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Law Society of Ireland



A Guide to Good
Professional Conduct
for Solicitors

3rd Edition

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Foreword

I am very pleased to introduce the third edition of our guide to conduct, *A Guide to Good Professional Conduct for Solicitors*. The previous edition was published in 2002.

The Guidance and Ethics Committee has carried out an excellent review and updating of the guide. The whole profession was invited to comment on the draft text and the resulting publication has benefited from this additional input.

As members of the solicitors' profession, we strive to deliver a quality service to our clients. We also recognise that we play a vital role in the administration of justice in our society. We must carry out our roles to the highest professional standard. When we find ourselves in situations where our professional duty is not immediately clear, we can consult the guide.

The role of solicitors is constantly evolving, and solicitors must adapt to meet the new challenges. However, the core principles that guide our conduct, including: honesty, integrity, independence, avoidance of conflict of interest, and confidentiality, remain the same.

The Guidance and Ethics Committee operates the Guidance and Ethics Helpline. Solicitors who are concerned about their own position on any matter of conduct should not hesitate to contact the secretary to the committee at the Law Society. The solicitor will be assisted and will be informed about any relevant published material, including practice notes. The solicitor will then be in a position to make an informed professional judgement on the particular matter.

This publication will be important in the training of solicitors. We must ensure that trainees fully understand the core principles and adopt them when they qualify as solicitors.

This guide will be reviewed on an ongoing basis. Accordingly, comment on this edition will be welcomed.

I would like to thank James Cahill, Brendan J. Twomey and Brendan Dillon (recent Chairs of the Guidance and Ethics Committee), Therese Clarke (secretary to the committee) and all committee members who were involved in this important task.

James McCourt
President

October 2013

PANEL TO ASSIST SOLICITORS

IN DIFFICULTY WITH

THE LAW SOCIETY

**PROBLEMS ARE
MORE LIKELY TO
BE RESOLVED IF
THEY ARE GIVEN
IMMEDIATE AND
PROPER
ATTENTION.**

If you have been notified by the Law Society of a complaint made against you or of other difficulties relating to your practice, you may wish to contact one of the Panel members to assist you with your *initial* response to the Society.

For further information about the Panel and for information in relation to regulation, visit the members' area at www.lawsociety.ie

Introduction

This is the third edition of the publication which was formerly known as “A Guide to Professional Conduct of Solicitors in Ireland”. The publication now has a new title – “A Guide to Good Professional Conduct for Solicitors”. The title describes the simple purpose of this publication. The publication, like the first two editions, will be commonly referred to as “The Guide”.

The Guide provides a statement of the accepted principles of good conduct and practice for solicitors. Those principles are illustrated in the context of practical situations, including those situations which are most frequently the subject of queries from solicitors to the Law Society. It serves a very useful purpose and is regularly consulted and quoted.

The Guide represents Law Society policy and recommendations as at the date of publication.

The Guide does not have the force of law. If a decision has to 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 Solicitors Disciplinary Tribunal, which will consider the facts of the particular case. Generally, no action can be declared misconduct until it has been so found by the Tribunal. The Complaints and Client Relations Committee and the Regulation of Practice Committee have some limited powers to deal with cases of misconduct¹.

The brief to the Guidance & Ethics Committee, who carried out the review of the current edition, was to review and update the guide, not to make new rules, and this is what has been done.

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. In addition, a comprehensive schedule of

1. *Section 14(c) Solicitors (Amendment) Act 2002 – Power of Complaints and Client Relations Committee to require contribution towards costs incurred by the Society and/or issue reprimand in writing.*
Regulation 28(5) Solicitors Accounts Regulations 2001 (S.I. No. 421 of 2001) – Power of Regulation of Practice Committee to levy the costs of the investigation.

Introduction

statutory instruments promulgated under the Solicitors Acts 1954 to 2011, and other relevant statutory instruments, has been included as an appendix. Reference has also been made in footnotes to practice notes to which the solicitor can refer for a full expansion of particular topics. The practice notes are updated on an ongoing basis – see www.gazette.ie.

Account was taken of the codes of other jurisdictions and disciplines. CCBE (Conseil Des Barreaux de la Communauté Européenne) which is the association of the Bars and Law Societies within the EU, has requested that the CCBE Code be taken into account in all revisions of national rules, with a view to the progressive harmonisation of codes and regulations governing lawyers within the European Community.

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.

The Guide is relevant for all solicitors whether in private practice as principal, partner or assistant or in employment in the corporate and public services sectors.

References to the masculine should be read to include reference to the feminine.

October 2013

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Chapter 01

The Rules of Professional Conduct

1.1 THE FUNCTION OF THE SOLICITOR IN SOCIETY

In a society founded on respect for the rule of law, solicitors fulfil a special role. Their duties do not begin and end with the faithful performance of what they are instructed to do so far as the law permits. Solicitors must serve the interests of justice as well as the rights and liberties of their clients. It is their duty not only to plead their clients' cause but also to be their adviser.

The solicitors' function therefore imposes on them a variety of legal and moral obligations, sometimes appearing to be in conflict with each other, towards:-

- (a) their clients,
- (b) the courts and other bodies before whom solicitors plead their clients' cause or act on their behalf,
- (c) the public, for whom the existence of a free and independent profession is an essential means of safeguarding individual rights in face of the power of the State and other interests in society,
- (d) the legal profession in general and each fellow member of it.

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

1.2 LEGISLATION

The rules of professional conduct are derived both from statutory and non-statutory

sources. The Solicitors Acts 1954 to 2011 and the regulations made under these acts are the legislative framework for the regulation of solicitors¹.

Solicitors should also be mindful of additional statutory duties, such as those necessitated by Data Protection legislation and Anti-Money Laundering legislation².

1.3 CORE VALUES OF THE PROFESSION

General

In addition to the legislative requirements, solicitors are also required to observe general core principles of conduct, in particular honesty, independence, confidentiality and the avoidance of situations of conflict of interest. A solicitor should at all times observe and promote these core values of the profession and avoid any conduct or activities inconsistent with those values.

The rules of all the Bar Associations and Law Societies in the European Community are based on identical values and in most cases demonstrate a common foundation which is also reflected in the rules of Bar Associations and Law Societies throughout the world. When the solicitor observes the highest professional standards, this is to the ultimate benefit of the client whether an individual or an organisation³.

Honesty

A solicitor must be honest in his practice as a solicitor in all his dealings with others.

Independence

Solicitors must always retain their professional independence and their ability to advise their clients fearlessly and objectively. Independence is essential to the function of solicitors in their relationships with all parties and it is the duty of solicitors that

1 *Schedule of Statutory Instruments relevant to the conduct and practice of solicitors, enacted under the Solicitors Acts 1954 to 2011 and other legislation at Appendix 1.*

2 *“Data Protection and Solicitors” Law Society, January 2008. See www.lawsociety.ie; Criminal Justice (Money Laundering and Terrorist Financing) Act 2010; “AML Obligations” – Law Society. See www.lawsociety.ie.*

3 *“Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers” CCBE (edition 2010). See www.ccbbe.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 2011. See www.ibanet.org. See Appendix 3.*

they do not allow their independence to be 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 his various relationships of trust. The independence of a solicitor's advice is an essential value.

Solicitors who are proprietors of firms are responsible for everything which happens in their firms and must retain full control of the firm at all times.

A solicitor must not allow himself to be intimidated by a client or other person, into making decisions or taking actions relating to the firm, or the legal services provided by the firm, which are illegal, breach the solicitor's professional duties or are not in the solicitor's own interests.

A solicitor should never permit his independence to be undermined by the wishes of a party who has introduced a client.

Independence of the solicitor employed in an organisation

In in-house situations, the solicitor has only one client, who is also the employer. As an employee of the organisation the solicitor owes a duty of loyalty to the employer. The solicitor will share the common objectives of the organisation but should at the same time maintain an objective and professional stance.

Should a situation arise where an employer instructs a solicitor to act in a way which, in the opinion of the solicitor, would amount to unprofessional conduct on the solicitor's part or which may even be illegal, the solicitor should advise the employer that those instructions cannot be acted upon. The solicitor should analyse the matter carefully, tender the appropriate advice and make every effort to persuade the employer to change the instructions. In appropriate situations the matter might be resolved by seeking a second opinion from another lawyer.

However, difficulties arising in the exercise of professional independence are the exception rather than the norm. Rather, the in-house solicitor is valued for an objective contribution to the making of informed and legally correct decisions by the organisation.

Every solicitor is faced with difficult decisions from time to time. This is inevitable, given the solicitor's role. However, the in-house solicitor must at all times give legal advice which is both independent and impartial.

In-house solicitors who hold practising certificates are subject to the statutory regulation of the Law Society in the same way as solicitors in private practice⁴.

Conflict and confidentiality

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

1.4 THE ENFORCEMENT OF THE RULES OF PROFESSIONAL CONDUCT

The failure of the solicitor to observe these rules, whether having a statutory basis or otherwise, could result in a complaint to the Law Society. Referral to the Solicitors Disciplinary Tribunal of the High Court may follow. Alternatively, a complaint may be made directly to the Tribunal.

The Tribunal, which sits as a division of the High Court, may upon due inquiry make a finding of misconduct.

The definition of misconduct in the Solicitors Acts 1954 to 2011 provides as follows:-

“misconduct” includes

- (a) the commission of treason or a felony or a misdemeanour,
- (b) the commission, outside the State, of a crime or an offence which would be a felony or a misdemeanor if committed in the State,
- (c) the contravention of a provision of the Solicitors Acts 1954 to 2011, or any order or regulation made thereunder,
- (d) in the course of practice as a solicitor –

4. *“Guide for Solicitors Employed in the Corporate and Public Sectors” (4th edition) – Law Society, May 2012. See www.lawsociety.ie.*

- (i) having any direct or indirect connection, association or arrangement with any person (other than a client) whom the solicitor knows, or upon reasonable enquiry should have known, is a person who is acting or has acted in contravention of Section 55 or 56 or Section 58 (which prohibits an unqualified person from drawing or preparing certain documents), as amended by the Act of 1994, or the Principal Act, or Section 5 of the Solicitors (Amendment) Act 2002, or
 - (ii) accepting instructions to provide legal services to a person from another person whom the solicitor knows, or upon reasonable enquiry should have known, is a person who is acting or has acted in contravention of those enactments,
- (e) any other conduct tending to bring the solicitors' profession into disrepute.⁵

A finding of misconduct may result in a sanction being imposed on the solicitor by the Solicitors Disciplinary Tribunal itself or by the High Court.

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

5. *"Inquiry by the Solicitors Disciplinary Tribunal into the conduct of a solicitor on the grounds of alleged misconduct"* – Section 7 (as substituted by Section 17 of the Solicitors (Amendment) Act 1994 and as amended by Section 9 of the Solicitors (Amendment) Act 2002) of the Act of 1960;
"Interpretation" – Section 3 (as substituted by Section 24 of the Solicitors (Amendment) Act 1994 and as amended by Section 7 of the Solicitors (Amendment) Act 2002) of the Act of 1960;
"Abolition of distinction between felony and misdemeanour" – Section 3 of the Criminal Law Act 1997.

Chapter 02

The Solicitor and his Relationship with his Client

2.1 ACCEPTANCE OF INSTRUCTIONS

General

The decision to accept instructions in any particular case is a matter for the discretion of the individual solicitor.

A solicitor should not discriminate unfairly between members of the public. He should not refuse to act for a person on the grounds of the gender, civil status, family status, sexual orientation, religion, age, disability, race, membership of the Traveller community or membership of any social grouping of that person. However, a solicitor is not bound to accept the instructions of any client. In certain circumstances it is clearly wrong for a solicitor to act or to take instructions, for example, where to accept instructions would involve the solicitor in the furtherance of a crime or in some form of unprofessional conduct such as conflict of interest¹.

Terms and conditions of business

It is recommended that when a solicitor is taking instructions, he should provide the client with the firm's terms and conditions of business. Where practicable, he should confirm the instructions in writing and set out in general terms what he intends to do.

While there is no obligation on a solicitor to have the firm's terms and conditions of business signed by the client, it is good practice to do so. If the letter or other document giving the client information in respect of legal charges is separate, it is also good practice to have this signed by the client. This signed documentation might be the solicitor's best defence in the event of a dispute².

1. *Equal Status Act 2000, as amended.*

2. *"Terms and Conditions of Business" – Law Society, October 2013. See www.lawsociety.ie; S.I. No. 533 of 2010. European Union (Provision of Services) Regulations 2010.*

The Solicitor and his Relationship with his Client

Information in relation to legal charges

The solicitor must inform the client in writing as soon as reasonable and practical, of the charges they will incur for the provision of any legal service. The definition of charges includes both professional fees and outlays. The legislation requires that the actual charges be given, if this is possible. If not, then an estimate must be given, and if that is not possible, the basis of the charges must be given. If, subsequently, unforeseen complexities arise, the solicitor should review the information given to the client and, if the letter setting out the charges needs to be varied, then a revised letter should issue to the client³.

Time costing

Where the basis of charge is the time spent on a case, it is recommended that the solicitor keeps the client informed on a regular basis of the time spent. Time records must be maintained and must be available for inspection in the event of a dispute or a complaint to the Law Society.

Refusal of instructions

A solicitor should not agree to act for a client if he knows that he will be unable to carry out the instructions of the client adequately.

A solicitor should not accept instructions to act in a matter for which he does not have sufficient expertise or if he will not have time to give the necessary attention to the case.

Where, having regard to his professional, legal and moral obligations, a solicitor decides that he cannot accept instructions from a particular person, he should immediately inform that person, preferably in writing, of his decision not to act.

The solicitor employed in an organisation

An employed solicitor may receive his instructions from one or more employees in an organisation.

3. “Charges to clients” – Section 68 of the Solicitors (Amendment) Act 1994. See later also Chapter 10 “The Remuneration of a Solicitor”;
“The Dos and Don’ts of Section 68” – Practice Note, Gazette, November 2010. See www.gazette.ie.

The Solicitor and his Relationship with his Client

The reporting context within which the solicitor operates is very important. If it is too limited, it makes the exercise of the solicitor's function very difficult.

All the acts of an organisation and of its employees are acts delegated from a board of directors or other source of authority. When difficulties arise, it is important that the senior or sole solicitor has effective lines of communication, if not direct access, to an executive director.

Instructions to be taken directly from 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.

Payment by client of fees in advance

A solicitor may only wish to act for a client in circumstances where the client pays all fees due in advance or pays a sum in respect of fees due as they arise. A solicitor is entitled to refuse to act for a client if the client does not agree to the terms by which the solicitor is to be paid, as communicated to the client at the commencement of the case. A solicitor may terminate a retainer if the client does not abide by payment terms as initially agreed.

