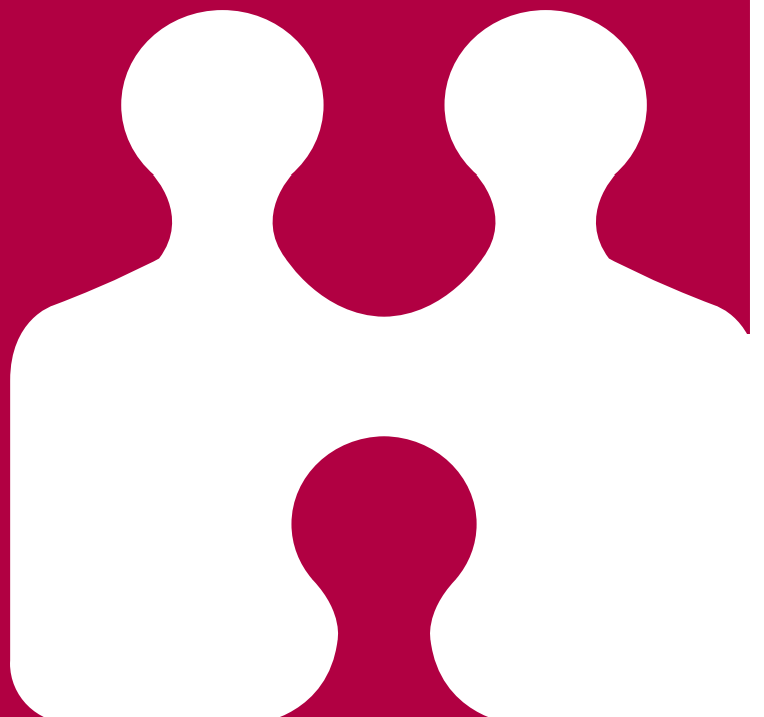


2017

Guide to Good Practice on working with vulnerable clients



This Guidance was revised in November 2017. The law or procedure may have changed since that time and members should check the up-to-date position.

Guide to Good Practice on working with vulnerable clients

In reality all family law clients should be considered as vulnerable, they are usually in a state of heightened emotion when they first meet with their lawyer, and we are usually asking them to explain very personal and upsetting matters with someone they have not met before. There are of course very different degrees of vulnerability and how best to support and assist our clients can be an area of concern and confusion, particularly to less experienced practitioners. This guide is designed to set out some best practice guidance on working together with vulnerable clients. However, please bear in mind that each client is an individual and it is often a judgement call on behalf of the practitioner instructed as to whether or not, for example, external support or assistance or special measures are required. What should, however, be clear is that the same approach for each client will not always work, particularly when they are vulnerable. It is critical that you access your own support from a colleague/supervisor if you feel unsure or worried about a particular client so that you are well-equipped to provide the appropriate service and support to them.

All solicitors are, of course, bound by the SRA Code and in particular Principle 5, which states that solicitors should provide a proper standard of service to clients. A number of the listed Outcomes add more detail about how this should be achieved. For example, Outcome (1.5) states that “the service you provide to clients is competent, delivered in a timely manner and takes account of your clients’ needs and circumstances”. Clearly this is highly relevant when working with a vulnerable client, and the SRA, in making sure that these minimum standards are delivered by all firms, have made it clear that they will prioritise this with firms that have a vulnerable client base.

Who is a vulnerable client?

As stated above all of our clients are vulnerable to a certain extent and we are used to communicating with them in a sensitive and supportive way. This guidance is, however, focussed on those who would be seen to be more vulnerable than most and where more than your usual good client care might be needed, with tailored support needed to progress their case effectively.

A non-exhaustive list of clients who might be considered vulnerable might include:

- children

- victims of domestic abuse
- alcohol or substance misusers
- those with a physical disability or illness
- those with a mental illness
- the elderly
- those who do not speak English as their first language; and
- those with a learning difficulty.

It may not be apparent at your first meeting that the client has any difficulty giving you instructions, but you have a duty of course to keep this under review.

Children

Children will always be considered vulnerable clients or witnesses in any family law case. Should they be a party to proceedings they will be represented by a member of the Law Society's Children Panel. The members of that panel will have been assessed by the local authority as qualified to represent children either through a guardian or directly. You should not accept instructions from a child client unless you are a member of that Panel.

