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OF IRELAND

# SOLICITOR'S GUIDE TO PROFESSIONAL CONDUCT

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4th Edition

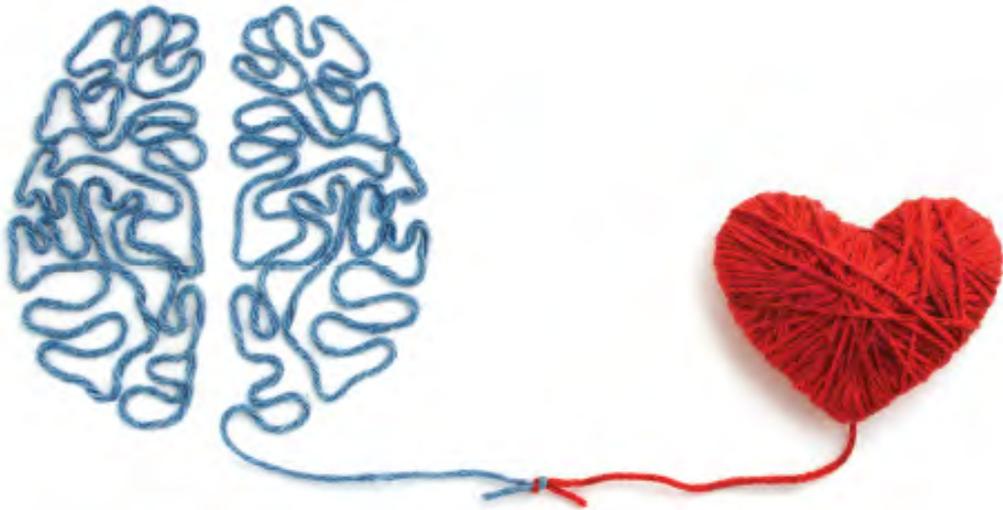
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# SOLICITOR'S GUIDE TO PROFESSIONAL CONDUCT

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# FOREWORD

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It is often said that the solicitors' profession is one in which every member should be capable of being trusted to the ends of the earth (see *Bolton v The Law Society* [1994] 2 All ER 486). And, it is certainly true to say that a profession without the hallmarks of integrity, honesty and trustworthiness simply cannot hope to enjoy such an exceptionally high degree of trust and confidence.

Importantly, solicitors are often engaged by members of the public at times when they may be anxious, confused, stressed and possibly even deeply vulnerable. Accordingly, it is vital that everything possible is done to protect and maintain public confidence in the reliability and honesty of the profession's members. The provision of a reliable service, the maintenance of client confidentiality, and compliance with the rules in relation to financial stewardship of clients' monies are the bare minimum standards to be expected of a solicitor. This *Solicitor's Guide to Professional Conduct* encourages and expects a great deal more of solicitors in terms of their conduct and envisages the type of professionals who can be trusted to the ends of the earth. But what does this phrase necessarily mean?

In my role as President of the High Court, I have the somewhat unfortunate role of presiding over solicitors' disciplinary matters. It often falls to me to assess whether a person is "fit and proper", and in this regard I will refer to what was said by McKechnie J. in *Law Society v Carroll* [2016] 1 IR 676:

*"The phrase 'fit and proper' combines two broad elements, fitness and properness. Both, whilst complementary, are intended to convey different requirements*

*and to cover different aspects of a person's overall suitability for the solicitors' profession."*

McKechnie J then went on to say that in broad terms 'fitness' relates to a person's necessary academic qualifications and experience and also encompasses matters such as "knowledge, skill, understanding, expertise, competence and the like, all of which impact on one's capacity to appropriately discharge the obligations which the practice of his profession imposes". In relation to being 'proper', it was stated:

*"The second aspect of the term 'being a proper person' is much more directly related to character and suitability. Critical in this respect are matters such as honesty, integrity and trustworthiness: a person of principled standards, of honest nature and of ethical disposition; a person who understands, appreciates and takes seriously his responsibilities to the public, to the administration of justice, to individual colleagues and to the profession as a whole."*

I think this quote captures the essence of the characteristics necessary for anyone aspiring to become a 'fit' and 'proper' member of the solicitors' profession. The propriety of a solicitor should be evident, not only from the way in which they conduct themselves in the course of their work, but also from the manner in which they engage with society in other respects. What is required and expected is something more than just strict adherence to a guide. Their conduct and character should be such as would inspire public confidence in the administration of justice as a whole. This is because solicitors, although acting for their clients' best interests, are first and foremost officers of the court and are therefore obligated to support the administration of justice.

The characteristics of a fit and proper solicitor are not merely aspirational. And, on that note, it would be wise for all practitioners, regardless of their seniority and experience, to bear in mind the judgment of the Supreme Court in *Re Burke* [2001] IESC 13, in which it was said that if public confidence in the solicitors' profession is to be maintained, any abuse of that trust must inevitably have serious consequences for the solicitor concerned. This is because, as expressed

by Sir Thomas Bingham in *Bolton v The Law Society*, a client “is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured”. In the same case it was said that “a profession’s most valuable asset is its collective reputation and the confidence which that inspires”.

### **The Honourable Ms Justice Mary Irvine**

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President of the High Court 2022





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# INTRODUCTION

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This *Solicitor's Guide to Professional Conduct* is an updated, renamed, fourth edition of the *Guide to Good Professional Conduct of Solicitors in Ireland*. It is intended that this publication, like its predecessors, will be commonly referred to as the *Solicitor's Guide*, or the *Guide*.

Ethics is personal to each solicitor, and it is for each solicitor to reach their own conclusion on ethical matters. For this reason, the *Guide* is neither a rule book nor a manual, and does not have the force of law. It is a source of reference on professional conduct for all solicitors, to be used as an information tool to assist solicitors in their decision-making and in considering the many and varied ethical questions that arise in day-to-day practice for every solicitor.

The *Guide* is intended for all solicitors, from those who are beginning their legal career to practitioners who have already accumulated considerable experience. The index is detailed, and the *Guide* has been written with the intention of allowing quick and easy access to the most appropriate sections. Certain guidance may be repeated in different chapters if the guidance is relevant to more than one area.

The *Guide* represents Law Society policy and recommendations as at the date of publication, and is also the primary source material used for teaching ethics to trainee solicitors.

It should be borne in mind that if a decision must be made as to whether certain acts or omissions of an individual solicitor constitute misconduct, this can only be done following a hearing of the Legal Practitioners Disciplinary Tribunal,

which will consider the facts of the case. Generally, no action can be declared misconduct until it has been so found by the Tribunal.

The Guidance & Ethics Committee of the Law Society of Ireland has carried out its review of the current edition and updated it without making new rules or imposing new obligations on solicitors. As the rules of professional conduct derive both from statutory and non-statutory sources, the committee has tried to ensure that all necessary references to legislation and case law are included. Accordingly, where legislation or case law is relevant, reference has been made to it in footnotes. Reference has also been made in footnotes to practice notes to which the solicitor can refer for further information on particular topics. The practice notes are updated on an ongoing basis – see [www.lawsociety.ie](http://www.lawsociety.ie). The Guide has been made as user-friendly as possible. It is hoped that the detailed schedule of contents and the index will lead the solicitor to the required topic without difficulty. Case law and precedents referred to in this guide are available on the Law Society Guidance & Ethics Committee resources page.

The Guide is relevant for all solicitors, whether in private practice or in employment in the in-house and public sector.

## **Ms Justine Carty**

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Chair  
Guidance & Ethics Committee 2022

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# CHAPTER 1

## THE RULES OF PROFESSIONAL CONDUCT

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# CHAPTER 1

## THE RULES OF PROFESSIONAL CONDUCT

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### THE FUNCTION OF THE SOLICITOR IN SOCIETY

In a society founded on respect for the rule of law, solicitors fulfil a special role in the administration of justice and as officers of the court.<sup>1</sup>

Solicitors are under a duty to exercise their professional skill and judgement when acting on instructions. A solicitor must then advise on whether what is required is proper and legal. It is the solicitor's duty not only to plead their clients' cause but also to be their legal advisor, while observing the core values of the profession.

Solicitors must serve the interests of justice. Barron J set out the obligation of the solicitor in *Doran v Delaney*, Supreme Court [1998] 2IR 61 as follows:

*“The solicitor is not a conduit pipe. Once he is acting professionally, he warrants that so far as his own acts are concerned, he has taken the care and applied the skill and knowledge expected of a member of his profession. He cannot therefore accept his client's instructions without question when it is reasonable to query them...”*

The solicitor's function, therefore, imposes a variety of legal and moral obligations on the solicitor, which sometimes appear to conflict with each other, including:

- a) Obligations to their clients,
- b) Obligations to the court as officers of the courts and to other bodies before whom solicitors plead their clients' cause or act on their behalf,
- c) Obligations to the public, for whom the existence of an independent profession is an essential means of safeguarding individual rights in the face of the power of the State and other interests in society,

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<sup>1</sup> 'Solicitors as officers of the court', Practice Note, September 2016 ([lawsociety.ie](http://lawsociety.ie)).

- d) Obligations to their colleagues in the legal profession,
- e) Obligations to themselves.

Rules of professional conduct are designed to assist the proper performance by a solicitor of their duties and functions in practice. Solicitors, whether in private practice or the in-house and public sector, share the same professional standards of conduct.

## LEGISLATION

The rules of professional conduct are derived both from statutory and non-statutory sources. The *Solicitors Acts 1954 to 2015* (the *Solicitors' Acts*), the *Legal Services Regulation Act 2015* (the 2015 Act), the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* as amended and the regulations made under these Acts are part of the legislative framework for the regulation of solicitors.<sup>2</sup>

Solicitors should also be mindful of the statutory duties provided for under the *General Data Protection Regulation* and anti-money-laundering legislation, among others.<sup>3</sup>

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<sup>2</sup> Schedule of statutory instruments relevant to the conduct and practice of solicitors, enacted under the *Solicitors Acts 1954 to 2015* and the *Legal Services Regulation Act 2015* and the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* as amended. For references to AML Guidance visit [www.lawsociety.ie/aml](http://www.lawsociety.ie/aml).

<sup>3</sup> For guidance on GDPR and data protection and AML obligations, see [www.lawsociety.ie/Solicitors/Regulations/Data Protection](http://www.lawsociety.ie/Solicitors/Regulations/Data Protection) and [www.lawsociety.ie/Solicitors/Regulations/Anti-Money-Laundering/](http://www.lawsociety.ie/Solicitors/Regulations/Anti-Money-Laundering/).

## CORE VALUES OF THE PROFESSION

### General

In addition to the legislative requirements, solicitors are required to observe general core values of conduct. These include **honesty, integrity, independence, confidentiality, and the avoidance of conflicts of interest**. Solicitors should always observe and promote the core values of the profession and avoid any conduct or activities inconsistent with those values.

All bar associations and law societies in Europe share values and, in most cases, demonstrate a common foundation that is also reflected in the rules of bar associations and law societies throughout the world.<sup>4</sup> When the solicitor observes the highest professional standards, this is to the ultimate benefit of the client, whether an individual or an organisation.

### Integrity

Solicitors must maintain strong ethical principles in their professional dealings. This means solicitors must not unfairly discriminate by allowing their personal view to affect their professional judgement. Solicitors are in a position of trust in society, and it is of the utmost importance that they do not take unfair advantage of clients or others. Professional undertakings go to the core of solicitors conduct and, where an undertaking is given, it must be complied with within the agreed time frame. A solicitor's word must be their bond; they must not mislead, in any respect, the courts or others by their acts or omissions.

### Honesty

Solicitors have an important role in the administration of justice. As a solicitor, one needs to be careful that what is said in their name is truthful, as it may affect both the solicitor and their client. A solicitor must represent the truth. This requires solicitors to be honest and forthright in all professional and business relationships. Honesty is not an abstract concept; it must be practised. Both the role of legal representative and the role of officer of the court can only be

<sup>4</sup> 'Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers', CCBE (2010 edition) – see [www.ccbe.org](http://www.ccbe.org). The charter and code deal with cross-border activities of lawyers in the EU. While they are not enforceable as law in this jurisdiction, they are relevant insofar as they reflect the core principles of the profession. See Appendix 2, 'IBA International Principles on Conduct for the Legal Profession', International Bar Association (2018). See [www.ibanet.org](http://www.ibanet.org). See Appendix 3.

effectively fulfilled if the probity or trustworthiness of the solicitor is not in doubt. Honesty is central to how solicitors engage with clients, colleagues, and the courts.

### **Independence**

Solicitors must retain professional independence and the ability to advise their clients fearlessly and objectively. Independence is essential to the functioning of solicitors' relationships with all parties, and it is the duty of the solicitor to ensure that their independence is not compromised. Solicitors should not allow themselves to be restricted in their actions on behalf of clients or restricted by clients in relation to their other professional duties.

A solicitor's independence is necessary because of the position of trust they hold. The position of trust carries responsibilities to the courts, as officers of the court, to clients, third parties and to the legal profession. The independence of a solicitor's advice is a core value of the legal profession.

Solicitors must not allow themselves to be intimidated by a client or other person into making decisions, giving advice, or taking actions that are in any breach of the solicitor's professional duties.

Individual solicitors are responsible for their own conduct; solicitors who are owners of firms also have a responsibility for the good management of their firm and should always retain full control of the firm.

### **Independence of the in-house and public-sector solicitor**

The in-house and public-sector solicitor has one client who is also their employer. The solicitor shares the common objectives of the organisation, but should always maintain an objective and professional position within the business. Where a solicitor is employed by a regulated organisation, there may be additional regulations that the solicitor is required to comply with. It is inevitable, given the solicitor's role, that they may be faced with difficult decisions on occasion. The in-house and public-sector solicitor must give legal advice that is both independent and impartial.

If an employer instructs a solicitor to act in a way that, in the opinion of the solicitor, would amount to unprofessional conduct on the solicitor's part, the solicitor should advise the employer that those instructions cannot be acted upon. The solicitor should analyse the matter carefully, provide the appropriate advice, and advise the employer to change the instructions. In appropriate

situations, the matter might be resolved by seeking a second opinion from a lawyer in another firm or organisation.

In-house solicitors who hold practising certificates are subject to the statutory regulation by the Law Society and the LSRA in the same way as solicitors in private practice.<sup>5</sup>

### Conflict and confidentiality

These topics are considered in detail in chapters 3 and 4.

## THE ENFORCEMENT OF THE RULES OF PROFESSIONAL CONDUCT

The failure of a solicitor to observe the rules of professional conduct, whether having a statutory basis or otherwise, could result in a complaint to the Legal Services Regulatory Authority and may result in a finding of misconduct.<sup>6</sup>

Under the *Legal Services Regulation Act 2015*,<sup>7</sup> misconduct may be an act or omission where the act or omission:

- a) Involves fraud or dishonesty,*
- b) Is connected with the provision by the legal practitioner of legal services, which were, to a substantial degree, of an inadequate standard,*
- c) Where occurring otherwise than in connection with the provision of legal services, would justify a finding that the legal practitioner concerned is not a fit and proper person to engage in the provision of legal services,*
- d) Consists of an offence under this Act,*
- e) In the case of a solicitor, consists of a breach of the Solicitors Acts 1954 to 2015 or any regulations made under those Acts,*
- f) In the case of a solicitor, consists of an offence under the Solicitors Acts 1954 to 2015,*
- g) In the case of a barrister, is likely to bring the barristers' profession into disrepute,*
- h) In the case of a solicitor, is likely to bring the solicitors' profession into disrepute,*

<sup>5</sup> *A Guide for In-House Solicitors employed in the Corporate and Public Sector, May 2018.*

<sup>6</sup> It should be noted that, at the time of publication, misconduct as defined under section 3 of the Solicitors (Amendment) Act 1960 (as amended) has not been repealed.

<sup>7</sup> *Legal Services Regulation Act 2015, section 50 (irishstatutebook.ie).*

- i) In the case of a legal practitioner who is a managing legal practitioner of a multi-disciplinary practice, consists of a failure by him or her to comply with his or her obligations under this Act as a managing legal practitioner (within the meaning of Part 8,*
- j) Consists of the commission of an arrestable offence,*
- k) Consists of the commission of a crime or offence outside the State which, if committed within the State, would be an arrestable offence,*
- l) Consists of seeking an amount of costs in respect of the provision of legal services, that is grossly excessive,*
- m) Consists of a breach of this Act or regulations made under it, or,*
- n) Consists of a contravention of section 215(1).”*

A finding of misconduct may result in a sanction being imposed on the solicitor.

The standards of professional conduct that the profession sets for itself should not be confused with the requirements of the general law of contract, tort, criminal law or equity, even though the requirements of conduct may in some cases follow, or closely parallel, these general legal requirements.

Practitioners should remember that the Superior Courts retain an inherent disciplinary jurisdiction over solicitors as officers of the court; while the jurisdiction is compensatory rather than punitive, it is still a disciplinary aspect.<sup>8</sup>

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<sup>8</sup> *Bank of Ireland Mortgage Bank v Coleman* [2009] IESC 38.



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## **CHAPTER 2**

# **THE SOLICITOR AND CLIENT RELATIONSHIP**

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# CHAPTER 2

## THE SOLICITOR AND CLIENT RELATIONSHIP

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### ACCEPTANCE OF INSTRUCTIONS

#### General

The decision to accept instructions in a matter is at the discretion of the individual solicitor or, if appropriate, the firm or organisation of which the individual solicitor is a member.

In general, a solicitor is not bound to accept instructions from any client and is bound not to accept instructions where to do so would involve the solicitor in some form of unprofessional conduct, such as a conflict of interest.

However, a solicitor should not discriminate unfairly between members of the public, nor refuse to act for a person on the grounds of discrimination. A solicitor should observe equality legislation.<sup>9</sup>

#### Terms and conditions of business

It is recommended that when a solicitor takes instructions, the client is provided with the firm's terms and conditions of business, including its complaints procedure. Where practicable, it is preferable to confirm the instructions in writing and set out in general terms what the solicitor understands their instructions to be and how they intend to carry out the instructions.

There is no obligation on a solicitor to have the firm's terms and conditions of business signed by the client. However, it is good practice to do so. If the terms and conditions are issued by email, the client should be asked to acknowledge

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9 *Equal Status Acts 2000-2018.*

receipt and confirm that they have read and understood the documents in question.

If the notice or other document giving the client information in respect of legal costs is a separate document, it is also good practice to have this signed by the client. This signed documentation may be the solicitor's best defence in the event of a dispute.<sup>10</sup>

Solicitors should be cognisant of the potential challenges faced by clients who have language or literacy difficulties, or other disability that could impair their understanding of the documents.

### Information in relation to legal costs

Sections 149-152 of the *Legal Services Regulation Act 2015* (the 2015 Act) governs the provision of information on legal costs and provides, inter alia, as follows:

- On receiving instructions from a client, the solicitor must provide their client with a notice setting out the costs and VAT that will be incurred in relation to that matter,
- If it is not reasonably practicable for the notice to set out the exact costs at that time, then the basis of calculation must be outlined,
- Once it is possible to quantify the actual costs, an updated notice must be issued to the client containing the requisite details,
- The definition of legal costs includes both professional fees and outlays,
- If, subsequently, the solicitor becomes aware of any factor that would make the legal costs incurred in the matter significantly greater than those disclosed, then a new notice should issue to the client.<sup>11</sup>

In the alternative, the 2015 Act provides that a solicitor and client can make an agreement in writing concerning the amount and the manner of payment in relation to all or part of the legal costs payable.<sup>12</sup>

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<sup>10</sup> *Terms and Conditions of Business Precedent, Law Society, (see [www.lawsociety.ie](http://www.lawsociety.ie)); SI no 533 of 2010, European Union (Provision of Services) Regulations 2010.*

<sup>11</sup> *Section 150(5) of the Legal Services Regulation Act 2015.*

<sup>12</sup> *Section 151 of the Legal Services Regulation Act 2015.*

### Time costing

Where the basis of charge is the time spent on a matter, the solicitor ought to keep the client informed on a regular basis of the time spent. It is recommended that time records be maintained, as they may be required in the event of a dispute or a complaint to the Legal Services Regulatory Authority.<sup>13</sup>

### Refusal of instructions

A solicitor should not accept instructions to act in a matter for which they do not have sufficient expertise, time, or adequate resources to give the necessary attention to the matter.

Where, having regard to their professional, legal, and moral obligations, a solicitor decides that they cannot accept instructions from a particular person, they should immediately inform that person, in writing where appropriate, of their decision not to act. The decision not to act and the communication of that decision should be unambiguous.

### Instructions to be taken directly from the client

A solicitor should take instructions directly from the client. Where instructions are first received from a third party, the instructions should be confirmed directly with the client. Where a solicitor takes instructions from an agent, the rules of agency apply.

### The in-house and public sector solicitor

A solicitor employed in an in-house or public-sector capacity may receive instructions from one or more employees in an organisation. The solicitor should ensure that the person providing the instruction is authorised to do so.<sup>14</sup>

### Payment of fees by a client in advance

Solicitors are entitled to be paid for the work they do. The basis of a particular fee arrangement, such as stage payments or payments in advance, and the basis on which fees are charged, should be agreed with the client, and communicated in clear and unambiguous terms in advance of the retainer.

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<sup>13</sup> *Legal Services Regulation Act 2015, Schedule 1, Principles Relating to Legal Costs*

<sup>14</sup> *For further guidance, in-house and public-sector solicitors can access the Guide for In-House Solicitors.*

A solicitor may be prepared to act for a client only in circumstances where the client pays fees in advance or pays a sum in respect of fees due as they arise. A solicitor is entitled to refuse an instruction if the client does not accept those terms. A solicitor may terminate a retainer if the client does not abide by the agreed payment terms.

### **Contingency fee arrangements (also known as 'no win/no fee' or 'no foal/no fee agreements')**

It is permitted for a solicitor to enter a fee agreement with their client where the solicitor agrees to waive their professional fee if the case is ultimately unsuccessful in Court. However, solicitors should be cognisant of the advertising restrictions and regulations in place governing such agreements.<sup>15</sup>

Solicitors should also be cognisant of the rule against champerty and the case law in this area.<sup>16</sup>

### **Legally aided clients in criminal matters**

Where a solicitor on the legal aid panel is either instructed by the defendant or nominated by the court to act on behalf of the defendant, they are under a duty to comply with those instructions unless they have reasonable grounds for refusing to act.<sup>17</sup>

### **Legally aided clients in civil matters**

When accepting instructions in civil legal aid matters, solicitors should have regard to the relevant legislation.<sup>18</sup>

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<sup>15</sup> Section 4 of the Solicitors (Amendment) Act 2002 and SI no 644/2020 – Legal Services Regulation Act 2015 (Advertising) Regulations 2020. See also practice note dated 04.04.2014, Restrictions and Limitations on Solicitors' Advertising ([lawsociety.ie](http://lawsociety.ie)).

<sup>16</sup> Champerty occurs where there is a further agreement that a person who gives the aid shall receive a share of what might be recovered in the action. See *Giles v Thompson* [1993] 3 All E R 321; *McElroy v Flynn* [1991] ILRM 294; and *Fraser v Buckley and Others* [1994] 1 ILRM 276.

<sup>17</sup> Criminal Justice (Legal Aid) Act 1962.

<sup>18</sup> Civil Legal Aid Act 1995.

## PROPER STANDARD OF LEGAL SERVICES

### General

A solicitor should be open, frank, and honest in all dealings with clients. They should treat clients with respect and carry out instructions in a courteous and professional manner. The relationship between solicitor and client should be one of mutual respect.

The use of plain English, expressed in a modern way, is desirable in all dealings with clients. Although there are some circumstances in which a particular phrase or maxim has a precise meaning, the excessive or unnecessary use of old-fashioned language or arcane terminology may alienate a client and can make the solicitors' profession appear out of touch with modern life.

The retainer of a solicitor is a contract for legal services whereby, in return for the offer of a client to retain them, a solicitor, expressly or by implication, undertakes to fulfil certain obligations.

The standard of care expected of a solicitor is that of a reasonably careful and skilful solicitor who has the relevant expertise.<sup>19</sup> The solicitor should also consider the fact that the relationship of a solicitor and client is of a fiduciary nature.

A solicitor should also consider that, in certain circumstances, the courts have held as a matter of law that a duty of care may be owed, not just to a solicitor's own client, but to a third party, such as an intended beneficiary of a will or to the purchaser of a property when a solicitor is replying to requisitions on title on behalf of the vendor of the property.<sup>20</sup>

A solicitor should, as far as practicable, explain to the client the procedures to be followed in a matter and the length of time the process is likely to take.

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<sup>19</sup> *Roche v Peilow* 1985 [IR] 232

<sup>20</sup> *Wall v Hegarty* [1980] ILRM 124; *Doran v Delaney*, Supreme Court [1998] 2 IR 61.

A solicitor should keep the client informed of the progress of the matter. Where it is important to notify the client of a particular matter, or to confirm or clarify details with the client, preferably this should be done in writing.<sup>21</sup>

Solicitors should be cognisant of the potential challenges faced by clients who have language or literacy difficulties, or other disability that could impair their understanding of the documents.