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, he is under a duty to comply with those instructions unless he has reasonable grounds for refusing to act in that particular case for that particular client, subject to the agreement of the court, where this is necessary⁴.

Legally aided clients in civil matters

When accepting instructions in civil legal aid matters, solicitors should comply with the relevant legislation⁵.

4. *Criminal Justice (Legal Aid) Act 1962.*

5. *Civil Legal Aid Act 1995.*

2.2 PROPER STANDARD OF LEGAL SERVICES

A solicitor should be open, frank and honest in all his dealings with his clients.

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

A solicitor should use his utmost skill and care in acting on behalf of his client. The standard of care expected is that of a reasonably careful and skilful solicitor who has the relevant expertise. The standard should also take into account the fact that the relationship of a solicitor and client is a fiduciary relationship⁶.

Continuing professional development

A solicitor is required by regulation to keep his knowledge and skill up to date on a continuing basis during the whole of his professional career. This will ensure that clients receive a competent professional service based on current developments in legislation and practice⁷.

Solicitors should refer to the practice notes published in every edition of the Law Society Gazette which covers best practice in each practice area. All practice notes can also be accessed on the Law Society's Gazette website. Solicitors should also ensure that they are signed up to receive Law Society eZine and e-Bulletins⁸.

General

A solicitor should also take into account that in certain circumstances the courts have held as a matter of law that a duty of care is 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 property when a solicitor is replying to requisitions on behalf of the vendor of the property⁹.

A solicitor should, as far as practicable, explain to the client the procedures to be followed in any particular matter and the length of time the procedures are likely to take.

6. "Power of Society to impose sanctions for inadequate services" – Section 8 of the Solicitors (Amendment) Act 1994.

7. S.I. No. 501 of 2012. "Solicitors (Continuing Professional Development) Regulations 2012" or other regulations enacted from time to time.

8. See www.gazette.ie.

9. *Walls v Hegarty* 1980 ILRM 124; *Doran v Delaney*. Supreme Court [1998] 2 IR 61.

The Solicitor and his Relationship with his Client

A solicitor should keep the client informed of the progress of the matter and, where appropriate, copy relevant correspondence to the client.

Where it is important to notify the client of a particular matter, or to confirm or clarify details with the client, this should be done in writing¹⁰.

Legal agents

When a solicitor employs a legal or other agent to carry out work related to a client's business he should endeavour to ensure that the work will be carried out in a competent manner¹¹.

Failure to reply to letters

A solicitor should reply promptly to letters written to him on professional business. A solicitor should always answer letters from another solicitor, in particular those letters which make inquiries on behalf of a client.

Complaints

A solicitor should ensure that there is a system in place for dealing with complaints, including a review of the client's file. The client should then be advised of any actions that will be taken in relation to the matter¹².

Accounting for monies

At the conclusion of any matter a solicitor should account to the client for monies received on the client's behalf, setting out details of all charges and outlays incurred¹³.

10. "Terms and Conditions of Business" – Law Society, October 2013. See www.lawsociety.ie;

"Quality Service Statement" – Law Society, February 2001.

11. "The Use of Legal and other Agents by Solicitors" – Practice Note, Gazette, August 1998. See www.gazette.ie;

"Law Searchers" – Practice Note, Gazette, June 2010. See www.gazette.ie.

12. Internal complaints procedure in solicitors' firms;

"Terms and Conditions of Business" – Law Society, October 2013. See www.lawsociety.ie

13. Section 68 (6) Solicitors (Amendment) Act 1994;

S.I. No. 421 of 2001. Solicitors Accounts Regulations 2001 to 2006;

S.I. No. 372 of 2004. Solicitors (Interest on Clients' Moneys) Regulations 2004;

S.I. No. 719 of 2005. Solicitors Accounts (Amendment) Regulations 2005 – Form of acknowledgment of compliance with accounts regulations;

S.I. No. 111 of 2006. Solicitors Accounts (Amendment) Regulations 2006.

The Solicitor and his Relationship with his Client

Client lacking mental capacity

As with any other contract, if a client lacks mental capacity, he does not have the legal capacity to enter into a contractual relationship with the solicitor.

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. 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.

However it should also be recognised that in some cases a person may not have the capacity to make any decisions which have legal consequences¹⁴.

Vulnerable clients

The solicitor has a special duty of care in respect of vulnerable clients. The relationship between a solicitor and a client is a fiduciary relationship. Accordingly, in dealings with any client, a solicitor should be cognisant of characteristics which make a client more vulnerable, such as the 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 facilitating 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

14. "Do not go Gentle" – *Cherishing the Elderly Client* – Gazette, December 2008. See www.gazette.ie;
"Joint Bank Accounts" – *Guidelines for Solicitors* – Gazette, December 2008. See www.gazette.ie;
"Drafting Wills for the Elderly Client" – *Guidelines for Solicitors* – Gazette, Jan/Feb 2009. See www.gazette.ie;
"Administration of Estates" – *Guidelines for Solicitors* – Gazette, March 2009. See www.gazette.ie;
"Gifts: Acting for an Elderly Client" – *Guidelines for Solicitors* – Gazette, April 2009. See www.gazette.ie;
"Enduring Powers of Attorney" – *Guidelines for Solicitors* – June 2009. See www.gazette.ie.

The Solicitor and his Relationship with his Client

- 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 which he suspects 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.

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 the client whether the client should proceed with the transaction, taking all factors into account. The advices should include advising the client of making provision for his 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 which 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 client¹⁵.

Family law

The practice of family law requires a special approach and the development of skills which enable the practitioner to assist the parties reach a constructive settlement of their differences. The welfare of children should be a first priority. Solicitors should encourage a conciliatory approach¹⁶.

15. *Carroll v Carroll (2000) 1 ILRM 2010; Bourke v O'Donnell & Ors. (2010) IEHC 348.*

16. "Family Law in Ireland, Code of Practice (2008)" – Law Society Family Law and Child Law Committee, 2008. See Appendix 4.

Litigation, Arbitration and Mediation

In addition to litigation, solicitors should familiarise themselves with other methods of dispute resolution, such as mediation and arbitration. Solicitors are encouraged to recommend their use to clients where appropriate.

The solicitor should not, without good reason, characterise a suggestion of mediation or settlement by an opposing party as a sign of weakness. Initiating or engaging in settlement discussions where appropriate, whether through mediation or otherwise, is consistent with effective and zealous representation.

2.3 TERMINATION OF A RETAINER

General

A solicitor cannot terminate a retainer without good cause and without reasonable notice where the retainer is for work from which the client will derive no benefit until the work is completed.

Where a solicitor decides that he cannot continue to act for a client and the circumstances are such that the determination of his retainer is reasonable, the solicitor should give as much notice as possible to the client of his intention to cease to act.

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

If the solicitor terminates his retainer for good cause, and has given reasonable notice to his client, he is entitled to be paid for the work done¹⁷.

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

17. "Terms and Conditions of Business" – Law Society, October 2013. See www.lawsociety.ie;
"Transferring files between solicitors" – Practice Note, Gazette, December 1996. See www.gazette.ie.

The Solicitor and his Relationship with his Client

A solicitor may terminate a retainer in a case where he has asked the client to be put in funds and the client has refused to do so.

Client's failure to act on advice or to furnish instructions

A solicitor may be compelled to cease to act for a client because the client refuses to accept and act upon the advice which the solicitor has given him and the circumstances are of such importance as to destroy the basis of the relationship of solicitor and client.

A solicitor should cease to act for a client where the client refuses or fails to give the solicitor further instructions.

Permanent loss of capacity

If a client suffers permanent 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 cannot proceed on the basis of instructions given before this happens.

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 appear¹⁸.

Termination by client

A client may change his solicitor whenever he wishes to do so, but is liable to the solicitor for all reasonable charges incurred for legal services properly provided.

18. "Restriction on the withdrawal of a solicitor from a case" – Section 74 Solicitors (Amendment) Act 1994.

Chapter 03

Conflict of Interest

3.1 GENERAL

A solicitor should not act where there is a conflict of interest.

3.2 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 between the clients, and the solicitor should not act for both. The solicitor is also 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 the 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.

A solicitor owes a duty to a client to disclose all relevant information to him. 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.

Where there may be a conflict of interest, it is a matter for the judgment of the solicitor whether or not he should act, based on the professional duty owed by a solicitor to every client. It is not a matter for the judgment of the clients.

3.3 PROPERTY TRANSACTIONS

General

A solicitor, or two or more solicitors acting in partnership or association, shall not act for both vendor and purchaser in a conveyancing transaction, with certain limited and defined exceptions, as set out in regulation¹.

1. *S.I. No. 375 of 2012. Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulations 2012.*

Conflict of Interest

The exceptions include the voluntary transfer of property which 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 his or her spouse or civil partner. There are also exceptions for certain transfers between associated companies, transfers affecting trusts and transfers between “qualified parties”, as set out in the regulations. The exception for “qualified parties” is subject to the firm observing certain statutory requirements and guidelines issued by the Law Society².

Second party to a conveyancing transaction not represented

If the second party to a transaction wishes to represent themselves, there is a danger that the solicitor, who is representing one individual, might later find it difficult to show that he was not representing both parties, in breach of the regulations. The solicitor should write to the non-represented party, informing that person that he, the solicitor, is not representing them. A copy of that letter should be kept on file. In such cases, the solicitor should be careful to ensure that he does not do any conveyancing work that would normally be done by the other side in the transaction.

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 development³.

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

- The lender and borrower
- The lender and guarantor
- The lender and indemnifier
- The lender and security provider

2. *S.I. No. 375 of 2012. Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulations 2012;*
Section 432, The Taxes Consolidation Act 1997 – ‘Meaning of “associated company” and “control”’;
‘Ethical Barriers Within a Firm’ – Practice Note, Gazette, March 2013. See www.gazette.ie.

3. *Section 3(6) Multi-Unit Developments Act 2011.*

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, shall not exceed €75,000.

Solicitors are also advised not to act for both a borrower and their guarantor, indemnifier or security provider⁴.

Residential conveyancing

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

Undertaking to lender on behalf of solicitor

A solicitor shall 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 which is to secure the loan, unless the lender has consented in writing to the solicitor providing the undertaking⁵.

3.4 NON-CONVEYANCING TRANSACTIONS

If a conflict of interest arises between two clients in a particular matter in which the firm is acting, the firm must cease to act for either client in that matter.

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. The client must know and understand that when the solicitor acts for both parties, the solicitor may not be in a position to share all the information the solicitor hears from the other side.

4. *S.I. No. 366 of 2010. Solicitors (Professional Practice, Conduct and Discipline – Commercial Property Transactions) Regulations 2010.*

5. *S.I. No. 211 of 2009. Solicitors (Professional Practice, Conduct and Discipline – Secured Loan Transactions) Regulations 2009.*

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 he is in a relationship of trust and must avoid conflicts of interest from the beginning⁶.

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, and 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. Is the solicitor in possession of information, gained within the prior solicitor/client relationship, which would prejudice the position of the other party? The solicitor should ensure, by correspondence if necessary, that the other party has no reasonable objection to the retainer.

Even if the solicitor has no relevant information, is the perception of the other party that there is a conflict of interest? If this is so, 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 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. Relevant authorities should be reviewed.

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 he can only accept instructions and give advice for one role and agree the role for which he is accepting instructions.

Conflict as family solicitor

Solicitors sometimes see themselves as being "the family solicitor" and the trusted adviser to a family, and the family sees them as such. However, they, and other solicitors

6. "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; *Prince Jefri v KPMG (1999) 1 All ER 517*; *Moody v Cox & Hatt 1917*.

who are asked to give advice or carry out non-conveyancing transactions between family members, must recognise that there is often a potential conflict in such transactions. This arises whether the transaction is a voluntary transaction or full consideration is passing. While there is no prohibition on solicitors giving such advice or carrying out such non-conveyancing transactions, solicitors should be alert to the potential conflict⁷.

Separate representation for vulnerable clients

Where, in the judgment 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 proper advice. It helps preserve the integrity of the transaction and protects it from being challenged at a later date. It also protects the solicitor.

Client lacking mental capacity

A person lacking mental capacity does not have capacity to contract with a solicitor for legal services. 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. The family should be informed about the Wards of Court system. It should be explained that if the Wards of Court Office is involved, it will act on behalf of the person lacking mental capacity to ensure that the interests of the person lacking mental capacity are protected. For instance, it would not be correct for the solicitor to attempt to deal with this person's assets, by getting that person to sign documents.

State solicitors

A State solicitor, or any member of his firm, should not appear for a defendant in any criminal proceedings within the State solicitor's area, where a summons is issued by the Garda Síochána, the Director of Public Prosecutions, the Attorney General or any government department. This is also usually a term in the contract of engagement between the solicitor and the State.

7. "Transactions involving vulnerable/older adults (to include requests for visits to residential care settings) – Guidelines for solicitors" – Practice Note, Gazette, March 2012. See www.gazette.ie.

Independent legal advice

There are circumstances in which a firm representing two parties to a non-conveyancing transaction may decide that, while it is not necessary for both parties to the transaction 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 particular 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.

Independent advice can only be given by a separate firm; it cannot be given within the one 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 interview and advise the client. If the second solicitor is satisfied that the client understands the nature and implications of the transaction, and is happy to proceed, the solicitor should make a note of the meeting and send it back to the first solicitor who will continue to represent the client in the remainder of the transaction.

It is recommended that in any situation 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 the independent adviser⁸.

Conflict in probate and administration

A solicitor is not prohibited from acting on behalf of the executor or administrator, and a person in whose favour an assent of property from the estate is being made.

A solicitor who is acting for the executor or administrator 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 and before the solicitor resumes representing all parties.

8. *Section 3 Solicitors (Amendment) Act 1994 – Definition of “Solicitor”.*

A solicitor is prohibited from acting for both grantor and grantees in a Deed of Family Arrangement.

Family law

Where a solicitor has acted for both parties in a non-contentious matter, and subsequently one or other of the parties returns to that solicitor seeking family law advice then, before the solicitor agrees to act, he should satisfy himself that he has acquired no information from that prior transaction that could lead to a possible conflict of interest. He should also ensure, by correspondence if necessary, that the other party has no reasonable objection to the retainer⁹.

3.5 CONFLICT OF INTEREST BETWEEN SOLICITOR AND CLIENT

Where a conflict of interest exists between the interests of a solicitor and those of his client, the solicitor must not act for the client. If the conflict arises during the course of a transaction, the solicitor must cease to act for that client.

