**Instructed by a deputy or an attorney- so who is your client?**

When acting on the instructions of an attorney or deputy, it is not always clear for whom you act. This article explores the complexities and highlights a simple change which practitioners may wish to make to ensure they get paid and avoid any conflict of interest.

Little thought is given as to who is your client when you are receiving instructions via the agency of an attorney or deputy, but with increasing disputes coming to the Court of Protection for their removal, or challenges about who should be appointed, or whether they should be entitled to a gift or benefit under a statutory will- the issue should not be ignored as it impacts on

1. who is responsible for paying your bill;
2. to whom do you owe your professional duties; and
3. how this fits in specifically to a Court of Protection application.

***Who pays your bill?***

Section 87 of the Solicitors Act 1974 defines 'the client' and frames this by reference to the identity of the person responsible for paying your bill:

*‘(a) in relation to contentious business, any person who as a principal or on behalf of another person retains or employs, or is about to retain or employ, a solicitor, and any person who is or may be liable to pay a solicitor’s costs; and*

*in relation to non-contentious business, any person who, as a principal or on behalf of another, or as a trustee or executor, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs or is about to retain or employ a solicitor, and any person for the time being liable to pay a solicitor for his services any costs.’*

As a starting point your client must be a person with capacity, capable of giving instructing either personally or by someone on their behalf. In the absence of an express definition of the meaning of *'on behalf of another'*, the court would usually adopt its ordinary meaning, and should cover an appointed or authorised agent. Clearly when the appointed attorney (the agent) instructs you in a matter concerning the donor’s affairs, for which he has authority, the donor (as the principal) is your client.

It is less clear when one is instructed in relation to Court of Protection proceedings. The section 87 definition is linked to the payment of costs, so one must turn to the Court of Protection Rules 2007 which in particular provide:

*156. Where the proceedings concern P’s property and affairs the general rule is that the costs of the proceedings or of that part of the proceedings that concerns P’s property and affairs, shall be paid by P or charged to his estate.*

*157. Where the proceedings concern P’s personal welfare the general rule is that there will be no order as to the costs of the proceedings or of that part of the proceedings that concerns P’s personal welfare.*

*159.—(1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including–*

*(a)  the conduct of the parties;*

*(b)  whether a party has succeeded on part of his case, even if he has not been wholly successful; and*

*(c)  the role of any public body involved in the proceedings.*

*(2) The conduct of the parties includes–*

*(a)  conduct before, as well as during, the proceedings;*

*(b)  whether it was reasonable for a party to raise, pursue or contest a particular issue;*

*(c)  the manner in which a party has made or responded to an application or a particular issue;*

*(d)  whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response; and*

*(e) any failure by a party to comply with a rule. Practice direction or court order.*

*(3) Without prejudice to rules 156 to 158 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.*

*162. Where two or more persons having the same interest in relation to a matter act in relation to the proceedings by separate legal representatives, they shall not be permitted more than one set of costs of the representation unless and to the extent that the court certifies that the circumstances justify separate representation.*

In respect of a deputyship application, section 19 (6) of the Mental Capacity Act 2005 (MCA) provides ‘*A deputy is to be treated as P’s agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part*’. As such once the deputy is appointed, he is the statutory agent for P, who at this point is the principal and your client (see also *Re EG* [1914] 1 Ch 927, CA). After the appointment your costs can be paid out of P's estate.

Unfortunately it leaves unanswered the position pre-appointment. Section 7 MCA (payment for necessary good and services) may not fully assist as it only provides that necessary services arranged for P must be for a reasonable price. Although it must be implied that someone on behalf of P can commission necessary services under the common law. A deputyship application is likely to amount to a necessary service; the only certainty being that P must pay a reasonable price. Given the court rules on costs are not always the same, it cannot follow that P is the client pre- appointment. This is highlighted where the deputyship application is challenged as there will be a number of parties who may be separately represented. As such rule 162 applies, so there is no automatic guarantee you will get paid unless the court is satisfied that separate representation was justified. Unfortunately at the point of instruction, you may not know whether the case is likely to become contested and so run the risk that you will not be paid. There is strong argument that in such cases, the intended agent must be your client unless and until appointed.