### **Failure to reply to letters**

A solicitor should reply to correspondence and should return phone calls in a timely manner, both to clients and colleagues. In circumstances where there is no update or if the solicitor has no instructions in the matter, the solicitor should respond to say that, rather than not replying to the correspondence.

### **Complaints**

A solicitor should have a dispute-resolution procedure in place for dealing with complaints, which should be communicated to the client. The client should be advised of any actions that will be taken in relation to the matter that is the subject of a complaint.<sup>22</sup>

When providing a client with a bill of costs, the solicitor is required to provide the dispute-resolution procedure available, should the client wish to dispute any aspect of the bill of costs.<sup>23</sup>

### **Accounting for monies**

A solicitor should account to the client for monies received and paid out on the client's behalf, including details of all charges and outlays incurred at the conclusion of any matter.<sup>24</sup>

A solicitor should return clients' monies held in a client account on behalf of a client in respect of a specific matter after the conclusion of the provision of legal

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21 'Terms and Conditions of Business Precedent' – Law Society (see [www.lawsociety.ie](http://www.lawsociety.ie)).

22 'Internal complaints procedure in solicitors' firms'; Terms and Conditions of Business Precedent – Law Society, (see [www.lawsociety.ie](http://www.lawsociety.ie)).

23 Section 152(3) of the Legal Services Regulation Act 2015.

24 SI no 516 of 2014, Solicitor Accounts Regulations 2014.

services<sup>25</sup> to that client in respect of that matter unless the client provides the solicitor with specific instructions to provide further legal services in respect of those monies.

### Client lacking mental capacity

A solicitor should satisfy themselves about a client's capacity to give instructions if they have any doubts about their client's capacity.

If a client lacks mental capacity, they will be unable to give instructions or enter into a contractual obligation. If the client has diminished capacity, they may require special assessment by an appropriate medical practitioner. Particular care is required in financial transactions.

A decision on legal capacity should be made in relation to the specific issue about which the client must give instructions, in recognition of the fact that there are different levels of understanding required for different transactions.<sup>26</sup> The client may have sufficient capacity to make some decisions but not others. There should also be recognition that mental capacity may fluctuate. An assessment as to capacity should be made at the time the client is giving instructions and at the time of the execution of any document.<sup>27</sup>

It should also be recognised that, in some cases, a person may not have the capacity to make any decisions that have legal consequences.<sup>28</sup>

<sup>25</sup> Retention of professional fees earned for longer than period allowable, Practice Note 2021

<sup>26</sup> Drafting Wills for the Elderly Client – Guidelines for Solicitors – Gazette, Jan/Feb 2009.

See [www.gazette.ie](http://www.gazette.ie).

<sup>27</sup> The Assisted Decision-Making (Capacity) Act 2015, is due to be commenced in June 2022. It provides that a person's capacity shall be assessed on the basis of their ability to understand the nature and consequences of a decision to be made by them in the context of the available choices at the time the decision is made.

<sup>28</sup> "Do not go Gentle" – Cherishing the Elderly Client – Gazette, December 2008. See [www.gazette.ie](http://www.gazette.ie);

"Joint Bank Accounts" – Guidelines for Solicitors – Gazette, December 2008. See [www.gazette.ie](http://www.gazette.ie);

"Drafting Wills for the Elderly Client" – Guidelines for Solicitors – Gazette, Jan/Feb 2009.

See [www.gazette.ie](http://www.gazette.ie);

"Administration of Estates" – Guidelines for Solicitors – Gazette, March 2009. See [www.gazette.ie](http://www.gazette.ie);

"Gifts: Acting for an Elderly Client" – Guidelines for Solicitors – Gazette, April 2009.

See [www.gazette.ie](http://www.gazette.ie);

"Enduring Powers of Attorney" – Guidelines for Solicitors – June 2009. See [www.gazette.ie](http://www.gazette.ie).

A solicitor should consider the context in which they are being instructed. If the solicitor has acted for the client or their family over many years, the solicitor or another colleague may have helpful background information. Particular care should be taken where the solicitor is acting for a new client, who has changed solicitors, who appears to have diminished capacity.

### **Vulnerable clients**

The solicitor has a special duty of care in respect of vulnerable clients. As the relationship between a solicitor and a client is of a fiduciary nature, a solicitor should be cognisant of characteristics that make a client more vulnerable, such as inexperience, youth, want of education, lack of knowledge, lack of business acumen, mental illness, frailty due to the age of the client or the client's lack of ability to make an informed and independent decision regarding their affairs. Solicitors should be alert to the danger of being requested to facilitate any type of financial abuse of a vulnerable client, such as the following:

- Client forced to give money or property to another,
- Client denied access to money or property,
- Money or possessions stolen,
- Client forced or misled into signing over ownership of their home or other property,
- Client's signature forged,
- Client forced to change their will,
- Misuse of a power of attorney,
- Misuse of joint bank accounts.

### **Duress or undue influence**

A solicitor should not accept instructions that they suspect have been given by a client under duress or undue influence. Particular care should be taken where a client is elderly or otherwise vulnerable to pressure from others. A solicitor will usually, but not always, see a client alone. In the case of suspected duress or undue influence, the solicitor should ensure that the client is seen alone.

In these circumstances, a solicitor must also consider whether there is a conflict of interest or duty and whether it would be in the best interests of that client to accept the client's instructions, particularly where the solicitor acted for another connected family member in another matter.

A solicitor's duty involves more than merely taking instructions. A solicitor has a duty to make full inquiries about the client's circumstances and then to advise them whether they should proceed with the transaction, taking all factors into account. The advice may extend to advising the client to make provision for their own future needs.

If a court is asked to investigate an allegation of duress or undue influence, it is not necessary that the court finds a wrongful act. Where the presumption arises, the court intervenes in order to prevent an abuse of influence possessed by one party over the other.

Where there is no evidence of undue influence, but the client wishes to enter into a transaction that would not be in their best interests, such as an improvident bargain, a solicitor is under a duty to clearly advise the client of the consequences of entering into the transaction and the possible alternative options available to the client. These advices should be recorded in writing.<sup>29</sup>

### Family and child care law

The practice of family law benefits from a collaborative approach and the development of skills that enable the practitioner assist the parties to reach a constructive settlement of their differences. The best interests of children should be paramount. Solicitors should encourage a conciliatory approach, as families will have to co-exist long after the case has concluded.<sup>30</sup>

Please see the notes in Chapter 7.

### Litigation, arbitration and mediation

In addition to litigation, solicitors should familiarise themselves with other methods of dispute resolution, such as mediation and arbitration.

Solicitors must provide their client with information on mediation as a means of resolving disputes unless the circumstances deem it inappropriate to do so.<sup>31</sup>

Initiating or engaging in settlement discussions where appropriate, whether through mediation or otherwise, is consistent with effective representation.

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<sup>29</sup> *Carroll v Carroll* (2000) 1 ILRM 2010;

*Bourke v O'Donnell & Ors.* (2010) 1 EHC 348.

<sup>30</sup> *Family Law in Ireland, Code of Practice* (2017) – Law Society Family Law and Child Law Committee.

<sup>31</sup> Section 14 of the Mediation Act 2017.

## TERMINATION OF A RETAINER

### General

A solicitor should not terminate the solicitor/client relationship without good cause and without reasonable notice.

The solicitor should confirm in writing that they have ceased to act. Where court proceedings have been commenced, the solicitor must comply with the procedures for coming off record.

A solicitor may cease to act in a case where they have asked the client to put them in funds, and the client has refused to do so, as the solicitor/client relationship has broken down.

If the solicitor terminates the solicitor/client relationship for good cause, and has given reasonable notice to their client, they are entitled to be paid for the work done.<sup>32</sup>

If instructions had been accepted on a contingency fee basis, it is implied in the arrangement that the solicitor will continue to have carriage of the case. If the solicitor's retainer is terminated, the solicitor is entitled to be paid for the work done.

### Client's failure to act on advice or to provide instructions

A solicitor may be compelled to cease to act for a client because the client refuses to accept and act upon the advice that the solicitor has given them, and the circumstances are of such importance as to damage the trust on which the solicitor/client relationship is based.

A solicitor should cease to act for a client where the client refuses or fails to give the solicitor further instructions, and where appropriate make an application to the courts to come off record.<sup>33</sup>

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<sup>32</sup> 'Terms and Conditions of Business' – see [www.lawsociety.ie](http://www.lawsociety.ie); 'Transferring files between solicitors' – Practice Note, 2<sup>nd</sup> Edition.

<sup>33</sup> Transferring Files between Solicitors, Practice Note 2020.

### Loss of capacity

If a client suffers loss of capacity, the retainer of the solicitor is terminated by law. If the solicitor's instructions pre-date the loss of capacity, the solicitor should not proceed based on the instructions given before the loss of capacity, save in certain circumstances where protective measures are prudent.

### Termination when client in custody

A solicitor who has accepted instructions to appear in court for a client who is in custody may not withdraw from the client's case without obtaining permission from the court before which that client is next scheduled to appear.<sup>34</sup>

### Termination by client

A client may change solicitor whenever they wish to do so but remains liable to the first solicitor for all reasonable charges incurred for legal services properly provided.

### Undertaking in respect of payment of costs

This topic is considered in detail at page 96.

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<sup>34</sup> Section 215, *Legal Services Regulation Act 2015*.





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# CHAPTER 3

## CONFLICT OF INTEREST

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## CONFLICT OF INTEREST

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### GENERAL

A solicitor should not act in a matter, or any part of a matter, where there is a conflict of interest.

A conflict of interest means a situation where a solicitor's separate duty to act in the best interests of two or more clients in relation to the same or a related matter conflict.

Conflicts of interest can arise between a solicitor and client(s) and between two or more clients.

A solicitor is likely to have a conflict if either client could reasonably take exception to what the other client has asked the solicitor to do. Acting in a conflict-of-interest situation may involve a solicitor in a breach of the duty of undivided loyalty owed to each client, a breach of the duty to make full disclosure to each client in a matter, or a breach of the duty of confidentiality owed to each client.

Where there may be a conflict of interest or a risk of a conflict of interest, it is a matter for the judgement of the solicitor in deciding whether to act, based on the professional duty owed by a solicitor to their client. It is not a matter for the judgement of the client(s). A solicitor must give careful thought to the matter to ensure that their professional obligations are discharged, that no conflict of interest arises, and/or that any identified risk is carefully considered and mitigated.

A solicitor owes a duty to a client to disclose all relevant information to them. This follows from the fact that the solicitor is the agent of the client, who is the principal. In practice, this means that a solicitor must be careful not to accept information that is to be kept confidential from the client.

## CONFLICT OF INTEREST BETWEEN TWO CLIENTS

If a solicitor, acting with ordinary care, would give different advice to different clients about the same matter, there is a conflict of interest, and the solicitor should not act for both clients. The solicitor owes a duty of care to each individual client, so must advise in accordance with that client's best interests. Even where clients have a substantially common interest or where they are competing for the same objective, where the advice given to each party differs, a conflict may arise.

To act in a conflict-of-interest situation may involve the solicitor in:

- a) A breach of the duty of undivided loyalty owed to each client,
- b) A breach of the duty to make full disclosure to each client in a matter, or
- c) A breach of the duty of confidentiality owed to each client.

## CONVEYANCING TRANSACTIONS

### General

A solicitor may not act for both vendor and purchaser in a conveyancing transaction, with certain limited and defined exceptions, as set out.<sup>35</sup> Solicitors are reminded that, under the *Legal Services Regulation Act 2015*,<sup>36</sup> misconduct may be an act or omission where the act or omission consists of a breach of the *Solicitors Acts 1954 to 2015* or any regulations made under those Acts.

The exceptions include the voluntary transfer of property that is a family home or a shared home from its owner (or its owners, where spouses or civil partners hold as tenants in common) to the joint tenancy of the owner and their spouse or civil partner. There are also exceptions for certain transfers between associated companies, transfers affecting trusts, and transfers between 'qualified parties'. The exception for 'qualified parties' is subject to the firm observing certain statutory requirements and guidelines issued by the Law Society.<sup>37</sup>

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35 *SI no 375 of 2012, Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulations 2012.*

36 *Legal Services Regulation Act 2015, section 50 (irishstatutebook.ie).*

37 *SI no 375 of 2012, Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulations 2012; section 432 of the Taxes Consolidation Act 1997 – 'Meaning of "associated company" and "control"'; 'Ethical Barriers Within a Firm' – Practice Note, March 2013.*

### Voluntary property transactions

Subject to the exceptions set out in the preceding paragraph, a solicitor cannot act for both parties in a voluntary property transaction. A solicitor cannot refer one party to another solicitor for ‘independent legal advice’ and continue to act for both parties in the execution and completion of the documentation.

### Second party to a conveyancing transaction not represented

There is no prohibition on a solicitor acting in a transaction where the other party is not represented by a solicitor, but the solicitor should proceed with caution and undertake no work on behalf of the other party.

If one party to a matter wishes to represent themselves, there is a danger that the solicitor who is representing the other party might later find it difficult to show that they were not representing both parties, in breach of the regulations. It is recommended that the solicitor write to the non-represented party, informing that person that the solicitor is not representing, advising, or assisting them in the transaction. A copy of that letter should be kept on file. In such cases, the solicitor should be careful to ensure that they do not do any conveyancing work that would normally be done by the other side in the transaction.<sup>38</sup>

### Owners’ management companies

A solicitor’s firm cannot represent both an owners’ management company and the developer of the development in the transfer of common areas in a multi-unit development in certain circumstances.<sup>39</sup>

### Prohibition on acting for borrower and lender in commercial conveyancing transactions

Solicitors are prohibited from acting on behalf of both a borrower and a lender in a commercial property transaction because of the inherent conflict of interest.

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<sup>38</sup> ‘Separate representation for both parties to a conveyancing transaction’, *Practice Note*, April 2020.

<sup>39</sup> Section 3(6) of the Multi-Unit Developments Act 2011, which applies for developments where there are apartments or duplexes and where there has been no sale of a unit before 1 April 2011.

They may not act on behalf of both of the following:

- 1) The lender and borrower,
- 2) The lender and guarantor,
- 3) The lender and indemnifier, or
- 4) The lender and security provider.

A borrower's solicitor is also prohibited from giving a 'relevant undertaking', as defined in the regulations, to a lender in the course of a commercial property transaction. There is an exception where the solicitor's undertaking expressly provides that the solicitor's liability to the financial institution pursuant to the undertaking does not exceed €75,000.<sup>40</sup>

### Residential conveyancing

The certificate of title system currently in use (2011 edition) in residential mortgage lending is based on the premise that the borrower's solicitor does not also act for the lending institution.

### Undertaking to lender on behalf of solicitor

A solicitor should not give an undertaking to or for the benefit of a lender in relation to a loan transaction in which the solicitor, or a connected person of that solicitor, has a beneficial interest in the underlying property that is to secure the loan, unless the lender has consented in writing to the solicitor providing the undertaking.<sup>41</sup>

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<sup>40</sup> SI no 366 of 2010, *Solicitors (Professional Practice, Conduct and Discipline – Commercial Property Transactions) Regulations 2010*.

<sup>41</sup> SI no 211 of 2009, *Solicitors (Professional Practice, Conduct and Discipline – Secured Loan Transactions) Regulations 2009*.

## NON-CONVEYANCING TRANSACTIONS

Where clients consent to one firm representing both parties to a non-conveyancing transaction, the law requires that each client gives **informed** consent. This means that the client must know and understand that there is a potential conflict. The client must know and understand that the solicitor may not be able to advise each client as fully as that solicitor would if the solicitor did not act for both parties.

Solicitors should be alert to the dangers of acting for two clients who have a potential conflict, even if they consent to the solicitor representing both parties. The law provides that where an individual, such as a solicitor who has fiduciary duties, undertakes conflicting duties to more than one person, this in itself is a breach of duty. The solicitor should not over-commit in the first instance, because the solicitor is in a relationship of trust and must avoid conflicts of interest from the beginning.<sup>42</sup>

Where a solicitor has previously acted for two parties jointly and is later asked to accept instructions in a new matter on behalf of one of the parties, where the other party is on the opposing side, the solicitor should consider whether there is a conflict because of the solicitor's knowledge of the facts of the matter. If the solicitor is in possession of information, gained within the prior solicitor/client relationship, that could create an unfair advantage or the perception of unfair advantage over the position of the other party, then the solicitor should consider, at the outset, whether it is appropriate to act.

The solicitor should consider obtaining confirmation that the other party has no reasonable objection to the retainer.

If there is a perception of a conflict of interest or if the solicitor feels their independence is compromised, the solicitor should consider whether it would be in the client's best interest to instruct a different solicitor, to avoid the issue being a focus in itself, to the detriment of the client's case. The circumstances

<sup>42</sup> 'Potential conflict of interest where a solicitor is acting for both driver and passenger of the one vehicle', Practice Note, Gazette, July 1998 (see [www.gazette.ie](http://www.gazette.ie)); *Prince Jefri v KPMG* [1999] 1 All ER 517; *Moody v Cox & Hatt* 1917.

of each case must be examined and the matter decided on a case-by-case basis. Factors such as the inequality in bargaining power between the parties should be considered.

### Client with conflicting roles

A solicitor should avoid acting for a client with conflicting roles. When taking instructions, the solicitor should make it clear to the client that they can only accept instructions and give advice for one role, and agree and document the role for which they are accepting instructions.

### Separate representation for vulnerable clients<sup>43</sup>

Where, in the judgement of a solicitor, one of the parties to a non-conveyancing transaction, while having full capacity, is vulnerable, the solicitor should not act on both sides, and each party should be separately represented by a different firm. This is in order to ensure that both parties receive independent advice. It helps preserve the integrity of the transaction and protects it from being challenged at a later date. It also protects the solicitor.<sup>44</sup>

Solicitors should be aware that the characteristics of vulnerability are not exhaustive and include a person who, by reason of age, infirmity, mental illness, mental incapacity, or physical disability, lacks the ability to make an informed or independent decision regarding the matter.<sup>45</sup>

The *Assisted Decision-Making (Capacity) Act 2015* (ADMA) introduced a new statutory framework for individuals who have difficulty in making decisions without help. The Act provides for the establishment of the Decision Support Service within the Mental Health Commission.<sup>46</sup>

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<sup>43</sup> *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* (see also Chapter 2 on the characteristics that might make a client vulnerable).

<sup>44</sup> 'Transactions Involving Vulnerable/Older Adults' (Practice Note, 2012).

<sup>45</sup> See also chapter 2 – Vulnerable Clients

<sup>46</sup> At the date of publication of this Guide, only the office of the Decision Support Service has been established, and the provisions of the ADMA dealing with supported decision-making have not been commenced.

### Client lacking mental capacity

A person lacking mental capacity does not have capacity to contract with a solicitor for legal services or provide instructions. The solicitor should not assume a lack of mental capacity and should establish in their view whether or not the individual is capable of giving instructions.<sup>47</sup> If the solicitor is of the opinion that the individual is not capable, enquiries should be made as to the existence of an EPA.

Accordingly, where a family wishes to provide for a member lacking mental capacity, which involves transferring or otherwise dealing with their assets, the solicitor who has been consulted should advise the family that it is not possible for that solicitor's firm to act on both sides of the transaction. Having followed the steps set out above regarding assessing the relevant person's capacity and checking for the existence of an Enduring Power of Attorney, the family should be informed about the Wards of Court system.<sup>48</sup>

### State solicitors

A solicitor appointed as a 'state solicitor' by the Director of Public Prosecutions is contractually prohibited from acting in cases or matters that would conflict with their duties to the Director, including, but not limited to, matters arising from the circumstances of a criminal investigation or prosecution.

### Independent legal advice

There are circumstances in which a firm representing two parties to a non-conveyancing matter may decide that, while it is not necessary for both parties to the matter to be represented by a separate firm, it is advisable that either or both parties seek advice from a different firm – or different firms – in relation to certain aspects of the transaction. It may be necessary to refer both parties to seek independent advice if the first solicitor is not independent of either client.

<sup>47</sup> *The functional approach to capacity should be used in making this assessment. A functional approach to assessing capacity means that a person's capacity shall be assessed on the basis of their ability to understand the nature and consequences of a decision to be made by them in the context of the available choices at the time the decision is made.*

<sup>48</sup> *The provisions of the Assisted Decision Making Capacity Act are likely to be in place from June 2022 and will replace the Wards of Court system.*

Independent advice can only be given by a separate firm – it cannot be given within the same firm. In circumstances where a second firm gives independent advice to a client in a non-conveyancing matter, that client is the client of the second firm in relation to that advice. The second firm owes a duty of care to that client. The solicitor giving the independent advice will usually have been sent an outline of the facts of the matter by the first solicitor. The second solicitor must question and advise the client. The second solicitor should be satisfied that the client understands the nature and implications of the matter. The second solicitor should make a note of the meeting and, if requested by the client, write to confirm the outcome of the meeting to the first solicitor.

It is recommended that in any matter where independent legal advice has been given, and the solicitor giving that advice is satisfied that the client should proceed, the execution of any document by the party who obtained that advice should be witnessed by that solicitor.

### **Conflict in probate and administration**

A solicitor is not prohibited from acting on behalf of the legal personal representative (LPR) and a person in whose favour an assent of property from the estate is being made.

A solicitor who is acting for the LPR is not prohibited from also acting on behalf of any beneficiary who executes a disclaimer in favour of the estate. However, the solicitor should be alert to the issue of conflict and, where necessary, one or more parties should be advised to take independent legal advice before the disclaimer is executed.

It is good practice that, where a solicitor acts as the LPR, that the solicitor LPR provide the beneficiaries with a copy of the section 150 notice on legal costs and any letter of engagement to the class of beneficiaries from whose benefit the legal costs will ultimately be paid (normally the residuary legatees). Solicitors not acting as LPR should advise their LPR client that it is best practice to provide a copy of the section 150 notice to the beneficiaries from whose benefit the legal costs will ultimately be paid and seek instructions to do so.

A solicitor is prohibited from acting for both grantor and grantee(s) in a Deed of Family Arrangement.

### Family law

Where a solicitor has acted for both parties in a non-contentious matter, and subsequently one party returns to that solicitor seeking family law advice then, before the solicitor agrees to act, the solicitor should satisfy themselves that they are not in possession of information, gained within the prior solicitor/client relationship, which could create an unfair advantage or the perception of unfair advantage, and the solicitor should consider whether it is appropriate to act.

The solicitor should consider, at the outset, obtaining confirmation that the other party has no reasonable objection to the retainer, so as to avoid the fact of the retainer becoming an issue in itself that may be to the detriment of the client's case.<sup>49</sup>

A conflict of interest can arise in the sale/disposal of a property where there are co-owners, most likely following a court order. Consideration should be given to agreeing joint carriage of sale.<sup>50</sup>

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<sup>49</sup> *Family Law in Ireland, Code of Practice – Law Society Family Law and Child Law Committee, 2017* (see Appendix 4).

<sup>50</sup> *Joint Carriage of Sale, Conveyancing Committee Practice Note, November 1999, which adopts the DSBA 1996 Practice Note re disposal of property in family matters.*

## CONFLICT OF INTEREST BETWEEN SOLICITOR AND CLIENT

A solicitor should not act where their duty to act in the best interests of a client in relation to a matter conflicts, or there is a significant risk that it may conflict, with their own interests in relation to that matter or a related matter. If the conflict arises during a transaction, the solicitor should give careful consideration to their position.

### **Bequests or gifts by client to solicitor, staff, or family**

Where a client intends to bequeath under their will or make a gift by deed to the solicitor drafting the will or deed, or to a partner, staff member, or member of the family of that solicitor, then the solicitor should not act and should advise the testator to consult another firm.

Where a client wishes to leave a token legacy or to make a token gift of a nominal amount to a solicitor or member of the solicitor's staff or family, it would not be considered unprofessional to take such a gift or bequest. However, the prudent course is for the solicitor to refuse to accept any benefit under a will that the solicitor or the firm in which they work are personally drafting.

### **Wills for parents**

If a parent asks their child, who is a solicitor, to make a will, there is potential for conflict of interest. A conflict may arise between the interests of the solicitor and their other family members and, in these circumstances, the solicitor should recommend that the testator consults a different firm to draft the will and, if the parent insists, then the solicitor should proceed with caution.

Similar considerations may apply to the drafting of wills for other family members.

### **Borrowing money from a client**

A solicitor should not borrow money from a client unless that client is independently represented by another firm in that transaction or it is part of the business of the client to lend money, as when the client is a bank. If the client does not come within that category of client, then best practice dictates that the solicitor should arrange for the client to obtain independent legal advice and

that full supporting documentation for the loan be recorded on the client's file.<sup>51</sup> Accordingly, details of the agreement for the client to lend money to the solicitor should be evidenced in writing, which should include, among other things, the amount of the loan, the date of the agreement, the terms of repayment, and evidence of the identity of the solicitor providing the independent legal advice.