Bequests or gifts by client to solicitor, staff or family

Where a client intends to confer a bequest under his will, or make a gift by deed, to the solicitor drafting the will or deed, then the solicitor should refuse to act and advise the testator to consult another firm. Even if the testator presses the solicitor to act, the solicitor should persist in his refusal to act. This also applies where the bequest or gift is to a partner, staff member or member of the family of that solicitor.

Where a client wishes to leave a token legacy or to make a token gift of a nominal amount to a solicitor, as a mark of regard and appreciation for the services rendered by the solicitor, there is nothing unprofessional in the solicitor taking such a gift or legacy. However, the prudent course is for a solicitor to refuse to accept any benefit under a will that the solicitor is personally drafting.

The principal or partners in a firm should ensure that an assistant solicitor or a member of staff of the firm does not insert a clause in a will under which that person takes personal benefit or provides for a gift to himself from a client of the firm without the express consent of the principal or partners.

9. *"Family Law in Ireland, Code of Practice (2008)" - Law Society Family Law and Child Law Committee, 2008. See Appendix 4.*

Wills for parents

If a parent asks a son or daughter, who is a solicitor, to make a will, there is potential for conflict of interest if the solicitor is to benefit. A conflict may arise between the interests of the solicitor and his or her siblings. Even if the will is a simple will, and the estate is to be divided equally between all the children of a marriage, a difference in benefit granted by a parent to the children during the parent's lifetime may make the situation less straightforward than it appears. In these circumstances the solicitor should ensure that the testator consults a different firm to draft the will.

Similar considerations may apply to other family wills¹⁰.

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.

Prohibition on payments to clients

In order to protect the integrity of the relationship between solicitor and client, as well as to avoid any conflict of interest, 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.

A solicitor may discharge outlays associated with a client transaction during the currency of that transaction.

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.

10. "Wills for Parents" – Practice Note, Gazette, Aug/Sept 1997. See www.gazette.ie.

Solicitor holding power of attorney

Where a solicitor holds a power of attorney from a client, he should ensure that he does not use that power of attorney to gain a benefit for himself which he would not be prepared to allow to an independent third party. A power of attorney operates under the law of agency. An agent cannot benefit himself or others while acting as agent for the principal, unless specifically authorised.

A solicitor holding an Enduring Power of Attorney has no authority to make gifts to himself or any other person¹¹.

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, either in a partnership or through a limited company. While there is no rule prohibiting the solicitor or, if a proprietor, his firm, from acting for such joint venture, care must be taken by the solicitor to avoid potential or actual conflicts of interest.

11. Section 6(5) Powers of Attorney Act 1996.

Chapter 04

Privilege and Confidentiality between Solicitor and Client

4.1 INTRODUCTION

Legal privilege is a right conferred by law on clients so that communications which they have with their solicitor, are protected from disclosure to any party. There is a distinction between the law of legal professional privilege and the professional duty to keep clients' affairs confidential.

4.2 PRIVILEGE

Legal professional privilege is a fundamental feature of the administration of justice and the rule of law. When communications, which qualify as privileged communications, pass between a solicitor and his client, or a person who consults the solicitor with a view to becoming a client, the solicitor cannot be compelled to disclose those communications. Communications which qualify as privileged communications are those which contain legal advice. Both oral and written communications may be protected by privilege. Privilege applies to any legal advice, not only to communications made prior to, and during the course of legal proceedings¹.

Privilege does not extend to communications made for the purpose of being repeated to the other party to a dispute.

Court orders or warrants

Solicitors should be aware of Anti-Money Laundering legislation and how this affects privilege and confidentiality.

If a solicitor is served with a court order or warrant requiring the production of the documentation of a particular client, the terms of the court order or warrant should be

1. *Smurfit Paribas v AAB Export Finance Limited* (1990 ILRM 588);
Miley v Flood 2001 2IR 50.

Privilege and Confidentiality between Solicitor and Client

examined. If items subject to privilege are excluded from the order, the solicitor has a duty to check the documentation and retain any material which is subject to privilege².

Tax legislation

Solicitors may be accountable persons in certain circumstances in respect of tax payable, such as stamp duty, capital acquisitions tax and capital gains tax. However, legislation provides that a solicitor may refuse to allow the Revenue Commissioners to inspect files or documents where that person has a legal right to do so, such as where privilege can be established³.

Receipt of information intended for the other party to litigation

A solicitor should not ask to obtain access to private correspondence or documents of, or intended for, the other side in a case or matter in which he has been instructed. This includes desisting from opening letters not addressed to him or his firm.

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

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 his personal representative to whom privilege passes.

Material disclosed by mistake

If a solicitor mistakenly acquires material which should not have been acquired by him, and that solicitor realises, or ought to realise, that an obvious mistake has been made, then privilege is retained by the sender. If the contents of documents come to his knowledge in any other way, he is not as a general rule entitled to use the information obtained for the benefit of his client.

2. “AML Obligations” – Law Society. See www.lawsociety.ie; *Criminal Justice Act 1994*; S.I. No. 55 of 1995. *Criminal Justice Act 1994 (Commencement) Order 1995*; S.I. No. 105 of 1995. *Criminal Justice Act 1994 (Section 32 (10)(b) Regulations 1995*; “What to do when the CAB comes to call” – Practice Note, *Gazette*, May 2000. See www.gazette.ie; *EU Directive on Money Laundering 2001/97/EC (Amends 91/308/EEC)*; *Criminal Justice (Money Laundering & Terrorist Financing) Act 2010*.

3. “Collection and enforcement of Stamp Duty” – Revenue Commissioners Statement of Practice SP-SD 1/91. See also Para. 9.2 *Finance Act 1991*.

This would not apply in circumstances where the material comes into the solicitor's possession at a later date or where privilege does not apply, such as on discovery.

Exceptions to privilege

Privilege does not exist in the following circumstances:-

- (a) communications made for some fraudulent or illegal purpose,
- (b) 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,
- (c) in the case of joint retainer where communications made to a solicitor for all those clients jointly must be disclosed to all of them, except where a communication is made to a solicitor in his exclusive capacity as solicitor for one party only,
- (d) communications between solicitor and client concerning those persons who have a joint interest with the client in the subject matter of the communications or between joint claimants under the same claim,
- (e) where privilege may be overridden by statute,
- (f) 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.

4.3 THE SOLICITOR EMPLOYED IN AN ORGANISATION

It is essential that an in-house solicitor is familiar with the up-to-date position in relation to the law of privilege in the various jurisdictions where the company or organisation operates. In the European context, there is case-law to the effect that legal professional privilege does not extend to communications of the in house lawyer in relation to the enforcement of EU competition law. The Irish courts do not draw any distinction in respect of the general application of legal professional privilege 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 privilege⁴.

4.4 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, 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 co-operate with them against the interest of the client.

For instance, where a solicitor is asked by the 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 which 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 court, not for the solicitor, to decide the issue of confidentiality. The solicitor can explain to the judge that certain information is confidential, as opposed to privileged, and then leave the matter in the hands of the court.

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

4. *Akzo Nobel Chemicals Limited v European Commission (Case C-550/07P)*; "Guide for Solicitors employed in the Corporate and Public Sectors" – Law Society, May 2012. See www.lawsociety.ie.

Privilege and Confidentiality between Solicitor and Client

Solicitor as mediator

The duty of confidentiality also applies to a solicitor involved in mediation.

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 confidentiality⁵.

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 Probate a solicitor acting for the executor should not supply a copy of, or extract from, a will to a beneficiary, unless with the prior consent of the executor. The executor should, however, be advised that it is the recommended and normal practice to supply an extract of the relevant part of the will to an interested legatee.

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 to residuary legatees.

Testator's solicitor

Where a will drafted by a solicitor is the subject of a probate action in which that solicitor is not concerned, the solicitor who has drafted the will is at liberty, after commencement of the proceedings and subject to the consent of the executor or personal representative, to supply a statement as to the surrounding circumstances to any interested party.

Wills from an acquired practice

Where a solicitor acquires the practice of another solicitor together with custody of envelopes containing wills, he is entitled to open the envelopes and communicate with

5. "Memorandum of Understanding between the Revenue Commissioners and the Law Society of Ireland concerning the Audit of the tax returns of Solicitors and Solicitors Practices" – February 2002; "Guidelines to Solicitors in relation to Revenue Audits" – Law Society – February 2002. See Appendix 5.

the clients or their personal representatives for the purpose of notifying them of the existence of the wills and of advising that they may be amended as appropriate in accordance with changes in the law or in accordance with further instructions.

Exceptions to confidentiality

The circumstances which override confidentiality are similar to those which override privilege. Where the solicitor is being used by the client to facilitate the commission of a crime or fraud, confidentiality is waived and the solicitor is then free to communicate his knowledge to a 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 absolutely confidential. However, some situations may arise which justify a breach of confidentiality, but this must be limited to the extent necessary.

Sometimes a solicitor may be informed of a situation where there appears to be a serious risk to the well being of the client or a third party. The solicitor will then face a dilemma. He will have to decide whether the threat should be judged to be sufficiently serious to justify a breach of the duty of confidentiality. This may be a difficult decision.

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 see 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.

The medical practitioner is, in turn, bound by his own rule of professional confidentiality, but is in a position to make any necessary referrals⁶.

Suicidal intention

If a client informs the solicitor of an intention to commit suicide, and the solicitor is of the opinion that the risk arises because the client may be suffering from a mental

6. *Section 3 Mental Health Act 2001.*

disorder, the solicitor can encourage the client to see their medical practitioner. Again, if the solicitor believes it is 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 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 local Health Services Executive, Dedicated Officer for Elder Abuse. Again, if the solicitor believes it is unlikely that this advice will be taken, the solicitor can consider making a confidential referral to that officer.

If the client is vulnerable, the solicitor may also consider a referral to the Wards of Court office.

Risk of abuse to third party

If the solicitor becomes aware of a situation where there is a risk of abuse to a third party, which requires the urgent intervention of the health authorities on behalf of the third party, and the client is unwilling to take action in relation to the matter, the solicitor should advise the client to encourage the third party to contact their medical practitioner or Health Services Executive, as appropriate.

Threats of death or serious injury

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

Cases involving abuse or neglect of children

In particular, there may be exceptional circumstances involving children where a solicitor should consider revealing confidential information to a medical practitioner. This may be where the child is the client and reveals the relevant information.

Similarly, there may be situations where an adult discloses abuse or neglect either by himself or by another adult against a child but refuses to allow any disclosure to third parties. If the situation indicates continuing sexual or other physical abuse, or ongoing neglect of a child, and there is a serious threat to the child'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 medical practitioner can be made. The solicitor should consider whether the situation is sufficiently serious to justify such a breach⁷.

4.5 CONFIDENTIALITY IN THE SOLICITOR'S OFFICE

Shared accommodation

Solicitors who share accommodation or staff with non-solicitors or another solicitor's firm should ensure that arrangements are in place which restrict access to all information, including information stored on computer, to authorised staff. Failure to do so could lead to a breach of confidentiality in respect of the business and affairs of the clients⁸.

Electronic records

When storing electronic 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.

Service providers

It is recognised that in the course of practice firms will inevitably have to give limited access to client details, to their professional advisers, IT maintenance contractors and others. The solicitor should ensure that the providers of the services are reputable and a confidentiality agreement should be signed by the provider, where appropriate. The disclosure of information should be limited as much as possible.

Off site storage

If files are stored off site, the solicitor should take all reasonable steps to ensure that the clients' information is kept confidential.

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 that staff should be informed of their responsibility to refrain from disclosing to any unauthorised party anything they learn in the course of their employment and that this should be acknowledged

7. Section 3 Protection of Persons reporting Child Abuse Act 1998 probably does not apply to solicitors.

8. "Head in the Clouds" – Practice Note, Gazette, December 2010. See www.gazette.ie.

by them in writing. 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 which is subject to this rule to any third party even if he has his own client's consent.

It is advisable that the family law file of a deceased client should be kept confidential. If necessary a direction from the court could be sought. This is because the file may include sensitive material. In addition, the person seeking the file may be the opposing party in family law proceedings, or a family member affected by the proceedings.

Confidentiality of deed of Enduring Power of Attorney

The deed of an Enduring Power of Attorney belongs to the donor of the power. It does not belong to the donee or donees. Accordingly, an original deed of Enduring Power of Attorney should not be released to a donee or their solicitor for registration. The proper procedure is for the first solicitor to lodge the deed with the Registrar of Wards of Court, pending registration.

Chapter 05

The Solicitor and his Relationship with the Court

5.1 FUNDAMENTAL PRINCIPLES

General

A solicitor not only acts for his client and owes a duty to do his best for that client but he also owes a duty to the court. The proper administration of justice requires that the court be able to rely upon each lawyer who appears before it or who has dealings with it. A solicitor:-

- (a) should promote and protect fearlessly by all proper and lawful means, the client's best interests and do so without regard to his own interest or to any consequences to himself or to any person,
- (b) should keep confidential information about a client and his or her affairs, and must not disclose the facts known to him regarding the client's character or previous convictions, without the client's express consent,
- (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.

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

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

The solicitor advocate

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

A solicitor should present his client's case to his client's best advantage. It is not the task of an advocate to win a case at all costs. In addition, the advocate has a duty to assist the court in reaching a just decision and in furtherance of that aim he must advise the court of all relevant cases and statutory provisions.

With regard to evidence, while the advocate should not deceive the court in relation to any facts placed before it, he is not obliged to make available to the court any evidence harmful to his case of which the court or the opposing party is otherwise unaware. Except 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 an affidavit has been made and filed in the case which he is conducting and which is therefore within the knowledge of the court, and the affidavit 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.

It is the duty of the advocate to uphold fearlessly the proper interests of his client and to protect his client's liberty. He 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. He should resist any attempt to restrict him or his client in the performance of this task.

It is the duty of an advocate to guard against being made the channel of questions which are only intended to insult, degrade or annoy either the other side, a witness or any other person. He is under a duty to exercise his own judgment both with regard to the substance and the form of a question.

The advocate should never allow his personal feelings to intrude upon his task as an advocate. He should always act with due courtesy not only towards the court but also towards his opponent and all concerned in the case.

A solicitor should not call a witness whose evidence is untrue to the solicitor's knowledge, as opposed to his belief.

5.2 CONFLICT ARISING DURING RETAINER

According to the principles of agency, a solicitor, whether acting as advocate or otherwise, derives his instructions and authority solely from those who instruct him. It is an implied term of the retainer of a solicitor that he is free to conduct the proceedings in such a way as he, in his proper discretion, considers appropriate. 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 his duty to the court on the other hand conflict, he should, unless his instructions are varied, withdraw from the case after seeking the court's approval to that course, but without disclosing matters which are protected by the client's privilege.

