



# Vulnerable clients – some considerations from a regulatory perspective

Legal professionals, whether regulated by the Solicitors Regulation Authority (SRA), Bar Standards Board (BSB) or otherwise, will need to consider their regulatory obligations during their engagement with any client. Particularly where a client is vulnerable, there may be a tension between different obligations.

The SRA has issued guidance on accepting instructions from vulnerable clients or third parties acting on their behalf, which may be accessed here: [SRA | Accepting instructions from vulnerable clients or third parties acting on their behalf | Solicitors Regulation Authority](#)

It has also published guidance on providing services to people who are vulnerable: [SRA | Providing services to people who are vulnerable | Solicitors Regulation Authority](#)

The Law Society provides practical guidance on meeting the needs of vulnerable clients, including those who may lack capacity: [Meeting the needs of vulnerable clients | The Law Society](#)

The Bar Standards Board has published a factsheet on identifying and assessing vulnerability and clients' needs:

<https://www.barstandardsboard.org.uk/static/0d03cfc3-138f-4307-993d69b899792b57/factsheet2.pdf>

Regulated professionals must satisfy themselves as to their obligations and take advice from their regulator where appropriate.

The SRA's Ethics Guidance Helpline may be contacted on 0370 606 2577 or email [professional.ethics@sra.org.uk](mailto:professional.ethics@sra.org.uk)

The Bar Council's Ethical Enquiries line is on 020 7611 1307 or email [Ethics@BarCouncil.org.uk](mailto:Ethics@BarCouncil.org.uk)

This annex is not, and should not be relied upon, as regulatory guidance. The purpose of this annex is simply to signpost some areas where particular thought may need to be given to the regulatory implications of supporting vulnerable clients.

### **Capacity**

Whilst vulnerability does not necessarily denote a lack of or diminution in capacity, practitioners should always ensure that they are comfortable that their client has capacity, and be mindful of their duties under the Mental Capacity Act 2005.

The Law Society has published guidance on [working with clients who may lack mental capacity](#). It notes that solicitors must satisfy themselves about a client's capacity and whether they can accept and act on the client's instructions. The guidance (and relevant law) should be consulted whenever doubts arise as to a client's capacity. The guidance notes:

*Although the MCA 2005 guiding principle is the presumption of capacity, the SRA's Principle 7 requires that you act in your client's best interests. Under paragraph 3.4 of the SRA's Code of Conduct for Solicitors, RELs and RFLs, you must consider and take account of your client's attributes, needs and circumstances. As such you must satisfy yourself about their capacity if you have any doubts and provide necessary support.*

*Furthermore, under the Equality Act 2010, section 20 requires you to make reasonable adjustments for people who have a mental impairment which may extend to providing accessible information for them to be able to give instructions.*

*You must apply the relevant legal test for each transaction at the time the client needs to make the decision.*

The Bar Council has issued guidance to assist barristers who have doubts about a client's capacity to understand advice, give instructions or follow or take part in proceedings, which can be accessed here: [Client Incapacity – Bar Council - Practice & Ethics \(barcouncil.ethics.co.uk\)](#) This guidance (and the texts, guidance and law it refers to) should be referred to where a barrister suspects that a client may lack capacity. The guidance notes that:

*"The general rule is that once a legal adviser entertains a reasonable doubt about their client's capacity to give proper instructions, it is that adviser's professional duty to satisfy themselves that the client either has or does not have the capacity to give instructions"*

### **General duties**

Both the SRA Code of Conduct and the BSB Handbook draw practitioners' attention to the need to act in the best interests of each client, to bear in mind their characteristics, including any vulnerability and factor this into the way in which services are provided. Practitioners should also bear in mind their obligations under the Equality Act 2010.