### Loans to clients

If a solicitor makes a loan of a purely personal nature to a client, the solicitor should ensure that documentation is put in place to support the solicitor's view that the transaction is a personal one. If security for the loan is required, or there are terms and conditions attached to the loan, separate advice or representation will be required by the client. A solicitor who engages in any activity that amounts to carrying on the business of moneylending is subject to the provisions of national and EU legislation, as well as other instruments, such as the relevant consumer protection code. In addition to the specific legal obligations and liability that such laws create, a breach of them could amount to professional misconduct.<sup>52</sup>

### Loans from one client to another client

No sum in respect of a private loan from one client to another client should be paid out of client funds held for the client lender, either by means of a client ledger transaction between the clients or to a client borrower directly. Any such loan arrangements between clients should be a matter for the clients involved to be dealt with between the parties.<sup>53</sup>

### Prohibition on payments to clients

A solicitor should not, directly, or indirectly, make or offer to make any payment to or on behalf of any person as an inducement to obtain or retain instructions from that person or for the purpose of securing the transfer of that person's instructions from another solicitor.

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51 *Solicitors Borrowing from Clients Practice Note, Regulation of Practice Committee, 2019.*

52 *Loans from One Client to Another Client', Practice Note 2019.*

53 *'Loans from One Client to Another Client', Practice Note 2019.*

A solicitor may discharge outlays associated with a client transaction during the course of that transaction on client's instructions.

### **Solicitor holding power of attorney**

Where a solicitor holds a power of attorney from a client, they operate under the law of agency and have a fiduciary duty. An agent cannot benefit himself or others while acting as agent for the principal, unless specifically authorised to do so.

### **Joint ventures between solicitor and client**

There may be circumstances where a solicitor enters into business or engages in a transaction with one or more clients by way of joint venture, by way of example, in either a partnership or through a limited company. While there is no rule prohibiting the solicitor, or their firm, from acting for such joint venture, care must be taken by the solicitor to avoid potential or actual conflicts of interest.

### **In-house and public-sector solicitor**

In-house and public-sector solicitors should avoid conflicts of interest when providing services to their employers. The employer may also have an internal code of ethics that outlines conflicts of interest in the context of the employment. Where an in-house or public-sector solicitor has a personal conflict of interest, the solicitor should advise the employer of the conflict and where necessary make alternative arrangements.



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## **CHAPTER 4**

# **PRIVILEGE AND CONFIDENTIALITY BETWEEN SOLICITOR AND CLIENT**

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## CHAPTER 4

# PRIVILEGE AND CONFIDENTIALITY BETWEEN SOLICITOR AND CLIENT

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### GENERAL

Legal professional privilege (LPP) is a common-law privilege. It is an exemption conferred on clients to protect communications that they have with their solicitor that may otherwise require disclosure. There is a distinction between the law of LPP and the professional duty to keep clients' affairs confidential. Privilege applies to both private practice and in-house and public-sector solicitors.

In 2020, the Law Society produced two practice notes for members on LPP – 'Legal professional privilege' and 'Legal professional privilege and in-house counsel'. The first practice note provides an overview on the status of LPP for all solicitors and provides a summary of the principal duties with regard to LPP. The second practice note focuses on the position for solicitors working in-house in the private or public sector.

### PRIVILEGE

LPP is a fundamental feature of the administration of justice and the rule of law. When privileged communications pass between a solicitor and their client or a prospective client, the privilege is that of the client, and the solicitor cannot be compelled to disclose those communications unless ordered to do so by a court. Solicitors should advise their clients that they, the client, have a right to assert a claim to LPP upon forming a view that a valid claim to LPP arises.

There are two forms of LPP: legal advice privilege and litigation privilege.

#### Legal advice privilege

Communications that qualify as privileged communications are those that contain legal advice. Legal advice privilege applies to any legal advice, either oral or written, and once a communication is privileged, it remains so.

### Litigation privilege

Litigation privilege applies to communications made for the dominant purpose of preparing for litigation or anticipated litigation, or in an attempt to agree matters so as to avoid litigation.<sup>54</sup> Litigation privilege only extends to the scope of the relevant proceedings, unless closely related proceedings ensue. Solicitors should be aware that it is for the party asserting privilege to justify any claim of privilege.

### Legislation, court orders or warrants

Solicitors should be aware of anti-money-laundering legislation and how this affects privilege and confidentiality.<sup>55</sup>

If a solicitor is served with a court order or warrant requiring the production of documentation of a particular client, the terms of the court order or warrant should be examined. If items subject to privilege are included in the order, the solicitor has a duty to check the documentation and list and retain any material over which they are claiming privilege. The solicitor may be required to provide a list of material withheld if they are withheld on the basis that they are protected by LPP.<sup>56</sup>

### Tax legislation

Solicitors may be accountable persons in certain circumstances in respect of tax payable, such as capital acquisitions tax and capital gains tax, or may have reporting obligations in relation to certain transactions. However, legislation provides that a solicitor may refuse to allow the Revenue Commissioners to inspect files or documents where the solicitor's client has a legal right to do so, such as where privilege can be established.<sup>57</sup>

### Receipt of information intended for the other party to litigation

A solicitor should not access privileged communications intended for the other side.

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<sup>54</sup> See Law Society Practice Note, *Legal Professional Privilege*, published July 2020.

<sup>55</sup> AML Guidance and Resources ([www.lawsociety.ie](http://www.lawsociety.ie))

<sup>56</sup> 'What to do when the CAB comes to call' – Practice Note, *Gazette*, May 2000.

<sup>57</sup> Section 902(A), 907(A) and 817J of the Taxes and Consolidation Act 1997; Revenue Commissioners Guidance Notes on Mandatory Reporting Obligations; section 128(3) of the Stamp Duties Consolidation Act 1999 and Revenue Notes for Guidance.

If a solicitor is on notice or is satisfied that evidence has been obtained illegally – for instance, if it has been stolen – this evidence should not be produced to the court.

### Material disclosed by mistake

If a privileged communication is inadvertently disclosed to another party, the solicitor can still assert privilege on behalf of the client. Solicitors should not knowingly open privileged communications not addressed to the solicitor or the solicitor's firm. If a solicitor mistakenly acquires such communications, then privilege is retained by the sender.

### Common interest and joint interest privilege

In a situation where two parties have a common interest in the outcome of litigation or investigation, and privileged communications are shared, the parties may consider a common interest agreement to maintain the LPP.

In the case of a joint retainer where a communication is provided to all clients jointly, privilege over that communication can be preserved if one party goes on to be represented by that solicitor following the joint retainer. Each party may be entitled to see the privileged communication providing legal advice issued during the joint retainer.

### Loss or waiver of privilege

Privilege may be lost by inadvertence or waiver. It can be waived by the client or, if the client has died, by their personal representative to whom privilege passes. Where privilege has been lost due to the intentional release of a privileged document, then the privilege is lost. However, an automatic waiver does not arise in the event that a privileged document is disclosed to a third party.

### Privilege may be lost in the following circumstances:

- Communications made for some fraudulent or illegal purpose,
- Communications made by a client to a solicitor before the commission of a crime for the purpose of being guided or helped in the commission of that crime,
- Where privilege may be overridden by statute,
- In the case of records of public proceedings, public documents, pleadings, or copies of them when they have been filed, depositions and transcripts of proceedings in court,
- In some proceedings which involve the welfare of minors.

## ADDITIONAL CONSIDERATIONS FOR THE IN-HOUSE AND PUBLIC-SECTOR SOLICITOR

As set out above, privilege applies to the in-house and public-sector solicitor. However, it is essential that solicitors working in an in-house or public-sector capacity are familiar with the up-to-date position in relation to the law of privilege in the various jurisdictions where the company or organisation operates. The Irish courts do not draw any distinction in respect of the general application of LPP to legal advice received from in-house counsel. It would be prudent for the in-house solicitor to obtain external legal advice where an EU competition law matter arises, so that the advices are protected by privilege.<sup>58</sup>

## PROFESSIONAL DUTY OF CONFIDENTIALITY

### General

The professional rule of confidentiality is wider than legal privilege and applies to all communications passing between a solicitor and their client or former client, and to the existence of the relationship. It is also an implied term of the contract for legal services between the solicitor and the client.

Any matter relating to a client's affairs can only be disclosed with the consent of the client, by the direction of a court, or to a body requiring disclosure while exercising its statutory powers.

The solicitor's professional duty of confidentiality should override a solicitor's inclination as a dutiful citizen to report any matter to the authorities or to cooperate with them against the interest of the client. For instance, where a solicitor is asked by An Garda Síochána for information or documentation relating to a client, unless the client is prepared to waive confidentiality, the solicitor should insist upon receiving a court order or warrant. Likewise, where the solicitor is asked to attend court to give evidence of matters that are within solicitor/client confidentiality, the solicitor should not attend unless he receives a witness summons or subpoena. Where this is done, it will be a matter for the

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<sup>58</sup> *Akzo Nobel Chemicals Limited v European Commission (Case C-550/07P)*; 'A Guide for In House Solicitors Employed in the Corporate and Public Sector' (May 2018). *Legal Professional Privilege and In House Counsel*, Law Society Practice Note 2020.

court, not for the solicitor, to decide the issue of confidentiality. The solicitor can explain to the court that certain information is confidential, as opposed to privileged, and then leave the matter in the hands of the court to decide.

A solicitor should keep the addresses of clients confidential. However, as a matter of courtesy, they may offer to forward correspondence to a client.

### **Solicitor as mediator**

The duty of confidentiality also applies to a solicitor who is acting as a mediator.

### **Revenue audits**

When a solicitor is the subject of a Revenue audit, all necessary steps should be taken by the solicitor to ensure that there is no breach of confidentiality.<sup>59</sup>

### **Disclosure of testator's affairs**

On the death of a client/testator, a solicitor should not, without the consent of the executor, disclose any information, other than to the executor, about the testator's affairs.

### **Supplying copy of will**

Before the issue of a grant of representation, a solicitor acting for the executor should not supply a copy of, or extract from, a will to a beneficiary, without the prior consent of the executor. The executor should, however, be advised that it is recommended practice to supply an extract of the relevant part of the will to an interested beneficiary.

### **Supplying copy of executor's or administrator's account**

On the completion of the executor's or administrator's account, a copy should be supplied on request to residuary legatees.

### **Testator's solicitor**

Where proceedings challenging a will are issued, the solicitor who drafted the will, may, with the consent of the executor, supply a statement to the parties to the proceedings about the circumstances surrounding the execution of the will.

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<sup>59</sup> *Memorandum of Understanding between the Revenue Commissioners and the Law Society of Ireland concerning the Audit of the Tax Returns of Solicitors and Solicitor's Practices* – February 2002; *Guidelines to Solicitors in relation to Revenue Audits* – Law Society, February 2002; see Appendix 5.

### **Wills acquired from another practice**

Where solicitors come into possession of envelopes containing wills from another practice, they are entitled to open the envelopes and may contact the testators or, if deceased, their personal representative for the purpose of notifying them of the existence of the wills and of advising that the will may require amendment, as appropriate, in accordance with changes in the law or on foot of further instructions.

### **Exceptions to confidentiality**

The circumstances that override confidentiality are similar to those that override privilege. Where a client attempts to use the solicitor to facilitate the commission of a crime or fraud, confidentiality is waived and the solicitor is then free to communicate that knowledge to a relevant third party, for instance to a colleague subsequently instructed in the matter.

### **Confidentiality in the face of risk to client or others**

Solicitors accept instructions from clients to provide legal services to them on the basis that everything disclosed to the solicitor within the solicitor/client relationship will be kept confidential. However, some extreme situations may arise that justify a breach of confidentiality, but this must be limited to the extent necessary.

Any time it is necessary to deviate from the general principles, it is suggested that a solicitor document their decision-making process.

Sometimes a solicitor may be informed of a situation where there appears to be a serious risk to the physical or mental wellbeing of the client or a third party. The solicitor will have to decide whether the threat is sufficiently serious to justify a breach of the duty of confidentiality. This may be a difficult decision, and the solicitor may have to consult with appropriate relevant professionals for advice and guidance to satisfy themselves that it is reasonable in the circumstances to breach the duty of confidentiality. In all the relevant situations below, solicitors should document their decision-making process.

### **Client with mental disorder**

If the solicitor is of the opinion that the risk arises because the client may be suffering from a mental disorder, the solicitor can encourage the client to contact their medical practitioner. If the solicitor believes it unlikely that this advice will be taken, the solicitor can consider making a confidential referral to the client's medical practitioner.

### **Risk of abuse, neglect, or ill-treatment of client**

If the solicitor becomes aware of a situation where there is a serious risk to the client, such as elder abuse, neglect, or ill-treatment, which requires the intervention of the health authorities on behalf of the client, the client should be encouraged to refer the matter to the relevant department in the Health Service Executive. If the solicitor believes it is unlikely that this advice will be taken, the solicitor can consider making a confidential referral to that office.

This situation may also apply in the context of a serious risk to third parties disclosed in the course of instructions.

### **Threats of death or serious injury**

If a solicitor is informed by their client of a death threat or of a threat of serious injury, the solicitor should encourage the client to report the matter to the gardaí.

### **Cases involving abuse or neglect of minors**

There may be exceptional circumstances involving a minor where a solicitor should consider revealing confidential information to the Child and Family Agency or An Garda Síochána. This may be where the minor is the client and reveals relevant information.

Similarly, there may be situations where an adult discloses abuse or neglect either by themselves or by another adult against a minor but refuses to allow any disclosure to third parties. If the situation indicates continuing sexual or other physical abuse, or ongoing neglect of a minor, and there is a threat to the minor's life or health, whether mental or physical, but there is a refusal on the part of the client to allow disclosure of such information, if the situation is sufficiently serious, a breach of the overriding duty of confidentiality may be justified and

a confidential referral to a the Child and Family Agency or an Garda Síochána can be made. The solicitor should consider whether the situation is sufficiently serious to justify such a breach and that a reasonable solicitor would breach the duty of confidentiality in similar circumstances.

In making this decision, the solicitor should be conscious that it is a criminal offence to withhold information from An Garda Síochána concerning offences against children and that the solicitors' profession is not exempt from the obligation to disclose.<sup>60</sup>

Solicitors should also be aware that the *Protections for Persons Reporting Child Abuse Act 1998* provides a legal immunity to the reporter of suspected child abuse to designated officers of Tusla, the Health Service Executive (HSE) or to members of the gardaí so long as the report is made in good faith and is not malicious.

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<sup>60</sup> A list of offences are contained in Schedule 1 of the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012*.

## CONFIDENTIALITY IN THE SOLICITOR'S OFFICE

### Shared accommodation

It is recommended that solicitors who share accommodation or staff with non-solicitors or another solicitor's firm put policies in place that restrict access to all information to authorised staff. Failure to do so could lead to a breach of confidentiality in respect of the business and affairs of the clients.<sup>61</sup>

This duty of confidentiality extends not only to the solicitor's office but also to any situation whereby a file is removed from the office by a member of staff of the firm such as attending court or working away from the office.

### Storage of records

When storing records in the office or off-site, or providing for the maintenance of those records, solicitors must take all reasonable steps to ensure that the client's information is kept confidential.

Files should be retained for the statutory period, or that identified in the solicitor's retention policy, and then destroyed.<sup>62</sup>

### Service providers

It is recognised that, in the course of practice, firms will inevitably have to give limited access to client data to their professional advisers, IT maintenance contractors, and others. The solicitor should ensure that the appropriate industry standard agreements are in place with the provider and that those agreements are in compliance with GDPR. Disclosure should be limited to that which is necessary.

### Staff of solicitor

The duty to protect clients' privilege and the duty to keep the affairs of clients confidential extends to the staff of a solicitor. It is recommended practice that staff should be informed of their responsibility to refrain from disclosing to any

<sup>61</sup> 'Head in the Clouds' – Gazette, December 2010 (see [www.gazette.ie](http://www.gazette.ie)).

<sup>62</sup> 'Data Retention and Destruction of Paper and Electronic Files', Practice Note, 2019. See also [www.lawsociety.ie/aml](http://www.lawsociety.ie/aml).

unauthorised party anything they learn in the course of their employment, and this should be acknowledged by them in writing.

It is recommended practice to have staff sign a confidentiality agreement informing staff of their obligation not to disclose to any unauthorised party anything they learn in the course of their employment. This duty, imposed on each member of the staff of a solicitor, is not terminated by the determination of the retainer of the solicitor by a client, by the completion of the matter in question, or by the termination of the employment of the member of staff.

### **Family law files**

A solicitor should be mindful of the extent and effect of the in camera rule. A solicitor must not disclose the contents of a family law file to any third party even with the client's consent (subject to limited statutory exemptions or a court order). It is recommended that solicitors advise their clients of the significance of the in camera rule.

The family law file of a deceased client should be kept confidential. This obligation survives the death of a client. If necessary, a direction from the court could be sought by the personal representative of a deceased client seeks information from the file.

### **Confidentiality of deed of Enduring Power of Attorney**

An Enduring Power of Attorney belongs to the donor of the power. It does not belong to the attorney or attorneys. Accordingly, an original Enduring Power of Attorney should not be released to an attorney or their solicitor for registration. The proper procedure is for the first solicitor to lodge the original Enduring Power of Attorney with the Registrar of Wards of Court, pending registration, in the event that the first solicitor is not instructed in the registration.



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# CHAPTER 5

## THE SOLICITOR AND THEIR RELATIONSHIP WITH THE COURT

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# CHAPTER 5

## THE SOLICITOR AND THEIR RELATIONSHIP WITH THE COURT

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### GENERAL

A solicitor owes a duty to do their best for their client. A solicitor also owes a duty to the court as an officer of the court.<sup>63</sup> The proper administration of justice requires that the court is able to rely upon every lawyer who appears before it or who has dealings with it.

A solicitor:

- a) Should promote and protect by all proper and lawful means, without fear or favour, the client's best interests,
- b) Should keep information about clients confidential and must not disclose the facts known to them regarding the client's character or previous convictions without the client's express consent,<sup>64</sup>
- c) Has an overriding duty to the court to ensure, in the public interest, that the proper and efficient administration of justice is achieved, and should assist the court in the administration of justice, and should not deceive, or knowingly or recklessly, mislead the court.

Solicitors' rights and obligations as officers of the courts are derived from the inherent jurisdiction of the Superior Courts over officers of the court as

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<sup>63</sup> 'Solicitors as Officers of the Court' ([lawsociety.ie](http://lawsociety.ie)).

<sup>64</sup> *The absolute duty of client confidentiality has been tempered by, inter alia, statutory duties under anti-money-laundering regulations, section 19 of the Criminal Justice Act 2011 and section 52 of the Criminal Justice Theft and Fraud Offences Act 2001, the Children First Policy and the protection of vulnerable persons, and any other legislative provisions that would require a solicitor to seek further guidance if confronted with a situation that could be covered by that legislation.*

recognised by statute in section 78 of the *Judicature (Ireland) Act 1877*<sup>65</sup> and section 61 of the *Courts (Supplemental Provisions) Act 1961*.

This inherent jurisdiction of the Superior Courts over solicitors can apply in the following areas, but this is not an exhaustive list:

- Enforcing solicitors' undertakings or compensating for loss arising from the breach of an undertaking,
- Imposing liability for costs on solicitors,
- Ensuring proper accounting for clients' monies by solicitors, including the suspension of the solicitor where necessary on application to the High Court,
- Ordering former solicitors to deliver up client files,
- Imposing sanctions on solicitors where the solicitor as an officer of the court is in contempt of the court.

A distinction must be drawn between the supervisory jurisdiction of the courts and the statutory framework for disciplinary action contained in the *Solicitors Acts 1954 to 2015*. The courts do not make findings of misconduct per se. That is the role of the Legal Practitioners Disciplinary Tribunal.

A solicitor should avoid improper or abusive litigation, predatory litigation, abuse of process, taking unfair advantage, misleading the court, and conducting frivolous and/or vexatious cases.

There will always be complex situations where maintaining the correct balance between a solicitor's duty to their client and their duty to the court is not straightforward, and such matters must be decided on the facts. It is important for solicitors to recognise their wider duties and not to rationalise misconduct in the mistaken belief that their only duty is to their client.

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<sup>65</sup> This sections states: "any solicitors, attorneys or proctors to whom this section applies shall be deemed to be officers of the Court of Judicature: and that that court and the High Courts of Justice and the Court of Appeal respectively or any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of Her Majesty's superior courts of law or equity might previously to the passing of this act have exercised in respect of any solicitor or attorney to practise therein".

Litigation is a reserved legal activity regulated by the *Solicitors Acts 1954 to 2015*.<sup>66</sup> The integrity of the justice system depends on the ethical conduct of solicitors as officers of the court and their overriding duty is to the rule of law and the administration of justice. Nowhere is that more apparent than when conducting litigation.

A solicitor should not assert what they know to be untrue or substantiate a fraud, as that would amount to a positive deception of the court. However, a solicitor is under no duty to undo the consequences of the court being misled by the opposing party, otherwise than on a point of law, where this occurs due to the opposing party lacking certain information or misinterpreting the available information.

A solicitor interacts with the court in one of two ways. First, directly by way of advocacy before the court and, secondly, in filing pleadings and other documents that come before the courts.

### The solicitor advocate

There are general rules that apply to all solicitor advocates, whether acting in a civil or criminal matter and irrespective of which side the solicitor is representing:

- 1) A solicitor should present their client's case to their client's best advantage. It is not the task of an advocate to win a case at all costs. The advocate has a duty to assist the court in reaching a just decision and, in furtherance of that aim, the solicitor must advise the court of relevant case law and statutory provisions.
- 2) While the advocate should not deceive the court in relation to any facts or evidence placed before it, the solicitor is not obliged to make available to the court any evidence harmful to their case of which the court or the opposing party is otherwise unaware. Save where appearing as a prosecution advocate, a solicitor is not under any duty to inform the court of the existence of witnesses who would assist the other side. However, if a solicitor knows that

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<sup>66</sup> Section 58 of the *Solicitors Act 1954* sets out the so-called 'reserved areas' in which legal services can only be provided by solicitors and, in some cases, barristers. These reserved areas deal primarily with conveyancing, litigation and probate work.

an affidavit or statement of truth has been made and filed in the case that they are conducting, and which is therefore within the knowledge of the court, and the affidavit or statement of truth is such that, if it were before the court, it might affect the mind of the judge, then the advocate's duty is to disclose the affidavit to the judge.

- 3) It is the duty of the advocate to uphold the proper interests of their client and to protect their client's liberty. The advocate is entitled to state every fact freely and to use every argument, whether technical or otherwise, that may be used in accordance with the law and within the rules of professional conduct. The advocate should resist any attempt to restrict them or their client in the performance of this task.
- 4) It is the duty of an advocate to guard against being made the channel of questions that are only intended to degrade the other side, a witness, or any other person. They are under a duty to exercise their own judgement both regarding the substance and the form of a question.
- 5) The advocate should never allow their personal feelings to intrude upon their task as an advocate. They should always act with due courtesy not only towards the court but also towards their opponent and all concerned in the case.
- 6) A solicitor should never call a witness whose evidence is untrue to the solicitor's knowledge, as opposed to their belief.

### ***Ex parte* applications**

In *ex parte* court applications, the solicitor has a particular duty to act in good faith and to present the court with all relevant information and/or correspondence and make full disclosure in respect of the application before the court.

## CONFLICT ARISING DURING RETAINER

According to the principles of agency, a solicitor – whether acting as advocate or otherwise – derives their instructions and authority solely from those who instruct them. It is an implied term of the retainer of a solicitor that they will use their professional discretion in the conduct of the proceedings. If the express instructions given to the solicitor give rise to a situation in which the inclusion or exclusion of evidence on the one hand and their duty to the court on the other hand conflict, they should, unless their instructions are varied, apply to the court to withdraw from the case, but without disclosing matters that are protected by the client’s privilege.

## PERJURY BY A CLIENT

A solicitor must decline to act further in any proceedings where a solicitor has knowledge that the client has committed perjury or has misled the court in relation to those proceedings, unless the client agrees to make a full disclosure of their conduct to the court. Likewise, it is the duty of the solicitor not to knowingly allow dishonest omission by a client in discovery, statements of truth, affidavits, and disclosure.<sup>67</sup>

## WITNESSES

### Advertising for witnesses

On the instructions of a client, a solicitor may advertise for witnesses to come forward to give evidence as to a particular occurrence, but the advertisement should not invite persons to testify as to particular facts.

### Calling a witness to give evidence

A solicitor should never call a witness to testify and give evidence in a case where that solicitor knows the evidence to be untrue.

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<sup>67</sup> *Square Global Ltd v Leonard* [2020] EWHC 1008 (QB): “It is fundamental that the client must not make the selection of which documents are relevant.”

### Interviewing witnesses

There is no property in a witness. A witness does not belong to either side in a case or proceedings.

A solicitor may interview a witness and take statements in any proceedings, subject to the agreement of the witness, whether that witness has been interviewed or called as a witness by the other party, provided there is no question of tampering with the evidence of a witness or suborning them to change their story.

Where a solicitor acts for the defence in criminal matters and interviews a witness for the other side, that solicitor may be exposed to the suggestion that they have tampered with the evidence of such a witness. A court or jury may conclude that the witness has been tampered with where such an interview has taken place. The fact that the witness has been interviewed may be seen to weaken the cross-examination, and this may harm the case to be made by the solicitor's client.

It is not improper for a solicitor to inform a witness that they are not obliged to make a statement, subject to specific legislative exceptions. The information the solicitor gives will depend on the interests of their client and the circumstances of the case.