5.3 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 his conduct to the court.

5.4 WITNESSES

Advertising for witnesses

On the instructions of his 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.

Interviewing witnesses

There is no property in a witness.

A solicitor is entitled to interview a witness and to take statements from him in any civil or criminal proceedings, whether or not 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 him to change his story.

In the rare case where a solicitor for the defence interviews a witness for the other side, that solicitor may well be exposed to the suggestion that he has tampered with the evidence of such a witness. A court or jury would be more likely to conclude that the witness has been tampered with where such an interview has taken place and this might harm the case to be made by the solicitor's client. The fact that the witness has been interviewed may be seen to weaken the cross examination.

The Solicitor and his Relationship with the Court

It is not improper for a solicitor to advise a witness from whom a statement is being sought that he need not make a statement except subject to specific legislative exceptions. The advice the solicitor gives will depend on the interests of his 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 should not, without the leave of the court or without the consent of counsel or the solicitor for the other side, discuss the case with the witness, whether or not that witness is the client. The prohibition covers the whole of the relevant time including adjournments and weekends¹.

Payment to witnesses

A solicitor should not make payments or offer to 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. There is no objection to the payment to any witness of 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.

Payment of witnesses in legally aided cases

In legally aided cases, a solicitor should draw to the attention of witnesses the fact that the case is being legally aided and that the witness fees and disbursements will be those which are taxed or assessed as being proper by the relevant authority, being the Legal Aid Board for civil cases and the Department of Justice and Equality, Finance Division for criminal cases. It should be explained that no payments other than those made by these bodies can be made to the witnesses 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 his client. If he is of the opinion that his client should not have to bear the expenses of a particular witness on whom the solicitor has served a subpoena, he should bring the

1. “Cross Examination of Witnesses” – Practice Note, Gazette, November 1994. See www.gazette.ie.

matter to the attention of the court and seek an order for costs in favour of his client in relation to those expenses.

The solicitor as witness

It is unwise for a solicitor to be a witness in his own case or to remain in a case where a member of his 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.

5.5 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 solicitor or counsel representing the other side of the case or to the opposing party, if he is not represented by a solicitor or counsel. Where an oral communication is proper, adequate notice to the other party or his solicitor or counsel should be given.

If, after the conclusion of the evidence and legal argument, judgement is reserved and the solicitor then discovers a proposition of law which is directly in point and proposes to bring it to the attention of the judge, the solicitor on the other side ought to concur in his so doing, even if he knows that the proposition is against him. If he does not concur the first solicitor may submit the additional authority to the judge in writing and that solicitor should at the same time send his opponent a copy of the letter he has sent to the judge.

Compliance with orders of the court

A solicitor is obliged to comply with an order of the court requiring him to take or refrain from taking some particular course of action 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 which 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, which would be prejudicial to the proper adjudication or outcome of pending litigation or proceedings.

5.6 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. The advocate who is prosecuting must see that every material point is made which supports the prosecution case or weakens the case put forward for the defence. The advocate should not regard his task as one of winning the case. The advocate must present the case against the accused relentlessly but with scrupulous fairness. 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.

The prosecutor must state the relevant facts dispassionately. The prosecutor, particularly where the accused is unrepresented, should mention to the court any mitigating circumstances. The prosecutor must not in his opening address state as a fact anything which he knows, or ought to know, he is not in a position to prove.

The prosecutor must not deliberately withhold anything which tends to favour the accused. The prosecutor must reveal all relevant cases and statutory provisions known to him 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.

The prosecutor must not conceal from an opponent facts which are within the knowledge of the prosecutor and which are inconsistent with the facts which the prosecutor has presented to the court. Before commencement of the trial, where a prosecutor obtains evidence which 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 which he does not intend to use and which may assist the defence, he must give it to the defence. If the prosecutor knows of a credible witness who can give evidence concerning material facts which tend to show the accused to be innocent he must either call that witness or make the witness statement available to the defence.

Interviewing a witness for the other side

In criminal cases it is recommended that a solicitor for the prosecution or the defence who may wish to interview witnesses who have already given evidence on the preliminary enquiry into an indictable offence, or 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 him of his 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 the 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 or to correct any information which 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 of course obliged to disclose to the prosecution and to the court all relevant cases and statutory provisions relating to his client's case but should not, subject to alibi evidence, disclose any evidence in relation to his 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, his reply should be that the question is not one for him to answer.

Whilst a defence advocate should present every technical defence which is available to the defendant he should never present a defence other than one based upon the facts.

Duty of disclosure of previous convictions

Where the prosecution 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. Where 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 his representation of the accused.

Admission of guilt by client

In criminal matters it is a matter for the jury or the court, not for the advocate for the defence, to decide the guilt or innocence of his client. It is the duty of the solicitor for the defence to put the prosecution to 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 any criminal case, a client admits to his solicitor that he is 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 his innocence. Where the client has admitted his guilt to his solicitor but will not be giving evidence, his solicitor may continue to act for him. The solicitor for the defence may also advance any other defence which obliges the prosecution to prove guilt other than protesting the client's innocence.

Withdrawal where a client is in custody

There is a restriction on the withdrawal of a solicitor from a case where he has accepted instructions to appear in court for a client who is in custody. A solicitor cannot do so without obtaining permission from the court before which that client is next scheduled to appear².

2. "Restriction on the withdrawal of a Solicitor from a case" – Section 74 Solicitors (Amendment) Act 1994.

Prisoners in courthouse cells

Where 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 so inform the court and seek to have the accused's case put back in order to enable a consultation take place.

The solicitor standing bail

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

Chapter 06

The Solicitor and his Relationship with Third Parties

6.1 PROFESSIONAL STANDARD OF CONDUCT

A solicitor must be honest and courteous in all his dealings with third parties.

A solicitor, whether in his professional capacity or otherwise, must not engage in any conduct which is fraudulent, deceitful or in any way contrary to his position as a solicitor and an officer of the court. A solicitor should not use his position to take unfair advantage either for himself or for any other person.

6.2 INDUCEMENTS

A solicitor must not actively encourage or offer inducements to any third party with a view to obtaining instructions from any person¹.

6.3 PERSONS ACTING FOR THEMSELVES

Where a solicitor acting for a client in any matter finds that the other party to the matter has decided to act for himself, the solicitor is not bound to actively assist the other party. Where the solicitor forms the opinion that the other party is not competent to act for himself, the solicitor should recommend in writing that the other party consult a solicitor.

In a conveyancing matter where a solicitor is instructed by a vendor and is not aware of the name and address of the solicitor for the purchaser, it is in order for the solicitor for the vendor to write to the purchaser asking the purchaser for the name and address of his solicitor.

When dealing with a lay conveyancer the solicitor should explain to his own client difficulties which may be encountered. For instance, the solicitor will not be in a position

1. "Prohibition with respect to introduction of business" – Section 62 of the Solicitors Act 1954; S.I. No. 518 of 2002. Solicitors (Advertising) Regulations 2002. Regulation 4(a)(ix).

to accept undertakings in relation to any matter. Additional expense may be incurred because it is likely that extra 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 the vendor, 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 bank.

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 at all times behave in a courteous manner towards that individual.

6.4 LITIGATION – INITIATING LETTERS

Where a solicitor is instructed to collect a simple debt it is improper to demand the costs of the letter which he sends 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, which may follow, as that will be a matter for the court. 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 any proceedings, a preliminary letter should usually be written to the intended defendant by the solicitor acting for the intended plaintiff, even though the costs of such letter may not be recoverable. However, there are circumstances where proceedings will be issued 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.

An initiating letter should not be unnecessarily aggressive.

6.5 UNDERTAKINGS

General

An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it which is made by a solicitor in the course of his practice, either personally or by a member of the solicitor's staff, whereby the solicitor, or in the

case of a member of his staff, his employer, becomes personally bound. Undertakings should be in writing and be signed by the principal or a partner of the firm giving the undertaking. Before giving the undertaking a solicitor should obtain an irrevocable instruction in writing from the client authorising the solicitor to act for the client and to give the undertaking².

- A solicitor will be required to honour the terms of a professional undertaking as a matter of conduct.
- An undertaking will normally be required to be honoured only as between the giver and the recipient or an assignee of the recipient.
- An ambiguous undertaking is generally construed in favour of the recipient.
- An undertaking does not have to constitute a legal contract to be enforceable in conduct.
- An undertaking is still binding even if it is to do something outside the solicitor's control.
- A solicitor is responsible for honouring an undertaking given by a member of the solicitor's staff, whether such staff member is admitted to the Roll of Solicitors or not.
- Where a solicitor in partnership gives an undertaking as a solicitor in the course of practice, 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 which is expressed to be dependent upon the happening of a future event should notify the recipient immediately if it becomes clear that the event will not occur.

2. "Notice to all practising solicitors – Undertakings" – Practice Note, Gazette, March 2011. See www.gazette.ie; Undertakings – Notice to all solicitors – Practice Note, Gazette, Aug/Sept 2013. See www.gazette.ie; "VHI Undertakings – Should I sign the standard format of undertaking?" – Medico- Legal Recommendations, Law Society, November 2008

The Solicitor and his Relationship with Third Parties

- In addition to the Law Society’s power to enforce undertakings as a matter of conduct, the court, by virtue of its inherent jurisdiction over its own officers, has power of enforcement in respect of undertakings.
- 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 which the first solicitor knows, or ought to know, should not be given.

If a solicitor, who gives an undertaking “on behalf of” a client, does not thereby intend to give a professional undertaking, this should be clearly stated.

No undertakings in respect of children’s monies

An undertaking should not be given in relation to funds to be recovered on behalf of children. This is because the courts have an exclusive jurisdiction in relation to the determination of infant actions and the disposition of monies paid, whether on foot of a judgment, compromise or settlement of such actions³.

The solicitor employed in an organisation

The position in relation to undertakings is no different for a solicitor in employment in an organisation from the position of a solicitor in private practice. The solicitor is responsible for the solicitor’s own undertakings and for those of the staff who report to that solicitor. Sometimes the solicitor’s personal liability in the matter may not be appreciated by the employer until explained.

A solicitor should not give a professional undertaking to do something which is outside the solicitor’s control. 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

3. *Order 22 Superior Court Rules; S.I. 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.*

that a function is or will remain in 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 delegated⁴.

6.6 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 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 clearly acting as an agent for a disclosed principal.

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 an action in which 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 he is 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 furnish an undertaking to the effect that the solicitor will be responsible for the doctor's standby and court attendance fees. The Society does not approve of the giving of such undertakings.

4. "Guide for Solicitors employed in the Corporate & Public Services Sectors" – Law Society, May 2012. See www.lawsociety.ie.

The Solicitor and his Relationship with Third Parties

Solicitors are under no obligation to furnish them. However, where an undertaking is given, the solicitor will be obliged to comply with the undertaking⁵.

6.7 LAW SOCIETY

A solicitor should reply promptly to correspondence from the Law Society whether in relation to complaints or to any other practice matter.

The solicitor should co-operate with the Law Society in dealing with and resolving complaints. A solicitor should attend meetings of the Law Society Regulation of Practice Committee or the Complaints and Client Relations Committee if requested to do so, unless excused beforehand.

Failure to communicate with the Law Society could result in a referral to the Solicitors Disciplinary Tribunal and a finding of misconduct⁶.

6.8 WRITING OFFENSIVE LETTERS

A solicitor, while acting for a client or otherwise, should not use insulting language or indulge in acrimonious correspondence.

6.9 DISCRIMINATION

A solicitor should treat all persons as equal. A solicitor should avoid discrimination against any person whether clients, counsel, professional or other witnesses or opposing clients because of their gender, civil status, family status, sexual orientation, religion, age, disability, race or membership of the traveller community⁷.

6.10 RECORDING CONVERSATIONS

A solicitor may make an electronic recording of a conversation with a colleague, client or third party. If a solicitor proposes to record a conversation, he should warn the party to be recorded that the conversation will be recorded. There may be exceptional circumstances where such warning need not be given.

5. "Compendium of Frequently Asked Litigation Questions" – Law Society, November 2009. See www.lawsociety.ie

6. "Section 10A Solicitors (Amendment) Act 1994" as inserted by Section 13 Solicitors (Amendment) Act 2002; "Panel of Solicitors to assist Solicitors in difficulty with the Law Society". See www.lawsociety.ie.

7. Equal Status Act 2000, as amended.

6.11 ADMINISTRATION OF OATHS

Solicitors are entitled to administer oaths and statutory declarations. They have the same obligations as apply to Commissioners for Oaths⁸.

8. *“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) www.lawsociety.ie; “Administration of oaths by solicitors” – Practice Note, Gazette, June 2005. See www.gazette.ie.*

Chapter 07

The Solicitor and his Relationship with Other Solicitors

7.1 PROFESSIONAL STANDARD OF CONDUCT

General

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

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

A solicitor should honour his 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 a written undertaking, would be an essential proof.

A solicitor 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 instance, for costs which may be awarded against his plaintiff-client. Such a threat has no basis in law and, accordingly, it is not appropriate to make such a threat¹.

Amendments to documents made by solicitor on other side

If amendments are made by the solicitor for one party to a transaction, to a draft document sent by the solicitor for the other party to the transaction, the first solicitor should be alerted to the amendments in the covering letter returning the documents.

1. *“Threat by a solicitor to sue an opposing solicitor personally” – Practice Note, Gazette, March 2012. See www.gazette.ie.*

This would apply, for instance, if changes were made to the terms of a conveyancing contract, or a map which forms part of that contract².

7.2 COMMUNICATING WITH THE CLIENT OF ANOTHER SOLICITOR

General

A solicitor should neither interview nor 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 the 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 his intention to do so.

Client seeking a second opinion

It is in order for a solicitor to 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.

The client of an in-house solicitor

Where the other solicitor in a case or transaction is a solicitor employed in-house in an organisation, the employer of the in-house solicitor is usually that solicitor's client. If there is ongoing correspondence with the in-house solicitor, all communications should be directed to that solicitor. Other personnel in the organisation should not be contacted directly. Otherwise, the proper involvement of the in-house solicitor in the matter is affected³.

2. "Amendments to Conveyancing Contract before execution by a Purchaser" – Practice Note, Gazette, October 1993. See www.gazette.ie.

3. "Communication with the client of another solicitor: an in-house solicitor" – Practice Note, Gazette, Jan/Feb 1998 and April 2012. See www.gazette.ie.