Mental health/lack of capacity

One of the most difficult areas for practitioners is raising the issue of a client's mental health or a concern regarding their capacity to provide you with instructions. It is of course a highly sensitive issue, and many sufferers of mental ill health have little or no insight into their own difficulties. If you are concerned that your client should be a protected party you will need to carefully consider the guidance in [Part 15 of the FPR](#) with PDs [15A](#) and [15B](#) and the [Mental Capacity Act 2005](#) (MCA 2005).

Proof of capacity

Mental capacity is assessed under the MCA 2005, which states that a person must be assumed to have capacity unless it is established that they lack capacity (s1(1) MCA 2005). Whether a person has capacity is determined by the court and although it is likely to place considerable weight on medical opinion, this is not conclusive. The court will look at all evidence, medical and otherwise.

A person lacks capacity if they are unable to make a decision for themselves because of “an impairment of, or a disturbance in the functioning of the mind or brain”. It does not matter if the impairment is permanent or temporary.

It is important to remember that your client’s capacity should be assessed continually and, at a time when all clients are feeling vulnerable, this is particularly important. It can often be difficult. A client cannot be considered to lack capacity simply because they have made an unwise decision. For example, a husband who is content to accept a proposal which in no way meets his needs due to a desire to conclude matters as quickly as possible cannot be said to lack capacity. However, a lack of rationality behind a person’s decision may provide evidence that they lack capacity. The general habits of a person can also be a consideration for the court in determining capacity.

The need for a litigation friend

If you do consider your client to be incapable of managing their own affairs then you must arrange for the appointment of a litigation friend to conduct proceedings on their behalf. There will be circumstances where you receive instructions from a family member who wishes to commence proceedings. If no one is able or willing to act as a litigation friend, that is when the Official Solicitor becomes involved.

It is not only good practice, but also essential, to make sure that a litigation friend is appointed as a first step.

If a vulnerable adult is a “protected party” they must have a litigation friend. In family proceedings this requirement appears in Part 15 of the FPR 2010. In proceedings in the Family Court under the court’s inherent jurisdiction it appears in [Part 21 of the Civil Procedure Rules 1998](#). In family proceedings a “protected party” means a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings: [r2.3 FPR 2010](#); in proceedings under the inherent jurisdiction the expression has the same meaning: [r21.2 CPR 1998](#).

The following should be noted:

- a)** There must be undisputed evidence that the party, or intended party, lacks capacity to conduct the proceedings (on a balance of probabilities).
- b)** That evidence, and what flows from the party, or intended party, being a protected party, should have been disclosed to, and carefully explained to, the party or intended party.
- c)** The party, or intended party, is entitled to dispute an opinion that they lack litigation capacity and there may be cases where the party’s, or intended party’s, capacity to conduct the proceedings is the subject of dispute between competent experts. In either case a formal finding by the court under [r2.3 FPR 2010](#) or [r21.2 CPR 1998](#) is required.

Expert evidence to determine whether your client lacks such capacity is likely to be necessary for the court to make a determination relating to their capacity to conduct proceedings. However, there are some cases where the court may consider that evidence from a treating medic such as a psychiatrist or GP is all the evidence of lack of litigation capacity which may be necessary. If your client is agreeable it may be that you approach the medic, with their consent (a signed form of authority will be required – although with concerns about capacity there will be concerns about their ability to ‘consent’ to this request), and request that they meet with the client/patient and complete a [certificate of capacity](#).

Otherwise you will need to consider making an application for an expert assessment (para 2.1 PD15B). You should lead any such instruction, and of course a Part 25-compliant application will need to be issued.

Official Solicitor

The Official Solicitor must always be considered as the litigation friend of *last resort*. Guidance on their appointment is in the form of a [practice note](#). This is a very user-friendly and clear document and should be used as a reference for any case where capacity is an issue

It is important to remember that no person, including the Official Solicitor, can be appointed to act as litigation friend without their consent. The Official Solicitor will not accept an appointment where there is another person who is suitable and willing to act as litigation friend. The Official Solicitor’s criteria for consenting to act as litigation friend are:

- a) In the case of an adult, that the party or intended party is a protected party.
- b) There is security for the costs of legal representation of the protected party which the Official Solicitor considers satisfactory. Sources of security may be:
 - (i) the Legal Aid Agency where the protected party or child is eligible for public funding;
 - (ii) the protected party’s or child’s own funds where they have financial capacity, or where they do not, where the Court of Protection has given authority to recover the costs from the adult’s or child’s funds; or
 - (iii) an undertaking from another party to pay the costs.
- c) The case is a last resort case.