### Witness in the course of giving evidence

When a witness is in the course of being cross-examined, a solicitor shall not, without the leave of the court, discuss the case with the witness. This prohibition covers the whole of the relevant time, including adjournments and weekends.<sup>68</sup>

### Payment to witnesses

A witness is entitled to expect reasonable expenses or reasonable compensation for loss of time for attending court or the payment of a reasonable fee for the services of an expert witness.

A solicitor should not make payments or agree to the making of payments to a witness contingent upon the nature of the evidence given or the outcome of a case.

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68 'Cross-Examination of Witnesses', *Practice Note, Gazette, November 1994* (see [www.gazette.ie](http://www.gazette.ie)).

### Payment of witnesses in legally aided cases

In legally aided cases, a solicitor should draw to the attention of a witness the fact that the case is being legally aided and that the witness fees and disbursements will be those that are adjudicated upon or assessed as being proper by the relevant authority responsible to pay legal fees. The solicitor should explain that no payments other than those made by the relevant authority can be made to the witness and that the solicitor has no personal liability for the payment of any fees, either those allowed or any fees additional to those amounts.

### Expenses of witness served with a subpoena

A solicitor should be cognisant of the fact that costs will not always be awarded in favour of their client, even where the client is successful in their claim or defence of the matter.

In the context of court proceedings, it is important to be mindful of the vital function the medical profession performs in society. Every effort should be made to accommodate medical practitioners in standby and attendance arrangements. Where it is not possible to reach an agreement with respect to attendance in court of a medical practitioner, a subpoena will have to be served. On these occasions, a medical practitioner is entitled to the usual attendance fee as would be payable on adjudication.

If the solicitor is of the opinion that their client should not have to bear the expenses of a particular witness on whom the solicitor has served a subpoena, they should bring the matter to the attention of the court and seek an order for costs in favour of their client in relation to those expenses.

### The solicitor as witness

It may be unwise for a solicitor to be a witness in their own case or to remain in a case where a member of their firm is called as a witness.

However, a solicitor may give evidence in a case where either the evidence to be given is purely formal, such as the witnessing of deeds in civil cases or, in criminal cases, where evidence relating to attendance at a garda station or prison is required.

In making the decision as to whether to continue or cease acting, consideration should be given to the nature of the case, the nature of the evidence, and the position of the client, should the solicitor cease to act. However, the interest of justice, real or perceived, should be the deciding factor.

## COMMUNICATION WITH THE COURT

A solicitor should not discuss the merits of a case with the judge, registrar, clerk or other official before whom a case is pending. Where during the case a written communication to the court is required, the solicitor should deliver a copy of the communication to the opposing party. Where an oral communication is proper, adequate notice to the opposing party should be given.

If, after the conclusion of the evidence and legal argument in a civil matter, judgment is reserved and the solicitor then discovers a proposition of law that is directly relevant and wishes to bring it to the attention of the judge, the solicitor on the other side ought to concur in their so doing, even if they know that the proposition is against them. If they do not concur, the first solicitor may submit the additional authority to the judge in writing and that solicitor should, at the same time, send the second solicitor a copy of the letter they have sent to the judge.

### Compliance with orders of the court

A solicitor is obliged to comply with an order of the court, and failure to do so may amount to contempt of court.

A solicitor should not aid or assist a client where the client refuses to obey an order of the court.

A solicitor is bound to honour an undertaking given to the court.

### Dress in court

A solicitor appearing in court should always dress in a manner that shows respect for the dignity and formality of the court.

### Publicity for pending litigation or proceedings

A solicitor should avoid any comment, in advance of any determination, that would be prejudicial to the administration of justice.

### Solicitor instructed in professional negligence proceedings

A solicitor should not make allegations of professional negligence or issue proceedings alleging professional negligence in the absence of supportive independent expert evidence.<sup>69</sup>

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<sup>69</sup> *Cooke v Cronin* [1999] IESC 54.

To sustain an allegation of professional negligence, it is necessary to provide evidence or a report by an independent expert.<sup>70</sup> There may be circumstances where it is necessary to issue a protective writ without an expert witness report, to protect the claim from expiration pursuant to the statute of limitations and provide an opportunity for the expert witness report/evidence to be obtained.<sup>71</sup>

### **Funding of litigation with a financial interest in the outcome is prohibited**

The law precludes parties unconnected with the proceedings from funding litigation in return for a benefit in the outcome.<sup>72</sup>

### **Duty of solicitors to encourage mediation and ADR**

Solicitors have a statutory duty to advise on the merits of mediation.<sup>73</sup>

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<sup>70</sup> *Greene v Triangle Developments & Anor* [2008] IEHC 52: “It would be most inappropriate for any party to issue proceedings alleging professional negligence or join a third party against whom professional negligence was to be alleged, without having a sufficient expert opinion available that would allow an assessment to be made to the effect that there was a statable case for the professional negligence intended to be asserted.”

<sup>71</sup> *Cooke v Cronin* [1999] IESC 54.

<sup>72</sup> *Persona Digital Telephony Limited and Another v The Minister for Public Enterprise, Ireland and Others* [2017] IESC 27.

<sup>73</sup> *Divorce cases under section 6 and 7 of the Family Law (Divorce) Act 1996 and prior to the issue of civil proceedings advise the client on mediation pursuant to section 14 of the Mediation Act 2017.*

## CRIMINAL CASES

### The solicitor prosecutor

In a criminal case, the responsibilities of the advocate acting for the prosecution are different from those of the advocate acting for the defence:

- 1) The advocate who is prosecuting must ensure that every material point is made that supports or weakens the prosecution case. The advocate should not regard their task as one of winning the case.
- 2) The advocate must present the case against the accused relentlessly but with scrupulous fairness.
- 3) The names of all witnesses and all material facts must be disclosed to the court, irrespective of whether the witnesses and facts are detrimental to the prosecution case.
- 4) The prosecutor must state the relevant facts dispassionately.
- 5) The prosecutor, particularly where the accused is unrepresented, should bring to the attention of the court any mitigating circumstances.
- 6) The prosecutor must not in their opening address state as a fact anything that they know, or ought to know, they are not in a position to prove.
- 7) The prosecutor must not deliberately withhold anything that tends to favour the accused.
- 8) The prosecutor must reveal all relevant cases and statutory provisions known to them, irrespective of whether the information is to the benefit of the prosecution case, and this is so whether or not the prosecutor has been called upon to argue the particular law in question.
- 9) The prosecutor must not conceal from an opponent facts that are within the knowledge of the prosecutor and that are inconsistent with the facts that the prosecutor has presented to the court. Before commencement of the trial, where a prosecutor obtains evidence that may assist the defence, or learns of witnesses who may do so, the prosecutor must supply the defence with the particulars of the evidence and the names of the witnesses. During the trial, if the prosecutor obtains evidence that they do not intend to use and that may assist the defence, they must give it to the defence. If the prosecutor knows of a credible witness who can give evidence concerning material facts that tend to show the accused to be innocent, they must either call that witness or make the witness statement available to the defence.

### Interviewing a witness for the other side

In a criminal case, it is recommended that the solicitor for the prosecution or the defence, who may wish to interview (a) witnesses who have already given evidence on deposition<sup>74</sup> or at the preliminary hearing in a prosecution for an indictable offence, or (b) witnesses who it is known are to be called as witnesses for the other side, should communicate first with the solicitor for the other side informing them of their intention.

It may be a wise precaution in such circumstances for the interview on behalf of the defence to take place in the presence of a representative of An Garda Síochána who is not involved in the case.

### The solicitor advocate for the accused

In a criminal case, the solicitor has a duty to ensure that the prosecution discharges the onus placed upon it to prove the guilt of the accused.

Unless there are exceptional circumstances, a client's privilege prevents the solicitor from making a disclosure of privileged information without the client's consent. The defence advocate, unlike the advocate for the prosecution, is under no duty of disclosure to the court or to the prosecution to correct any information that may have been given to the court by the prosecution if the correction would be to the detriment of the defendant. However, the advocate should not indicate agreement with information that the prosecution has put forward that the advocate knows to be incorrect. The advocate for the defence is obliged to disclose to the prosecution and to the court all relevant cases and statutory provisions relating to their client's case but should not, subject to alibi evidence, disclose any evidence in relation to their client's defence.

Should the court put any question to the advocate for the defence as to the character of the defendant, whether the character of the defendant is or is not an issue, their reply should be that the question is not one for them to answer.

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<sup>74</sup> *Witnesses can give evidence on deposition in a procedure defined by section 4F of the Criminal Procedure Act 1967, as substituted by the Criminal Justice Act 1999.*

While a defence advocate should present every technical defence that is available to the defendant, they should never present a defence other than one based upon the facts of the case.

### **Duty of disclosure of previous convictions**

Where the prosecution solicitor outlines to the court the accused's previous convictions, but this information is incorrect or incomplete to the knowledge of the solicitor for the defence, that solicitor, if asked by the court to comment on the list of previous convictions, should decline to comment.

When a solicitor is not asked to comment on the list of previous convictions, the solicitor should not be seen to corroborate the incorrect information furnished by the prosecution, as that would amount to positive deception.

Where an accused gives evidence to the court and, in so doing, accepts the list of previous convictions given to the court, and which list is to the knowledge of the advocate incorrect, that advocate must then cease their representation of the accused.

### **Admission of guilt by client**

In a criminal case, it is a matter for the jury or the court, not for the advocate for the defence, to decide the guilt or innocence of their client.

It is the duty of the solicitor for the defence to put the prosecution on proof of what it alleges, and the solicitor may submit to the court that there is insufficient evidence adduced to justify a conviction.

Where, prior to the commencement or during the course of a criminal case, a client admits to their solicitor that they are guilty of the charge, it is well settled that the solicitor need only decline to act in such proceedings if the client is insistent on giving evidence to deny such guilt or requires the making of a statement asserting their innocence. Where a client has admitted their guilt to their solicitor but will not be giving evidence, their solicitor may continue to act for them. The solicitor for the defence may also advance any other defence that obliges the prosecution to prove guilt other than protesting a client's innocence.

### Withdrawal where a client is in custody

A solicitor cannot withdraw from a case where they have accepted instructions to appear in court for a client who is in custody. The solicitor must obtain permission from the court before which that client is next scheduled to appear to withdraw from the case.<sup>75</sup>

### Prisoners in courthouse cells

When a solicitor requires to have a consultation with a prisoner in custody in cells within the courthouse or in the immediate vicinity of a court, the solicitor should inform the court and seek to have the accused's case put back to enable a consultation take place.

### The solicitor standing bail

A solicitor should not stand bail for a person for whom they or their firm act. It is unlawful for any person, including a solicitor, to be a party to a bargain to indemnify a surety for bail.

### Solicitors providing legal services in garda stations

When advising a person in garda detention or attending an interview in a garda station, solicitors should consider the guidance available from the Law Society<sup>76</sup> and be cognisant of the *Code of Practice on Access to a Solicitor by Persons in Garda Custody*, issued by An Garda Síochána.<sup>77</sup>

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<sup>75</sup> Section 215 of the Legal Services Regulation Act 2015.

<sup>76</sup> Guidance for solicitors providing legal services in garda stations (lawsociety.ie).

<sup>77</sup> Code of Practice on Access to a Solicitor by Persons in Garda Custody.





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## **CHAPTER 6**

# **UNDERTAKINGS, THE SOLICITOR AND THEIR RELATIONSHIP WITH THIRD PARTIES, AND THE LSRA**

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# CHAPTER 6

## UNDERTAKINGS, THE SOLICITOR AND THEIR RELATIONSHIP WITH THIRD PARTIES, AND THE LSRA

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A solicitor, in the course of the discharge of their duties, will deal with third parties, including colleagues, clients, lay litigants, the Law Society, the LSRA, Government agencies, and the courts.

### PROFESSIONAL STANDARD OF CONDUCT

A solicitor must be honest and courteous in all their dealings.

A solicitor, whether in their professional capacity or otherwise, must not engage in any conduct that is fraudulent, deceitful, or in any way contrary to their position as a solicitor and as an officer of the court. A solicitor should not use their position to take unfair advantage either for themselves or for any other person. A solicitor ought to be alert to exploitation of minors or vulnerable persons and give due consideration to reporting obligations of any such activities to statutory authorities.

### INDUCEMENTS

A solicitor must not encourage or offer inducements to any third party with a view to obtaining instructions from any person.<sup>78</sup>

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<sup>78</sup> *Prohibition with respect to introduction of business* – section 62 of the Solicitors Act 1954; SI 644 of 2020, *Legal Services Regulation Act 2015 (Advertising) Regulations*.

## PERSONS ACTING WITHOUT LEGAL REPRESENTATION

Where a solicitor acting for a client in any matter finds that the other party has opted not to have legal representation, the solicitor is not bound to assist the other party. The solicitor should recommend in writing that the other party obtain legal representation and make clear that the solicitor will only protect the interests of their own client.

### Conveyancing matters

In conveyancing matters, where the vendor's solicitor is not aware of the name and address of the solicitor for the purchaser, if there is no estate agent involved in the matter, the vendor's solicitor may write to the purchaser asking the purchaser for the name and address of their solicitor.

When dealing with a lay conveyancer, the solicitor should explain to their own client the potential difficulties that may be encountered. For instance, the solicitor cannot accept undertakings in relation to any matter. Additional legal costs may be incurred because it is likely that extra time and work will be involved. If the solicitor is acting on behalf of the purchaser, the deposit should not be handed over to the lay vendor. An alternative stakeholder who would be acceptable to both parties should be sought, so that a better procedure for the protection of the purchaser's deposit can be put in place. A reputable person known to both parties might be found, or an arrangement could be made with a financial institution.

### Litigation matters

In litigation matters, where the opposing party acts *pro se*<sup>79</sup> it is likely that the solicitor's own client will incur additional legal costs, as the opposing party may not be familiar with the rules of court, which may result in additional time and expense in prosecuting or defending the case.

While the solicitor is not under any duty to assist a third party other than as set out above, or as directed by the court, a solicitor should behave in a professional manner in all their dealings.

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<sup>79</sup> *Pro se* is latin for or "on one's own behalf"

## LITIGATION – INITIATING LETTERS AND CORRESPONDENCE

Where a solicitor is instructed to collect a liquidated debt, it is improper to demand the costs of the letter that they send to the debtor, as the costs of that letter are not part of the debt. It is also improper to imply in such a letter that the debtor will have to pay the costs of the litigation, if any, that may follow, as that will be a matter for the court to decide upon. However, a solicitor may state in such correspondence that, in the event of proceedings proving necessary, the letter will be used as evidence in an application for costs to be awarded against the debtor.

Before a solicitor institutes proceedings, a preliminary letter is usually written to the intended defendant by the solicitor acting for the intended plaintiff, even though the costs of such letter may not be recoverable. There may be circumstances where it is necessary to issue proceedings without a warning letter. A solicitor may wish, as a matter of courtesy, to include a letter with the proceedings to explain the reason why this was necessary.

Solicitors should maintain a professional stance in relation to correspondence. Correspondence should not be unnecessarily acrimonious. A solicitor is not a mere conduit for their client's instructions and should not purport to represent their clients' instructions as facts.

A solicitor should remember that they are an officer of the court and should not act as a medium for animosity that is unhelpful to the orderly conduct of litigation. The solicitor should apply professional judgement to the content of correspondence.

While it is at times necessary to set out in correspondence difficult matters or problems with the behaviour of the other party, it is preferable to set out the detail in a factual way and without the use of provocative language. Should a disagreement arise between solicitors themselves for whatever reason, this should not be dealt with in the course of the case but resolved outside it. It is unfair to the parties engaged in litigation for their solicitors to act in this manner, and is in any event unprofessional.

## UNDERTAKINGS

### General

An undertaking is a solemn promise by a solicitor to a third party.

*“The solicitor’s undertaking is part of the hard currency of the solicitor’s profession. The trust in faith proposed in such undertakings are an indispensable part of the conduct of the legal business and transactions without which the profession and the public it serves would be the poorer. The undertaking is based on the absolute honesty and integrity expected of a solicitor in his dealings with his client, other parties to a transaction and the courts. A solicitor is an officer of the court. His/her word must be his/her bond. If a solicitor undertakes to do something it must be done.”*<sup>80</sup>

It is a promise given with the consent and authority of a client to do something or give something at a date in the future. An undertaking given by a member of staff or assistant solicitor will bind the partners of the practice. Prior to giving an undertaking, it is strongly recommended that written authority and consent of the client be obtained.

If a solicitor gives an undertaking ‘on behalf of’ a client and does not thereby intend to give a professional undertaking, this should be clearly stated. If there is any ambiguity, it may be interpreted by a court or the Legal Services Regulatory Authority (LSRA) in favour of the recipient. Instead, the undertaking should be addressed directly from the client to the recipient and should be signed by the client.

In addition to the LSRA’s jurisdiction to enforce undertakings as a matter of conduct, the High Court, by virtue of its inherent jurisdiction over its officers, has power of enforcement in respect of undertakings.

A solicitor is required to honour the terms of an undertaking as a matter of professional conduct. A breach of an undertaking is a matter of professional misconduct.

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<sup>80</sup> *Law Society v Tobin, Court of Appeal [2017] IE CA 215. Peart J*

### General guidance on undertakings

- Undertakings should be recorded and, if in writing, should be signed by the principal, partner of the firm, or authorised person of the firm.
- An accountable trust receipt (ATR) is a form of undertaking.
- Undertakings should only be provided where absolutely necessary.
- An undertaking is usually honoured only as between the giver and the recipient or an assignee of the recipient.
- An ambiguous undertaking is generally construed by the courts in favour of the recipient.
- An undertaking does not have to constitute a legal contract to be enforceable as a matter of professional conduct.
- An undertaking is binding even if it is to do something or give something outside the solicitor's control.
- A solicitor is responsible for honouring an undertaking given by a member of the solicitor's staff, whether or not such staff member is admitted to the Roll of Solicitors.
- Where a solicitor in partnership gives an undertaking, all partners are responsible for its performance.
- A solicitor cannot avoid liability on an undertaking by pleading that to honour it would be a breach of duty owed to the client.
- A solicitor who gives an undertaking that is expressed to be dependent upon the happening of a future event should notify the recipient promptly if it becomes clear that the event will not occur.
- An undertaking should not be given by a solicitor as an inducement to a client to secure that client's business.
- A solicitor should not seek an undertaking from another solicitor that the first solicitor knows, or ought to know, should not be given – an example would be where the matter is out of the solicitor's control.
- Prior to accepting an undertaking, a solicitor should consider whether it is wise to do so and whether the undertaking is sufficiently clear.
- It is good practice to retain a copy of any undertaking given, along with evidence of discharge, even after the transaction has concluded.

- It is recommended that firms should keep a register of undertakings for ease of identifying and complying with overdue undertakings. In the case of firms that do not have a register at the present time, the Law Society recommends that a register is drawn up.<sup>81</sup>

Responsibility for undertakings is personal to the solicitor in all cases.

### Undertakings in respect of monies held on behalf of minors.

The courts have an exclusive jurisdiction in relation to the determination of minors' actions and the disbursement of monies paid, whether on foot of a judgment, compromise, or settlement of such actions.<sup>82</sup> Accordingly, no undertaking should be given in relation to funds to be recovered on behalf of a minor.

### In-house and public-sector solicitor

The general principles applicable to undertakings apply to the in-house and public-sector solicitor. The solicitor is responsible for undertakings given by themselves and for those of the staff who report to that solicitor.

As an employee, the functions delegated to a solicitor may be limited, and therefore undertakings should be limited to those delegated functions. If the carrying out of some function is reserved to another employee or category of employees in the organisation, that matter should not be the subject of an undertaking given by the solicitor, because it is outside the solicitor's control.

If it is not certain that a function is or will remain under the solicitor's control, specific delegation of the function should be sought before the undertaking is given. If the solicitor's authority to give professional undertakings as solicitor on behalf of the organisation is not clearly defined, the authority should be specifically delegated in writing.<sup>83</sup>

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81 'Notice to all practising solicitors – Undertakings', *Gazette*, March 2011 (see [www.gazette.ie](http://www.gazette.ie)); 'Undertakings – notice to all solicitors' – *Practice Note*, *Gazette*, Aug/Sept 2013 (see [www.gazette.ie](http://www.gazette.ie)); 'VHI undertakings – should I sign the standard format of undertaking?' – *Medico-Legal Recommendations*, *Law Society*, November 2008.

82 *Order 22, Superior Court Rules; SI no 99 of 1990, Solicitors (Practice Conduct and Discipline) Regulations*; 'Prohibition on parental indemnity settlements in personal injury cases' – *Practice Note*, *Gazette*, December 2010 (see [www.gazette.ie](http://www.gazette.ie)).

83 'Guide for Solicitors employed in the Corporate and Public Services Sectors' – *Law Society*, May 2012 (see [www.lawsociety.ie](http://www.lawsociety.ie)).

## FEES AND EXPENSES OF PROFESSIONAL AND OTHER SERVICE PROVIDERS

A solicitor acting on behalf of a client does not incur personal or legal responsibility for the fees and/or expenses of a third-party professional or other service provider engaged on behalf of a client. This includes fees and expenses to provide a service or to appear in court, whether on foot of a subpoena or otherwise. Unless there is agreement to the contrary, the solicitor is acting as an agent for a disclosed principal, that is, the client.

The solicitor should use reasonable endeavours to ensure that the fees are paid to the professional at the earliest opportunity. This may not be possible if, for instance, the client refuses to authorise the release of the necessary funds. Where a solicitor acts for a plaintiff in a civil action in which medical treatment or other professional fees are recovered as part of the special damages and where no undertaking has been given by the solicitor to pay same, it is the obligation of the solicitor to pay all damages received to the client or to make payments according to the client's instructions.

It is recommended that, when engaging a professional or other service provider or serving a subpoena on a professional witness, the solicitor should advise the individual that they are doing so solely as the agent of a disclosed principal.

A solicitor should ensure that adequate notice is given and suitable arrangements made in respect of attendances by witnesses who are attending court on foot of a subpoena or otherwise.

Some members of the medical profession now require solicitors to provide an undertaking to the effect that the solicitor will be responsible for the standby and court attendance fees. Solicitors are under no obligation to provide such undertakings. However, where an undertaking is given, the solicitor will be obliged to comply with the undertaking.<sup>84</sup> Prior written authority of the client should be sought before providing such undertaking, where practicable.

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<sup>84</sup> *'Compendium of Frequently Asked Litigation Questions'* – Law Society, November 2009 (see [www.lawsociety.ie](http://www.lawsociety.ie)).

## LEGAL SERVICES REGULATORY AUTHORITY

A solicitor should reply promptly and, in any event, within the time permitted, to correspondence received from the LSRA, howsoever the correspondence arises. Under no circumstances should the correspondence be ignored or overlooked.

A solicitor should attend meetings of the LSRA if requested to do so, unless excused beforehand.

Failure to engage with the LSRA could result in a referral to the Legal Practitioners' Disciplinary Tribunal.

## LAW SOCIETY OF IRELAND

A solicitor should reply promptly to correspondence from the Regulation Department of the Law Society, howsoever the correspondence arises. Under no circumstances should the correspondence be ignored or overlooked.

A solicitor should attend meetings of the Law Society Regulation of Practice Committee if requested to do so, unless excused beforehand.

Failure to engage with the Law Society could result in a referral to the Legal Practitioners' Disciplinary Tribunal.

## DISCRIMINATION

A solicitor should not discriminate against any person, whether clients, counsel, professional or other witnesses, or opposing parties because of their gender, civil status, family status, sexual orientation, religion, age, disability, race, or membership of the Traveller community.<sup>85</sup>

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<sup>85</sup> *Equal Status Act 2000, as amended.*

## RECORDING CONVERSATIONS

A solicitor should not record a conversation whether in person, or over the telephone, or via a video platform without the express consent of the other party.<sup>86</sup>

Recording of any form is prohibited by any party within the precinct of the courts.

## ADMINISTRATION OF OATHS

Solicitors holding a current practising certificate are entitled to administer oaths and statutory declarations. They have the same obligations as apply to Commissioners for Oaths.<sup>87</sup>

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86 *Interception of Postal Packets and Telecommunications (Regulation) Act 1993, the General Data Protection Regulation (GDPR), together with an individual's constitutional right to privacy, and their rights under European Convention on Human Rights.*

87 *'Administration of oaths and taking of affidavits' – section 72 of the Solicitors (Amendment) Act 1994; 'Memorandum from Chief Justice re Section 72 of the Solicitors (Amendment) Act 1994' (see Law Directory annually, where the memorandum is included in the reference material section). This is subject to change (see section 21 of the Civil and Criminal Miscellaneous Provisions Act 2020). 'Administration of oaths by solicitors' – Practice Note, Gazette, June 2005 (see [www.gazette.ie](http://www.gazette.ie)).*





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# CHAPTER 7

## THE SOLICITOR AND THEIR RELATIONSHIP WITH OTHER SOLICITORS

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# CHAPTER 7

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### PROFESSIONAL STANDARD OF CONDUCT

#### General

A solicitor should be honest in all their dealings with other solicitors and act towards them with frankness and good faith, consistent with their overriding duty to the client. Solicitors should promote a culture that recognises the bona fides of colleagues, even in situations that may be adversarial.