7.3 “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”.

The phrase “without prejudice” when used in correspondence, means that the correspondence is without prejudice to the writer’s position if the terms 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.

The device only attaches where the words are applied 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.

7.4 SUPPLYING INFORMATION ON REQUEST TO ANOTHER SOLICITOR

A solicitor should only supply information concerning documents in his possession or furnish information on a client’s file to another solicitor upon the receipt of written instructions from the client to supply the information and upon satisfactory provision being made for payment of the solicitor’s proper 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.

7.5 COSTS OF SOLICITOR AGENT

A solicitor who instructs a solicitor agent should ensure that the solicitor agent is paid at the earliest opportunity.

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.

The Solicitor and his Relationship with other Solicitors

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 themselves⁴.

Lien where retainer discharged by solicitor

Where a solicitor is exercising a lien on a file in a litigation case, where a 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 will usually 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 solicitor⁵.

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 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 Law Society of a complaint of inadequate services against a solicitor, if the complaint is upheld, the Law Society may direct the transfer of any documents, even if they are subject to the solicitor's lien⁶.

No lien in certain circumstances

No solicitor's lien exists over a will.

No solicitor's lien exists over files, money, documents or papers held on trust.

No solicitor's lien exists over money or deeds subject to an undertaking or subject to an accountable trust receipt.

No solicitor's lien exists over money held by the solicitor for the purpose of transmitting it to a third party.

No solicitor's lien exists over monies held by the solicitor as stakeholder.

4. 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.
5. *Ahern and Others v The Minister for Agriculture & Food, Ireland and The Attorney General [2008] IEHC 286;*
6. *Section 8(1)(e) Solicitors (Amendment) Act 1994.*

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 barred⁷.

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.

7.6 TRANSFER OF FILES BETWEEN SOLICITORS

A courteous request for files and a prompt response are the keys 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, arbitrated or taxed. "No foal, no fee" arrangements are determined if the client moves to another solicitor. It can be implied in these contingency fee arrangements that they are conditional on the first solicitor continuing to have prosecution of the case. The first solicitor will be entitled to his fees for the work done⁸.

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 alternative security to the solicitor's common law lien.

However, 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 moneys coming into the solicitor's control to pay the costs. Other qualifications as necessary may be made⁹.

7. See Chapter 10 "The Remuneration of the Solicitor – The solicitor's lien on monies".

8. "Transferring Files between Solicitors" – Practice Note, Gazette, December 1996. See www.gazette.ie.

9. "Undertakings given on the transfer of a file in respect of the payment of the first solicitor's costs" – Practice Note, Gazette, October 2010. See www.gazette.ie.

The Solicitor and his Relationship with other Solicitors

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

Undertakings furnished by first solicitor

On the transfer of a file to a new firm, the first solicitor should be released from undertakings furnished 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 his retainer, subject to a formal release of the undertaking by the recipient of the undertaking.

No solicitor should co-operate with a client who seeks to leave a solicitor with an outstanding undertaking.

The file belongs to the client

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

Copying the client's file

When a file is being transferred, the solicitor may wish to copy the file to comply with the solicitors' accounts regulations or for other administrative purposes. This copying should be at the solicitor's own expense¹⁰.

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 which deals with the substance of the matter and which would assist the new solicitor should be included. Certain papers belong to the previous solicitor and may be retained by him. These include letters, papers and documents prepared by that solicitor for his own benefit and for which he has not charged and does not intend to charge the client.

10. S.I. No. 421 of 2001. Solicitors Accounts Regulations 2001.

Notice of change of solicitor to the courts

When a solicitor proposes 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.

Apportioning party and party costs

At the conclusion of a litigation case if a second solicitor recovers costs which include the cost of work done by the first solicitor, he is accountable to the first solicitor for the appropriate portion of those costs. This is the case even if there are solicitor/client costs properly payable to him and these exceed the total amount of the party and party costs recovered. This applies where the first solicitor was not paid when his instructions were terminated.

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 his costs and to be paid by that client for all work properly done by him. Where a client discharges one solicitor and engages the services of a second solicitor, the second solicitor should ensure, in his initial discussions with the client, that the client fully appreciates and understands the client's 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 wishes of the clients. The client may, of course, choose to instruct whomsoever they wish on the departure of an employed solicitor or the dissolution of the partnership. Files should never be a pawn in disputes between solicitors.

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

7.7 PAYMENT FOR ASSISTANT SOLICITORS' PRACTISING CERTIFICATES

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. 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 recommended that the apportioned cost for the period when the solicitor is employed by the second firm should be refunded to the first firm.

7.8 SERIOUS MISCONDUCT BY ANOTHER SOLICITOR

If a solicitor is of the opinion that another solicitor is engaged in serious misconduct, this must be brought to the attention of the Law Society. If this would involve disclosure of a client's affairs, the client's consent to do so should be obtained.

There is no obligation to bring any matter to the attention of the Law Society if it comes to a solicitor's notice in the course of assisting a colleague as a panel member of a recognised Law Society assistance scheme¹¹.

7.9 REFERRAL OF FILES TO A COLLEAGUE

Where a client is referred to a solicitor under a consultancy referral system established by the Law Society, or, 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 him by his colleague, by agreeing to take instructions from the client in a new matter, save with the consent of the referring solicitor. This will apply within the period of twelve months from the referral, if such new instructions are of a type which the referring practitioner could carry out himself being within his reasonable competency. This is in the interests of fostering specialisation and better work practices within the profession.

11. "Panel of Solicitors to assist Solicitors in difficulty with the Law Society". See www.lawsociety.ie.

Chapter 08

The Solicitor and his Relationship with Counsel

8.1 RETENTION OF COUNSEL

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.

8.2 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 he receives allow. It is the duty of a solicitor to brief counsel adequately. Counsel should be instructed in a manner which ensures that counsel has all instructions and information which the solicitor has and which are or may be necessary for counsel to represent the client's interest properly within a reasonable time. 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 furnish to counsel within a reasonable time all further instructions and information which counsel reasonably requests for the proper conduct of the case.

A solicitor should use his best endeavours to ensure that counsel carries out instructions within a reasonable time and that the matter does not become statute barred or liable to be struck out for want of prosecution. Where appropriate, a solicitor should ask for the return of papers in order to instruct another counsel.

A solicitor should take care in the selection of suitable counsel and should, when considering the advice of counsel, ensure that it contains no obvious errors. If the advice conflicts with previous advice, it will be necessary to seek clarification. If the advice is that the solicitor takes certain actions, which the solicitor believes would be contrary to his professional duties, or his duties as an officer of the court, the solicitor should not follow that advice.

8.3 INFORMATION ABOUT COUNSELS' LEGAL FEES

Prior to engaging counsel, it is advisable for a solicitor to request information in writing from counsel in respect of their legal fees.

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, 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.

8.4 THE SOLICITOR'S LIABILITY FOR PROFESSIONAL FEES

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

A solicitor who has received a fee from a client payable to counsel should pay such fee immediately. A solicitor who instructs counsel should use his best endeavours to ensure that counsel receives fees that are due and owing to him at the earliest opportunity.

If a fee is marked on a brief and has been agreed with counsel, the fee is payable to counsel. In the absence of any express agreement, a reasonable fee should be paid to counsel¹.

Relations with counsel

When in communication with his client, a solicitor should not lay blame unfairly on counsel for an unsatisfactory outcome of a case.

A spirit of co-operation and trust should always exist between solicitor and counsel.

1. "Payment of Counsel's Fees" – Practice Note, Gazette, December 2010. See www.gazette.ie.

Chapter 09

The Solicitor in Practice

9.1 THE SUPERVISION OF THE SOLICITOR'S OFFICE

General

A solicitor is responsible for exercising proper supervision over staff. A solicitor practising as a sole principal is responsible for everything done in that practice. In a firm, each partner, jointly and severally, is similarly responsible. This includes the delivery of legal services in a competent manner and compliance with the law and regulations governing a solicitor's practice.

A solicitor may delegate work to his staff in such manner as he considers appropriate. However, a solicitor will not escape responsibility for work carried out in his office by delegating the relevant matter to the staff employed by him, even though they are well 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 made¹.

Branch office

Solicitors who operate branch offices have a particular duty to ensure that there is adequate supervision at those offices. Opening times should be restricted to times when a qualified assistant is in attendance or adequate alternative arrangements for supervision can be made².

The in-house solicitor's duty of supervision

An in-house solicitor should supervise unqualified staff, for whom that solicitor is responsible, properly. The solicitor is professionally responsible for all acts of the staff when they are carrying out work of a legal nature. Although the solicitor's staff in an

1. S.I. No. 719 of 2005. *Solicitors Accounts (Amendment) Regulations 2005*.
2. "Direction to grant or refuse practising certificate" – Section 49(f) (as substituted by Section 61(d) of the *Solicitors (Amendment) Act 1994*) of the *Solicitors Act 1954*.

organisation may also be answerable to other superiors in the organisation, the duty of supervision is not in any way diluted for the solicitor in relation to the legal work being carried on.

9.2 PROFESSIONAL NAMES, NAMEPLATES AND PROFESSIONAL NOTEPAPER

General

The use of professional names, nameplates and notepaper is governed by regulations. 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 Society³.

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 emanated from the legal department in the employer organisation.

If the solicitor practises in the employer's name, a clear indication should be given on the notepaper that the letter emanated from the solicitor's practice within the employer organisation⁴.

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 solicitor⁵.

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3. *S. I. No. 178 of 1996. Solicitors (Practice Conduct & Discipline) Regulations 1996; "New Regulations for Professional Names, Notepaper, Nameplates" – Practice Note, Gazette, July 1996. See www.gazette.ie.*
 4. *"Guide for Solicitors employed in the Corporate and Public Services Sectors" – Law Society, May 2012. See www.lawsociety.ie.*
 5. *"Use of Professional Notepaper in Debt Collection Matters" – Practice Note, Gazette, December 1997. See www.gazette.ie.*

9.3 SERVICE COMPANIES

There is no objection to a solicitor forming a service company to carry out necessary services in connection with the running of the practice of that solicitor.

9.4 ADVERTISING

Advertising by solicitors is subject to regulation.

When a solicitor is advertising he should ensure that the advertisement does not encourage personal injury litigation. Advertising should be couched in terms which do not give offence to members of the public or to members of the profession. A solicitor should not advertise in a manner which brings the profession into disrepute⁶.

9.5 TOUTING

A direct unsolicited approach may not be made to any person who is not an existing client with a view to being instructed to provide legal services, where this is likely to bring the solicitors' profession into disrepute. In particular, approaches should not be made at inappropriate locations, for example, adjacent to a calamitous event or in the vicinity of a Garda station, prison or courthouse⁷.

9.6 THE SOLICITOR ACTING FOR ASSOCIATIONS

Where a solicitor acts for an association such as a trade association, a residents' association or a trade union, he may also be asked to act for members of that association or trade union. It may be a condition of obtaining legal advice or assistance that the member should instruct the solicitor for the association or trade union. This is an acceptable practice, provided that there is no conflict of interest.

9.7 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, not only while in practice, but also after ceasing practice⁸.

6. *S.I. No. 518 of 2002. Solicitors (Advertising) Regulations 2002; "Advertising Specialisms: Notice to all Solicitors" – Practice Note, Gazette, April 2007. See www.gazette.ie.*

7. *S.I. No. 518 of 2002. Regulation 13, Solicitors (Advertising) Regulations 2002.*

8. *See www.lawsociety.ie.*

9.8 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.

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
- To use each client's money for that client's matters 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 on clients' monies in accordance with the statutory provisions
- To co-operate 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

While the Society does not provide legal advice, it believes that a solicitor placing a client's monies with a licensed bank in accordance with the requirements of the Solicitors Acts and the Solicitors Accounts Regulations is unlikely to incur liability to his or her client in the event that all or part of the client's monies are lost due to the bank's insolvency. The issue of the insolvency of a bank, at which clients' monies has been placed, can be addressed in the firm's terms and conditions of business.

When giving undertakings to pay out client funds, solicitors should consider whether all undertakings should be qualified to allow for the insolvency of the bank at which the funds, 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 his own funds to comply with an undertaking given on behalf of a client.

When client funds are received, they must be lodged without delay in a client account at an approved bank⁹.

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.

9.9 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 clients¹⁰.

9.10 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.

9.11 CONFIDENTIALITY OF OFFICE SYSTEMS

The principal or partners of a firm should ensure that office systems do not present a risk that privileged or confidential information will be disclosed.

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9. *S.I. No. 421 of 2001. Solicitors Accounts Regulations 2001 to 2006;*
S.I. No. 372 of 2004. Solicitors (Interest on Clients' Moneys) Regulations 2004;
S.I. No. 719 of 2005. Solicitors Accounts (Amendment) Regulations 2005 – Form of acknowledgment of compliance with accounts regulations;
S.I. No. 111 of 2006. Solicitors Accounts (Amendment) Regulations 2006.
10. *The Investment Intermediaries Act 1995;*
The 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, 25th November 1998;
Memorandum on Solicitors Financial Services operated by Irish Pensions Trust Ltd (“IPT”), an authorised investment business firm – Law Society, 25th November 1998;
S.I. No. 439 of 1999. The Solicitors Acts, 1954 to 1994 (Investment Business and Investor Compensation) Regulations 1998.

9.12 RETENTION OR DESTRUCTION OF FILES

In order to protect the interests of clients who may be sued by third parties and also to protect the interests of a solicitor's firm which 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.

Anti-Money Laundering legislation 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.

However, 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 he should consider whether the handwritten instructions taken should be retained with the original will which is being retained¹¹.

9.13 SETTING UP IN PRACTICE

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

9.14 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 he 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.

11. *Section 5 Criminal Justice (Money Laundering & Terrorist Financing) Act 2010*;
"Retention or Destruction of Files and other papers and Electronic Storage" – *Practice Note, Gazette, April 2005*.
See www.gazette.ie;
Data Protection Acts 1988 and 2003.

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 account.

9.15 PLANNING FOR SOLICITOR'S UNEXPECTED ABSENCE FROM OFFICE DUE TO ACCIDENT OR ILLNESS

A solicitor who is a sole practitioner or the sole principal of a firm should plan for emergencies. He should endeavor to have arrangements in place so that in the event of accident or illness these arrangements can take effect and the practice may be carried on with the minimum of interruption to the clients' affairs. Another solicitor will usually have to be given the necessary authority to make decisions in relation to the practice and to carry out any necessary functions. For instance, a solicitor may need to be authorised to take charge of the client accounts. However, that solicitor will not necessarily be required to become involved in the day to day running of the practice.