### SRA Principles:

*You act:*

*6. in a way that encourages equality, diversity and inclusion*

*7. in the best interests of each client.*

### SRA Code of Conduct:

*1.3 You do not abuse your position by taking unfair advantage of clients or others.*

*3.4 You consider and take account of your client's attributes, needs and circumstances.*

*8.6 You give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.*

*8.11 You do not abuse your position by taking unfair advantage of clients or others*

### BSB Handbook:

*Core Duty 1: You must observe your duty to the court in the administration of justice";*

*Core Duty 2: You must act in the best interests of each client.*

*Core Duty 8: You must not discriminate unlawfully against any person.*

*Outcome C11 – Clients' best interests are protected and promoted by those acting for them.*

*Outcome C13 – Clients know what to expect and understand the advice they are given.*

*Outcome C14 – Care is given to ensure that the interests of vulnerable clients are taken into account and their needs are met.*

*Guidance C38 - a competent standard of work and of service also includes:*

*.1 treating each client with courtesy and consideration; and*

*.2 seeking to advise your client, in terms they can understand...*

*Guidance C41 - You should remember that your client may not be familiar with legal proceedings and may find them difficult and stressful. You should do what you reasonably can to ensure that the client understands the process and what to expect from it and from you. You should also try to avoid any unnecessary distress for your client. This is particularly important where you are dealing with a vulnerable client.*

### **What should we be doing?**

You should consider the policies, procedures and support mechanisms available within your practice. Consideration might be given to ensuring that individuals and practices are able and equipped to:

— Identify vulnerability

— Make such adjustments as are appropriate

- So that a client is as able to, and comfortable with, accessing services as someone without that vulnerability.

The Law Society Guidance (link above) provides a number of suggestions for adjustments.

### **Support from third parties**

On occasion, a vulnerable client may wish to be assisted by a third party. While this support can be invaluable, you should bear in mind your obligations in respect of taking instructions from, and providing information to, the client.

#### **SRA Code of Conduct:**

*3.1 You only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. 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.*

- If a client is being supported by a third party, consider whether you are clear as to whom you can take instructions from.
- Before speaking to the third party, consider whether you should first seek to discuss matters with the client alone.
- Bear in mind the principle of client confidentiality.
- If the client would prefer that you engage directly with a third party on their behalf (or if you agree with the client that this would be appropriate at certain points), the SRA guidance states that you should obtain signed authority from the client, authorising you to share information with and take instructions from the third party.
- It is still advisable to verify any instructions from the third party with the client.
- Consider how to share any communications to/from the third party with the client.
- Where a client is being assisted by a third party, it is important to be alive to the risk of undue influence

### **Participation in proceedings**

Where a party or witness is vulnerable, the provisions of Rule 3A and the accompanying practice direction should be borne in mind. The court is under a duty to consider whether a party's participation in proceedings, or the quality of a witness's evidence is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make participation directions. Practitioners are reminded that, since the coming into force of the Domestic Abuse Act 2021, where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party, or a witness in the proceedings, the court must assume that participation and/or quality of evidence will be diminished by virtue of their vulnerability.

The Bar Council has issued informal guidance on witness preparation, which includes information in respect of intermediaries for vulnerable witnesses in family proceedings: <https://protect->

## **Litigants in person**

The Law Society, Bar Council and CILEx have provided joint guidance to lawyers on how best to support those without legal representation, broadly applicable across civil and family courts and tribunals.

### [Litigants in Person: Guidelines for Lawyers – Bar Council - Practice & Ethics \(barcouncilethics.co.uk\)](https://www.barcouncilethics.co.uk/)

The BSB Handbook makes specific reference to Litigants in person:

*gC5 Your duty under rule C3.3 includes drawing to the attention of the court any decision or provision which may be adverse to the interests of your client. It is particularly important where you are appearing against a litigant who is not legally represented.*

The SRA Code of Conduct includes the following:

*1.2 You do not abuse your position by taking unfair advantage of clients or others.*

*1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).*

*2.7 You draw the court's attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware, and which are likely to have a material effect on the outcome of the proceedings.*

In terms of litigation, the guidance sets out that *If you believe that a LiP is vulnerable and that their needs in terms of participating in the proceedings have not been recognised, you should bring this to the court's attention.* Practitioners should also have in mind the provisions of Rule 3A of the Family Procedure Rules 2010 and the accompanying practice direction.

The SRA has published "Guidance on conduct in disputes", which should particularly be borne in mind when another party is a litigant in person: <https://www.sra.org.uk/solicitors/guidance/conduct-disputes/>

## **Emergency Situations**

In an emergency situation (e.g. where you consider a client to be at risk of significant harm), the obligation to act in the client's interests may conflict with the duty to keep their affairs confidential. A client may assert that their confidentiality has been breached by you having contacted the emergency services or another third party.