This position is supported in the Law Society Practice Note on Meeting the Needs of Vulnerable Clients, published in July 2015, which takes the view that where you represent the deputy or other party to Court of Protection proceedings when there is a conflict of interest - in such a situation, you may act for the party to the proceedings and the Court of Protection may appoint the Official Solicitor or another independent person to act as litigation friend to represent the interests of the P.

What about a welfare deputyship? As there is no order for costs, the applicant pays your costs and supports the proposition they are your client from the beginning of the retainer- regardless of the potential for any dispute.

The situation is also unclear where a deputy is not appointed because P dies before an order is made.The COPR 2007 give the court power after P's death to make an order as to costs under rule165, which states *'an order or direction that costs incurred during P’s lifetime be paid out of or charged on his estate may be made within 6 years after P’s death'*. This could be interpreted to mean that the applicant deputy should always seek authority for costs as he was not the agent at the time of P’s death and so was not automatically entitled to reimbursement. In practice, this is not an issue- unless there has been an earlier unresolved dispute.

The Law Society Practice Note on Meeting the Needs of Vulnerable Clients contains other situations where you will be deemed to be acting for the agent rather than the principal. These include:

* Where you have been instructed by an attorney to apply to the Office of the Public Guardian for registration of the Enduring Power of Attorney or Lasting Power of Attorney where a prospective deputy instructs you to apply to the Court of Protection for the appointment of a deputy; and
* Where you believe there is a conflict of interest and that you must act for the agent rather than the principal (who should then be separately represented). This could occur where the Public Guardian is seeking to remove the agent, because they have exceeded their authority or because it is believed that they have not acted in the best interests of the principal.

It is advisable, particularly in respect of a Property and Financial Affairs deputyship application that the adviser sets out clearly in the client retainer letter that the applicant will be responsible for costs until the order is made, and provided there is no dispute or conduct which results in the court departing from the general rule on costs, he will be reimbursed out of P's estate. That way you know you will get paid, the applicant is accurately advised on the costs position and if there is any potential or undisclosed disputes, they are likely to come to your attention sooner rather than later.

***To whom do you owe your duty of care?***

Solicitors are regulated by the Solicitors Regulation Authority (the SRA) and their professional rules of conduct are contained in the SRA Code of Conduct. A solicitor has a duty to act in the best interests of his or her client (principle 4 of Code, rule 1). The SRA Code of Practice only refers to your duty towards 'the client' and makes no distinction between a person instructing you directly or their agent. Where the person is acting in an agency capacity, then logically it should be interpreted as meaning the principal.

If there was a conflict of interest or a dispute between P and the agent or prospective agent, then you would need to consider ceasing to act on the (prospective) agent's instructions. However, this may be resolved by the appointment of a litigation friend for P. Where this occurs and you are not instructed by the litigation friend, the client is the person instructing you in the dispute in their personal capacity. For example, in proceedings relating to a statutory will, a gift or settlement of P’s property, the Official Solicitor is usually appointed to represent P in order to resolve the problem of a potential, if not actual, conflict of interest between the applicant and P (rule 143 (1) CoPR 2007). The solicitor who has prepared the application for a statutory will, gift or settlement is usually, for the purposes of the application, deemed to be acting for the applicant. Costs are usually but not always paid out of P’s estate (see *Re Gladys Meek* [2014] EWCOP 1).

***How this fits in to a Court of Protection application***

Applications to the Court of Protection fall to be decided under the MCA, where the Court may make a decision for P, which P could make for himself if he had capacity, following the core principles (s1 MCA) and where required in his best interests (s4 MCA). Best interest is to be viewed from P’s perspective and not from the warring parties’ viewpoint (*Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67). Thus the focus for the Court and all parties must be to put P at the centre of all decision making. It should not be approached as to ‘what’s in my best interest’ but ‘what is in P’s best interest’. Advisers have to be mindful of this and remain objective when giving advice. This may mean telling the client they may not get the order they seek; or on the terms they want; or their views may not have the level of weight attached to them than the client believe they deserve.

In relation to a deputyship dispute it would mean advising on who is the most appropriate person to be the deputy, flagging up any reasons the applicant deputy would not or should not be appointed, the process, and how deputies are supervised and controlled after appointment etc.  Ideally this should mean that conflict is in the main avoided as everyone is working to the same end……

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