A sole practitioner/principal should consider having an agreement for the management of the firm drafted in readiness for an emergency. This could be used in circumstances where, although the solicitor is absent, he still has capacity and continues to hold a current practising certificate. It would cover temporary absences where the solicitor is likely to return to the practice and resume as sole practitioner/principal. It could also cover a female sole practitioner's maternity leave.

A Power of Attorney should also be executed in readiness for any emergency. It could be used if the practice was to be sold, to give the attorney the necessary powers to do this. The power could only be exercised where the solicitor continues to be capable of managing his affairs, but would facilitate a situation where the solicitor is too ill to attend to, or does not wish to attend to, business affairs. A Power of Attorney, which is not an enduring power, automatically comes to an end if and when the donor of the power lacks capacity.

An Enduring Power of Attorney should be put in place to be used if an emergency happens and if the solicitor then lacks mental capacity and will not, or is unlikely to, return to practice. The Enduring Power of Attorney, when registered, could be used to sell, transfer or wind up the practice and do any acts necessary to facilitate this.

Not only should the solicitor plan for emergencies, he also needs to budget for the likely additional costs which may be involved, such as the employment of a locum, or the costs associated with the sale, transfer or wind up of a practice.

It is important for the solicitor to inform the Law Society, a member of the solicitor's own staff and a member of the solicitor's family, of any arrangements that have been made to deal with an emergency.

In some instances the full emergency plan will not need to be triggered. The emergency might be met simply by having an authority in place to operate the firm's bank accounts¹².

9.16 DEATH OR INCAPACITY OF THE SOLICITOR

A solicitor who is a sole practitioner or sole principal should nominate a solicitor as one of his executors.

Where a solicitor who was a sole practitioner has died or becomes incapacitated, alternative arrangements for the continuation of the practice may be made, subject to the requirements of the relevant legislation¹³.

9.17 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

12. "Planning for Emergencies in a Sole Practitioner's/Principal's Firm" – *Gazette*, Aug/Sept 2007. See www.gazette.ie.

"Emergency Exits" – *Gazette*, October 2005. See www.gazette.ie;

"Guidelines for solicitors retiring or ceasing to practise as sole practitioners or sole principals" – Law Society booklet. See www.lawsociety.ie;

13. "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;

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 refused¹⁴.

14. "Effect of adjudication in bankruptcy" – Practice Note, Gazette, Aug/Sept 2012. See www.gazette.ie.

Chapter 10

The Remuneration of the Solicitor

10.1 INFORMATION IN RELATION TO LEGAL CHARGES

General

The law requires that solicitors inform their clients in writing, as soon as reasonable and practical, of the charges they will incur for the provision of any legal services provided by their solicitors. The legislation requires that the actual charges be given, if this is possible. If not, then an estimate must be given, and if that is not possible, the basis of the charges must be given. If, subsequently, unforeseen complexities arise, the solicitor must review the information given to the client and, if the letter is no longer correct, issue a revised letter to the client.

The information must be given in writing. Included in the definition of “charges” are fees, outlays, disbursements and expenses.

The legislation applies to all matters, both contentious and non-contentious.

10.2 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 and any such charges are unenforceable in any action to recover them¹.

Information to be given at the completion of a contentious matter

In relation to contentious business, 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 and the amount due by the client for any additional solicitor/client charges².

1. “Charges to clients” – Section 68(2) of the *Solicitors (Amendment) Act 1994*.

2. Section 68(6) *Solicitors (Amendment) Act 1994*.

The Remuneration of the Solicitor

Deductions in contentious matters

A solicitor is prohibited from making a unilateral 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 it would not be prudent for the solicitor to transfer the fees to the office account³.

Deductions in non-contentious matters

In non-contentious matters, once a solicitor has issued a bill of costs, the solicitor is entitled to transfer the fees to the office account. The client then has certain rights such as requiring the taxation of costs or the right to make a complaint to the Law Society in respect of excessive fees.

All monies received by a solicitor on behalf of a successful client, whether settlement monies or costs, are client monies⁴.

Explanations to client during settlement negotiations

During settlement negotiations the solicitor should explain matters as fully as possible to the client, including the likely deductions which will be made from the settlement figure, to the extent that this is practicable. Often third party fees will not be known at that point. The solicitor should include an explanation of the contribution to the solicitor's fees which will be made by the other party to the proceedings. He should also explain whether any balance will remain to be paid by the client in relation to the solicitor's bill 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 point⁵.

10.3 EXCESSIVE FEES

When a solicitor is retained by the client to do certain work in his professional capacity, the law implies a term into the contract between them that the remuneration of the solicitor will be fair and reasonable. The Law Society is required by law to investigate

3. Section 68(3), (4) and (5) *Solicitors (Amendment) Act 1994*.
4. "Charges to clients" – Section 68 of the *Solicitors (Amendment) Act 1994*;
See also Chapter 2 "The Solicitor and his relationship with his client";
"The Dos and Don'ts of Section 68" – Practice Note, *Gazette*, November 2010. See www.gazette.ie;
"Information in relation to Legal Charges" – Client information leaflet. See "Consumer Interest" at www.lawsociety.ie.
5. Section 68(6) *Solicitors (Amendment) Act 1994* – bills of costs in contentious matters.

complaints of excessive charging. Where a complaint is upheld, the Society may direct a refund of portion of the fee, if the fee has been paid, or a waiver of portion of the fee, if the fee has not been paid⁶.

10.4 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 furnished 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 which are greater than the amount due to the solicitor, the exercise of the lien should be limited to the amount due⁷.

10.5 SOLICITOR TRUSTEE'S COSTS

A solicitor who is appointed as a trustee ought not to charge his costs for legal work done by him in relation to the trust unless all the other trustees agree to that course of action or there is a clause in the trust instrument enabling that solicitor to charge his costs to the trust. The usual initial letter giving information with regard to legal charges should be sent to the trustees.

10.6 DISCLOSURE OF COMMISSIONS

All monies received by a solicitor for and on behalf of a client from a financial institution, insurance company or stockbroker 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 or stock broker, 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 compromised⁸.

6. "Power of Society to impose sanctions for charging excessive fees" – Section 9 of the *Solicitors (Amendment) Act 1994*.

7. See also Chapter 7 – "The Solicitor and his Relationship with other Solicitors" – "The first solicitor's common law lien".

8. *The Investment Intermediaries Act 1995*;
The Investor Compensation Act 1998.

10.7 INTEREST ON CLIENT MONIES

A solicitor must account to a client for interest earned 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 which would be earned if such monies had been held in a deposit account at the demand rate.

There is no obligation on a solicitor to disclose a preferential rate of interest which the firm earns with a bank, which is paid because of the total amount of funds held by the firm with the bank⁹.

10.8 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, he may charge a reasonable administration fee for the work involved.

Where a solicitor is requested by a person, other than his client, but with his client's consent, to give information which 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 account regulations, or for other administrative purposes, this must be done at the solicitor's own expense.

10.9 AUDITORS' FEES

Where a solicitor is requested by a client's auditor to furnish information required for audit purposes, a reasonable fee may be charged to the client for this work.

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

9. *S.I. No. 372 of 2004. Solicitors (Interest on Clients' Moneys) Regulations 2004.*

reviewing title and carrying out searches. The solicitor may not have acted in the purchase of the property.

10.10 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 country¹⁰.

10. *“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;
S.I. No. 343 of 1988. Solicitors (Professional Practice) Regulations 1988.

Chapter 11

Conduct in International Practice

11.1 RELEVANCE FOR ALL LAWYERS

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

In 1988 the International Bar Association adopted the current code as the basic code for lawyers' cross-border practice and for lawyers practising outside their own jurisdiction.

The current code of the CCBE was adopted in 2008 and 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 as their basis the principles of good conduct common to all lawyers¹.

11.2 RELATIONS BETWEEN LAWYERS

A solicitor should recognise all other lawyers as professional colleagues and act fairly and courteously towards them.

Instructing foreign lawyers

Solicitors should be aware that if they engage a lawyer abroad on behalf of a client, they themselves may be held personally liable for that lawyer's fees, even if they have

1. "Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers" CCBE (edition 2010). See www.ccbbe.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;
"IBA International Principles on Conduct for the Legal Profession" – International Bar Association 2011.
See www.ibanet.org.

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 his 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 for the fees would not follow in that situation.

11.3 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 his own rules but without prejudice to respect for the rules of the Host State. The latter's rules are applicable 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 incompatibility²".

11.4 EU DIRECTIVE ON ESTABLISHMENT

In December 1998 the EU adopted a Directive, referred to as the Establishment Directive, which facilitates a lawyer's practice in a Member State other than the state in which his 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 which 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 apply³.

2. *Council Directive No. 77/249 (EEC); S.I. No. 58 of 1979. European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979; S.I. No. 197 of 1981. European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 1981; S.I. No. 226 of 1986. European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 1986.*

3. *EU Directive on Establishment (98/5/EC), Article 6(1) and Article 7.*

Appendix 1

*Schedule of Statutory Instruments relevant to the Conduct and Practice of Solicitors, most enacted under the Solicitors Acts 1954 to 2011 and some under Other Legislation**

* 1) *Regulations governing practising certificates, practising certificate fees, Law School fees, traineeship matters and reciprocal arrangements for qualifications in other jurisdictions, are not included in this schedule. See www.lawsociety.ie to access these.*

* 2) *These regulations cover the period from 1979 forwards. For regulations from 1954 to 1978 see www.lawsociety.ie*

Professional Indemnity Insurance

SI 452/2012 - Solicitors Acts 1954-2011 (Professional Indemnity Insurance)
(Amendment) Regulations 2012

SI 409/2011 - Solicitors Acts 1954-2008 (Professional Indemnity) Regulations 2011

SI 495/2010 - Solicitors Acts 1954-2008 (Professional Indemnity Insurance)
(Amendment) Regulations 2010

SI 384/2009 - Solicitors Acts 1954-2008 (Professional Indemnity Insurance)
(Amendment) Regulations 2009

SI 441/2009 - Solicitors Acts 1954-2008 (Professional Indemnity Insurance)
(Amendment No. 2) Regulations 2009

SI 617/2007 - Solicitors Acts 1954-2002 (Professional Indemnity Insurance)
Regulations 2007

SI 122/2005 - Solicitors Acts 1954-2002 (Professional Indemnity Insurance)
(Amendment) Regulations 2005

SI 115/2004 - Solicitors Acts 1954-2002 (Professional Indemnity Insurance)
(Amendment) Regulations 2004

Appendix 1

*Schedule of Statutory Instruments relevant to the Conduct and Practice of Solicitors, most enacted under the Solicitors Acts 1954 to 2011 and some under Other Legislation**

SI 362/1999 - Solicitors Acts 1954-1994 (Professional Indemnity Insurance) (Amendment) Regulations 1999

SI 209/1998 - Professional Indemnity Insurance (Amendment) Regulations 1998

SI 312/1995 - Solicitors Acts 1954-1994 (Professional Indemnity Insurance) Regulations 1995

Solicitors Accounts

SI 111/2006 - Solicitors Accounts (Amendment) Regulations 2006

SI 719/2005 - Solicitors Accounts (Amendment) Regulations 2005

SI 372/2004 - Solicitors (Interest on Clients' Moneys) Regulations 2004

SI 421/2001 - Solicitors Accounts Regulations 2001

SI 108/1995 - Solicitors (Interest on Clients' Moneys) Regulations 1995

SI 204/1984 - Solicitors Accounts Regulations 1984

Professional Practice, Conduct and Discipline

SI 375/2012 - Solicitors (Professional Practice, Conduct and Discipline – Conveyancing Conflict of Interest) Regulation 2012

SI 366/2010 - Solicitors (Professional Practice, Conduct and Discipline – Commercial Property Transactions) Regulations 2010

SI 211/2009 - Solicitors (Professional Practice, Conduct and Discipline – Secured Loan Transactions) Regulations 2009

SI 85/1997 - Solicitors (Professional Practice, Conduct and Discipline) Regulations 1997

Re. Restrictions on solicitor acting in a conveyancing transaction on behalf of both the builder and purchaser of residential units.

Appendix 1

Schedule of Statutory Instruments relevant to the Conduct and Practice of Solicitors, most enacted under the Solicitors Acts 1954 to 2011 and some under Other Legislation*

SI 178/1996 - Solicitors (Practice, Conduct and Discipline) Regulations 1996
Re. Professional names and notepaper.

SI 99/1990 - Solicitors (Practice, Conduct and Discipline) Regulations 1990
Re. Acting on behalf of a minor in a personal injury claim.

SI 343/1988 - Solicitors (Professional Practice) Regulations 1988
Re. Professional fees.

Advertising & Touting

SI 518/2002 - Solicitors Acts 1954-2002 (Solicitors Advertising) Regulations

SI 344/1988 - Solicitors (Advertising) Regulations 1988

Fees

SI 605/2010 - Solicitors Acts 1954-2008 (Fees) Regulations 2010
Re. Fees to be paid to Law Society for a certificate of standing or for extracts from Law Society records.

SI 604/2010 - Solicitors Acts 1954-2008 (Sixth Schedule) Regulations 2010
Re. Additional applications for which fees may be prescribed by the Law Society.

Registered Lawyers and Visiting Lawyers

SI 97/2008 - European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 2008

SI 753/2004 - European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 2004

SI 752/2004 - European Communities (Lawyers' Establishment) (Amendment) Regulations 2004

SI 732/2003 - European Communities (Lawyers' Establishment) Regulations 2003

SI 132/1999 - European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 1999

Appendix 1

Schedule of Statutory Instruments relevant to the Conduct and Practice of Solicitors, most enacted under the Solicitors Acts 1954 to 2011 and some under Other Legislation*

SI 85/1991 - Solicitors Acts 1954 and 1960 (European Community) Regulations 1991

SI 226/1986 - European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 1986

SI 197/1981 - European Communities (Freedom to Provide Services) (Lawyers) (Amendment) Regulations 1981

SI 58/1979 - European Communities (Freedom to Provide Services) (Lawyers) Regulations 1979

Independent Law Centres

SI 103/2006 - Solicitors Acts 1954-2002 (Independent Law Centres) Regulations 2006

Independent Adjudicator

SI 720/2005 - Solicitors (Adjudicator) (Amendment) Regulations 2005

SI 406/1997 - Solicitors (Adjudicator) Regulations 1997

Court Procedures Related to Applications under the Solicitors Acts

SI 701/2004 - Rules of the Superior Courts (Solicitors Act 1954-2002) 2004
Re. Procedures relating to admission to Roll of Solicitors, reports from Solicitors Disciplinary Tribunal, appeals from Solicitors Disciplinary Tribunal, applications to freeze bank accounts and other matters.

