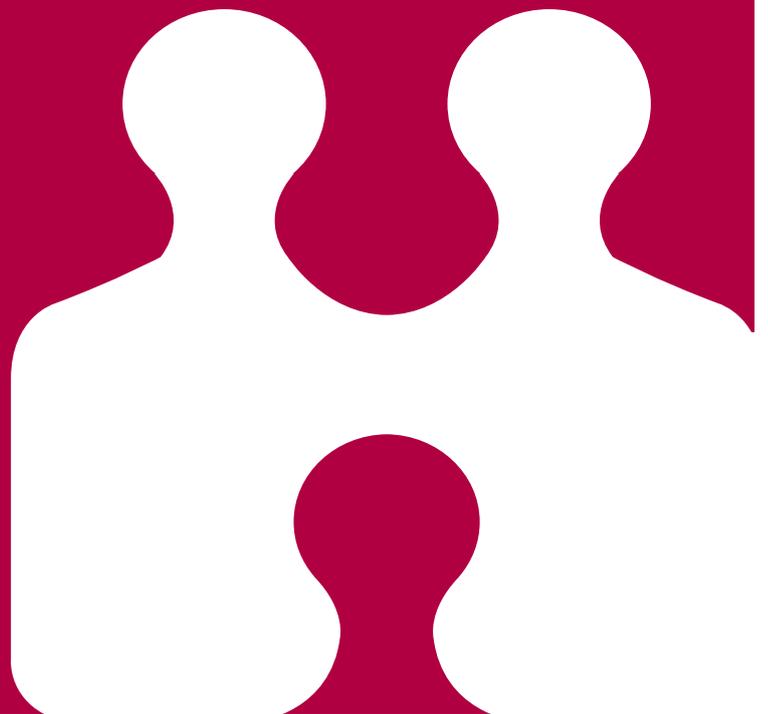


Guide to Good Practice on drafting documents



This Guidance was updated in September 2018. The law or procedure may have changed since that time and members should check the up-to-date position.

Guide to Good Practice on drafting documents

Introduction

One of the most important aspects of a family lawyer's job is to draft documents on behalf of clients. The documentation can take many different forms and it is often these documents that are pivotal in resolving disputes between parties, whether at a court hearing or in negotiations.

A family lawyer should be mindful of [Resolution's Code of Practice](#) when drafting documents and, in particular, should ensure they:

- Reduce or manage any conflict and confrontation; for example by not using inflammatory language
- Help clients understand and manage the potential long-term financial and emotional consequences of decisions

This guide looks at how to draft documentation within family law proceedings in a code-compliant manner.

Scope

Family lawyers can be asked to draft many different types of documents, from formal structured documents, such as divorce petitions and consent orders, to seemingly less rigid documents, such as statements or questionnaires.

The scope of this guide is to consider the drafting of documents in general and how to ensure that the [Resolution Code of Practice](#) is complied with in the drafting process. It is not intended to provide specific guidance as to how best to draft certain documents - although some specific practical considerations are suggested - but instead, to provide more general guidance as to how to ensure that the Code is reflected in documentation drafted by family lawyers.

Aside from correspondence and marital agreements, which are considered in separate guides published by Resolution, the documents drafted most frequently by family lawyers are likely to be applications, petitions, statements, Forms E and orders. However, many other types of documents are also regularly drafted by family

lawyers, such as instructions to counsel, chronologies, Scott schedules, statements of costs or letters of instruction.

All of these documents are likely to be referred to, or otherwise impact upon, the final outcome for clients - whether that outcome is reached by agreement or following contested proceedings.

The techniques and skills involved in drafting these documents differ but adherence to the Code of Practice in the drafting of these documents should assist, both in preparing documentation that best assists your clients, and also promotes early and non-confrontational settlement of issues where possible.

Resolution's [Precedents for consent orders](#) are available free online to members and the President of the Family Division has issued a number of draft precedent order which are widely available. There are also good practice guides published by Resolution in relation to the [drafting of correspondence](#) and the [Preparing marital agreements](#) guidance note.

The drafting of documentation is also governed and guided by the [Family Procedure Rules](#) and the relevant case law. Resolution has published guidance notes on [Documents following the Family Procedure Rules 2010](#) and on [Disclosure in Financial Order cases](#).

Client's instructions

Many of the documents drafted by family lawyers will stand as a client's evidence and will be incorporated into court bundles or used as base documents for alternate forms of dispute resolution. It is important that these documents set out accurately the client's instructions, wishes and feelings.

