



The Bar Council

## Client Incapacity

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| <b>Purpose:</b>              | To assist barristers who have doubts about a client's <sup>1</sup> capacity – by reason of mental disorder or by reason of temporary intoxication – to understand advice, give instructions, or follow or take part in proceedings   |
| <b>Outline:</b>              | Required reading - Mental Capacity Act 2005 - Court of Protection - "protected party" - <a href="#">Masterman-Lister v Brutton &amp; Co [2003]</a> - tests and presumptions - fitness to plead - Advocacy Training Council's toolkits - BSB Handbook obligations - duty of adviser - suggested approach (stage by stage) - professional client involved - Public Access cases - withdrawal & duties arising - other sources of assistance (OS) (Cafcass) - duty to the court - medical evidence - duty to the court - appointment of a 'litigation friend' - determinations by the courts - Bar Council's Ethical Enquiries Service - client's incapacity by reason of drink/drugs - keeping a record - Notice |
| <b>Scope of application:</b> | All practising barristers  |
| <b>Issued by:</b>            | The Ethics Committee   |
| <b>First issued:</b>         | February 2014  |
| <b>Last reviewed:</b>        | October 2023   |
| <b>Status and effect:</b>    | <b>Please see the important notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.</b>  |

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<sup>1</sup>For ease of explanation, this guidance will use the term "client" to refer both to a client *and* a prospective client, but you will need bear in mind the distinction between (i) not accepting instructions and (ii) withdrawing from a case in which you have already accepted instructions.

# Incapacity by Reason of Lack of Mental Capacity

## Introduction

1. In order to be able to deal with this issue, you need to be familiar with the standard texts on the current law and practice relating to:

1.1 The Mental Capacity Act 2005 and the principles set out therein relating to capacity. In particular, the principles set out in section 1 including:

- s.1(2) *“A person must be assumed to have capacity unless it is established that he lacks capacity”*;
- s.1(3) *“A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success”*;

1.2 A client lacking capacity for the purpose of managing money and property so that the client’s money and property is under the control of the Court of Protection;

1.3 A client being a "protected party" for the purpose of conducting civil or family proceedings, i.e. lacking capacity (within the meaning of the 2005 Act) to conduct proceedings; see CPR part 21.1 and FPR 2.3. In particular, you need to be aware of the leading case (as at the date of this guidance) of [Masterman-Lister v Brutton & Co \[2003\] 1 WLR 1511](#) (as approved by the Supreme Court in [Dunhill v Burgin \(Nos 1 and 2\) \[2014\] UKSC 18](#)) which emphasises that:

- There is a presumption of capacity for a person of adult age, but that as a matter of practice the court should investigate the issue where there is any reason to suspect its absence;
- The test of capacity is therefore issue specific: a client may have capacity to conduct relatively simple litigation, but lack the capacity to conduct more complex litigation;
- Equally, a client may have capacity to pursue or compromise a claim, but would be incapable of subsequently taking investment decisions in relation to any compensation ultimately received, and

Similarly, just because a party lacks ‘litigation competence’ in adoption or placement order proceedings, for example, does not mean that they lack ‘subject matter competence’ (say, in relation to consent): see [Sheffield City Council v E \[2004\] EWHC 2808 \(Fam\)](#);

1.4 A client being "unfit to plead" for the purpose of criminal proceedings.

2. You are also referred to the toolkits available on [The Advocate's Gateway](#)<sup>2</sup>, a website hosted by the Advocacy Training Council which provides guidance on vulnerable witnesses, the role of intermediaries, and defendants. In particular, see: toolkit 1: *Ground rules hearings and the fair treatment of vulnerable people in court*; toolkit 10: *Identifying vulnerability in witnesses and parties and making adjustments*; toolkit 8: *Effective participation of young defendants*; toolkit 12: *Planning to question someone with a suspected (or diagnosed) mental health disorder*; toolkit 13: *Vulnerable witnesses and parties in the family courts* (especially part 9) and toolkit 16: *Intermediaries: step by step*.

3. You must also bear in mind your obligations under the BSB Handbook, including in particular:

- CD1: *"You must observe your duty to the court in the administration of justice"*;
- CD2: *"You must act in the best interests of each client"*;
- CD8: *"You must not discriminate unlawfully against any person"*;
- oC14: *"Care is given to ensure that the interests of vulnerable clients are taken into account and their needs are met"*, and
- gC41: *"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"*.

4. 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; see *Re P* [2008] EWCA Civ 462, at paragraph 47:

*"...once either counsel or [the solicitor] had formed the view that ... [the client] might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible"*.

