

Tribunal Appointed Representatives in Mental Health (“Rule 11(7) Cases”)

Purpose

The purpose of this note is to provide guidance on when it is appropriate to allow a third party or provider to apply for legal aid or sign the application form where the tribunal appoints a legal representative in Mental Health proceedings.

Background

In Mental Health cases, the tribunal has the power to appoint a legal representative on behalf of an unrepresented client where:

- a.) the client has stated that they do not wish to conduct their own case or that they wish to be represented; or,
- b.) the client lacks the capacity to appoint a representative but the tribunal believes that it is in the client’s best interests for the patient to be represented.

This power is found at Rule 11(7) of the *Tribunal Procedure (First-Tier Tribunal) (Health, Education, and Social Care) Rules 2008* and so these cases are often colloquially known as “Rule 11(7) cases”¹.

When invoking these powers the tribunal will contact a provider from a list and appoint them to act for the client. Given tribunal proceedings are non-means tested and only subject to the “reasonableness test” for merits it is more than likely that the client will qualify for legal representation.

However, as the client has not sought out a legal representative themselves it is possible that they will be either unable or unwilling to sign the application form, in which case a third party or the provider may need to do so on their behalf. It is important that the correct rules are followed for making this application and that the provider does not start work until the application has been properly made.

Legal Aid

There are no specific rules in the legal aid legislation or the contract relating to the application process for legal aid in cases where the tribunal appoints a legal representative. There are, however, general provisions covering the circumstances where a third party or the provider might need to apply for legal aid or sign the application form that can be relied upon in this situation.

¹ There is an equivalent power for proceedings in the Welsh jurisdiction at Rule 13(5) of the *Mental Health Review Tribunal for Wales Rules 2008*.

INTERNAL GUIDANCE

Firstly, regulation 23(4) of the *Civil Legal Aid (Procedure) Regulations 2013* states that an applications for legal aid can be made on behalf of a client who lacks capacity by the following individuals:

- a.) a person acting or proposing to act as the protected party's litigation friend; or
- b.) any other person where there is good reason why a litigation friend or proposed litigation friend cannot make the application.

The tribunal does not have the power to appoint litigation friends so the first limb of this provision is not relevant to these cases. As such, the application can be made by "any other person" (for example, one of the client's relatives, a member of staff at their hospital, or a social worker). These individuals are only required to apply for legal aid – they are under no obligation to be otherwise involved in the case.

Regulation 23(5) of these regulations prohibits an application to be made by the client's legal aid provider. However, paragraph 7.40 of the Specification to the 2014 Standard Civil Contract states that:

"Exceptionally, where it is not appropriate to use any of the possibilities for the application for Legal Help or for CLR to be made on the patient's behalf and the patient will not sign the application due to their condition, then you may annotate the form to that effect and a Supervisor may sign the form."

LAA Position

The following list sets out the key points that should be taken into account in cases where a provider has been appointed to represent a client in a Rule 11(7) case:

1. No work on a client's case should be started before an application for legal aid has been made and properly signed
2. The provider should in general always seek to visit the client to see if they have capacity and are willing to apply for legal aid themselves (subject to bullets 6 and 7 below)
3. If the client lacks capacity any person can make the application for legal aid on their behalf. That individual does not otherwise have to be involved in the case
4. If the client lacks capacity or is unwilling/unable to sign the application form (and it is not appropriate for a third party to apply on their behalf) the provider can sign the application form in accordance with paragraph 9.40 of the contract specification
5. In all Rule 11(7) cases, we expect to see the authority from the tribunal appointing the firm/individual on the file (usually an email)
6. If it is clear from the outset of the case that client lacks capacity or will be unwilling to sign the application form then the provider does not necessarily need to visit the client to see if they are unable/willing to apply
7. In these circumstances, the provider should justify on file why they have not made any such attempts (e.g. the client clearly lacks capacity and/or has informed staff they do not wish to see a solicitor).