In the often emotive world of family breakdown, received instructions can be emotional, confrontational and use emotive and inflammatory language.

Preparing documents on behalf of clients that transfer the emotional and sometimes confrontational instructions into inflammatory and confrontational documents will not assist clients in reaching settlement with a minimum of stress, cost and time. Whilst in the short term the client may feel that they want their points made aggressively and forcefully, they have instructed a Resolution member and should be aware that adherence to the Code helps them to:

- balance financial and emotional costs with what they want to achieve
- focus on what's important in the long term; and

- manage stress in what can be an already stressful situation.

Documents drafted in an emotional, inflammatory and confrontational manner are more likely to prolong proceedings, increase costs for clients, reduce the likelihood of amicable and / or consensual resolution and increase hostility between parties, who are likely to have ongoing relations of one sort or another for many years to come.

Impact on other parties

Most of the documents drafted by family lawyers are read by other parties in any proceedings or proposed proceedings. Family lawyers should think very carefully about the impact that the content and tone of the document will have on those parties.

There are of course many occasions in family law when a client's case is likely to cause distress to another party. For instance, a statement in Family Law Act proceedings alleging domestic abuse, or a statement in Children Act proceedings raising concerns as to an ability to care for children, are by the nature of their content, likely to cause distress to and be objected to by another party.

It is particularly important in these circumstances that the Code of Practice is at the forefront of the mind of the lawyer drafting the document. Whilst the client's case has to be put clearly the lawyer should remain mindful of:

- the impact of the document
- the benefits to all parties, and any children, of non-confrontational and consensual resolution to a dispute
- the financial and emotional impact of any further polarising of parties' positions.

The purpose of the document

The family lawyer should be mindful of the purpose of the document that is being prepared. A client may well be keen for a document to set out all or many of their grievances against another party but this will not be the purpose of that document.

Documents in family law proceedings are primarily drafted with the purpose of:

- setting out a client's evidence / putting the client's case
- detailing the relevant background

- providing the client's disclosure.

Being mindful of the Code of Practice will assist in the preparation of the document to ensure that these aims are met and focused on. In particular:

- Clients often want to raise financial matters in children proceedings and children matters in financial proceedings. Keeping financial and children issues separate however, will help focus the clients on the relevant issues and relevant facts for the documentation and in ensuring that unnecessary tension is avoided, thus increasing the prospects of a consensual resolution.
- The interests of the children, be it in financial or children proceedings, are very likely to be the paramount or primary concern of the court and documentation should be drafted with this in mind. The Code of Practice requires family lawyers to encourage clients to put the best interest of the children first. This is what the court will do.
- The court has always, and understandably, frowned on dishonesty in proceedings and this has now been highlighted by the Supreme Court's decisions in [Sharland](#) and [Gohil](#). A client's dishonesty in family proceedings is likely only to increase tension between the parties and reduce the likelihood of early resolution. The Code of Practice requires family lawyers to emphasise to clients the importance of being open and honest in all dealings. Emphasising this to clients at the outset and ensuring that they are aware that all documentation must be drafted with this in mind should assist in saving costs and reducing tensions and the time taken to resolve the parties' disputes.

Practical considerations

Divorce petitions

A divorce petition is often one of the first documents drafted in proceedings. It can set the tone for dealing with the parties' separation. When advising on the reason for divorce the following should be born in mind:

- Divorce petitions are likely to be viewed as aggressive and hostile by other parties. This will be compounded if the statement of case is drafted in an aggressive and emotional manner.
- Where possible, and in accordance with the [Family Law Protocol](#), the content of a divorce petition should be agreed in advance with the other party so that the divorce can proceed without creating further unnecessary issues between the parties and to allow for the divorce to progress smoothly and swiftly.

- It is not necessary, in unreasonable behaviour petitions, for the allegations of unreasonable behaviour to be particularly severe, nor for every such behaviour to be raised. The courts will allow unreasonable behaviour petitions based on mild particulars to proceed.
- The Family Law Protocol states as follows:

“Where the divorce proceedings are issued on the basis of unreasonable behaviour, petitions should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court”
- In adultery petitions it is not necessary for a co-respondent to be named. If a co-respondent is named then this is likely to cause further tension and conflict between the parties and will also increase costs and time as a further party will be involved in the proceedings.
- If a petition based on separation is an option available to the parties this should be considered because a petition on a non-fault based ground will cause less conflict between the parties and allow them to focus and resolve the other issues in relation to their separation.