A solicitor should maintain personal integrity and practice good manners and courtesy towards other members of the profession or their staff.

A solicitor should honour their word given either personally, by partners, or by any other member of the solicitor's firm, and whether or not given in writing. However, in matters such as undertakings, proper consideration should be given to whether the acceptance of an oral statement only is appropriate. It should be noted that, in the event of disciplinary proceedings being invoked to compel compliance with an undertaking, a copy of the written undertaking is usually required.

A solicitor should be cognisant of the tone of correspondence and should not write offensive letters to other members of the profession.

#### Threat by one solicitor to sue the opposing solicitor personally

A solicitor should not threaten to sue an opposing solicitor personally for costs that may be awarded against their plaintiff-client. Such a threat has no basis in law and, accordingly, it is not appropriate to make such a threat.<sup>88</sup>

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<sup>88</sup> *'Threat by a solicitor to sue an opposing solicitor personally' – Practice Note, Gazette, March 2012 (see [www.gazette.ie](http://www.gazette.ie)).*

### Amendments to documents made by solicitor on other side

If amendments are made to a draft document by a solicitor for one party, the solicitor for the other party should be alerted to the amendments. This would apply, for instance, if changes were made to the terms of a conveyancing contract, or a map that forms part of that contract.<sup>89</sup>

## COMMUNICATING WITH THE CLIENT OF ANOTHER SOLICITOR

### General

A solicitor should not interview or otherwise communicate with any party on the other side of a matter who, to the solicitor's knowledge, has retained another solicitor to act in the matter about which the first solicitor wishes to communicate, except with that solicitor's consent. However, in exceptional circumstances, this general rule may not apply. For instance, where a solicitor has failed to reply in writing to correspondence from another solicitor, then the other solicitor may be justified in writing directly to the client of that solicitor. A solicitor who intends to write to the client of another solicitor should first warn that solicitor in writing of their intention to do so.

### Client seeking a second opinion

A solicitor may give preliminary advices to a client who seeks a second opinion, on a matter in which the client has already instructed another solicitor, whether or not they intend to change solicitors. If the second solicitor is then given instructions to act in the matter, the first solicitor should be notified without delay and should cease to act.<sup>90</sup>

### The client of an in-house or public-sector solicitor

Where the other solicitor in a case or transaction is a solicitor employed in-house in an organisation or where applicable in the public sector, the employer of the in-house solicitor or the public-sector solicitor is usually that solicitor's client. If there is ongoing correspondence with the in-house or the public-sector solicitor, all communications should be directed to that solicitor. Other

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89 'Amendments to Conveyancing Contract before execution by a Purchaser' – Practice Note, Gazette, October 1993.

90 For further guidance on the recommended procedures for transfer of client files, see '[Transferring Files Between Solicitors](#)', Guidance and Ethics Committee Practice Note, August 2020.

personnel in the organisation should not be contacted directly. Otherwise, the proper involvement of the in-house or public-sector solicitor in the matter is affected.<sup>91</sup>

## 'WITHOUT PREJUDICE' COMMUNICATIONS BETWEEN SOLICITORS

Communications between solicitors for opposing parties or between one solicitor and the opposing party are not privileged, since they are not confidential unless there is an express or implied agreement that they should be – for example, in circumstances where letters are written 'without prejudice' for the purpose of making admissions, acknowledgements, concessions or offers, with a view to possible settlement.

The phrase 'without prejudice', when used in correspondence, means that the correspondence is without prejudice to the writer's position if the terms of the admissions, acknowledgements, concessions or offers set out are not accepted by the party to whom the correspondence is addressed. It precludes the production of that correspondence as evidence of any information thus imparted.

This status usually only applies where the words are used in the course of bona fide negotiations for the settlement of disputes. If agreement is reached at the conclusion of negotiations, the privilege ceases to attach to the correspondence, and the correspondence or any oral statements arising therefrom may be adduced in proof of the agreement.

## SUPPLYING INFORMATION ON REQUEST TO ANOTHER SOLICITOR

A solicitor should only supply information concerning documents in their possession, or provide information on a client's file to another solicitor, on receipt of written instructions from the client. Provision should be made for

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<sup>91</sup> *'Communication with the client of another solicitor: an in-house solicitor' – Practice Note, Gazette, Jan/Feb 1998 and April 2012.*

payment of the solicitor's costs for so doing. This course of action is subject to any question of privilege of the client and the interests of the client being protected.

## COSTS OF SOLICITOR AGENT

A firm who instructs a solicitor agent should ensure that the solicitor agent is paid at the earliest opportunity. The firm who instructs the agent solicitor is responsible for paying the costs of the agent solicitor.

### The solicitor's common law lien – general

At common law, a solicitor can exercise a lien on the files, money, unencumbered deeds, documents, or other property of a client, for outstanding costs and outlays due by the client to the solicitor. A lien can be exercised on all the files of a particular client if there are costs outstanding on one of those files. For the avoidance of doubt, if the property is subject to a mortgage and the solicitor has given an undertaking to a financial institution, the solicitor cannot exercise a lien over the deeds.

The issue of the exercise of a lien usually arises where a file is being transferred from one solicitor to another or to the client themselves.<sup>92</sup>

### Lien where retainer discharged by solicitor

Where a solicitor is exercising a lien on a file in a litigation case, where the matter is before the court, and it is the solicitor who has terminated the contract with the client, the solicitor should be aware that the client may make an application to court for the release of the file to allow the litigation to proceed. The court may order the release of the file, subject to the solicitor's lien, in those circumstances. As a consequence, this may result in the lien being of no value to the solicitor.<sup>93</sup>

In other cases, the solicitor's right to exercise a lien may be challenged by clients who then bring the matter before the courts. They may claim that their rights are

<sup>92</sup> See Chapter 10, 'The Remuneration of the Solicitor – The Solicitor's Lien on Monies'; *Re Capital Fire Insurance Association* (1883) 24 Ch D 408, *Re Audley Hall Cotton Spinning Co* (1886) LR 6Eq 245.

<sup>93</sup> *Ahern and Others v Minister for Agriculture and Food, Ireland and The Attorney General* [2008] IEHC 286.

being prejudiced by the exercise of the lien, or that their right to pursue justice in the courts, or to complete a transaction, outweighs the solicitor's right to have security for their fees.

In the context of the investigation by the Legal Services Regulatory Authority of a complaint of inadequate services against a solicitor, if the complaint is upheld, the Authority may direct the transfer of any documents, even if they are subject to the solicitor's lien.<sup>94</sup>

### No lien in certain circumstances

- a) No solicitor's lien exists over a will.
- b) No solicitor's lien exists over files, money, documents, or papers held on trust.
- c) No solicitor's lien exists over money or deeds subject to an undertaking or subject to an accountable trust receipt.
- d) No solicitor's lien exists over money held by the solicitor for the purpose of transmitting it to a third party.
- e) No solicitor's lien exists over monies held by the solicitor as stakeholder.
- f) A lien for a debt due can continue to be exercised even after the period when proceedings for the recovery of the debt would be statute barred has expired. However, a lien cannot arise if a debt has already become statute barred.<sup>95</sup>
- g) Where a solicitor holds documents of a former client under the solicitor's common law lien for undischarged costs and hands them to another solicitor who is then acting for that client, subject to and without prejudice to the first solicitor's lien for costs, the other solicitor should return them on demand to the solicitor claiming the lien, as long as the lien subsists.

<sup>94</sup> Section 60(6) of the Legal Services Regulation Act 2015.

<sup>95</sup> See Chapter 10, 'The Remuneration of the Solicitor – The Solicitor's Lien on Monies'.

## TRANSFER OF FILES BETWEEN SOLICITORS

A courteous request for files and a prompt response is essential for a smooth handover of files between solicitors.

Unless a solicitor is agreeable to do so, there is no reason why the first solicitor should continue to fund a case after the client has left that solicitor. If costs are due, a bill of costs should be furnished without delay. Costs may be agreed, mediated, or adjudicated. Contingency arrangements are determined if the client moves to another solicitor.<sup>96</sup> It is implied in these contingency fee arrangements that they are conditional on the first solicitor continuing to have prosecution of the case. If the client terminated the retainer, the first solicitor will be entitled to their fees for the work done.<sup>97</sup>

### Undertaking in respect of payment of costs

When a file is transferred to another firm, the first solicitor may opt to accept an undertaking in respect of the payment of costs as an alternative security to the solicitor's common law lien. However, there is no obligation upon the first solicitor to accept such an undertaking.

It is advisable for a solicitor who is the second solicitor instructed by a client, and who is giving an undertaking to pay a first solicitor's costs, to qualify the undertaking to say, firstly, that it is conditional on the second solicitor not being discharged by the client and, secondly, to say it is conditional on sufficient monies coming into the solicitor's control to pay the costs. Other qualifications as necessary may be made.<sup>98</sup>

In cases where an undertaking in respect of the payment of costs is being accepted by the first solicitor, all outlays paid should be discharged immediately to the first solicitor.

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<sup>96</sup> To be read in conjunction with Chapter 10, 'Restriction on Calculation of Charges as a Percentage of Damages'.

<sup>97</sup> 'Transferring Files between Solicitors' – Practice Note, Gazette, revised edition 2020 (see [www.lawsociety.ie](http://www.lawsociety.ie)).

<sup>98</sup> 'Undertakings given on the transfer of a file in respect of the payment of the first solicitor's costs' – Practice Note, Gazette, October 2010.

### Undertakings furnished by first solicitor

On the transfer of a file to a new firm, the first solicitor should be released from undertakings given to third parties. This will be subject to the consent of the recipient of the undertaking.

In a situation where a client wishes to transfer their business from one solicitor to another, and the first solicitor has given an undertaking to a third party, the law of principal and agent provides that, in this instance, because the first solicitor has undertaken a personal liability on behalf of the client, the client cannot determine the retainer without the first solicitor's consent.

The solicitor may decide to consent to the determination of their retainer, subject to a formal release of the undertaking by the recipient of the undertaking.

A solicitor should not cooperate with a client who seeks to leave a solicitor with an outstanding undertaking.

### The file belongs to the client

Once the fees and outlay of a solicitor have been paid, the file belongs to the client.

### Copying the client's file

When a file is being transferred, solicitors should be mindful of their obligation to retain a copy of the file for, at a minimum, the relevant statutory periods<sup>99</sup> and to ensure compliance with the *Solicitors Accounts Regulations*. This copying should be at the transferring solicitor's own expense.<sup>100</sup>

The file transferred should include instructions, briefs, copies of correspondence written to third parties, and documents prepared by third parties for the benefit of the client. Any item that deals with the substance of the matter and that would assist the new solicitor should be included. Certain papers belong to the previous solicitor and may be retained by them. These include letters, papers, and documents prepared by that solicitor for their own benefit and for which they have not charged and do not intend to charge.

99 'Data Retention and Destruction of Paper and Electronic Files', *Guidance and Ethics Committee* 2019.

100 *SI no 516 of 2014, Solicitor Accounts Regulations* 2014.

### **Notice of change of solicitor to the courts**

When a solicitor wishes to come on record for a client, the appropriate notice of change of solicitor to the court, the opposite party, and the solicitor discharged must be filed and served before the notice takes effect.

### **Proceeding without the file**

Proceeding without the file is not recommended, but this may be necessary in certain circumstances.

### **Payment of first solicitor's fees**

A solicitor who has been engaged by a client is entitled to their costs and to be paid by that client for all work properly done by them. Where a client discharges one solicitor and engages the services of a second solicitor, the second solicitor should ensure, in their initial discussions with the client, that the client fully understands their obligation to pay all costs due for work properly done by the first solicitor. The second solicitor will usually endeavour to ensure that such costs are discharged by the client, but may agree with the client that the client will deal directly with their former solicitor in relation to the matter.

### **Employee leaving a firm or dissolution of a partnership**

An employee leaving a firm cannot, without formal authority, take the files of clients, even the files of clients introduced by the employee. If a partner leaves a firm, or if the partnership is dissolved, the transfer of files is a matter for agreement between the former partners, subject to the instructions of the clients. If there is a continuing firm, it is recommended that files remain with the continuing firm until the client directs otherwise.

On receipt of an authority for the transfer of a file, there is no restriction on a solicitor first instructed in a matter approaching the client to seek an explanation of the reasons for the determination of the retainer.

## PAYMENT FOR ASSISTANT SOLICITORS' PRACTISING CERTIFICATES

It is the obligation of each solicitor to ensure that they have a current practising certificate in place.<sup>101</sup> It is a matter of contract between the principal or partners of a firm and the solicitor employees of that firm whether the practising certificates of assistant solicitors are paid for by the firm.

It is both professional misconduct and a criminal offence for a solicitor to provide legal services without holding a current practising certificate issued by the Law Society.<sup>102</sup> A firm may not charge fees for legal services provided by a solicitor who does not hold a current practising certificate. It is recommended that firm owners ensure that all solicitors within their firm have applied for and been issued with a practising certificate on an annual basis.

However, where a firm employs an assistant solicitor who holds a practising certificate paid for by another firm in which the assistant was previously employed, it is good practice that the apportioned cost for the period when the solicitor is employed by the second firm should be refunded to the first firm.

## SERIOUS MISCONDUCT BY ANOTHER SOLICITOR

If a solicitor is of the opinion that another solicitor is engaged in serious misconduct, this should be brought to the attention of the Legal Services Regulatory Authority. If this involves disclosure of a client's affairs, the client's consent should be obtained in advance.

There is no obligation to bring any matter to the attention of the Authority if it comes to a solicitor's notice while assisting a colleague as a panel member of a recognised assistance scheme.<sup>103</sup>

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<sup>101</sup> *Solicitors Acts 1954-2015 and Solicitors Practising Certificate Regulations made thereunder.*

<sup>102</sup> *It is professional misconduct and a criminal offence for a solicitor (other than a solicitor in the full-time service of the State or a solicitor solely engaging in conveyancing services for a non-solicitor employer) to practise, or hold themselves out as a solicitor entitled to practise, without a practising certificate. For further reading see Guidance Notes for Practising Certificates, Qualifying Certificates and Service of State Applications on [www.lawsociety.ie/Solicitors/Practising](http://www.lawsociety.ie/Solicitors/Practising).*

<sup>103</sup> *Panel to Assist Solicitors in Regulatory Difficulty (see [www.lawsociety.ie](http://www.lawsociety.ie)).*

## **REFERRAL OF FILES TO A COLLEAGUE**

Where a client is referred to a solicitor, for instance, because the first solicitor has a conflict of interest, the basis of the arrangement should be that the second solicitor should not take advantage of the trust placed in them by their colleague.



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# CHAPTER 8

## THE SOLICITOR AND THEIR RELATIONSHIP WITH COUNSEL

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### RETENTION OF COUNSEL

A solicitor acting on a general retainer from a client is not entitled, without instructions from the client, to formally seek the advice of, or to instruct, counsel. That instruction should be confirmed in writing by the solicitor to the client and by the solicitor to counsel. A written estimate of fees should be sought and obtained from counsel and provided to the client.<sup>104</sup>

### INSTRUCTIONS TO COUNSEL

In all cases where counsel is instructed, a solicitor should always be conscious that counsel can only be as effective as the instructions they receive. Counsel should be instructed in a manner that ensures that counsel has all instructions and relevant information that the solicitor holds, and which is or may be necessary for counsel to represent the client's interest properly within a reasonable time frame. It is usual to prepare a statement of the case for counsel outlining the circumstances of the matter, which is sent to counsel with all relevant supporting documentation. It is the duty of a solicitor to brief counsel adequately, properly, and completely.

#### Disengaging counsel

It is the duty of a solicitor to provide to counsel, within a reasonable time, all further instructions and information that counsel reasonably requests for the proper conduct of the case. It is the role of counsel to provide a professional standard of work and service to each client in a timely and efficient manner. Solicitors should use reasonable endeavours to ensure that counsel carries

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<sup>104</sup> Section 150(10), *Legal Services Regulation Act 2015*.

out instructions within a reasonable time frame to prevent the matter from becoming statute barred or liable to be struck out for want of prosecution. Where appropriate, a solicitor should disengage counsel in order to instruct another counsel in a timely fashion.

Where a court appearance is required by counsel, they should be attended in court by their instructing solicitor or the solicitor's agent, save insofar as such attendance may be exempted by the court.

A solicitor should take care in the selection of counsel, and the choice should be made with due regard to the expertise required for the matter. The solicitor has a duty to consider whether the client's best interests would be better served if represented by a different counsel and, if so, to advise the client to that effect.

When considering the advice of counsel, a solicitor should ensure that it contains no obvious errors. If the advice conflicts with previous advice, it will be necessary to seek clarification. Briefing counsel does not obviate the solicitor's duty of care to the client.

If the advice is that the solicitor takes certain actions, which the solicitor believes would be contrary to their professional duties or their duties as an officer of the court, the solicitor should not follow that advice.<sup>105</sup>

## INFORMATION ABOUT COUNSEL'S FEES

Prior to engaging counsel, it is the duty of a solicitor to request information in writing from counsel in respect of their fees and obtain the client's agreement to engage counsel on behalf of the client. Solicitors should familiarise themselves with the provisions of the *Legal Services Regulation Act 2015*, including, but not limited to section 150. Counsel's fees are based upon commitments undertaken and work done, irrespective of whether it involves an appearance in court. In

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105 A solicitor is entitled to rely upon the advice of counsel who has been fully and properly instructed in the case. However, there are occasions when a solicitor's duty may be to reject counsel's advice if it is thought to be "obviously or glaringly wrong" when it is his/her duty to reject it (*Locke v Camberwell HA* [2002] Lloyd's Rep. PN 23; *Matrix Securities Ltd. v Goddard* [1998] PNLR 290).

marking a fee, they are entitled to consider all features of the instructions that bear upon the commitment that they undertake.

If a solicitor has reasonable grounds for believing that the client is unlikely to be in a position to pay counsel's fees in the event of the case being lost or, if the case is won, but the costs will not be recoverable, counsel should be advised of this in the initial letter of instruction or as soon as is practicable thereafter.

## THE SOLICITOR'S LIABILITY FOR PROFESSIONAL FEES

A solicitor has no personal liability for counsel's fees. This arises from the law of principal and agent, which is the relationship that exists between solicitor and client. Because the solicitor is an agent, the solicitor does not incur a personal liability for the debts of a disclosed principal.

Funds received on behalf of counsel must be lodged to the solicitor's client account and retained there until paid over to counsel. A solicitor who has received a fee from a client intended for counsel should pay such fee when it falls due. A solicitor who instructs counsel should use reasonable endeavours to ensure that counsel receives fees that are properly due and owing to them at the earliest opportunity.<sup>106</sup>

### Relationship with counsel

Solicitors should always be alert to the fact that they retain and instruct counsel on behalf of the client. What counsel say to the opposition or in court is said in the solicitor's name and in the name of the client, and it should be a true and accurate representation of the facts.

When in communication with their client, a solicitor should not lay blame unfairly on counsel for an unsatisfactory outcome of a case. A spirit of collaboration and trust should exist between solicitor and counsel. In circumstances where a client is being asked, through their solicitor, to agree to replacement or additional counsel, the same procedures to comply with the provisions of Section 150 apply.

<sup>106</sup> *D(K) v M(K)* [2020] IEHC 520.

Solicitors are reminded that counsel's duty is to act in the best interests of each client, within the limits the law permits. It is the solicitor's duty to consider whether it is in the client's best interest that the client should be represented by different counsel and, if so, advise their client to that effect.



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# CHAPTER 9

## THE SOLICITOR IN PRACTICE

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## THE SOLICITOR IN PRACTICE

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### THE SUPERVISION OF THE SOLICITOR'S OFFICE

#### General

A solicitor practising as a sole principal is responsible for everything done in that practice. In a firm, each partner is similarly liable on a joint and several basis, subject to the terms of the *Solicitors Acts*. This includes the delivery of legal services in compliance with the law and regulations governing a solicitor's practice.

A solicitor may delegate work to their staff in such manner as they consider appropriate. However, a solicitor will not escape responsibility for work carried out in their office by delegating the relevant matter to the staff employed by them, even though they are qualified to do the work.

The office of a solicitor should be supervised by the principal or partners of the firm or by a qualified assistant. In the event of unavoidable absences, adequate alternative arrangements for supervision should be made.<sup>107</sup>

#### Branch office

Solicitors who operate branch offices have a duty to ensure that there is adequate supervision in those offices.

#### The in-house and public-sector solicitor's duty of supervision

An in-house and public-sector solicitor should supervise staff for whom that solicitor is responsible. The solicitor is professionally responsible for all acts of their staff when they are carrying out work of a legal nature. Although the solicitor's staff in an organisation may also be answerable to other persons in the

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<sup>107</sup> *SI no 516 of 2014, Solicitors Accounts Regulations 2014.*

organisation, the duty of supervision is not in any way diluted for the solicitor in relation to the legal work being carried out.

## PROFESSIONAL NAMES, NAMEPLATES, AND PROFESSIONAL NOTEPAPER

### General

The use of professional names, nameplates, and notepaper is governed by regulations.<sup>108</sup> The name of the practice should be the name, or one of the names of the solicitors, or one or more of the present or former principals of the firm, or such other name as is approved in writing by the Law Society.

### Professional name of the solicitor employed in an organisation

An employed solicitor in the corporate sector may practise in the solicitor's own name, in the name of the employer, or under a business name. If the solicitor practises in the solicitor's own name, it is recommended that a clear indication is given on the notepaper that the letter has issued from the legal department in the employer organisation.<sup>109</sup>

If the solicitor practises in the employer's name, a clear indication should be given on the notepaper that the letter issued from the solicitor's practice within the employer organisation.<sup>110</sup>

### Business name

A solicitor using a business name should ensure registration under the *Registration of Business Names Act 1963*.

### Access by a client to the stationery of a solicitor

A client should not have access to the stationery of a solicitor.<sup>111</sup>

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108 *SI no 178 of 1996, Solicitors (Practice Conduct and Discipline) Regulations 1996; see also 'Notice to All Practising Solicitors: Practice Names', Practice Note, 2011; see also section 131 of the Legal Services Regulation Act 2015; section 3 of the Registration of Business Names Act 1963 shall not apply to a limited liability partnership.*

109 *SI no 178 of 1996, Solicitors (Practice Conduct and Discipline) Regulations 1996*

110 *Guide for In House Solicitors employed in the Corporate or Public Sectors – Law Society, 2018.*

111 *'Use of Professional Notepaper in Debt Collection Matters' – Practice Note, Gazette, December 1997.*

## SERVICE COMPANIES

While there is no prohibition on a solicitor forming a service company for the provision of administrative/secretarial services to support the operation of the practice of that solicitor, solicitors should remain alert to the prohibition on unqualified persons such as a service company acting as solicitor.<sup>112</sup>

## ADVERTISING

Advertising by solicitors is regulated by the Legal Services Regulatory Authority.<sup>113</sup>

When advertising, solicitors should ensure that the advertisement is not:

- i) Likely to bring the legal profession into disrepute,
- ii) In bad taste,
- iii) Reflecting unfavourably on another legal practitioner,
- iv) False or misleading in any material respect,
- v) Published in an inappropriate location, or
- vi) Subject to clause (b) of the regulation, expressly or impliedly solicit, encourage, or offer any inducement to any person or group or class of persons to make claims for personal injuries or seek legal services in connection with such claims.<sup>114</sup>

## TOUTING

A solicitor should not make a direct uninvited approach to any person with a view to being instructed to provide legal services, where this approach is likely to bring the solicitors' profession into disrepute. Approaches should not be made in inappropriate locations. For example, inappropriate locations may include adjacent to a calamitous event or in the vicinity of a garda station, prison, courthouse or hospital.

<sup>112</sup> Section 64 of the Solicitors Act 1954, as amended.

<sup>113</sup> Legal Services Regulation Act 2015 (Advertising) Regulations (SI no 644 of 2020).

<sup>114</sup> Legal Services Regulation Act 2015 (Advertising) Regulations (SI no 644 of 2020).

## THE SOLICITOR ACTING FOR ASSOCIATIONS

Where a solicitor acts for an association such as a trade association, a residents' association, or a trade union, they may also be asked to act for members of that association or trade union. This is an acceptable practice, provided that there is no conflict of interest.

## PROFESSIONAL INDEMNITY INSURANCE

A practising certificate will not issue to a solicitor unless the solicitor provides evidence of professional indemnity insurance or exemption therefrom. A solicitor must ensure compliance with all professional indemnity insurance regulations and the requirements of the Legal Services Regulation Authority<sup>115</sup> not only while in practice, but also after ceasing practice in respect of cover.<sup>116</sup>

## ACCOUNTS REGULATIONS

### General

The principal or partners of a firm must ensure compliance with all accounts regulations. Partners have a joint and several responsibility in the matter. As with all matters of practice, solicitors handling clients' monies must act with integrity, in the client's best interests, and in the interests of the good reputation of solicitors and the solicitors' profession.<sup>117</sup>

The accounts regulations are based on the following requirements:

- To keep clients' money separate from money belonging to the solicitor or the practice monies,
- To keep the clients' money safely in a bank or financial institution that is situated within the State or has a branch in the State,

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115 [www.lsr.ie](http://www.lsr.ie).