SI 14/1998 - Rules of the Superior Courts (No. 1) (Solicitors (Amendment) Act 1994) 1998

Re. Procedures relating to Solicitors Disciplinary Tribunal and other matters.

Investment Business

SI 439/1998 - Solicitors Acts 1954-1994 (Investment Business and Investor Compensation) Regulations 1998

Euro Changeover

SI 460/2001 - Solicitors Acts 1954-1994 (Euro Changeover) Regulations 2001

Appendix 1

Schedule of Statutory Instruments relevant to the Conduct and Practice of Solicitors, most enacted under the Solicitors Acts 1954 to 2011 and some under Other Legislation*

SI 504/2001 - Solicitors Acts 1954-1994 (Euro Changeover) Regulations 2001

Continuing Professional Development

SI 501/2012 - Solicitors (Continuing Professional Development) Regulations 2012

SI 807/2007 - Solicitors (Continuing Professional Development) Regulations 2007

Information to Clients

SI 533/2010 - European Union (Provision of Services) Regulation 2010

Re. Information which must be provided by any service provider, including a solicitor, to consumers/clients.

Commencement Orders for Certain Provisions of the Solicitors Acts

SI 494/2002 - Solicitors (Amendment) Act 2002 (Commencement) Order 2002

Re. Commencement of specified provisions of the Solicitors (Amendment) Act 2002.

SI 124/1995 - Solicitors (Amendment) Act 1994 (Commencement) Order 1995

Re. Commencement of specified provisions of the Solicitors (Amendment) Act 1994.

Appendix 2

*Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (CCBE, 2010)**

**See www.ccbe.eu for commentaries*

CHARTER OF CORE PRINCIPLES OF EUROPEAN LEGAL PROFESSION

CODE OF CONDUCT FOR EUROPEAN LAWYERS

1. PREAMBLE

- 1.1. The Function of the Lawyer in Society
- 1.2. The Nature of Rules of Professional Conduct
- 1.3. The Purpose of the Code
- 1.4. Field of Application Ratione Personae
- 1.5. Field of Application Ratione Materiae
- 1.6. Definitions

2. GENERAL PRINCIPLES

- 2.1. Independence
- 2.2. Trust and Personal Integrity
- 2.3. Confidentiality
- 2.4. Respect for the Rules of Other Bars and Law Societies
- 2.5. Incompatible Occupations
- 2.6. Personal Publicity
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3. RELATIONS WITH CLIENTS

- 3.1. Acceptance and Termination of Instructions
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- 3.5. Payment on Account
- 3.6. Fee Sharing with Non-Lawyers
- 3.7. Cost of Litigation and Availability of Legal Aid
- 3.8. Client Funds
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4. RELATIONS WITH THE COURTS

- 4.1. Rules of Conduct in Court
- 4.2. Fair Conduct of Proceedings
- 4.3. Demeanour in Court
- 4.4. False or Misleading Information
- 4.5. Extension to Arbitrators etc.

5. RELATIONS BETWEEN LAWYERS

- 5.1. Corporate Spirit of the Profession
- 5.2. Co-operation among Lawyers of Different Member States
- 5.3. Correspondence between Lawyers
- 5.4. Referral Fees
- 5.5. Communication with Opposing Parties
- 5.6. (Deleted by decision of the Plenary Session in Dublin on 6 December 2002)
- 5.7. Responsibility for Fees
- 5.8. Continuing Professional Development
- 5.9. Disputes amongst Lawyers in Different Member States

CHARTER OF CORE PRINCIPLES OF EUROPEAN LEGAL PROFESSION¹

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.

1. *Adopted at the CCBE Plenary Session on 25.11.2006*

CCBE CODE OF CONDUCT FOR EUROPEAN LAWYERS

1. 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.

2. GENERAL PRINCIPLES

2.1 Independence

2.1.1. 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.

2.1.2. 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.

2.2. 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.

2.3. Confidentiality

2.3.1 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.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. 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.

2.4. 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.

2.5. Incompatible Occupations

2.5.1. 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.

2.5.2. 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.

2.5.3. 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.

2.6. Personal Publicity

- 2.6.1. 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.
- 2.6.2. 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.

2.7. 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.

2.8. 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.

3. RELATIONS WITH CLIENTS

3.1. Acceptance and Termination of Instructions

- 3.1.1. 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.

- 3.1.2. 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.

3.1.3. 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.

3.1.4. 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.

3.2. Conflict of Interest

3.2.1. 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.

3.2.2. 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.

3.2.3. 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.

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

3.3. Pactum de Quota Litis

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

3.3.2. 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.

3.3.3. “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.

3.4. 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.

3.5. 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.

3.6. Fee Sharing with Non-Lawyers

3.6.1. 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.

3.6.2. 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.

3.7. Cost of Litigation and Availability of Legal Aid

3.7.1. 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.

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

3.8. Client Funds

- 3.8.1. 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.
- 3.8.2. 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.
- 3.8.3. 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.
- 3.8.4. 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.
- 3.8.5. 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.
- 3.8.6. 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.

3.9. Professional Indemnity Insurance

- 3.9.1. 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.

3.9.2. Should this prove impossible, the lawyer must inform the client of this situation and its consequences.

4. RELATIONS WITH THE COURTS

4.1. 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.

4.2. Fair Conduct of Proceedings

A lawyer must always have due regard for the fair conduct of proceedings.

4.3. 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.

4.4. False or Misleading Information

A lawyer shall never knowingly give false or misleading information to the court.

4.5. 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.

5. RELATIONS BETWEEN LAWYERS

5.1. Corporate Spirit of the Profession

5.1.1. The corporate spirit of the profession requires a relationship of trust and cooperation 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.

5.1.2. A lawyer should recognise all other lawyers of Member States as professional colleagues and act fairly and courteously towards them.

5.2. Co-operation among Lawyers of Different Member States

5.2.1. 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.

5.2.2. 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.

5.3. Correspondence between Lawyers

5.3.1. 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.

5.3.2. 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.

5.4. Referral Fees

5.4.1. 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.

5.4.2. A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to him- or herself.

5.5. 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).

5.6. (Deleted by decision of the Plenary Session in Dublin on 6 Dec 2002)

5.7. 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.

5.8. Continuing Professional Development

Lawyers should maintain and develop their professional knowledge and skills taking proper account of the European dimension of their profession.

5.9. Disputes amongst Lawyers in Different Member States

5.9.1. 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.

5.9.2. 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.

Appendix 2

CCBE Code of Conduct for European Lawyers

5.9.3. 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.

Appendix 3

*IBA International Principles on Conduct for the Legal Profession**

Adopted on 28 May 2011 by the International bar Association

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**See 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.

Appendix 4

Family Law in Ireland, Code of Practice 2008

INTRODUCTION

Family Law in Ireland has seen very significant changes in recent times as a result of the changing economic climate and the 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 our clients. This Code believes that family law disputes should best be resolved in a constructive and non-confrontational way.

It must also be remembered that solicitors act as representatives of the client, but 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.

Appendix 4

Family Law in Ireland, Code of Practice 2008

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. 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. Our 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.

Appendix 4

Family Law in Ireland, Code of Practice 2008

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 parent will affect the family as a whole and the child's relationship with his or her parents.
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.

ALTERNATIVE METHODS OF DISPUTE RESOLUTION

There are various forms of alternative dispute resolution 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.

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.

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 separately during the process, although any issues which arise might best be addressed in the course of mediation.

Collaborative law is a further means for separating or divorcing couples who wish to play an active role in the process and might be described as a form of solicitor-mediation where the focus is on mutual resolution of all matters arising. As it is a different process to mediation and traditional models of negotiation, specific training is required.

Where proceedings have been instituted, many of them 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.

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 same. 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 the client 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" their perception of the problem.

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.

Where there is a total breakdown in the solicitor/client relationship it may be necessary to terminate same and there are a variety of circumstances in which the solicitor/client relationship may be terminated.

If permission for the solicitor's withdrawal from representation is required by the court, 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 seek to maintain a good working relationship with colleagues and a co-operative approach. It is not appropriate to criticise the other party's solicitor, particularly to one's own client.

In correspondence and conversations with the other solicitor, you should try to maintain the focus on resolution of the dispute and avoid emphasising past difficulties or expressing opinions as to the conduct of the other party. You need to have regard to the impact of correspondence sent and received and consider before copying correspondence to the client. The solicitor should remain detached and avoid confrontational language which may further exacerbate the conflict between the parties. Threats of court proceedings should not be made without exploring other less contentious options.

Both solicitors should encourage their respective clients to provide full information in financial and other relevant matters at an early stage and exchange the information as soon as possible. They should try to agree on joint valuations of property and joint reports where the welfare of children is at issue.

RELATIONSHIP WITH COUNSEL

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.

However, counsel will not generally be involved on a day-to-day basis and solicitors must retain the overall responsibility for the management and progressing of a case.

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, allow. It is the duty of the solicitor to properly instruct counsel in the manner which ensures that counsel has all the information which the solicitor has and which are or may be necessary for counsel to properly represent the client's interests.

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 same. 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.

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 he or she 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.

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 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 or 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

Children may be the subject matter of disputes and/or proceedings in a number of ways for example in cases of custody/access, guardianship, child care (public law proceedings), child abduction, adoption. The views of children should be heard but are not always taken into account in practice.

Children in Private Family Law Disputes

When representing a parent in a private family law dispute, you should be very clear with your client that the child's welfare and interests are paramount.

You should encourage your client to co-operate with the other parent when making decisions concerning the 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 or the child(ren).

In any letters, you should keep disputes about arrangements for the child or children separate from disputes about any other matters. Children's matters should be referred to in separate letters.

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. There is provision in the Child Care Act, 1991 ("the Act") for the appointment of a Guardian Ad Litem to represent the child's interests separately. However, this section has not been implemented as of yet¹.

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.

Solicitors should attempt to agree in advance with other parties any evidence which is undisputed and inform the court of agreed facts.

Children as Clients in Public Law Matters - Children in Child Care Cases

Care proceedings originate under the Act and are public law proceedings. Child care proceedings are conducted in camera in accordance with Section 29 of the Act. The

1. *As at publication date 2008.*

parties to child care proceedings are inevitably the Health Service Executive, usually one parent, often two parents and increasingly a child will either be represented by a solicitor pursuant to Section 25 of the Act or will have a Guardian Ad Litem appointed to report on his/her wishes and feelings and to advise the court on what is in his/her best interests pursuant to Section 26 of the Act. The clients must be advised that the court will have regard to the wishes and feelings of the child and that those wishes and feelings will be considered in light of that child's age and understanding.

A solicitor can therefore find himself/herself retained on behalf of any one of these parties to the proceedings. The proceedings concern the welfare of a minor and Section 24 of the Act states that the welfare of a child is to be regarded as the first and paramount consideration.

There can be a variety of applications to court which would comprise a child care case, an application for an Emergency Care Order, an application for an Interim Care Order, an application for an extension of an Interim Care Order, an application for a Care Order and an application for a Supervision Order.

The client should be further advised that, because the proceedings are in camera the documents are confidential and the contents should not be disclosed or discussed with those who are not parties to the proceedings. Reports are generally released to the solicitors for the parents on their undertaking to discuss the contents/conclusions with the parent but not to release a copy of the report to them.

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 parents, and 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.

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. You must continually assess the child's competence to give instructions.

You should consider whether it remains possible for you to act as solicitor for the Guardian Ad Litem and the child but, if the views of the child and the professional opinion of the Guardian ad Litem substantially differ, you may need to opt to remain acting on behalf of the child and allow the guardian to seek his or her own representation.

You should make all efforts to ensure that the proceedings are not delayed and that the proceedings are concluded within a reasonable timeframe. 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.

A solicitor acting on behalf of a client in child care proceedings should ensure that they have appropriate CPD points, as this is increasingly a specialised area of practice.

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 the children. Negative effects can be avoided or minimised if parents can direct their energy to focus on what is best for the children. Even if the one-to-one relationship between the parents has ended, both have a role to play in the lives of the children.

When parents separate, issues 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 and should, therefore, be suggested and recommended by solicitors.

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
- 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 their 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 and the time of the hearing, by narrowing the issues at dispute at an early stage.

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

- a) satisfy him/herself that he/she has acquired no information that could lead to a possible conflict of interest; and
- b) 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.

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, can be 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.

You should advise your client to maintain a balance between the costs being incurred by him/her and what he/she 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 same from their spouse if the judge so decides.

We recommend that you should also discuss the contents of the Section 68 letter with your client in person or on the telephone if possible so that he/she fully understands same. It can be 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 he/she 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 rather 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

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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 counsel or senior counsel and any other experts.

You should advise your client as to the availability of Civil Legal Aid and you should furnish to them 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, to include frequent/long telephone calls.

Solicitors are also reminded of their obligations under the anti-money-laundering legislation, which may have a particular relevance in family law cases.

ANTI-MONEY-LAUNDERING OBLIGATIONS

It is necessary for all solicitors to take measures to identify new clients and maintain records of their identity. It is also necessary to maintain records of all transactions and copy 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 also 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.

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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 Guidance Notes for Solicitors on anti-money-laundering legislation which can be accessed through the Society's website at www.lawsociety.ie.

Appendix 5

Memorandum of Understanding between the Revenue Commissioners and the Law Society of Ireland concerning the audit of the tax returns of Solicitors and Solicitors Practices

1. The Purpose of this Memorandum of Understanding

The purpose of this memorandum of understanding is to clarify certain procedural matters that may arise in the audit of the tax returns (Income tax, Capital Gains tax, VAT, PAYE/PRSI, 3rd Party returns etc.) of solicitors and solicitors' practices.

2. Audit Focus

The primary purpose of the Revenue audit of solicitors or solicitors' practices is the audit of the tax returns of the individual solicitor or partnership, or both, as the situation demands. In carrying out these audits Revenue officials will not be collecting, collating or verifying client information.

However, Revenue audit programmes include verifying or cross checking tax related financial information on transactions from one taxpayers business records to those of another taxpayer. Similar checks are carried out in all businesses.

3. Information or professional advice of a confidential nature given to clients is not sought by Revenue Auditors

Confidential information which does not have a bearing on the tax liability of any solicitor is not sought by Revenue officials.

Revenue officials fully recognise the concept of legal advice privilege¹ and litigation privilege².

1. *Legal Advice Privilege*

The basic rule is that communications between a lawyer in his professional capacity and his client are privileged from production if they are confidential and for the purposes of seeking or giving legal advice to the client. It does not apply to legal assistance which covers many tasks which a solicitor carries out for clients.