### **SRA Code:**

*6.3 You keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents.*

### **BSB Handbook:**

*CD6 You must keep the affairs of each client confidential [CD6].*

*Rule C15.5 – you must protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which your client gives informed consent.*

*Guidance C42 - The duty of confidentiality (CD6) is central to the administration of justice. Clients who put their confidence in their legal advisers must be able to do so in the knowledge that the information they give, or which is given on their behalf, will stay confidential. In normal circumstances, this information will be privileged and not disclosed to a court.*

*Guidance C43 - Rule rC15.5 acknowledges that your duty of confidentiality is subject to an exception if disclosure is required or permitted by law. For example, you may be obliged to disclose certain matters by the Proceeds of Crime Act 2002. Disclosure in those circumstances would not amount to a breach of CD6 or Rule rC15.5 In other circumstances, you may only make disclosure of confidential information where your client gives informed consent to the disclosure.*

The SRA has provided guidance on client confidentiality, in which it confirms that it would not want concerns about possible regulatory action to prevent solicitors raising concerns when it is necessary to prevent an event which could lead to harm to the client or a third party. <https://www.sra.org.uk/solicitors/guidance/confidentiality-client-information/>

The Bar Council has also provided guidance in respect of circumstances where confidentiality may be over-ridden. Although the guidance is concerned with children cases, paragraphs 32 – 38 consider circumstances in which confidentiality may be breached, in particular where a barrister has *"reasonable grounds for believing that there is a significant risk of death or serious injury to an identifiable person or persons, at least (or particularly) if the risk is imminent"*, albeit they warn that authority for the proposition is sparse. <https://protect-eu.mimecast.com/s/NOIKCwjYVcYQ4O5fKqtfy?domain=barcouncilethics.co.uk/>

In the first instance, an attempt should usually be made to obtain the client's consent to disclosure of information. The client should be clear as to what is going to be disclosed. Consent to disclosure of confidential information must be clear, so that the client knows to whom their information will be made available, when and for what person. The SRA has stated that the ultimate test will be that the client, if asked, would say "Yes, I agreed to that information being disclosed for that purpose".

If consent is not forthcoming, or you fear that telling the client will increase the risk, you may need to consider whether disclosing without consent is necessary to protect the client's safety. In that instance, consideration should be given to the degree to which the disclosure is necessary to protect the client's interests – sufficient information to enable e.g. the emergency services to act would ordinarily be unlikely to include all the details of the litigation that the client is involved in. The disclosure should be the minimum necessary to protect the client's interests.

Where disclosure is made without the client's consent, it may be inappropriate for you to continue to act. This is particularly so where the

client has not been informed about the disclosure even after it has taken place.

### **Should a client be told that disclosure has been made without consent?**

#### **SRA Code of Conduct:**

*6.4 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:*

*(a) the disclosure of the information is prohibited by legal restrictions imposed in the interests of national security or the prevention of crime;*

*(b) your client gives informed consent, given or evidenced in writing, to the information not being disclosed to them;*

*(c) 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*

*(d) the information is contained in a privileged document that you have knowledge of only because it has been mistakenly disclosed.*

Where the client has not consented to the disclosure of information, you are ordinarily required to inform them of the disclosure made, unless one of the exceptions in 6.4 applies. Where the disclosure is made due to your assessment of risk to the client, 6.4(c) might (but will not necessarily) be engaged. The question as to whether a client should be told that disclosure has been made without consent is likely to be situation-specific.

#### **SRA Code of Conduct:**

*7.2 You are able to justify your decisions and actions in order to demonstrate compliance with your obligations under the SRA's regulatory arrangements.*

Where disclosure of confidential information is made, or where any action is taken to protect the interests of a vulnerable client, consideration should be given to ensuring that a full attendance note is kept, including, if relevant, the reasons why the client's consent wasn't sought or action was taken despite its not being forthcoming.

Matters that might be recorded could include:

- the situation that arose;
- what action you decided to take and why;
- if confidential information was disclosed to a third party, what information was disclosed and why;
- if the client's consent wasn't sought, or action was taken despite the client's consent not being forthcoming, why that course of action was taken.
- If the client's consent was not obtained, whether the client was told about the disclosure after the disclosure was made and, if not, why not.