



handbook

family law

Foreward

I greatly welcome this new edition of the *Family Law Handbook*. As is pointed out in the Introduction, family law in Ireland has seen very significant changes in recent times. Solicitors, and indeed all who deal with the difficulties that arise when family relationships break down, need to adapt both to changes in the legal environment and to changes in society in general.

The handbook notes the strong support for the family enshrined in the Constitution and the need for all involved in family law to have regard to the best interests of the family as a whole, and in particular to the best interests of the children of the family. This consideration makes the role of the family lawyer both sensitive and complex, so that adherence to an ethical code of practice is all the more essential.

This handbook is comprehensive in its coverage. It deals with the various relationships that arise in the course of a family law solicitor's practice, with the role of expert witnesses, with court proceedings and with the growing role of different forms of alternative dispute resolution. It also covers day-to-day practical realities such as file management and anti-money-laundering obligations.

I am, however, particularly impressed by the section dealing with children. In cases where children are concerned confusion can well arise as to the

exact role of the solicitor. Here a clear distinction is made between the role of a solicitor in private family law disputes, where the client is the parent but the child's welfare must still be regarded as paramount, and the role of a solicitor in a public law child care case, while the client may be either a parent or a child. The solicitor whose duty to the court is to ascertain and report on the wishes and feelings of a child while at the same time advising the court on the child's best interests has a delicate and difficult task. This task is not assisted by an overly aggressive or antagonistic approach. As is made clear in this handbook, litigation concerning children should never be treated as a battlefield; the casualties in such a contest can only be the children. The guidelines given in the handbook to a solicitor whose client is a child are both sensitive and sensible, as is the advice concerning parenting plans.

I hope that all solicitors involved in family law cases, both those who practice regularly in the family law area and equally importantly those who are involved in the occasional family law case, will keep this handbook in the forefront of their minds and put its precepts into practice.

Catherine McGuinness



Acknowledgments


Our Committee considered that a review of the Family Law Code of Practice was timely in circumstances where there has been a huge growth in the area of family law over the last ten years. There have been significant changes in the law with the introduction of divorce and all the ancillary reliefs that go with that.

Our main concern is to assist practitioners in providing an excellent service to clients who by virtue of the fact that they have instructed a solicitor, either are contemplating, or in the middle of family law proceedings, and are having a most stressful life experience. The guidelines are designed to enhance the service provided to the client and to assist professionals in maintaining professionalism in this most difficult task.

I want to commend my Committee for their energy and willingness to give time to putting together this handbook. I am lucky to serve on a committee with people with vast experience and a huge willingness to help. I believe our handbook reflects that enthusiasm, energy and commitment.

I would also like to thank our Committee secretary Colleen Farrell, who kept me within my timelines and drove this process from beginning to end.

Sinead Kearney,
Chairman, Family Law Committee



Contents

Code of Practice	page 3
Alternative Methods of Dispute Resolution	page 6
Relationship with the Client	page 7
Dealing with other Solicitors	page 9
Relationship with Counsel	page 10
Dealing with Lay Litigants	page 11
Court Proceedings	page 12
Children	page 13
Expert Witnesses	page 16
Conflict of Interest	page 17
File Management	page 18
Anti-Money-Laundering Obligations	page 20

Code of Practice

INTRODUCTION

Family Law in Ireland has seen very significant changes in recent times as a result of the changing economic climate and the changing fabric of our society. This brings increasing complexity to the practice of family law on a daily basis, although the issues of critical importance to our clients remain the same.

There can be a concern that solicitors and court procedures may add to the distress and anger that can arise when relationships break down. In general, solicitors should deal with matters in a way designed to preserve people's dignity and to encourage them to reach agreement wherever possible. The result will often be to achieve the same or more satisfactory solutions than going to court but at less cost both in terms of emotion and money. Various methods of alternative dispute resolution are now available and should be considered fully with 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.

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

Code of Practice

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 any 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.

Code of Practice

GENERAL

1. At an early stage, you should explain to your client the approach you adopt in family law work.
2. You should encourage your client to see the advantage to the parties of a constructive and non-confrontational approach as a way of resolving differences. You should advise, negotiate and conduct matters so as to help the parties settle their differences as speedily and amicably as possible and reach agreement, while allowing them time to reflect, consider and come to terms with their new situation.
3. If there are contentious issues concerning children, you should advise your client that the court will, by law, prioritise the best interests of the child. You should make sure that your client understands that the best interests of the child should be put first. You should explain that, where a child is involved, your client's attitude to the other 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. Telephone 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.

Relationship with the Client

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 wherever possible 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 a 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 a "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 also 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 and adoption. The views of children should be heard in these matters 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 yet.

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 parties to child care proceedings are inevitably the Health Service Executive, usually one parent, often two parents and

Children

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 should be 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 parent, 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

Children

and that they 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 and experience, 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 limited 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

File Management

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 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 a 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, in an efficient and 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.

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.

Anti-Money-Laundering Obligations

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.

Notes



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handbook

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