### **Suggested approach**

5. As the law and practice presently stand, the Bar Council suggests that you might adopt the following approach.

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<sup>2</sup> [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)

6. If you reasonably suspect that the client is or may be a "protected party" (for any relevant purpose) or "unfit to plead", you need to proceed with great care, in particular since:

6.1 If you doubt the client's capacity to give instructions, it follows that you cannot be certain that it is proper to act on any instructions which the client may purport to give you (although, even where a client definitely lacks the capacity to give instructions, you should still seek the client's views and take them into account);

6.2 You may need to consider placing the issue before the court, taking into account the Mental Capacity Act 2005, the relevant CPR and the guidance in *Masterman-Lister*. In certain circumstances failure to do so could expose you to a negligence claim (see e.g. *McFaddens (a firm) v Graham Platford* [2009] EWHC 126 (TCC));

6.3 Where the client is funding litigation privately, the propriety of your instructing solicitor accepting funds from the client may be in doubt; and

6.4 Revealing to your client your suspicion that he/she lacks capacity may well be perceived as offensive, and revealing the suspicion to the court and any other party may well be unauthorised and/or highly prejudicial.

7. Each case will be different, but the following stage by stage approach is suggested, depending upon whether there is an instructing solicitor involved.

### **In a case involving an instructing solicitor (or other professional client)**

8. In a case involving an instructing solicitor (or other professional client):

8.1 You should discuss the question of the client's capacity with your instructing solicitor (who is likely to have had more contact with the client than you have);

8.2 If, having done so, you still reasonably suspect that the client lacks capacity, then you should, if practicable, meet the client, if you have not already done so; and

8.3 Whether or not you meet the client, if your concerns about the client's capacity persist, you should ensure that the client is informed of those concerns as tactfully as possible, and that any comments which the client has to make on the issue of capacity are obtained and taken into account.

At each stage you should ensure that a careful record of the actions taken and advice given is kept by both yourself and your instructing solicitor (or other professional client).

- 8.4 In a case in which you are instructed by a solicitor (or other professional client), you should then advise that evidence about the client's capacity is obtained. In some obvious cases, a letter from a treating clinician will suffice. However, in most cases expert evidence is likely to be necessary which will require an application on your client's behalf. If this step is agreed by the client, well and good.
- 8.5 If the client rejects the advice to obtain further evidence but your instructing solicitor nonetheless has concerns about the client's capacity to litigate, in the Bar Council's view, the court should be informed of these concerns (which, in the absence of any special application, will normally mean informing any other party to the proceedings), even if the client purports to forbid this, so that the issue can be investigated without delay. This might include making an application for expert evidence concerning the client's litigation capacity, even if instructed not to do so.
9. In the Bar Council's view, this is a situation where your duty to the court at that time overrides the client's purported instructions, even if the client subsequently turns out to have capacity. Disclosure of the client's suspected lack of capacity is necessary for the protection of the client (in case the client lacks capacity), and may be necessary for the protection of you and your instructing solicitor, since, if the client lacks capacity to give instructions and/or to authorise private funding, neither you nor your instructing solicitor can properly act on the basis of the client's instructions and/or any such funding. It will also better enable the court to achieve the 'overriding objective', having regard to the difficulty which has arisen.
10. Once the client's suspected lack of capacity has been disclosed to the court:
  - 10.1 If the client's capacity to conduct civil or family proceedings is in question, that question can be determined by the civil or family court, and, if the client is a "protected party" for that purpose, a "litigation friend" can be appointed to conduct the litigation on the client's behalf. In [\*Ms K Jhuti v Royal Mail Group Ltd & Ors \(2017\)\*](#) Mrs Justice Simler held that the appointment of a litigation friend in an employment case was within the case management powers in the 2013 Rules where otherwise a litigant who lacked capacity to conduct litigation would have no means of accessing justice or achieving a remedy for a legal wrong.
  - 10.2 Obviously if the court determines that the client has got capacity to conduct the litigation, then you must continue with the case;

10.3 If, however, both the lay client and instructing solicitor reject your advice that the client's suspected lack of capacity be disclosed to the court, you will probably be in such a situation of professional embarrassment that the only proper course will be to withdraw from the case. In that event, you will be obliged to explain clearly to the client your reasons for withdrawing (BSB Handbook rC27.1.b).

10.4 Equally, in the unlikely event that the court refuses to determine the issue of capacity or fitness to plead, and indicates it intends to continue regardless, you may have to withdraw from the case, making clear to the court that you cannot act in the absence of proper instructions.

10.5 In criminal proceedings, barristers will be familiar with the legal procedures surrounding issues of fitness to plead and their determination by the court on the evidence of appropriately-approved doctors. Often, even when the conclusion is that the defendant is not unfit to plead and therefore does not lack "capacity" in this extreme sense, this investigative process will highlight particular ways in which the defendant and those dealing with him may be assisted.

10.6 Those representing defendants in this latter position will be familiar with the common law provisions by which the court has the power to appoint an intermediary to assist the defendant for part or all of the proceedings, notwithstanding that not all the relevant sections of the Youth Justice and Criminal Evidence Act 1999 are yet in force; see Archbold [2021 edition] 8-101/p1553; see further, 8-106-111/pp1556-8. This process may in turn lead to appropriate assistance being discussed at a "ground rules hearing" in advance of any trial, and/or to situation-specific practical adaptations to the trial process. The required procedures are set out in Part 18 of the Criminal Procedure Rules.