A checklist for the appointment of a litigation friend can be accessed [here](#).

Disability

Your client may have no issue regarding their capacity to provide instructions to you. However, a physical incapacity or disability may be something that you need to give careful consideration to so that they are fully able to participate.

Your office should be accessible, or you will need to consider an alternative venue, liaising with the person responsible for ensuring equality and diversity in your place of work. The SRA Code of Conduct Handbook makes it clear in Chapter 2 that:

... you make reasonable adjustments to ensure that disabled clients, employees or managers are not placed at a substantial disadvantage compared to those who are not disabled, and you do not pass on the costs of these adjustments to these disabled clients, employees or managers.

You should also check the arrangements and accessibility at court - for example requesting a hearing on the ground floor if there is no lift.

It may be that external support is needed. For example, for a client with a hearing disability you may need to ensure that a British Sign Language interpreter is available for meetings and hearings. You may also need to advise the court of the need for a hearing loop.

It is important to make sure that you are aware of what your client will need in place to ensure that you can represent them effectively throughout.

Alcohol/drug misuse

Clearly it would be inappropriate to take instructions from a client who is under the influence of alcohol or drugs. If you are concerned that this might be the case, you need to raise this sensitively with the client. If they confirm that they are under the influence, or you remain concerned that that is the case even though they have denied it and not provided any other explanation for that behaviour (for example a health condition, in which case see above), you must advise them that you will not be able to take instructions at that meeting. You will need to carefully explain why it would not be appropriate for you to take instructions in those circumstances, and to arrange a further appointment, making it clear that they must not drink/use drugs before the meeting. This should be followed up with a letter setting out the advice as a record for your file. You should speak to a supervising colleague about this, particularly if the problem persists.

Victims of domestic abuse

The definition of domestic abuse as provided by the President of the Family Division, Sir James Munby in Practice Direction 12J of the FPR 2010 is:

... any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage honour-based violence, dowry-related abuse and transnational marriage abandonment.” (Add in link to PD12J)

Whilst less than half of all incidents of domestic abuse are reported to the police, they still receive one domestic abuse call every minute in the UK. In a majority of cases, where there are children in the household, the children will witness the abuse that is occurring.

Identifying and assessing risk

Your client may have no hesitation in informing you of the domestic abuse they have suffered and you will be able to ask them openly about this in order to establish how you can best advise them. Other clients will not be so forthcoming about abuse and may actively avoid disclosing this information to you. It is often the case that victims of domestic abuse are embarrassed or ashamed, or do not think that the abuse is relevant to the issue they are seeking advice on.

Resolution has provided a [domestic abuse screening toolkit](#), which should be used in all first appointments with clients, and see also the good practice guidance on domestic abuse.

If your client has not sought support and assistance from an outside agency in relation to the domestic abuse they have suffered then you should signpost them to local services who can assist them. Other resources and information are available on the Resolution website.

Office procedures

Your firm’s office procedures should clearly identify those files which are high risk. Where, for example, address details are highly confidential and should not be disclosed, the usual protective obligations may not be sufficient and even more care must be taken.

Legal aid for victims of domestic abuse

Following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 legal aid has been preserved for victims of domestic abuse seeking protective court orders and/or who are party to family law proceedings against the perpetrator of the abuse. The reason for preserving legal aid in these categories was because of a concern that victims of domestic

abuse may be vulnerable to intimidation, and disadvantaged in legal proceedings, if they are forced to represent themselves against the perpetrator of the abuse. The Legal Aid Agency will not accept an application without specific types of supporting evidence of domestic abuse.

The elderly

We live in an ageing society in which one in four children born today can expect to live to 100. For the first time in history, there are 11 million people aged 65 or over in the UK and the growth curve in over 65s is increasing ever more sharply. These statistics indicate that elderly people may well provide a growing client base. An elderly client is at a higher risk of physical and or mental impairment, and the advice given above will need to be considered when advising clients who are elderly.

Those who do not speak English as their first language

You will need to ascertain as soon as possible whether a client does not speak English as their first language and they will therefore need the assistance of an interpreter. If you have arranged a first meeting with a client and then this becomes apparent, it is good practice to rearrange your meeting to ensure they have proper support in place. You should remember that while they may be able to speak English to a good level, their understanding of your advice may not be so good, particularly the legal language, which they are unlikely to be used to. You will also need to understand from them their reading ability and whether your written communication will need to be translated. It may be that external support from an interpreter is needed for meetings, telephone conferences and hearings.