2. *Litigation Privilege*

The basic rule here is that communications, after litigation has been commenced or after litigation has been contemplated, between (a) a lawyer and his client, (b) a lawyer and his non professional agent or (c) a lawyer and third party, for the sole or dominant purpose of such litigation (whether for seeking or giving advice in relation to it, or for obtaining evidence to be used in it, or for obtaining information leading to such obtaining), are privileged from production.

Memorandum of Understanding between the Revenue Commissioners and the Law Society of Ireland concerning the audit of the tax returns of Solicitors and Solicitors Practices

Revenue officials are entitled to access the names and addresses of clients subject to the exclusions as described at footnote³.

Tax legislation obliges solicitors to give authorised Revenue officials access to books, records and other documents, information and explanations for the purposes of verifying the tax liabilities of any individual solicitor or practice. Revenue officials are also entitled to reasonable assistance in this regard.

4. Special Cases

In additional to paragraph 3, in certain limited situations, where there are exceptionally sensitive issues, a solicitor may request that either the name and address of the client, or certain aspects of the case, should not be disclosed. Revenue officials will agree to conduct the audit without the client's name and address or the issues being revealed, provided the non disclosure does not restrict the audit process, and that sufficient meaningful information is supplied to the Revenue official to enable the tax issues to be verified.

Bearing in mind the confidentiality obligations on Revenue officials, it is expected that situations where this clause might be invoked will be exceptional.

Where there is disagreement regarding disclosure in these circumstances, the solicitor may request a review by the Senior Inspector or Regional Director to whom the Revenue official reports or a review by the internal / external reviewers in accordance with Statement of Practice S.P. Gen 2/99.

5. Access to books, records, documents and information and explanations relating to tax

Revenue officials will seek access to books, records, documents and information and explanations relating to tax so as to verify the amounts of professional income and other income earned within a specified period, and also to verify the correct accounting for VAT and correct operation of PAYE/PRSI.

3. Exceptional Circumstances

In addition to the privilege items outlined in the preceding footnotes account will also be taken of Mr. Justice Kelly's dicta in Miley v Flood [HC 2000 No. 310 I.R. (Kelly, J) 24 January 2001];

"..... a solicitor is not entitled to maintain a claim to privilege in respect of the identity of his client. A dilution of this general principle arises where (a) the naming of the client would incriminate or (b) where the identity of the client is so bound up with the nature of the advice sought, that to reveal the clients identity would be in fact to reveal that advice".

Memorandum of Understanding between the Revenue Commissioners and the Law Society of Ireland concerning the audit of the tax returns of Solicitors and Solicitors Practices

Broadly in general terms, access is sought, where appropriate, to the following:

- The underlying records (cash book, cheque journal, etc.), the accounts linking papers which link the underlying records to the annual accounts, including Trial Balance, Nominal Ledger, Journal entries, Bank account reconciliation, client Ledger balances reconciliation and reconciliation of opening and closing accounts balances.
- Records relating to fees receivable and profits earned, the timing of earnings, valuations of debtors and work in progress, timely transfer of costs to office account, treatment of clients outlay, treatment of office and personal expenditure, reconciliation of clients balances with balances in clients bank accounts.
- Access is sought to individual client's ledger accounts, correspondence, information and explanations so as to verify figures in the accounts, the status or timing of some transactions such as the source or destination of sums passing through the client ledger accounts, the commencement and ending of separate steps in litigation or other services giving rise to payment of fees, the valuation of work on progress, the determination of bad debts and other income or expense related transactions.
- Records and documents relevant to VAT.
- Records of employee emoluments relevant to PAYE/PRSI.
- All bank accounts (current, loan, deposit etc.) – client accounts, office accounts (including paid cheques) and private accounts.
- Computations of taxable profits and distribution of profits among the partners.
- Documents relating to various claims to relief and allowances.
- The correct accounting for any relevant tax under any provisions of the Taxes Acts.

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The above is an indicative list only and other records etc. may be required depending on the circumstances of any particular case.

Access is sought only to such practice correspondence that is likely to assist in verifying issues such as checking the timing of transfer of fees to office account, valuation of debtors and work in progress, verifying creditors and other income or expense related transactions. Where files are sought the solicitor may remove from the files, where relevant, items attracting legal advice privilege, litigation privilege and details of tax advice given to clients.

Where there is disagreement regarding disclosure in these circumstances the solicitor may request a review by the Senior Inspector or Regional Director to whom the Revenue official reports or a review by the internal/ external reviewers in accordance with Statement of Practice S.P. Gen 2/99.

6. Review

It is agreed that this Memorandum of Understanding will be reviewed as necessary, and in any event after two years in operation.

7. Position re Non-Production of Records to Date

It is accepted by Revenue that the non production of records in the course of an audit which commenced prior to 28 February 2002, on the basis that the solicitor was of the view that privilege applied, will not count as non co-operation for the purposes of penalty mitigation.

DISCLAIMER

Neither the Law Society nor the Revenue Commissioners accept any responsibility for any errors, omissions or inaccuracies herein nor for any loss arising to anyone as a consequence of acting or refraining from acting in reliance on the information herein contained.

Readers are advised to obtain professional advice and guidance as appropriate.

Guidelines to Solicitors in relation to Revenue Audits

Discussions have taken place between the Law Society and the Revenue Commissioners (“Revenue”) in relation to the conduct of Revenue audits on solicitors’ practices.

REVENUE AUDITS

If a solicitor is the subject of a Revenue audit it is recommended that the solicitor should familiarise himself with the following publications namely:-

- (i) Memorandum of understanding between the Law Society and Revenue, February 2002.
- (ii) Code of Practice for Revenue Auditors.
- (iii) Tax Commentary Volume 4 Issue 1 prepared by John Bradley at KPMG for the Law society dated August 1996.
- (iv) VAT and Solicitors: A simplified commentary as published by the Probate Administration and Taxation committee updated as of [February 2002].
- (v) The legislation and in particular Section 16-18 of the Value Added Tax Act, Regulation 3 of the Value Added Tax (Invoice and Other Documents) Regulations 1992 and Section 886 and 905 of the Taxes Consolidation Act 1997.

At the commencement of the audit, the Revenue Auditor will enquire if the solicitor wishes to make a voluntary disclosure.

Section 1086 of the Taxes Consolidation Act provides that a voluntary disclosure arises “where the Revenue.... are satisfied that, before any investigation or enquiry has been commenced by them.... into any matter occasioning a liability.... the person had voluntarily furnished to them complete information.... and full particulars of the said matter”. The benefits of voluntary disclosure are that

- publication will not arise
- penalties are generally mitigated and
- whilst no absolute assurance can be given, generally speaking Revenue will not seek a prosecution and a monetary settlement will be accepted.

When making a voluntary disclosure, the Revenue auditor will take notes and will read the note back to the solicitor so as to ensure that it reflects fully the extent of the

Guidelines to Solicitors in relation to Revenue Audits

disclosure. The auditor may seek assurances as to the completeness of the note and record the response of the solicitor and any consequential revisions to the note. The note will then be initialled by the auditor and the date and time will be marked thereon. This procedure is adopted so that there is no dispute at a later stage as to whether a complete voluntary disclosure was made or not. If at any stage of the audit, the Revenue issue a caution to a solicitor, the audit should cease or if the investigation branch present themselves at a solicitor's office, it is recommended that the solicitor should take advice from a colleague with a knowledge of criminal law practice and procedure.

BOOKS AND RECORDS TO BE PRODUCED

Revenue are entitled to inspect the solicitor's office bank account and to have sight of the office bank statements, cheque payments books, cash receipts book, purchases book, petty cash records, wages records and any other records which pertain to the office bank account.

The Law Society is of the opinion that Revenue are entitled to inspect the client bank account, client bank statements, client cheque payments book, client cash receipts book, client ledger accounts and copies of VAT invoices issued to clients without the client's name and address being redacted unless in exceptional cases revealing the client's name would (a) incriminate the client or (b) is so bound up with the nature of the advice given to the client as to reveal the name would reveal that advice². The only item which may be redacted is information or advice which attracts privilege, if indeed such information exists on the accountancy records. Solicitors are reminded that under the VAT legislation, there is no legislative requirement to have information or advice of a confidential nature listed on a VAT invoice and it is accordingly recommended that any practice whereby such information appears on a VAT invoice ceases. Similarly under the Solicitors Accounts Regulations the only information requirement to be contained on a client account is that the account be clearly marked as being a client account.

In ongoing litigation cases where there may be payment to a witness or expert for example in respect of a report, and the identity of the witness has not yet been revealed to the other side and if the client claims privilege over the identity of such a witness, then accordingly the witness' name may be redacted from the records being produced to the Revenue.

Guidelines to Solicitors in relation to Revenue Audits

If an issue arises with Revenue as to whether privilege is being properly claimed it is open to the Solicitor to take his own advices on the matter and to dispute the matter with the Revenue either through the internal/external review mechanism within Revenue or through the Courts.

Revenue have stated that they are entitled to have sight of the annual accountant's report to the Law Society on the grounds that the reconciliation of the client bank account as requested in paragraph 2 of the document brings the document into the realm of financial records which Revenue are entitled to see. The Law Society is of the opinion that the accountant's report is a document prepared for the Law Society and whilst the Society does not have a hard and fixed view on the matter feels that a solicitor is probably obliged to give the Revenue a copy of this document if there are surpluses on the client bank account equating with the parking of fees in the client account. The parking of fees in the client account is prohibited under the Solicitors Accounts Regulations, 2001. In circumstances where there are no unexplained surpluses in the client account and a solicitor may have made a voluntary disclosure and has made available to Revenue details of the client bank account, in such instances the Law Society feels that it is a matter for the Revenue to satisfy itself as to the adequacy or otherwise of the income tax return of the solicitor without having to resort to a document prepared for the solicitor's governing body.

During the course of the audit the Revenue will select the client ledger accounts it wishes to examine. At all stages the solicitor should bear in mind that there is a taxpayer's charter of rights whereby Revenue have stated that there is a presumption of honesty in favour of the solicitor taxpayer and that every effort is made to limit the impact of the audit on the solicitor's practice and to keep to a minimum the costs a solicitor incurs in complying with the audit. Revenue will generally agree the method of selection of client ledger accounts with the solicitor or its advisor early on in the audit. Usually a letter of the alphabet will be selected.

Revenue should not be given open unlimited access to client files per se. If a solicitor has been keeping proper records and raising VAT invoices when they fall due on the completion of a service then there should be no need for the Revenue to request access to a client's files. In general Revenue will usually only request sight of a client file for the purpose of verifying whether a service has been completed or not or verifying creditors or expenses. If a solicitor does receive a request from Revenue to have access

Guidelines to Solicitors in relation to Revenue Audits

to the client file, the solicitor must be afforded a reasonable opportunity of reading the file and removing therefrom any items attracting privilege or details of tax advice given to a client. Care must be taken that Revenue do not receive such information.

It is anticipated that circumstances may arise where Revenue request access to a particular client ledger or client file which is not privileged but which is particularly sensitive and the solicitor may feel obliged, due to the high degree of sensitivity about the matter, to refuse the Revenue access to the information. In such circumstances it is suggested that the parties attempt to resolve the matter in a practical fashion. Where there is a disagreement as to whether Revenue should have such access the matter can be referred to the internal/external review mechanism within Revenue and in such instances Revenue have advised that the party reviewing the matter would not necessarily need to be appraised of the client's name in order to come to a decision upon the matter.

BREACHES OF TAX CODE

During the course of the discussions with Revenue, Revenue highlighted certain examples where solicitors were found to be in breach of the tax code. Whilst the following is not an exhaustive list, the principal areas were as follows:-

1. Fees being left sitting indefinitely in the client account

In such instances profits are being suppressed and the solicitor's income tax liability is not being accurately assessed. Solicitors are reminded that under the Solicitors' Accounts Regulations such practice is prohibited. Where a solicitor has completed a service on behalf of a client and a bill of costs has been raised, solicitors are advised that the fees should be transferred across in a timely manner from the client account to the office account.

2. Solicitors using "pro forma invoices"

Revenue stated that since the change over of the obligation on solicitors to account for VAT from a cash receipts basis to an invoice basis that some solicitors allegedly sought ways and means of continuing to pay VAT on a cash receipts basis. A practice had arisen that a formal VAT invoice would only be raised when payment was received from a client. When furnishing a bill to a client, solicitors were using "pro forma VAT invoices" or fee statements which bore the narrative

Guidelines to Solicitors in relation to Revenue Audits

“this is not a VAT invoice”. This meant that there was an understatement of debtors on the solicitors accounts with a consequent suppression of income. As VAT was only being paid once received, there was a consequent time gap when Revenue were at a loss of use of the VAT. Solicitors are reminded that an invoice must be raised within 15 days of the end of the month in which the service is completed and that if they are on an invoice basis that they must account to Revenue for that VAT regardless of whether the client has discharged the liability or not. Solicitors are referred to the pamphlet prepared by the Probate Administration & Taxation Committee in February 2002 entitled “VAT and Solicitors: A simplified commentary”. It is recommended that solicitors read this pamphlet and apprise themselves of their VAT obligations.

3. Personal expenditure being included as an item of outlay in the client account

Revenue have found that in certain instances extraordinary expenses (for example travelling expenses) have been included as an item of outlay with the consequent result that the fee which would ordinarily be charged for the service is reduced and there is accordingly a loss of income tax and VAT to Revenue. Only properly vouched expenses should be charged as outlay to a client.

The Law Society recommends that solicitors examine their records and if the solicitor finds instances of the above that the solicitor contacts his accountant/tax adviser and that immediate steps be taken to rectify the situation.

Whilst every effort has been made by the Law Society to give guidance to solicitors on the subject matter of Revenue audits, every audit is different and every solicitor has its own way of dealing with accounts with the result that hard and fast advice cannot be given on the topic¹.

Probate Administration and Taxation Committee

February 2002

1. Care should be taken when reading this article as it sets out the law as of August 1996. In particular solicitors are referred to the advices contained in this article that client information should not be revealed to the Revenue Commissioners. Such advice is no longer current.
See Miley -v- Flood HC 2000 No. 310JR. Unrep. Kelly J. 24.1.01

Appendix 5

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DISCLAIMER

The Law Society does not accept any responsibility for any errors, omissions, or inaccuracies herein nor for any loss arising to anyone as a consequence of acting or refraining from acting in reliance on the information herein contained. Readers are advised to obtain professional advice and guidance as appropriate.

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