook before the implementation of outcomes-focussed regulation in October 2011.

Top of page

8.2 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

Top of page

8.3 Further products and support

8.3.1 Mental Health Review Tribunal Accreditation Panel

The Law Society operates the Mental Health Review Tribunal Accreditation Scheme. Solicitors and solicitors' employees who are on this scheme can, at tribunal hearings, advise and represent patients who have been detained under the Mental Health Act 1983. Only legal practitioners who meet the Law Society's strict requirements are permitted to join the scheme.

Find out more about eligibility and membership

8.3.2 Practice Advice Line

The Law Society provides support for solicitors on a wide range of areas of practice. Practice Advice can be contacted on 0870 606 2522 from 09:00 to 17:00 on weekdays.

8.3.3 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 (0870 606 2577) from 09:00 to 17:00 on weekdays.

8.3.4 Law Society publications

Assessment of Mental Capacity, 3rd ed

- *Mental Health Tribunals*
- *Mental Capacity, 2nd ed*
- *Advising Mentally Disordered Offenders, 2nd ed*

Top of page

8.4 Status of this practice note

Practice notes are issued by the Law Society for the use and benefit of its members. They 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, nor do they necessarily provide a defence to complaints of misconduct or of inadequate professional service. While care has been taken to ensure that they are accurate, up to date and useful, the Law Society will not accept any legal liability in relation to them.

For queries or comments on this practice note contact the Law Society's Practice Advice Service.

Top of page

8.5 Terminology in this practice note

Must - A specific requirement in legislation or of a principle, rule, outcome or other mandatory provision in the SRA Handbook. You must comply, unless there are specific exemptions or defences provided for in relevant legislation or the SRA Handbook.

Should

- Outside of a regulatory context, good practice for most situations in the Law Society's view.
- In the case of the SRA Handbook, an indicative behaviour or other 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 possible route to meet the needs of your client. However, if you do not follow the suggested route, you should be able to justify to oversight bodies why the alternative approach you have taken is appropriate, either for your practice, or in the particular retainer.

May - A non-exhaustive list of options for meeting your obligations or running your practice. Which option you choose is determined by the profile of the individual practice, client or retainer. You may be required to justify why this was an appropriate option to oversight bodies.

SRA Code - SRA Code of Conduct 2011

2007 Code - Solicitors Code of Conduct 2007

OFR - Outcomes-focused regulation

SRA - Solicitors Regulation Authority

IB - indicative behaviour

Top of page

8.6 Acknowledgements

This practice note has been prepared by the Law Society's Mental Health and Disability Committee, which is made up of senior and specialist lawyers from across the country, who volunteer their time. Advice on certain issues has been obtained from counsel, Paul Bowen, of Doughty Street Chambers. The committee would like to thank Anthony Harbour and the Mental Health Lawyers Association for their input into the practice note.

Top of page

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