You may also need to advise the court of the need for an interpreter. If the client is legally aided the Legal Aid Agency will pay for an interpreter for meetings and telephone conferences but will not pay for an interpreter to attend court. You will have to rely on the court interpreting service, and will have to ensure you have requested an interpreter in good time. It is best practice to set a reminder to check that the court has made the request a few days before the hearing.

Additionally, if your client does not read English there will need to be careful consideration as to how any translation costs will be met. If your client is legally aided it is best practice to obtain prior authority to incur the costs as the LAA does not provide clear guidance on this issue.

Those with a learning difficulty

If you have a client with a learning difficulty it is even more important to be patient, respectful and clear in the way you communicate in order to provide that client with a better legal service. A client with a learning difficulty is more likely to feel intimidated by legal terminology and you will need to find ways to simplify complex matters for them to be able to understand and engage in proceedings. Clients with learning difficulties are often heavily reliant on family, friends or carers to help them in their day-to-day lives. If your client attends your offices with a support worker, be careful to listen and direct your conversation to the client rather than their support, and allow extra time to accommodate their communication needs. Take the time to check the client has understood the key points of your advice and as with any client adapt your practice to meet their needs.

Your client may have had a psychological assessment, perhaps prepared to support them through school. If you can obtain a copy this may enable you to better understand their learning difficulty, and therefore support them. If your client has had no recent assessment you should consider whether a cognitive functioning assessment should be obtained. Of course, as with any expert assessment, the court would need to be satisfied that it is 'necessary'. The benefit of having a cognitive assessment - particularly in proceedings where a client is seeking to care for or spend time with their children and is being assessed - is that you can obtain expert advice in relation to how best to share information with your client so that it is most likely to be both understood and retained. This will be invaluable for all professionals working with the client, and particularly in respect of ensuring that any parenting assessment is fairly conducted, appropriately taking into consideration their learning difficulty.

You may meet a new client who is unable to read or write, or has difficulty with reading and writing. It is important that you are aware of your client's literacy ability at the earliest opportunity, so you may need to adjust your normal practice in respect of communicating with your clients. It is best to ask your client directly and sensitively about their reading ability. You could also ask the client to read something to you in your meeting, perhaps a Form of Authority or another document you are asking them to sign. If your client is unable to read you should find out if they would like you to telephone to read letters to them and/or if they have a trusted friend or family member who can read important documents to them. There will of course need to be consideration in relation to the confidential nature of court documents. Rule 12.75 of the FPR covers this:

A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party [...] by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings.

You will need to ensure that the recipient of the information is aware that they must not disclose the contents to anyone, and it is best practice to get them to sign a declaration confirming their understanding of the confidential nature of the information they will read whilst supporting your client.

Vulnerable Parties Update

As from 27th November 2017 the Family Procedure Rules 2010 (FPR 2010) will be amended to add in a new Part 3A, together with a new Practice Direction 3AA.

These amendments provide for the participation in court proceedings by vulnerable persons (including children) as well as the giving of evidence by vulnerable persons ([Pt 3A FPR/PD3AA](#))

Under the new rules, the court can make “Participation Directions” in relation to the involvement of a vulnerable person, protected party or child in family proceedings. In addition, the court will have the power to appoint an intermediary whose role would include communicating questions put to a witness or party.

The President of the Family Provision, St James Munby, established the Vulnerable Witnesses and Children Working Group (VWCWG) whose final report was published on 17th March 2015.

The President has referred on a number of occasions to the need to introduce rules to protect vulnerable persons in family proceedings, which includes children. That view has been echoed in a recent case of *Re A (a minor) (fact finding: unrepresented party)* [2017] EWHC 1195 FAM; [2017] All ER (D) 49 (JUN) by Hayden J who stated at paragraph 60:-

“It is a stain on the reputation of our family justice system that a judge still cannot prevent a victim being cross-examined by an alleged perpetrator. This may not have been the worst or most extreme example but it serves only to underscore that the process is inherently and profoundly unfair. I would go further it is, in itself, abusive. For my part, I am simply not prepared to hear a case in this way again. I cannot regard it as consistent with my judicial oath and my responsibility to ensure fairness between the parties”.

It is vital that members acquaint themselves with this new amended rule and practice direction to ensure that they understand and can implement the same.

Further resources

See the Law Society’s practice note on [Meeting the needs of vulnerable clients](#).

The SRA has released a document ['Providing services to people who are vulnerable'](#) available as a PDF from the SRA website.