116 See [www.lawsociety.ie](http://www.lawsociety.ie).

See links to the consolidated Solicitors Acts: <https://revisedacts.lawreform.ie/eli/2015/act/65/front/revised/en/html> and [www.lawsociety.ie/globalassets/documents/eocompendium/eocompendium-2020.pdf](http://www.lawsociety.ie/globalassets/documents/eocompendium/eocompendium-2020.pdf); [www.lawsociety.ie/Solicitors/Practising/PII](http://www.lawsociety.ie/Solicitors/Practising/PII).

117 SI no 516 of 2014, Solicitors Accounts Regulations.

- To use each client's money for that client's matter only,
- To use trust money only for the purpose of that trust,
- To establish and maintain proper accounting systems and proper internal control systems to ensure compliance with the regulations,
- To account for interest received or charged on clients' monies in accordance with the statutory provisions,
- To cooperate with the Law Society in checking compliance with the regulations,
- To deliver an annual accountant's report, as required by the regulations.

### Responsibility for clients' monies

When client funds are received, they must be lodged without delay in a client account at an approved bank.<sup>118</sup>

The issue of the insolvency of a bank at which clients' monies have been placed can be addressed in the firm's terms and conditions of business.<sup>119</sup> A solicitor placing a client's monies with a licensed bank in compliance with the requirements of the *Solicitors Acts* and the *Solicitors Accounts Regulations* is unlikely to incur liability to their client in the event that all or part of the client's monies are lost due to the bank's insolvency.

When giving an undertaking to pay out client funds, the solicitor should consider whether such undertakings should be qualified to allow for the insolvency of the bank at which the funds that are the subject of the undertaking will be held. The firm's terms and conditions of business can provide for agreement by the client to indemnify the firm, should the solicitor be required to use their own funds to comply with an undertaking given on behalf of a client.

### Monies handled by a solicitor under a power of attorney

Monies handled by a solicitor acting for a client under a power of attorney are clients' monies within the meaning of the *Solicitors Accounts Regulations*.<sup>120</sup>

118 *SI no 516 of 2014, Solicitors Accounts Regulations.*

119 *Terms and Conditions of Business.*

120 *SI no 516 of 2014, Solicitors Accounts Regulations.*

## INVESTMENT AND INSURANCE SERVICES

If a solicitor provides investment business services, investment advice or insurance intermediary services to clients, such services or advice must comply with the relevant legislation. The requirements vary depending on whether the services to the clients are, or are not, incidental to the provision of legal services to those clients.<sup>121</sup>

## THE SOLICITOR AS AGENT FOR AN INSTITUTION

If a solicitor holds an agency for an institution, the office of the solicitor should be clearly seen to be the office of a solicitor and not a branch of the organisation from whom the solicitor holds the agency.

## THE SECURITY AND CONFIDENTIALITY OF OFFICE SYSTEMS

The principal or partners of a firm should use reasonable endeavours to prevent a breach of security and confidentiality. All solicitors have a duty to ensure adherence to GDPR requirements. Solicitors should ensure a level of security appropriate to risks within their practice.<sup>122</sup>

It is recommended that firm owners should ensure an appropriate level of security, both physical and cyber, to mitigate the risks of loss to clients' monies and assets.

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<sup>121</sup> *Investment Intermediaries Act 1995; Investor Compensation Act 1998; Memorandum on the application of the Investment Intermediaries Act 1995 (IIA) and the Investor Compensation Act 1998 (ICA) to Solicitors – Law Society, 25 November 1998; Memorandum on Solicitors Financial Services operated by Irish Pensions Trust Ltd (IPT), an authorised investment business firm – Law Society, 25 November 1998; SI no 439 of 1999, Solicitors Acts 1954 to 1994 (Investment Business and Investor Compensation) Regulations 1998.*

<sup>122</sup> *Data Retention and Destruction of Paper and Electronic Files, Practice Note 2019.*

## RETENTION OR DESTRUCTION OF FILES

To protect the interests of clients who may be sued by third parties, and to protect the interests of a solicitor's firm that may be sued by former clients or by third parties, a solicitor should ensure that all files, documents, and other records are retained for appropriate periods and in compliance with GDPR requirements.<sup>123</sup>

Anti-money-laundering legislation<sup>124</sup> now requires firms to keep records showing compliance with money-laundering procedures applied, and information gathered, by the firm in relation to each client for a period of five years. This includes keeping copies of relevant deeds. Solicitors are also required to report any suspicious transactions to the Garda Financial Intelligence Unit and Revenue Commissioners.<sup>125</sup>

Solicitors should also be aware that, under the provisions of data protection legislation, once the appropriate period has elapsed, personal data relating to clients or others should not be retained longer than necessary.

When a solicitor drafts a will for a client, they should consider whether the instruction documentation should be kept with the original will that is being retained.<sup>126</sup>

## SETTING UP IN PRACTICE

When a solicitor sets up in practice, whether as a principal or partner, the solicitor commits himself to responsibilities that may continue even after the solicitor ceases practice or the firm closes. This may necessitate ongoing expenditure by the solicitor, such as the expenses that will be incurred in winding down the practice.<sup>127</sup>

123 *Data Retention and Destruction of Paper and Electronic Files, Practice Note 2019.*

124 *For AML Guidance, see [www.lawsociety.ie/aml](http://www.lawsociety.ie/aml).*

125 *Section 19 of the Criminal Justice Act 2011 See [www.lawsociety.ie/aml](http://www.lawsociety.ie/aml) for further guidance and the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2018.*

126 *Section 5 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010; Data Retention and Destruction of Paper and Electronic Files, Practice Note 2019,*

127 *Setting Up in Practice (Law Society booklet).*

### Continuing professional development

A solicitor is required by regulation to keep their knowledge and skill up to date on a continuing basis during the whole of their professional career.<sup>128</sup>

Solicitors should refer to the practice notes published by the Law Society, which cover best practice in each practice area. The Law Society provides updates to solicitors on practice areas by e-zine and e-bulletins.<sup>129</sup>

## CHANGES IN THE SOLICITOR'S PRACTICE

Where a sole practitioner ceases to practise, or all the partners in a partnership cease to practise, prompt notification to the clients of the firm should be made. It is a matter for the client to decide which new firm they will instruct. It would not be proper for the new firm to deal with the affairs of any client, including money and papers held, without the client concerned first being notified. The Legal Services Regulation Authority must also be notified of such changes, where applicable – for example, where a firm has been authorised to operate as an LLP.

Ideally, all of the principals or partners involved should agree how the clients will be informed. This will usually be by means of a circular letter, the text of which could be agreed between the solicitors concerned. This letter could issue in the name of one or all of the solicitors. Alternatively, the solicitors could agree that each of them would inform particular clients.

When appropriate, such letters should mention the amount outstanding to the credit of the particular client.

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<sup>128</sup> SI no 529 of 2017, *Solicitors (Continuing Professional Development) Regulations 2017*.

<sup>129</sup> See [www.gazette.ie](http://www.gazette.ie).

## SUCCESSION PLANNING FOR SOLICITOR'S UNEXPECTED ABSENCE FROM OFFICE

All firm owners, but particularly sole practitioners or the sole principal of a firm, should plan for emergency situations, such as death or other eventualities that might inhibit or restrict their ability to manage their firm,<sup>130</sup> subject to the requirements of the relevant legislation.<sup>131</sup>

Guidelines for solicitors retiring or planning to cease practice as a sole practitioner/principal and for solicitors purchasing practices from them can be found on the Law Society website.<sup>132</sup>

Solicitors should endeavour to have a succession plan for emergencies to minimise any disruption to clients, secure the position of staff, and ensure that the practice can continue, if this is what the solicitor wishes.

The essential element of any plan is an agreement with another solicitor to take charge if an emergency occurs. This does not necessarily mean that the other solicitor will be required to become involved in the day-to-day running of the practice.

Firm owners who are planning for the future of their firm should consider executing the following documents:

- 1) Will to appoint a 'special executor',
- 2) Agreement for management,
- 3) Power of attorney,
- 4) Enduring power of attorney.

The will should make provision for the solicitor dying in practice.

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130 'Emergency succession planning for a sole practitioner or principal's firm, Practice Note, 2021.

131 'Intervention in practice of sole practitioner in cases of death, incapacity, bankruptcy or abandonment' – section 61 (as substituted by section 31 of the Solicitors (Amendment) Act 1994) of the Solicitors Act 1954.

132 <https://www.lawsociety.ie/Solicitors/Running-a-Practice>.

The other documents cover eventualities during the solicitor's life that might inhibit or restrict their ability to manage their firm. If the wish is that the practice be sold, then this ensures that the powers are in place to do so.

## BANKRUPTCY OF THE SOLICITOR

The adjudication in bankruptcy of a solicitor operates immediately to suspend the solicitor's practising certificate. The suspension may subsequently be annulled or terminated by law. At any time prior to that, the solicitor may apply to the Law Society to terminate the suspension, and the Law Society may either do so unconditionally, or subject to such terms and conditions as are thought fit, or the application may be refused.<sup>133</sup>

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<sup>133</sup> 'Bankruptcy, judgments and debt arrangements', *Regulation of Practice Practice Note*, November 2013.



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# CHAPTER 10

## THE REMUNERATION OF THE SOLICITOR

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# CHAPTER 10

## THE REMUNERATION OF THE SOLICITOR

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### INFORMATION IN RELATION TO LEGAL CHARGES

#### General

The law requires that solicitors inform their clients in writing, on receiving instructions, by way of a formal notice, of the legal costs that will be incurred in relation to the matter concerned or, if it is not reasonably practicable for this notice to disclose the legal costs at that time, to set out the basis on which the legal costs are to be calculated.<sup>134</sup>

If, on receiving instructions, it is only possible for the solicitor to set out the basis upon which the legal costs are to be calculated, the law requires that the solicitor must, as soon as may be after it becomes practicable to do so, provide the client with a notice disclosing the legal costs that will be incurred in relation to the matter concerned.

The notice should provide information as to the costs that have been incurred up to that date and provide information in relation to the fixed nature of the costs or, if that is not possible, then to set out the basis upon which they are to be charged. The solicitor also has to specify the amount of value-added tax to be charged.

In litigation matters, the solicitor must set out an outline of the work in respect of each stage of the litigation process and the costs or likely costs involved in respect of each such stage, including the likelihood of engaging a practising barrister, expert witnesses, or providers of other services. Solicitors are also

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<sup>134</sup> Section 150 of the Legal Services Regulation Act 2015.

obliged to advise the client of the implications of withdrawing from the litigation, as well as the possibility of having to pay the costs of one or more other parties to the litigation if the litigation is lost, and that it is possible that the costs of the solicitor will not be fully covered from other parties to the litigation.

A cooling-off period of up to ten days shall apply from providing the client with the costs notice, and the solicitor shall not provide any services during that time unless any of the following situations arise:

- a) The client confirms that they wish to instruct the solicitor to continue to provide legal services,
- b) If directed by the court,
- c) Where a notice of trial has been served or a date has been fixed for the hearing of the matter concerned,
- d) Where, in the professional opinion of the solicitor, not to provide those legal services would constitute a contravention of a statutory requirement or the rules of court or would prejudice the rights of the client in a manner that could not later be remedied.<sup>135</sup>

### Instructing counsel

The law provides that a solicitor shall not retain a barrister, expert witness, or provider of any other service without first ascertaining the likely costs of engaging that person and providing the client with that information. Section 150 also applies to barristers, and if the barrister provides a section 150 notice to the solicitor (as opposed to the client), the solicitor is obliged to send that notice to the client. This also applies for the barristers' fee note.

### Agreement regarding legal costs<sup>136</sup>

It is permissible in law for a solicitor and their client to make an agreement in writing in relation to the amount and manner of payment of all or part of

<sup>135</sup> Section 150(8) of the Legal Services Regulation Act 2015.

<sup>136</sup> See 152(5) and 152(6) in relation to the obligations to provide a bill of costs for a legal costs agreement made under section 151. Section 152(5) requires that the legal costs agreement is annexed to the bill of costs to which the agreement relates. Section 152(6) requires an invoice to be provided by the solicitor to the client containing a summary of the costs and outlays pursuant to the agreement, which together with the agreement shall constitute a bill of costs.

the legal costs that are payable by the client to the solicitor for legal services provided.<sup>137</sup>

### Obligation to issue a bill of costs at the conclusion of legal services provided

Solicitors are obliged to issue a bill of costs at the conclusion of legal services provided, and each bill of costs must contain the particulars outlined in section 152(2) and a dispute resolution procedure.

### Disputes

Where a dispute arises in relation to legal costs, the solicitor is obliged to make all reasonable attempts to resolve the dispute with their client.<sup>138</sup>

Information in relation to the resolution on disputes relating to costs must be given in writing.

Included in the definition of 'legal costs' are fees, outlays, disbursements, and other costs incurred or charged, whether in contentious or non-contentious business.<sup>139</sup>

The failure to comply with the provisions of the law in relation to the charging of fees may lead to disciplinary action.

The client has certain rights, such as requiring the adjudication of costs or the right to make a complaint to the Legal Services Regulatory Authority (LSRA) in respect of excessive fees.

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137 Under 150(4)(c), the basis on which the amounts were or are to be calculated should be included and, under section 150(4)(d), the solicitor is obliged to update the notice in the event the solicitor becomes aware of any factor that would lead to significantly greater costs.  
See Also Chapter 2 – The Solicitor & Client Relationship

138 Section 153 of the Legal Services Regulation Act 2015, 'Legal Practitioner to Attempt to Resolve Disputes'.

139 Section 152 of the 2015 act.

## RESTRICTION ON CALCULATION OF CHARGES AS A PERCENTAGE OF DAMAGES

In contentious matters, except debt collection matters, a solicitor may not calculate charges as a specified percentage or proportion of any damages or other monies that may become payable to the client.<sup>140</sup>

### Information to be given at the completion of contentious matters

In relation to a contentious matter, solicitors are obliged at the completion of the case to inform clients in relation to the total amount of any settlement or award, the amounts of any contribution to costs received from any other party or parties, or any insurers of such party or parties.<sup>141</sup>

### Deductions in contentious matters

A solicitor is prohibited from making a deduction from a client's award or settlement unless the client consents in writing to the deduction. If the client's consent is not forthcoming, the solicitor can exercise a lien in those circumstances, but should not transfer the fees to the office account until the matter is resolved.<sup>142</sup>

### Deductions in non-contentious matters

In non-contentious matters, once a solicitor has issued a bill of costs and obtained the written agreement from the client, the solicitor is entitled to transfer the fees to the office account.

All monies received by a solicitor on behalf of a successful client, whether settlement monies or costs, are client monies.<sup>143</sup>

### Explanations to client during settlement negotiations

To enable a client to make an informed decision about the settlement on offer, the solicitor should explain matters as fully as possible to the client, including the likely deductions that will be made from the settlement figure, to the extent that this is practicable, allowing for the fact that third-party fees may not be

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140 Section 149 of the 2015 act.

141 Section 152 of the 2015 act.

142 Section 149 of the 2015 act.

143 Section 149 of the Legal Services Regulation Act 2015.

known at that point. The solicitor should inform the client of the contribution to the solicitor's costs that will be made by the other party to the proceedings. They should also explain whether any balance will remain to be paid by the client in relation to the solicitor's bill, and any shortfall in fees due to third parties, and that this amount will be deducted from the settlement monies. The client will then be in a position to make an informed decision about the settlement on the basis of the best information available at that point.

### EXCESSIVE FEES

When a solicitor is retained by a client to do certain work in their professional capacity, it is an implied term of the contract between the solicitor and the client that the remuneration of the solicitor will be fair and reasonable. The LSRA is required by law to investigate complaints of excessive charging. Where a complaint is upheld, the LSRA may direct:

- 1) A refund of portion of the fee if the fee has been paid,
- 2) A waiver of portion of the fee if the fee has not been paid,<sup>144</sup> or
- 3) May impose a disciplinary sanction.<sup>145</sup>

### THE SOLICITOR'S LIEN ON MONIES

A solicitor has a common law right to exercise a lien on monies held in respect of fees due on foot of a bill of costs provided to the client. A solicitor cannot exercise a lien on monies coming into the solicitor's control if the monies were sent to him for a specific purpose, such as for the payment of stamp duty.

If a solicitor holds monies in the client account that are greater than the amount due to the solicitor, the exercise of the lien should be limited to the amount due.<sup>146</sup> A solicitor cannot exercise a lien over the will of a deceased person.<sup>147</sup>

<sup>144</sup> Section 61 of the 2015 act.

<sup>145</sup> Section 50 of the 2015 act.

<sup>146</sup> See also Chapter 7, 'The Solicitor and his Relationship with other Solicitors' – 'The first solicitor's common law lien' and 'Transferring files between solicitors', Practice Note, August 2020.

<sup>147</sup> Right of a solicitor to exercise a lien, Practice Note 2020.  
See also Chapter 7, The Solicitor's Common Law Lien.

## SOLICITOR TRUSTEE'S COSTS

Where a solicitor is appointed as a trustee, they should ensure that there is a clause in the trust instrument that would enable them to charge for their legal costs. Where there is no charging clause in the trust instrument, the solicitor should seek the authority of all trustees to charge the trust for legal costs. The initial notice giving information about legal costs should be sent to the trustees.<sup>148</sup>

## DISCLOSURE OF COMMISSIONS

All monies received by a solicitor for and on behalf of a client from a financial institution, insurance company, stockbroker, mortgage broker, or financial advisor are deemed to be the client's money.

If a solicitor is to be paid a commission for placing business with a financial institution, insurance company, stockbroker, mortgage broker or financial advisor, prior disclosure should be made to the client by the solicitor. Otherwise, there is an inherent conflict between the interests of the solicitor and the client, and the independence of the solicitor in advising the client is compromised. A solicitor owes a fiduciary duty to their client to account to the client for any commissions in this regard.

## INTEREST ON CLIENT MONIES

A solicitor must account to a client for interest earned and/or charged on the client's monies where the amount of interest earned exceeds the amount specified by regulation. The interest is calculated by reference to the amount of interest that would be earned if such monies had been held in a deposit account at the then prevailing demand rate, in accordance with the *Solicitors Accounts Regulations*.<sup>149</sup>

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<sup>148</sup> Section 82 of the Succession Act 1965. If a solicitor, their spouse, or a partner in the firm attests a will, the solicitor is not entitled to receive payment for their services under the charging clause. All they will be entitled to receive is out of pocket expenses. Thus, even where a charging clause is included in the will, a solicitor still may not be entitled to charge for work done if they witness the will. It is imperative that no partner in the firm or their spouse witness a will.

<sup>149</sup> 'Interest charges on client accounts', Practice Note, February 2021.

There is no obligation on a solicitor to disclose a preferential rate of interest that the firm earns with a bank, which is paid because of the total amount of funds held by the firm with the bank.<sup>150</sup>

In circumstances where there are no interest-bearing accounts available to the solicitor from the principal bank to the firm, solicitors are permitted to hold clients' moneys in a non-interest-bearing account.

In circumstances where negative interest is applied by the bank in respect of client monies held by the solicitor, solicitors are permitted to pass on that charge to their clients, provided that certain steps are taken by the solicitor.

Solicitors should ensure that they set out clearly to their client the basis of calculation of the charge to be passed on within the section 150 notice.<sup>151</sup>

## SEARCH, SCRIVENERY, AND ADMINISTRATION FEES

Where a solicitor is required to make a search for papers and documents, or to schedule documents of a former client, they may charge a reasonable administration fee for the work involved, provided that an appropriate notice in respect of costs has been provided on receipt of the request.

Where a solicitor is requested by a person other than their client, but with their client's consent, to give information that necessitates making a search, a reasonable fee may be charged to such persons for such a search.

When a file is being transferred, if the solicitor wishes to copy the file to comply with the *Solicitors Accounts Regulations* or for other administrative purposes, this must be done at the solicitor's own expense.

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150 *SI no 372 of 2004, Solicitors (Interest on Clients' Moneys) Regulations 2004.*

151 'Interest charges on client accounts', *Practice Note, February 2021.*

## AUDITORS' QUERIES

Where a solicitor is requested by a client's auditor to provide information required for audit purposes, a reasonable fee may be charged to the client for this work, provided a costs notice is provided to the client in advance of this work being carried out.<sup>152</sup>

The information requested is usually an estimate of the client's ultimate liability, an estimate of costs and outlays due to the solicitor, and confirmation of the amount of client monies held on behalf of the client.

Likewise, if the information requested relates to confirmation of title to properties, a reasonable fee may be charged, in particular as this will necessitate the solicitor reviewing title and carrying out searches, as they may not have acted in the purchase or the sale of the property.

## FEE SHARING

A solicitor is prohibited by law from sharing professional fees generated by the provision of legal services by that solicitor, with a solicitor who does not hold a current practising certificate or with a non-solicitor, unless that person is a duly qualified legal agent in another country.<sup>153</sup>

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<sup>152</sup> 'Guidance for practitioners on response to audit queries', Practice Note, May 2021.

<sup>153</sup> 'Qualifications for acting as solicitor' – section 54 of the Solicitors Act 1954, as substituted by section 62 of the Solicitors (Amendment) Act 1994; 'Prohibition on solicitor acting as agent for unqualified person' – section 59 of the Solicitors Act 1954; SI no 343 of 1988, Solicitors (Professional Practice) Regulations 1988.



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# CHAPTER 11

## CONDUCT IN INTERNATIONAL PRACTICE

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# CHAPTER 11

## CONDUCT IN INTERNATIONAL PRACTICE

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### RELEVANCE FOR ALL LAWYERS

Professional conduct is relevant not only in national practice but also in international practice. Solicitors in this jurisdiction may have contact with lawyers in other jurisdictions through their practices. Professional conduct in these situations has been outlined in codes adopted by the International Bar Association and the Association of Bars and Law Societies of Europe (the CCBE).

Solicitors are referred to the current *International Principles on Conduct for the Legal Profession*, adopted by the International Bar Association as the basic code for lawyers' cross-border practice and for lawyers practising outside their own jurisdiction.<sup>154</sup>

The current code of the CCBE is recognised as the expression of consensus of all the bars and law societies of the EU in relation to codes of conduct for lawyers' cross-border practice within the EU and for lawyers practising outside the jurisdiction of their own member state.

Both codes have the principles of good conduct common to all lawyers as their basis.<sup>155</sup>

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154 'International Principles on Conduct for the Legal Profession', International Bar Association (2018).

155 *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*, CCBE (2010 edition) – see [www.ccbe.org](http://www.ccbe.org). The charter and code deal with cross-border activities of lawyers in the EU. While they are not enforceable as law in this jurisdiction, they are relevant insofar as they reflect the core principles of the profession.

## INTERACTIONS BETWEEN LAWYERS

A solicitor should recognise all lawyers and legal practitioners as professional colleagues and act respectfully, fairly, and courteously towards them.

### Instructing foreign lawyers

Solicitors should be aware that if they engage a lawyer in another jurisdiction on behalf of a client, they themselves may be held personally liable for that lawyer's fees, even if they have not been put in funds by the client. In order to avoid personal liability for those fees, the solicitor should ensure that an express agreement is made with the foreign lawyer at the time of that lawyer's appointment, confirming that the Irish solicitor will not be made personally liable for the fees.

An alternative would be for the solicitor to limit their involvement to referring the client to a lawyer in the particular jurisdiction. The client would then instruct the lawyer directly. The relationship of agent would not arise, and the personal liability would not follow in that situation.

Solicitors should be mindful that their professional indemnity insurance may not cover legal advice on international law and seek guidance from their PII provider.

## EU DIRECTIVE ON SERVICES

This directive covers a situation where a lawyer with an office established in one member state provides legal services in another without actually establishing an office there.

The lawyer remains subject to their own rules, but without prejudice to respect the host state's rules. The rules apply to the extent that they are capable of being observed by the lawyer and the extent to which their observance is "objectively justified to ensure, in the State, the proper exercise of a lawyer's

activity, the standing of the profession and respect for the rules concerning incompatibility”.<sup>156</sup>

An Irish qualified solicitor seeking to register as a Registered European Lawyer (REL) in another member state is required under the *Establishment Directive* to produce a registration certificate attesting to their qualification as a lawyer in their home member state.<sup>157</sup> Solicitors can apply to the Law Society for a Certificate of Attestation.<sup>158</sup>

## EU DIRECTIVE ON ESTABLISHMENT

The *Establishment Directive* facilitates a lawyer’s practice in a member state other than the state where their qualification was obtained.

The directive deals with the matter of rules of professional conduct. It provides that the immigrant lawyer is subject to the rules of professional conduct that apply to lawyers in the host state.

It also provides that, if the obligations enforced in the host member state are not complied with, the rules of procedure, penalties, and remedies provided for in the host member state shall apply.<sup>159</sup>

156 Council Directive 77/249 (EEC); SI no 58 of 1979, *European Communities (Freedom to Provide Services) (Lawyers) Regulations* 1979; SI no 197 of 1981, *European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations* 1981; SI no 226 of 1986, *European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations* 1986.