10.7 For situations in which the defendant has been found unfit to plead and the court appoints an advocate to cross examine on their behalf – or where an advocate is appointed for other reasons – see the Bar Council's document, "*Court appointed legal representatives*".

### **In a case without an instructing solicitor (or other professional client)**

11. In a matter that does not involve a professional client, you should, if practicable, meet the client, and follow the approach in paragraph 8.3 above, again, keeping a careful record of the actions taken and advice given. You

should also take into account the section in the BSB's [Public Access Guidance for Barristers](#) which deals with identifying and representing vulnerable clients.

12. If, having taken those steps, you still reasonably suspect the client lacks capacity, then in a public access case, you are likely to be in the position of being unable to act (if instructions have not been accepted), or of being obliged to cease acting. The practical implications of the client's perceived lack of capacity are likely to be such that you will have concluded that the case is not suitable for public access, not least because in all the circumstances, it would in any event be in the interests of the client or in the interests of justice for the client to instruct a solicitor or professional client (BSB Handbook rC123).
13. Even if that is not the case, the Bar Council considers that you cannot properly accept instructions from a client, or continue to act for a client, whom you reasonably perceive to lack capacity, having taken the steps already identified above. However:
  - 13.1 In a case involving withdrawal, you should bear in mind paragraphs 35-41 of the BSB's [Public Access Guidance for Barristers](#), concerning limitations on withdrawal under rC25-rC26, cases of potential urgency or prejudice to the client, and referrals to solicitors. Whilst the Bar Council is of the view that you cannot continue to act for, or take any further steps on behalf of, a client who is believed not to have the capacity to give instructions (which is not a situation catered for in the BSB guidance), you may feel that giving assistance along the lines suggested in paragraph 44 of the *Public Access Guidance for Barristers* may still be appropriate in cases where the client might otherwise be prejudiced, depending on the circumstances. You will in any event be obliged to explain clearly to the client your reasons for withdrawing (BSB Handbook rC27.1.b);
  - 13.2 Even in a case in which you are declining to accept instructions, rather than withdrawing, this does not mean that you cannot try to assist the client, perhaps by helping to find a solicitor, or by referring the client to a particular solicitor or to [CAFCASS Litigation](#), either of whom may be better placed to assist the client to find a way forward despite the issue of capacity. You may also assist the client to engage a solicitor with a view to you and that solicitor taking the steps indicated below, if you consider that to be in the client's best interests, and if the client agrees. However, you should be wary of those situations in which there may be no time for a client to seek alternative advice, or where delay may prejudice the client's position, in which case the client should be told: (i) that you consider it to be in the client's best interests to inform the court of your suspicions. Although this does not involve you withdrawing from a case, you may still be assisted by referring to paragraphs 35-41 of the BSB's *Public Access Guidance for Barristers* as regards situations of urgency and referrals to solicitors; and

13.3 In either type of case, you are also not prevented from informing the client of the importance of professional assistance, or (where you think it appropriate) from giving tactful advice about the merits of the client raising the issue of their capacity with a solicitor, or indeed from informing the chosen solicitor of your concerns as to the client's capacity (although you should take care not to breach any duty of confidentiality owed to the client when doing so).

## **Incapacity by Reason of Drink/Drugs**

### **A. Client still capable**

14. If a client attends court under the influence of drink or drugs, but you reasonably believe that the client is still capable of understanding advice, giving instructions, and following and, if necessary, taking part in the proceedings, your duties are, as always:

14.1 Your overriding duty to the court (BSB Handbook CD1, rC3 and rC4), in particular not to mislead the court; and

14.2 Subject to that, your duty to your client (BSB Handbook CD2 and rC15), which includes a duty to advise the client as to the client's best interests (which may be to seek an adjournment) but ultimately to follow the client's instructions (which may be to proceed) even if those instructions appear to you to be unwise.

### **B. Client incapable**

15. If, on the other hand, a client attends court and appears to be so under the influence as to be temporarily incapable of understanding advice, giving the instructions, or following or taking any necessary part in the proceedings:

15.1 In rare cases, where the particular procedure has previously been explained to the client and the client's instructions taken at a time when the client was capable of giving them, and the hearing concerned is a formality which follows its predicted course, it may be appropriate for you to allow the hearing to proceed; but

15.2 More often, you will need to seek an adjournment, since it would be a breach of your duties to the court and to the client to allow the court to proceed on the assumption that the client is capable when that is not in fact the case. In practice, this is likely to mean that you have to make some disclosure of the



client's intoxication (in the unlikely event that it is not already apparent to the court); and

15.3 As ever in difficult situations, you are strongly advised at every stage to make and keep a good contemporaneous note, and to ask any representative of your instructing solicitors to do the same.

### **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please refer to the professional practice and ethics section of the Bar Council’s website [here](#).