The Official Solicitor performs a wide range of duties including the representation of persons under a legal disability due to minority or mental disorder where there is no other suitable person willing and able to act. The bulk of this workload consists of representing adults who lack capacity in a wide range of litigation. This includes divorce, Family Law Act injunctions and every type of civil litigation (see Chapters 7 and 10), representing patients in the Court of Protection upon the consideration of applications for a statutory will to be made on their behalf under the Mental Health Act 1983 (see section 5.7) or for other financial transactions to be entered into on their behalf (see Chapter 4). The Official Solicitor may also act on behalf of children and young people in certain circumstances although, in general, proceedings involving children and young people under 18 years are dealt with by the Children and Family Court Advisory and Support Service (CAFCASS). The role of CAFCASS is outside the scope of this book.

Perhaps the Official Solicitor’s best known role is that of guardian ad litem in proceedings where a declaration is sought as to whether proposed medical treatment or other arrangements are in the best interests of a patient. The Official Solicitor is usually involved in all cases in which the giving or withholding of consent to medical treatment on behalf of an incapacitated adult patient is an issue (see section 12.4).

Whatever the type of proceedings, in order for the Official Solicitor to become involved the person who is the subject of the proceedings must be shown to be a “patient” within the meaning of Part VII of the Mental Health Act 1983, that is an adult who is incapable, by reason of mental disorder, of managing and administering his or her property and affairs (see section 7.2). Medical evidence (from a medical practitioner or psychologist) is usually required before the Official Solicitor can consent to act. The standard form of medical certificate is set out at Appendix E.
There are therefore a number of potential roles for the Official Solicitor according to the type of proceedings and the circumstances of the particular case. This may be to be the litigation friend or guardian ad litem of the person who is the subject of the proceedings (see Chapter 7). Alternatively, the role may be to obtain evidence, usually medical evidence, and instruct counsel to assist the court in the role of advocate to the court (formerly known as “amicus”). In addition the Official Solicitor may be a defendant in his or her own right, for example where otherwise the proceedings would be without a defendant. The Official Solicitor always carries out impartial and independent enquiries to ensure that all relevant information is before the court and all views are aired and expressed. When acting as litigation friend, next friend or guardian ad litem for a person under incapacity, the role of the Official Solicitor is to select and instruct solicitors as necessary, and make all the decisions required in the course of the litigation, including whether to pursue, withdraw, or settle the proceedings. While the Official Solicitor will, where possible, ascertain the views of the patient or child, and relay them to the court, he or she is not bound to follow those views but must act in the client’s best interests. Independent psychiatric and other medical evidence is frequently commissioned.

The Official Solicitor’s functions and duties are more fully described in Practice Notes covering declaratory proceedings relating to medical and welfare decisions and family proceedings which are set out in Appendix C and Appendix D. Note also the Direction issued by the President of the Family Division confirming that declaratory proceedings concerning the best interests of incapacitated adults are civil proceedings and are more suitable for hearing in the Family Division than any other division of the High Court. Cases which also require the review of a decision by a public authority through judicial review proceedings in the Administrative Court, however, should preferably be heard before a nominated judge of the Administrative Court who is also a judge of the Family Division.

Early contact with lawyers in the Office of the Official Solicitor is advisable in those cases in which they are to be involved. Members of staff are always prepared to discuss cases over the telephone and give general advice. The address and telephone number are listed on page 221.
Out of hours applications to court

All cases in which the giving or withholding of consent to medical treatment is an issue are heard by judges in the Family Division of the High Court. Outside normal office hours contact should be made, normally by counsel (or solicitor with higher advocacy rights), with the security officer at the Royal Courts of Justice in London. He or she contacts the designated urgent business officer by telephone, whose responsibility it is to assess the urgency of the application and, if appropriate, to contact the Duty Judge. The judge would, if necessary, contact the Official Solicitor. The judge may grant the order sought over the telephone or may direct attendance at his or her lodgings. In the event of a medicolegal emergency, it is therefore prudent to have available to speak to the judge both counsel and a relevant medical expert. A contact telephone number for the Royal Courts of Justice is given on page 222.

References and notes

4 Practice Direction (Declaratory Proceedings: Incapacitated Adults) [2002] 1 All ER 794.
5 A v A Health Authority and another; In re J (A Child) [2002] Fam 213.