157 ‘Practising certificates and solicitors outside of the jurisdiction’, *Practice Note*, 2020.

158 ‘Information relating to practising certificates/membership/Certificates of Good Standing and Certificates of Attestation’.

159 ‘EU Registered Lawyers’, ([www.lawsociety.ie](http://www.lawsociety.ie)); *EU Directive on Establishment (98/5/EC)*, articles 6(1) and 7.

## IRISH QUALIFIED SOLICITORS SEEKING TO REGISTER WITH A FOREIGN BAR

An Irish qualified solicitor who wishes to register or maintain registration with a foreign bar can apply to the Law Society for a Certificate of Attestation. This evidence of registration/enrolment as a solicitor should be sufficient to allow them to register in that jurisdiction.<sup>160</sup>

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160 *'Practising certificates and solicitors outside the jurisdiction'*,

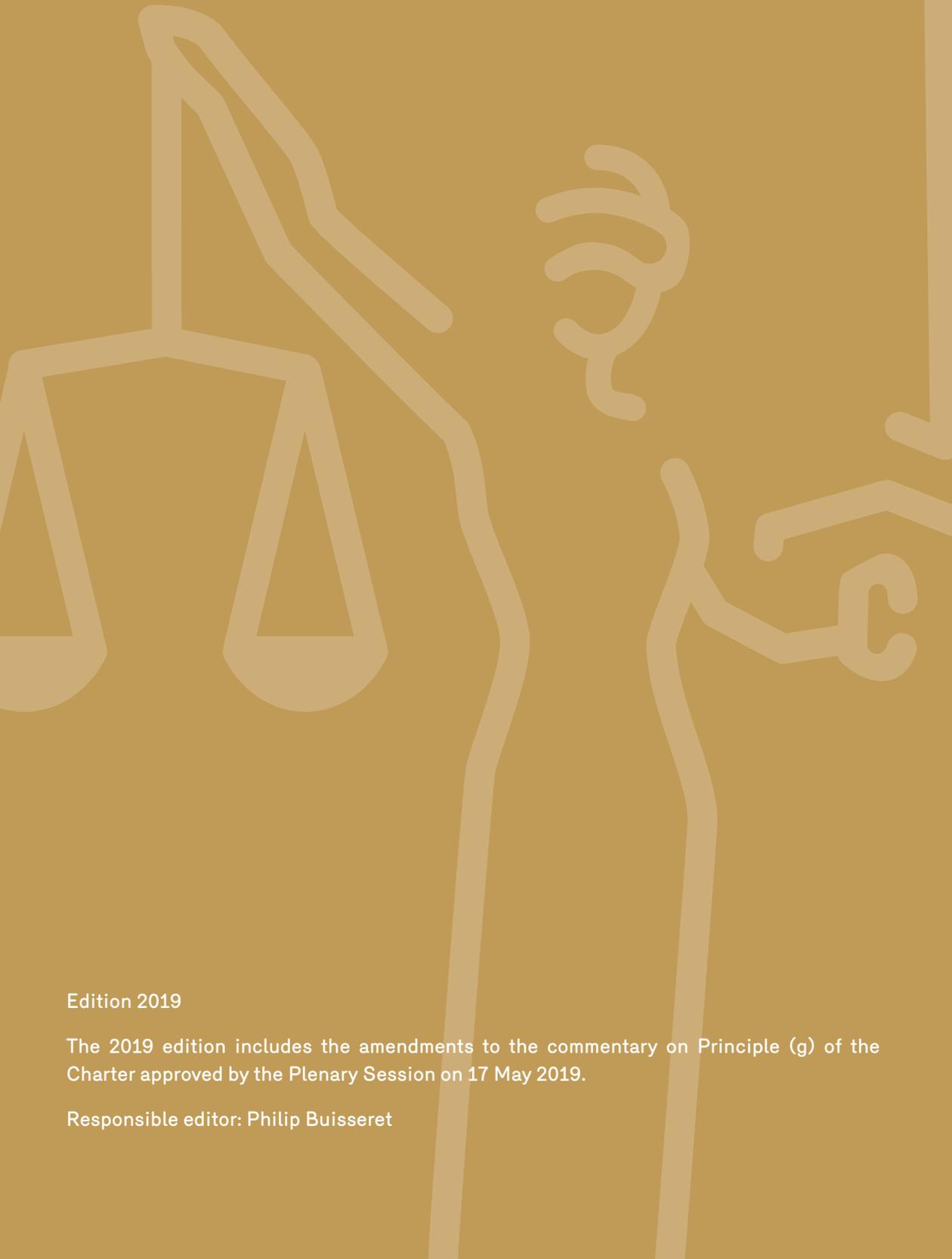


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# APPENDIX 1

CHARTER OF CORE PRINCIPLES OF  
THE EUROPEAN LEGAL PROFESSION  
&  
CODE OF CONDUCT FOR EUROPEAN LAWYERS  
Council of Bars and Law Societies of Europe  
(CCBE)

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Edition 2019

The 2019 edition includes the amendments to the commentary on Principle (g) of the Charter approved by the Plenary Session on 17 May 2019.

Responsible editor: Philip Buisseret

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# APPENDIX 1

## CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION & CODE OF CONDUCT FOR EUROPEAN LAWYERS

### Council of Bars and Law Societies of Europe (CCBE)

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The Council of Bars and Law Societies of Europe (CCBE) has as its principal object to represent its member Bars and Law Societies, whether they are full members (i.e. those of the European Union, the European Economic Area and the Swiss Confederation), or associated or observer members, on all matters of mutual interest relating to the exercise of the profession of lawyer, the development of the law and practice pertaining to the rule of law and the administration of justice and substantive developments in the law itself, both at a European and international level (Article III 1.a. of the CCBE Statutes).

In this respect, it is the official representative of Bars and Law Societies which between them comprise more than 1 million European lawyers.

The CCBE has adopted two foundation texts, which are included in this brochure, that are both complementary and very different in nature.

The more recent one is the *Charter of Core Principles of the European Legal Profession* which was adopted at the plenary session in Brussels on 24 November 2006. The Charter is not conceived as a code of conduct. It is aimed at applying to all of Europe, reaching out beyond the member, associate and observer states of the CCBE. The Charter contains a list of ten core principles common to the national and international rules regulating the legal profession.

The Charter aims, inter alia, to help bar associations that are struggling to establish their independence; and to increase understanding among lawyers of the importance of the lawyer's role in society; it is aimed both at lawyers

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*In 2021 the CCBE produced the Model Code of Conduct for European Lawyers "inspired by the Charter of Core Principles" page 4 Model Code of Conduct, 2021".*

themselves and at decision makers and the public in general.

The *Code of Conduct for European Lawyers* dates back to 28 October 1988. It has been amended three times; the latest amendment took place at the plenary session in Oporto on 19 May 2006. It is a binding text on all Member States: all lawyers who are members of the bars of these countries (whether their bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.

These two texts include a commentary for the first one, and an explanatory memorandum for the second one.

It is unnecessary to emphasise the importance of the set of norms set out in these two documents, which are the basis of the deontology of the European legal profession, and which contribute to shaping the European lawyer and the European bar.

31 January 2008

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## CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION

“In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer’s duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s cause but to be the client’s adviser. Respect for the lawyer’s professional function is an essential condition for the rule of law and democracy in society.”

– the CCBE’s Code of Conduct for European Lawyers, article 1.1

There are core principles which are common to the whole European legal profession, even though these principles are expressed in slightly different ways in different jurisdictions. The core principles underlie the various national and international codes which govern the conduct of lawyers. European lawyers are committed to these principles, which are essential for the proper administration of justice, access to justice and the right to a fair trial, as required under the European Convention of Human Rights. Bars and Law Societies, courts, legislators, governments and international organisations should seek to uphold and protect the core principles in the public interest.

The core principles are, in particular:

- (a) the independence of the lawyer, and the freedom of the lawyer to pursue the client’s case;
- (b) the right and duty of the lawyer to keep clients’ matters confidential and to respect professional secrecy;
- (c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;
- (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;
- (e) loyalty to the client;
- (f) fair treatment of clients in relation to fees;

- (g) the lawyer's professional competence;
- (h) respect towards professional colleagues;
- (i) respect for the rule of law and the fair administration of justice; and
- (j) the self-regulation of the legal profession.

## CODE OF CONDUCT FOR EUROPEAN LAWYERS

This Code of Conduct for European Lawyers was originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998, 6 December 2002 and 19 May 2006. The Code also takes into account amendments to the CCBE Statutes formally approved at an Extraordinary Plenary Session on 20 August 2007.

### PREAMBLE

#### 1.1. The Function of the Lawyer in society

In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society.

A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf;
- the legal profession in general and each fellow member of it in particular;
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

#### 1.2. The Nature of Rules of Professional Conduct

1.2.1. Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance

by the lawyer of a function which is recognised as essential in all civilised societies. The failure of the lawyer to observe these rules may result in disciplinary sanctions.

- 1.2.2. The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application.

The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation.

### 1.3. The Purpose of the Code

- 1.3.1. The continued integration of the European Union and European Economic Area and the increasing frequency of the cross-border activities of lawyers within the European Economic Area have made necessary in the public interest the statement of common rules which apply to all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross-border practice. A particular purpose of the statement of those rules is to mitigate the difficulties which result from the application of “double deontology”, notably as set out in Articles 4 and 7.2 of Directive 77/249/EEC and Articles 6 and 7 of Directive 98/5/EC.

- 1.3.2. The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

- be recognised at the present time as the expression of a consensus of all the Bars and Law Societies of the European Union and European Economic Area;
- be adopted as enforceable rules as soon as possible in accordance with national or EEA procedures in relation to the cross-border activities of the lawyer in the European Union and European Economic Area;
- be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

They further express the wish that the national rules of deontology or

professional practice be interpreted and applied whenever possible in a way consistent with the rules in this Code.

After the rules in this Code have been adopted as enforceable rules in relation to a lawyer's cross-border activities the lawyer will remain bound to observe the rules of the Bar or Law Society to which he or she belongs to the extent that they are consistent with the rules in this Code.

#### 1.4. Field of Application *Ratione Personae*

This Code shall apply to lawyers as they are defined by Directive 77/249/EEC and by Directive 98/5/EC and to lawyers of the Associate and Observer Members of the CCBE.

#### 1.5. Field of Application *Ratione Materiae*

Without prejudice to the pursuit of a progressive harmonisation of rules of deontology or professional practice which apply only internally within a Member State, the following rules shall apply to the cross-border activities of the lawyer within the European Union and the European Economic Area. Cross-border activities shall mean:

- (a) all professional contacts with lawyers of Member States other than the lawyer's own;
- (b) the professional activities of the lawyer in a Member State other than his or her own, whether or not the lawyer is physically present in that Member State.

#### 1.6. Definitions

In this Code:

“Member State” means a member state of the European Union or any other state whose legal profession is included in Article 1.4.

“Home Member State” means the Member State where the lawyer acquired the right to bear his or her professional title.

“Host Member State” means any other Member State where the lawyer carries on cross-border activities.

“Competent Authority” means the professional organisation(s) or authority(ies)

of the Member State concerned responsible for the laying down of rules of professional conduct and the administration of discipline of lawyers.

“Directive 77/249/EEC” means Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

“Directive 98/5/EC” means Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

## GENERAL PRINCIPLES

### 1.7. Independence

- 1.7.1. The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties.
- 1.7.2. This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure.

### 1.8. Trust and Personal Integrity

Relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.

### 1.9. Confidentiality

- 1.9.1. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

- 1.9.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.
- 1.9.3. The obligation of confidentiality is not limited in time.

- 1.9.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

#### 1.10. **Respect for the Rules of Other Bars and Law Societies**

When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

Member organisations of the CCBE are obliged to deposit their codes of conduct at the Secretariat of the CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat.

#### 1.11. **Incompatible Occupations**

- 1.11.1. In order to perform his or her functions with due independence and in a manner which is consistent with his or her duty to participate in the administration of justice a lawyer may be prohibited from undertaking certain occupations.
- 1.11.2. A lawyer who acts in the representation or the defence of a client in legal proceedings or before any public authorities in a Host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the Host Member State.
- 1.11.3. A lawyer established in a Host Member State in which he or she wishes to participate directly in commercial or other activities not connected with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State.

#### 1.12. **Personal Publicity**

- 1.12.1. A lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.
- 1.12.2. Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.

**1.13. The Client's Interest**

Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession.

**1.14. Limitation of Lawyer's Liability towards the Client**

To the extent permitted by the law of the Home Member State and the Host Member State, the lawyer may limit his or her liabilities towards the client in accordance with the professional rules to which the lawyer is subject.

## RELATIONS WITH CLIENTS

### 1.15. Acceptance and Termination of Instructions

- 1.15.1. A lawyer shall not handle a case for a party except on that party's instructions. The lawyer may, however, act in a case in which he or she has been instructed by another lawyer acting for the party or where the case has been assigned to him or her by a competent body.

The lawyer should make reasonable efforts to ascertain the identity, competence and authority of the person or body who instructs him or her when the specific circumstances show that the identity, competence and authority are uncertain.

- 1.15.2. A lawyer shall advise and represent the client promptly, conscientiously and diligently. The lawyer shall undertake personal responsibility for the discharge of the client's instructions and shall keep the client informed as to the progress of the matter with which the lawyer has been entrusted.

- 1.15.3. A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it.

A lawyer shall not accept instructions unless he or she can discharge those instructions promptly having regard to the pressure of other work.

- 1.15.4. A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

### 1.16. Conflict of Interest

- 1.16.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

- 1.16.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

- 1.16.3. A lawyer must also refrain from acting for a new client if there is a risk of

breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

- 1.16.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

### 1.17. **Pactum de Quota Litis**

1.17.1. A lawyer shall not be entitled to make a pactum de quota litis.

1.17.2. By “pactum de quota litis” is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.

1.17.3. “Pactum de quota litis” does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.

### 1.18. **Regulation of Fees**

A fee charged by a lawyer shall be fully disclosed to the client, shall be fair and reasonable, and shall comply with the law and professional rules to which the lawyer is subject.

### 1.19. **Payment on Account**

If a lawyer requires a payment on account of his or her fees and/or disbursements such payment should not exceed a reasonable estimate of the fees and probable disbursements involved.

Failing such payment, a lawyer may withdraw from the case or refuse to handle it, but subject always to paragraph 3.1.4 above.

### 1.20. **Fee Sharing with Non-Lawyers**

1.20.1. A lawyer may not share his or her fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted

by the laws and the professional rules to which the lawyer is subject.

1.20.2. The provisions of 3.6.1 above shall not preclude a lawyer from paying a fee, commission or other compensation to a deceased lawyer's heirs or to a retired lawyer in respect of taking over the deceased or retired lawyer's practice.

#### 1.21. Cost of Litigation and Availability of Legal Aid

1.21.1. The lawyer should at all times strive to achieve the most cost-effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution.

1.21.2. A lawyer shall inform the client of the availability of legal aid where applicable.

#### 1.22. Client Funds

1.22.1. Lawyers who come into possession of funds on behalf of their clients or third parties (hereinafter called "client funds") have to deposit such money into an account of a bank or similar institution subject to supervision by a public authority (hereinafter called a "client account"). A client account shall be separate from any other account of the lawyer. All client funds received by a lawyer should be deposited into such an account unless the owner of such funds agrees that the funds should be dealt with otherwise.

1.22.2. The lawyer shall maintain full and accurate records showing all the lawyer's dealings with client funds and distinguishing client funds from other funds held by the lawyer. Records may have to be kept for a certain period of time according to national rules.

1.22.3. A client account cannot be in debit except in exceptional circumstances as expressly permitted in national rules or due to bank charges, which cannot be influenced by the lawyer. Such an account cannot be given as a guarantee or be used as a security for any reason. There shall not be any set-off or merger between a client account and any other bank account, nor shall the client funds in a client account be available to defray money owed by the lawyer to the bank.

1.22.4. Client funds shall be transferred to the owners of such funds in the shortest period of time or under such conditions as are authorised by them.

- 1.22.5. The lawyer cannot transfer funds from a client account into the lawyer's own account for payment of fees without informing the client in writing.
- 1.22.6. The Competent Authorities in Member States shall have the power to verify and examine any document regarding client funds, whilst respecting the confidentiality or legal professional privilege to which it may be subject.

**1.23. Professional Indemnity Insurance**

- 1.23.1. Lawyers shall be insured against civil legal liability arising out of their legal practice to an extent which is reasonable having regard to the nature and extent of the risks incurred by their professional activities.
- 1.23.2. Should this prove impossible, the lawyer must inform the client of this situation and its consequences.

## RELATIONS WITH THE COURTS

### 1.24. Rules of Conduct in Court

A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.

### 1.25. Fair Conduct of Proceedings

A lawyer must always have due regard for the fair conduct of proceedings.

### 1.26. Demeanour in Court

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person.

### 1.27. False or Misleading Information

A lawyer shall never knowingly give false or misleading information to the court.

### 1.28. Extension to Arbitrators etc.

The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.

## RELATIONS BETWEEN LAWYERS

### 1.29. Corporate Spirit of the Profession

- 1.29.1. The corporate spirit of the profession requires a relationship of trust and co-operation between lawyers for the benefit of their clients and in order to avoid unnecessary litigation and other behaviour harmful to the reputation of the profession. It can, however, never justify setting the interests of the profession against those of the client.
- 1.29.2. A lawyer should recognise all other lawyers of Member States as professional colleagues and act fairly and courteously towards them.

### 1.30. Co-operation among Lawyers of Different Member States

- 1.30.1. It is the duty of a lawyer who is approached by a colleague from another Member State not to accept instructions in a matter which the lawyer is not competent to undertake. The lawyer should in such case be prepared to help that colleague to obtain the information necessary to enable him or her to instruct a lawyer who is capable of providing the service asked for.
- 1.30.2. Where a lawyer of a Member State co-operates with a lawyer from another Member State, both have a general duty to take into account the differences which may exist between their respective legal systems and the professional organisations, competences and obligations of lawyers in the Member States concerned.

### 1.31. Correspondence between Lawyers

- 1.31.1. If a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice he or she should clearly express this intention prior to communicating the first of the documents.
- 1.31.2. If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he or she should inform the sender accordingly without delay.

### 1.32. Referral Fees

- 1.32.1. A lawyer may not demand or accept from another lawyer or any other

person a fee, commission or any other compensation for referring or recommending the lawyer to a client.

- 1.32.2. A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to him- or herself.

**1.33. Communication with Opposing Parties**

A lawyer shall not communicate about a particular case or matter directly with any person whom he or she knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

**1.34. (Deleted by decision of the Plenary Session in Dublin on 6 December 2002)**

**1.35. Responsibility for Fees**

In professional relations between members of Bars of different Member States, where a lawyer does not confine him- or herself to recommending another lawyer or introducing that other lawyer to the client but instead him- or herself entrusts a correspondent with a particular matter or seeks the correspondent's advice, the instructing lawyer is personally bound, even if the client is insolvent, to pay the fees, costs and outlays which are due to the foreign correspondent. The lawyers concerned may, however, at the outset of the relationship between them make special arrangements on this matter. Further, the instructing lawyer may at any time limit his or her personal responsibility to the amount of the fees, costs and outlays incurred before intimation to the foreign lawyer of the instructing lawyer's disclaimer of responsibility for the future.

**1.36. Continuing Professional Development**

Lawyers should maintain and develop their professional knowledge and skills taking proper account of the European dimension of their profession.

**1.37. Disputes amongst Lawyers in Different Member States**

- 1.37.1. If a lawyer considers that a colleague in another Member State has acted in breach of a rule of professional conduct the lawyer shall draw the matter to the attention of that colleague.

- 1.37.2. If any personal dispute of a professional nature arises amongst lawyers in different Member States they should if possible first try to settle it in a friendly way.
- 1.37.3. A lawyer shall not commence any form of proceedings against a colleague in another Member State on matters referred to in 5.9.1 or 5.9.2 above without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.





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## APPENDIX 2

### IBA INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION

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# APPENDIX 2

## IBA INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION\*

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### Approved on 25 May 2019 by the Council of the International Bar Association

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\* See [www.ibanet.org](http://www.ibanet.org) for commentaries

Lawyers throughout the world are specialised professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. They have to combine a continuous update on legal developments with service to their clients, respect for the courts, and the legitimate aspiration to maintain a reasonable standard of living. Between these elements there is often tension. These principles aim at establishing a generally accepted framework to serve as a basis on which codes of conduct may be established by the appropriate authorities for lawyers in any part of the world. In addition, the purpose of adopting these International Principles is to promote and foster the ideals of the legal profession. These International Principles are not intended to replace or limit a lawyer's obligation under applicable laws or rules of professional conduct. Nor are they to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind.

### 1. Independence

A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.

### 2. Honesty, integrity and fairness

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

### **3. Conflicts of interest**

A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

### **4. Confidentiality/professional secrecy**

A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

### **5. Clients' interest**

A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

### **6. Lawyers' undertaking**

A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.

### **7. Clients' freedom**

A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

### **8. Property of clients and third parties**

A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.

### **9. Competence**

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

### **10. Fees**

Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.



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**APPENDIX 3**  
**FAMILY LAW IN IRELAND**  
**CODE OF PRACTICE**  
**2017**

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# APPENDIX 3

## FAMILY LAW IN IRELAND

### CODE OF PRACTICE

#### 2017

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## ACKNOWLEDGEMENTS

The Society considered that a review of the *Family Law Code of Practice* was timely in circumstances where there has been a huge growth in the area of family law over the last number of years. There have been significant changes in the law, particularly with the children’s rights referendum and the enactment of the *Children and Family Relationships Act 2015*.

Our main concern is to assist practitioners in providing an excellent service to clients who, by virtue of the fact that they have instructed a solicitor, are either contemplating or are in the course of family law proceedings and are having a most stressful life experience. The guidelines are designed to enhance the service provided to the client and to assist professionals in maintaining professionalism in this most difficult task.

We wish to commend the committee for their energy and willingness to give time to putting together this handbook. The Society is lucky to have a committee comprised of people with vast experience and a huge willingness to help. We believe the handbook reflects that enthusiasm, energy and commitment.

We would also like to thank our committee secretary, Jane Moffatt, who kept us within agreed timelines and drove this process from beginning to end.

*Family and Child Law Committee*

## INTRODUCTION

Family law in Ireland has seen very significant changes in recent times, in particular as a result of the changing fabric of our society. This brings increasing complexity to the practice of family law on a daily basis, although the issues of critical importance to our clients remain the same.

There can be a concern that solicitors and court procedures may add to the distress and anger that can arise when relationships break down. In general, solicitors should deal with matters in a way designed to preserve people's dignity and to encourage them to reach agreement wherever possible. The result will often be to achieve the same or more satisfactory solutions than going to court but at less cost both in terms of emotion and money. Various methods of alternative dispute resolution are now available and should be considered fully with clients. This Code tries to encourage solicitors that family law disputes should best be resolved in a constructive and non-confrontational way.

It must also be remembered that, while solicitors act as representatives of the client, we are also officers of the court and citizens having special responsibilities for the quality of justice.

As a representative of clients, the solicitor performs various functions. As an adviser, the solicitor provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, the solicitor forthrightly asserts the client's position under the rules of the adversarial system. As a negotiator, the solicitor seeks a result advantageous to the client but consistent with the requirement of honest dealings with others.

The solicitor's responsibilities as a representative of clients and as an officer of the court are usually harmonious. However, conflicting responsibilities can be encountered. The *Code of Practice* suggests methods by which such conflicts may be resolved.

In all professional functions, the solicitor must uphold the duties owed to clients in accordance with the Law Society's rules of professional conduct and must also demonstrate respect for the Constitution and the legal system and for those who serve it, including judges, other lawyers and public officials.

The Constitution is strongly supportive of the family and children. In family law cases, therefore, solicitors should fulfil their professional duties in a manner conducive to the best interests of their client, but also mindful of the best interests of the family as a whole and the children of the family in particular. Solicitors should also ensure that consideration is given at all times to balancing the benefits of any proposed action against the costs, both emotional and financial, to be incurred as a result.

The Law Society recommends that all solicitors practising family law should follow this Code as a point of reference. Members should also explain the Code to their clients, as it will form the basis of the approach that they and their colleagues should adopt.

Keeping the Code is not a sign of weakness and will not expose the client to disadvantage. The approach the solicitor adopts should be firm and fair and in accordance with their client's instructions. Solicitors are not prevented from taking immediate and decisive action where necessary. Even when there are ongoing discussions, court proceedings may be commenced and continue at the same time in case negotiations do not produce an agreement.

The Code is not a straitjacket. Its guidelines cannot be absolute rules and it may be necessary to depart from the Code if professional rules or duties require it.