The Supreme Court, in the case of *Owens v Owens* [2018] UKSC 41 provided some detailed consideration of unreasonable behavior petitions. For drafting purposes practitioners are reminded by Lord Wilson that

“Unreasonable behaviour” has always been the family lawyer’s shorthand description for the content of the subsection. But it is wrong. The subsection requires not that the behaviour should have been unreasonable but that the expectation of continued life together should be unreasonable.”

Most divorce petitions remain likely to progress through the Courts uncontested and can be drafted in the manner set out above. Even with petitions that are contested or likely to be contested, practitioners should remain mindful of the code of practice and that with a behavior petition it is the expectation of continued life together that has to be shown to be unreasonable. With prolonged course of conduct petitions, such as that ultimately presented in the *Owens* case, practitioners should take care to ensure that where contested sufficient court time is allowed for the Court to be able to make course of conduct findings.

At the time of updating this guide the Justice Secretary has announced a consultation on “no fault” divorces.

Applications

- As with divorce petitions (another form of application), the application is likely to be one of the first documents seen by a party in relation to their separation and so the tone and content of that application is likely to have a significant impact on the tone and content of the subsequent proceedings.
- It is unnecessary in most applications to provide a detailed narrative explanation as to the basis of the application as the parties will both have an opportunity to set out that case in full at a later date in the form of a statement.

Narrative statements

- A narrative statement will stand as a client's evidence. It is important that it contains your client's instructions but also that it focuses on the issues in question. A statement is likely to have much more impact if it is clear, concise and deals with the specific issues in question, rather than being long, rambling and setting out facts and allegations which the court is not considering.
- In relation to section 25 statements, but of relevance generally, family lawyers should be mindful of the [Statement on efficient conduct of financial remedy final hearings before High Court judges](#). In respect of narrative statements "The parties' section 25 statements must only contain evidence. By virtue of [FPR PD22A para 4.3\(b\)](#) the statement must indicate the source for any matters of information and belief. On no account should a section 25 statement contain argument or other rhetoric."

Forms E

- Although a factor to be taken into account in matrimonial financial proceedings, conduct during the marriage is unlikely to be a factor which influences a court's decision and even more rarely would it be accepted as a consideration in any dispute resolution forum.
- The relevance of conduct is case-specific, but the examples of conduct being taken into account are rare and relate usually to extreme bad behaviour (such as attempted murder) or poor financial dealings (such as fraud). It has to be conduct that it would be inequitable for the court to disregard and have a direct impact upon the order the court is likely to make. Therefore, it is important to focus a client on this as early as possible and completing this part of the Form E only in circumstances where there is a realistic conduct claim

Chronologies, case summaries and statements of issues

- These documents are intended as an initial summary guide to the court as to the background to the proceedings and as to the issues in dispute. They are not intended to be position statements or used as an opportunity for one or both parties to advance their case.
- Where possible, these documents should be agreed between the parties in advance. Competing documentation should not be filed but instead any areas of dispute should be noted on one composite document.

Conclusion

In family law each case is fact and circumstance specific. What might be the right course of action in one set of proceedings may not be the right course of action in another.

The [Code of Practice](#) is relevant to all of the circumstances and should be at the forefront of a family lawyer's mind when drafting documents. It will often be the case that the circumstances of a case mean that difficult and challenging allegations are set out in these documents. In those circumstances it is all the more important that the Code of Practice is considered and applied so that no further unnecessary difficulties are created.

Applying the Code of Practice should assist in progressing matters in as non-confrontational manner as possible and affording the parties every opportunity of resolving their disputes as quickly and efficiently as possible.

Sources and materials

Resolution's [Precedents for Consent Orders](#) is an invaluable guide and is available to members for free online.

The good practice guide on [Correspondence](#) and the guidance notes for [Documents following the Family Procedure Rules 2010](#), [Disclosure in Financial Order cases](#), [Court Bundles](#) and [Preparing Pre- and Post-Marital Agreements](#) can also all be found at www.resolution.org.uk

The [Financial Remedies Omnibus](#), the [Child Arrangements Programme precedent orders](#) and the revised statement on the efficient conduct of financial remedy hearings are also all available online.

Most practitioners will have access to software which allows them to download court forms. Family law forms, including applications, Forms E and petitions, can also be downloaded from the [Ministry of Justice website](#).