## GENERAL

1. At an early stage, you should explain to your client the approach you adopt in family law work.
2. You should encourage your client to see the advantage to the parties of a constructive and non-confrontational approach as a way of resolving differences. You should advise, negotiate and conduct matters so as to help the parties settle their differences as speedily and amicably as possible and reach agreement, while allowing them time to reflect, consider and come to terms with their new situation.
3. If there are contentious issues concerning children, you should advise your client that the court will, by law, prioritise the best interests of the child. You should make sure that your client understands that the best interests of the child should be put first. You should explain that where a child is involved, your client's attitude to the other spouse will affect the family as a whole and the child's relationship with his or her parents. In light of the *Thirty-First Amendment of the Constitution (Children) Act 2012* and the provisions of the *Children and Family Relationships Act 2015* it is also prudent to advise the client of the obligation on courts to hear the voice of the child in appropriate cases. This may involve the child being asked to come to court to talk directly to the judge.
4. You should maintain professional objectivity and respect for all parties involved in the family law dispute, taking into account the long-term consequences of your actions for all concerned. In practice, issues relating to children and finances should be kept separate, where possible.
5. You should encourage the attitude that the dispute is not a contest in which there is a winner and a loser, but rather that it is a search for fair solutions. You should avoid using words or phrases that suggest or cause a dispute where there is no serious dispute. You should stress the need for your client to be open and honest in all aspects of the case and you must explain what could happen if your client does not conduct him or herself in this way.

6. Emotions are often intense in relationship disputes. You should avoid inflaming them in any way. You should take great care when considering the effect your correspondence could have on other parties and on your own client. Your letters should also be clear and free of jargon. Remember that clients may see assertive letters between solicitors as aggressive declarations of war.
  
7. Advise the client as to the restrictions imposed on the client and others by the in camera rule in family law proceedings.

## ALTERNATIVE METHODS OF DISPUTE RESOLUTION

There are various forms of alternative dispute resolution mechanisms in family law and it is important to make clients aware of these services, which may bring about a settlement and may help your client and any other parties involved. These mechanisms alleviate the need for a court-imposed outcome. They may therefore assist clients in reaching their own mutually beneficial terms in family law.

1. In the first place, you should explore the possibility of a reconciliation with your client and, where appropriate, give encouragement in that regard. Clients should also be provided with a list of suitable agencies to assist them in this process. In many cases, even where the difficulties are irretrievable, clients may benefit from personal counselling to assist them in dealing with the separation and/or divorce process.
2. You should also make your client aware of the avenue of mediation prior to entering into any correspondence or negotiation with the other party. In some cases, for example where there are unresolved domestic violence or protection issues, mediation may not be suitable. While the mediation process does not typically involve the assistance of solicitors, clients may seek legal advice in parallel or during the process, although many issues that arise might best be addressed in the course of the mediation itself.
3. Collaborative law is a further means for separating or divorcing couples who wish to play an active role in the process. Parties, including the collaborative lawyers, sign a participation agreement and undertake to stay out of court to resolve the terms of their separation/divorce/dissolution. As it is an advisory role involving a different approach than traditional representation, specific training is required. Of note is that clients cannot use the same lawyer in any future court-contested proceedings in the event the collaborative process breaks down.
4. The vast majority of family law cases are settled by solicitors and counsel either through the traditional means of negotiations leading to a Deed of Separation or negotiations in the context of ongoing court proceedings. It is hoped, however, that more parties will avail of alternative dispute resolution mechanisms such as mediation and collaborative law in the future.

## RELATIONSHIP WITH THE CLIENT

You should make sure that you are always objective and do not allow your emotions or personal opinions to influence your advice.

You should actively listen to the client's instructions to ensure that you fully understand. You should also exercise great care in the language used to communicate with clients both orally and in writing.

From the outset of the solicitor/client relationship, you should manage expectations as to service, time to conclude, result and costs. You should, with courtesy and respect, establish and maintain appropriate boundaries with your client from the outset.

When advising your client you must explain all options. The client must understand the consequences of any decision he/she has to make. You cannot make decisions on your client's behalf; decisions are a matter for the client taking your advice into account.

You should advise your client of the obligation in family law cases to make full disclosure of assets, income, liabilities, outgoings and pensions in negotiations and court proceedings where ancillary financial matters are at issue. Clients should also be advised of the consequences for non-disclosure.

You should keep clients fully informed both orally and in writing of all steps and material actions in their case. All communication should be clear and should, where possible, avoid legal jargon. Calls should also be returned as expeditiously as possible.

You must make your client aware of the legal costs at all stages and comply fully with your obligations under section 68 of the *Solicitors (Amendment) Act 1994*. The benefits and merits of any steps taken must be balanced against the costs at all stages of the process. The right of your client to apply for civil legal aid should also be made clear and all appropriate information and documentation furnished in this context.

Should problems arise in the solicitor/client relationship, you should address these as a priority. You should actively listen to the client's perception of the

problem and seek to resolve any complaint with courtesy and respect. You and your client may have very different perceptions of the problem. A client will not ‘hear’ you unless they are sure that you have ‘heard’ the problem from their perspective.

Clients should be informed of the firm’s complaints-handling procedure. Clients should also be made aware of their right to make complaints to the Law Society of Ireland. Ideally, clients should be sent a detailed letter of engagement with the section 68 letter setting out in greater detail how costs are calculated and their entitlement to have costs taxed. Clients should be asked to sign a copy of the letter of engagement so that there can be no confusion later as to the basis on which their costs have been calculated. You should also ensure that you comply with your money-laundering obligations.

Where there is a total breakdown in the solicitor/client relationship, it may be necessary to terminate it, and there are a variety of circumstances in which the solicitor/client relationship may be terminated.

If permission by the court is required for the solicitor’s withdrawal from representation, you must not withdraw from representation without the court’s permission. In any event, you must not withdraw without taking all reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice, allowing time for the employment of another solicitor, and delivering to the client all papers and property to which the client is entitled following payment of all outstanding fees due to you.

## DEALING WITH OTHER SOLICITORS

You should be honest in all dealings with other solicitors and act towards them with frankness and good faith consistent with your duties to your client. You should seek to maintain a good working relationship with colleagues and adopt a cooperative approach even in situations which are necessarily adversarial.

It is not appropriate to criticise the other party's solicitor, and particularly to one's own client. You should maintain your personal integrity and observe the requirements of good manners towards colleagues.

Care should be taken with written correspondence. Any communication should ideally be constructive, informative and effective. It should not contain emotive or inflammatory language. It should be easily understandable. Your communication with colleagues should not be personalised nor should a colleague's professionalism or expertise be questioned.

A solicitor should not write offensive letters to other members of the profession. A solicitor should not threaten to sue an opposing solicitor personally.

Both solicitors should encourage their respective clients to exchange full and complete information and documentation concerning the finances at the earliest possible stage. This would be in ease of all parties, not least the trial judge, and will enhance the chances of an early resolution.

## RELATIONSHIP WITH COUNSEL

It is not possible, except in limited circumstances, for a client to directly engage with counsel. Therefore, counsel is engaged by a solicitor (the ‘professional client’) to act on behalf of the solicitor’s client (the ‘lay client’). A solicitor acting on a general retainer from a client is not entitled, without instructions from the client, to seek the advice of, or to instruct, counsel. A specialist family law barrister may bring many benefits to an appropriate case, working with you to best advance matters on behalf of your client.

The role and functions of counsel includes advocacy, drafting pleadings, drafting legal opinions and other legal documents and negotiating settlements. However, counsel works only on the instructions given to him/her by his/her solicitor and will not generally be involved on a day-to-day basis in the administration and management of the lay client’s case. Therefore solicitors retain the overall responsibility for the management and progressing of a case and the lay client remains the solicitor’s direct client for the duration of the legal proceedings.

In any case where counsel is instructed, you should always be conscious that counsel can only be as effective as the instructions s/he receives. It is the duty of the solicitor to properly instruct counsel in the manner that ensures that counsel has all the information that the solicitor has, and which is or may be necessary for counsel to properly represent the client’s interests in a reasonable time frame.

A solicitor should endeavour to ensure that counsel delivers instructions within a reasonable time period in order to avoid the matter becoming statute barred or liable to be struck out. Where a solicitor is concerned that the instructed counsel will not deliver instructions on time, the solicitor is advised to request that counsel return their brief, in order for the solicitor to instruct another counsel.

Where a settlement consultation is arranged to discuss aspects of the case with a view to exploring the possibility of agreeing appropriate terms of settlement, it is important that both counsel and the solicitor explain fully the implications of any such settlement to ensure that the client has a full understanding of the terms. The client must be kept fully advised and involved as this is more likely to lead to a satisfactory outcome and satisfaction on the part of the client.

It is not permissible for counsel to be employed by a solicitor's firm. Neither may they have a room in the offices of a solicitor.

A solicitor and counsel may not make an agreement that counsel will do all of the work of the solicitor's firm or have a retainer in such firm. However, counsel is permitted to agree and have a retainer to do all of the work for a solicitor in relation to a specific client. Where such an agreement is entered into, counsel must be paid a separate fee for each piece of work completed.

Best practice stipulates that all communication between counsel and a solicitor should be expressed to be confidential and privileged. Where counsel is communicating via email with a solicitor, s/he should keep a hard copy of such correspondence or forward a copy to their instructing solicitor.

Prior to engaging counsel, solicitors are advised to request counsel's legal fees in writing. Where no express agreement has been made regarding fees, a reasonable fee should be paid to counsel. Although solicitors are not liable for counsel's fees, they are under a duty to endeavour to reclaim the fees that are properly owed to counsel. Solicitors should at the very least write to the client requesting payment of such fees, follow up such requests, and alert clients to the possibility that proceedings may be issued against them for the recovery of the payment. Where there is a possibility of reclaiming the fees owed, the solicitor may have to instigate proceedings.

Where a solicitor has received payment from the client for counsel's fees, the solicitor should pay the fee without delay.

Where the outcome of the case is unsatisfactory, the solicitor should not lay unjustified blame on counsel.

## DEALING WITH LAY LITIGANTS

In many family law cases, one or both parties involved will not have professional legal representation. Parties to litigation in our courts are entitled, as a matter of constitutional right, to fair procedures. They are also entitled to access to the courts and they can conduct litigation without a legal representative if they so choose.

When you are dealing with someone who is not represented by a solicitor, you should take even greater care to communicate clearly and try to avoid any technical language or jargon that is not easily understood.

You should also strongly recommend an unrepresented person to consult a solicitor and also advise that person that s/he may have an entitlement to civil legal aid. This advice should be communicated in writing, where possible, and should be repeated in all subsequent correspondence.

The lay litigant can also, in certain circumstances, avail of some help from a named party chosen by them in court proceedings. This party would not act as an advocate, but would sit with the lay litigant and, for example, take notes and generally advise while taking no part in the actual case itself. This is what is known as the 'McKenzie Friend'. This was given statutory recognition in section 40(5) of the *Civil Liability and Courts Act 2004*. The court must approve this and can provide directions as appropriate.

It is appropriate to prove to a court that legal documents have been properly served on a lay litigant by the production of the requisite affidavits of service. Any settlement concluded with the lay litigant may be open to possible subsequent legal challenge on the basis of the lack of legal representation/advice. It is therefore recommended that any settlement reached with a lay litigant is ruled by the court. If a settlement is reached between your client and a lay litigant, it is good practice to ensure that the lay litigant signs the terms of settlement in the presence of the judge ruling the case.

## COURT PROCEEDINGS

The institution of court proceedings in family law matters should be considered a last resort in circumstances where it is not possible to resolve matters arising by other means. In some exceptional cases, it may be necessary to issue court proceedings without first exploring the possibility of settlement, for example where it is necessary to invoke the jurisdiction of a particular court in international cases. However, this should only arise in exceptional cases.

Prior to instituting proceedings, all alternative means of dispute resolution should be fully explored with the client. It is also necessary for a solicitor, when instituting certain family law proceedings, to file a certificate with the relevant court office confirming that the appropriate steps have been taken to resolve matters without recourse to court proceedings.

Before filing proceedings, you and your client should consider whether the other party or his/her solicitor should be contacted in advance with a view to coming to an agreement and minimising any possible misunderstandings.

Particular care should be taken when drafting family law proceedings that the content is not inflammatory or aggressive.

You should also discourage your client from naming any third parties unless there are very good reasons to do so.

When taking any step in the proceedings, the long-term effect on your client and other family members must be balanced with the likely short-term benefit to the case.

If the purpose of taking a particular step in proceedings may be misunderstood or appear hostile, you should consider explaining it, as soon as possible, to your colleague.

Where possible, consideration should be given at an early stage in the proceedings to narrowing any issues in dispute and to bringing about an early settlement to the matter.

Throughout the conduct of court proceedings, solicitors must remember that the process is fraught with anxiety and fear for our clients and we must be sensitive to these concerns.

## CHILDREN

The best interests of children are paramount in any dispute concerning the children. Parents should be reminded that they will continue to be parents, even after a dispute regarding their children has been dealt with, and that co-operation is preferable to litigation.

Counselling and mediation should be canvassed at the earliest opportunity. Children may be damaged if they are drawn into the dispute between parents. Children may be the subject matter of disputes/proceedings in a number of ways – for example, in cases of custody/access, guardianship, childcare, child abduction, adoption. Parents should also be advised of the provisions around the rights of children inserted into the Constitution by the Thirty-First Amendment. In all relevant proceedings, the voice of the child, who is capable of forming his/her own views, should be heard as far as practicable and given due weight having regard to the child's age and maturity.

### CHILDREN IN PRIVATE FAMILY LAW DISPUTES

You should encourage your client to cooperate with the other parent when making decisions concerning their child and advise parents that it is often better to make arrangements for the child between themselves, through their solicitors or through a mediator, rather than through a court hearing where the decision of the judge may not suit either parent.

In any letters, you should keep disputes about arrangements for the child or children separate from disputes about any other matters. When acting for a parent in a private law family dispute, you must remember that the interests of the child may not mirror those of the parent and that the courts will focus on what is in the best interests of the child.

Solicitors should encourage clients to remember that, in most cases, they will be continuing to co-parent with the other party and it is better to acknowledge the other party's strengths as a parent rather than to condemn his or her weaknesses in an inflammatory negative statement. Where the other party is a perpetrator of domestic abuse, however, this clearly impacts on their parenting capacity and makes them an increased risk to the child and resident parent, and this should clearly be communicated to the court, with supporting evidence where available.

The *Children and Family Relationships Act 2015* puts much greater emphasis on the voice of the child and imposes a duty on a court to take into account the views of the child in many cases. This is underpinned by the provisions inserted into the Constitution by the *Thirty-First Amendment of the Constitution (Children) Act 2012* following the Children’s Rights Referendum.

## CHILDREN IN CHILDCARE CASES

There are obligations to report concerns that a child is at risk of abuse. Care proceedings originate under the *Child Care Acts* and are public law proceedings taken by the Child and Family Agency (Tusla) against the parent(s) where the child may be the subject of abuse or neglect. There may be an application for an emergency care order, an interim care order (or an extension thereof), a care order or a supervision order.

A solicitor can therefore find himself/herself retained on behalf of a parent, a child or a guardian ad litem (who has been ordered by the court to represent the views of and what is in the best interest of the child).

## THE CHILD AS A CLIENT

You should only accept instructions from a child if you have the necessary training and expertise in this field and the child is of an age and understanding to instruct. The solicitor’s role is to provide independent representation and advice to the child.

You must continually assess the child’s competence to give instructions.

Solicitors should advise clients that it will not assist them to produce statements or letters written by their children, nor to bring their children to speak with solicitors acting for one or other parent. Solicitors should firmly discourage such conduct. Solicitors should not see the children who are the subject of any case in which they are advising, unless they are acting for the child.

You should make all efforts to ensure that the proceedings are not delayed and that the proceedings are concluded within a reasonable time frame. You should also ensure the matter is listed for full hearing to ensure that all reports are exchanged in good time in advance of the hearing.

You should ensure that the child has sufficient information to make informed decisions. The information should be given to the child in a clear and understandable manner, and you should be aware that certain information may be considered harmful to a child.

### SURVIVAL PLAN FOR PARENTS/PARENTING PLANS

The way in which parents deal with their separation makes a difference to how their children cope with the situation. This means parents have a responsibility to make every effort to do whatever is necessary to minimise the trauma for their children. Negative effects can be avoided or minimised if parents can direct their energy to focus on what is best for their children. Even if the one-to-one relationship between the parents has ended, both have a role to play in the lives of their children.

When parents separate, may arise as to:

- How to tell the children about the separation,
- How to support the children through the separation process,
- How to parent into the future,
- How to deal with any disagreement on future parenting.

Parenting plans are helpful in establishing a structure for the family. A parenting plan can assist in reducing conflict between parents and provide security for the children.

Parenting plans generally set out an agreement between parents in relation to children, particularly in the following areas:

- What time is spent with each parent,
- Arrangements in relation to school and other activities,
- Holiday arrangements,
- How decisions are to be arrived at about the children and
- How children are to be consulted and informed about decisions.

## EXPERT WITNESSES

Independent experts have played a significant role in family law for a number of years. Expert witnesses such as child consultants, forensic accountants, valuers, pension consultants and insurance advisors are examples of experts commonly retained by the parties or their solicitors.

Where either party or their solicitor wishes to have a child medically examined or assessed for the purposes of producing evidence in court, the parties should, in the first instance, seek the agreement of the other party to the proceedings so as to secure an agreed referral to a mutually acceptable expert. Solicitors for both sides should agree on the issues to be notified to the agreed expert and the areas where direction and advice is sought. In default of agreement, the matter should be referred to the court for its directions.

It is important to advise clients that the role of the expert witness will generally be non-partisan in circumstances where the expert owes a duty to assist the court on matters within his/her expertise, and this duty overrides any obligation to the party from whom the expert has received instructions or by whom the expert is to be paid.

Increasingly, parties or their solicitors agree to the appointment of a joint expert who is mutually acceptable to both parties. A letter of joint appointment should first be agreed with all necessary information to enable the expert witness furnish his/her opinion. The appointment of joint experts is generally agreed with a view to minimising the costs to be incurred by both parties as well as the duration of the hearing, by narrowing the issues at dispute at an early stage.

It is likely that an increasing number of reports in respect of children will be required in family law proceedings, in particular reports to ascertain the ‘voice of the child’. It is important that solicitors advise clients properly as to the purpose of such reports and, in particular, to the fact that it is ultimately a matter for the court to make a determination on issues affecting a child. The same consideration applies in respect of recommendations made in reports under section 47 of the *Family Law Act 1995*. Such childcare expert recommendations are advisory only to a court.

## CONFLICT OF INTEREST

Where a solicitor has acted for both parties in a non-contentious matter (for example, probate and conveyancing) and subsequently one or other of the parties returns to that solicitor seeking family law advice then, before the solicitor agrees to act, he/she should:

- Satisfy him/herself that he/she has acquired no information that could lead to a possible conflict of interest, and
- Ensure, by correspondence if necessary, that the other party has no objection to the retainer.

It is entirely inappropriate for a solicitor or a firm of solicitors to represent both parties in any matrimonial/relationship dispute, notwithstanding that different solicitors within the firm may be representing the parties.

It is critical that the solicitor's role remain and be seen to be independent, and solicitors should ensure at all times that their representation of a client does not become a further issue of conflict between the parties.

It is advisable to ask a new client at the very start of your first conversation, and before you offer any advice, who their spouse/partner is, so as to avoid a conflict situation developing.

## FILE MANAGEMENT

It is very important that you keep written notes of all attendances on your client or on any person in any way connected with the case. The attendance note should include the date of the attendance, the name of the attendee(s) and, at the very minimum, all the information given by your client, all the advice given by you, and your client's response to your advice. You should also make a note of the emotional state of your client, if relevant. To assist in the matter of calculation of costs, the attendance note should also detail the duration of the attendance. The note can be typed or, where more expedient, handwritten. Attendances should also be kept by the staff in your office of all interaction between them and the client.

If you are doing other work for a family law client, it is important that you keep all documentation relating to that other work on a separate file.

It can sometimes be very helpful to suggest to your client that they should bring a friend/person with them to the consultations with you if they wish to do so, particularly at any difficult stages of the process. However the client should also be made aware of the restrictions imposed by the *in camera* rule in family law proceedings.

You should advise your client to maintain a balance between the costs being incurred by him/her and what s/he is likely to achieve following such expenditure. You should remind your client at all times to bear in mind and to review, from time to time, what is the appropriate sum to expend on resolving the dispute with their spouse, particularly in the context of discovery and interim applications, pending the substantive hearing.

As with all legal work, it is essential to furnish clients with a detailed letter pursuant to section 68 of the *Solicitors (Amendment) Act 1994*. In this letter, you should advise your client that he/she is responsible to you in respect of your costs and that it is only on some occasions that he/she may recover all or some of those costs from their spouse. You should also advise your client of the factors that influence a judge when he is considering whether or not to award costs in his/her favour or against them, and you should clarify for your client that, even if he/she gets an order for costs against their spouse, they are responsible to you for your costs but that they can recover some or all of their solicitor and client costs from their spouse if the judge so decides.

You should also discuss the contents of the section 68 letter with your client in person or on the telephone if possible so that s/he fully understands. It is a good idea to inform them in advance that you will be writing to them about costs. This also helps to maintain a good relationship between you and your client because, if a section 68 letter is received 'cold' by your client, it can lead to your client thinking that your only interest in the case is the amount of costs you can earn and/or that you do not trust that s/he will pay you. This is particularly important in a family law case because of the very sensitive nature of such cases. You will be able to explain more easily in a conversation than in writing that the section 68 letter is sent for the benefit of the client rather than the solicitor.

You should advise your client that costs accrue whether or not the case goes to court, as protracted correspondence and sometimes negotiations can also lead to substantial costs being incurred.

You may wish to seek payment on account and, if so, you should advise your client of this at the outset. You should clarify whether or not you wish payment on account or whether or not you propose to furnish interim bills for work done to date. These are two distinct matters, and you should make it clear to your client which, if any, you require.

When issuing proceedings, you should discuss with your client the advantages and disadvantages of bringing proceedings in the Circuit or the High Court from the costs point-of-view. You should also explain to your client the costs implications when instructing junior or senior counsel.

You should advise your client as to the availability of legal aid and you should furnish them with the address and telephone number of the nearest law centre.

You should advise your client that lengthy and/or accusatory correspondence with the solicitor for their spouse will very likely lead to increased costs and, furthermore, that it may well inflame the situation, prompting an aggressive response from their spouse, which may lead to further protracted correspondence/litigation between the parties, resulting in increased legal costs.

You should also advise your client that costs will be kept to a minimum if they carry out actions and prepare the work, which you request them to do, efficiently and in a timely manner.

You should advise your client that the conduct of the litigation may influence a court in deciding whether or not to make an order for costs for or against either party. This will include any delay or obstruction by either party to the proceedings in complying with any reasonable request by the other side or delay in complying with any court order. This includes not complying with a reasonable request for discovery and also includes either party making an unreasonable request of the other party including seeking excessive discovery.

You should also advise your client that all the time spent by you on his/her file results in increased legal costs including frequent/long telephone calls.

## ANTI-MONEY-LAUNDERING OBLIGATIONS

Solicitors are reminded of their obligations under the anti-money-laundering legislation, which may have a particular relevance in family law cases.

It is necessary for all solicitors to take measures to identify new clients and maintain records of their identity. If it is an existing client, solicitors must still comply with anti-money-laundering requirements by verifying the client's identity by way of photographic identification such as a driving licence or passport and a recent utility bill (less than three months old) with the client's address. It is also necessary to maintain records of all transactions and a copy of documents for at least five years following the transaction.

A solicitor must not:

- Advise or assist a client to convert, transfer, handle or remove property that represents the proceeds of criminal conduct, or
- Conceal or disguise the true nature of any property that represents the proceeds of criminal conduct, or
- Acquire, possess or use property, including fees, that represents the proceeds of criminal conduct.

Any assets or resources purchased with untaxed income represent the proceeds of 'criminal conduct'. For this reason, solicitors must be careful in transferring property between spouses where there may be any suggestion that the assets were purchased with untaxed income or represent the proceeds of any other criminal conduct. A solicitor who advises or effects such a transaction could commit the offence of money-laundering. The legislation does not require actual knowledge on the part of the solicitor that the assets are 'tainted'. The test is one of recklessness or suspicion. The legislation does not contain any de minimis provision and an asset is considered 'tainted' even if only a small proportion of the funding arose from untaxed income and regardless of the length of time that has elapsed since the asset was required.

Where the transfer of such 'tainted' assets is being ruled or ordered by the court, the court must be made aware of the provenance of the assets or of any suggestion of funding, whether in whole or in part, from criminal conduct. A failure to disclose to the court a fact relating to the status of such property could amount to concealment on the part of the solicitor.

Where the transfer of such ‘tainted’ assets is being sought by agreement of the parties, without the intervention of the court, a solicitor should not complete any such transaction until the client has regularised the situation in respect of those assets. If a client refuses to do so, the solicitor should cease to act.

Where court proceedings have been instituted, a further reporting obligation may not arise by virtue of legal privilege. However, this reporting obligation may arise outside the context of court proceedings. In particular, this obligation may arise in the context of negotiations leading to a Deed of Separation or in the context of collaborative law.

The attention of all solicitors is drawn to the Law Society of Ireland guidance notes for solicitors on anti-money-laundering legislation, which can be accessed through the Society’s website at [www.lawsociety.ie](http://www.lawsociety.ie).

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Note: Texts of Appendices are **not** included in the Index

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