

Resolution Guides to Good Practice

Code of Practice

Dealing with Clients

Correspondence

Litigants in Person

Working with the Bar

Disclosure in Ancillary Relief

Service in the Family Law Context

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Introduction

The Resolution Guides to Good Practice are an invaluable tool for family lawyers and should be read and inwardly digested by all alongside the Code of Practice. They build on the core tenets of the Code by developing the ethos behind it into areas of practice. They are intended to help to show the way in which the Code should be applied in day-to-day situations. The Law Society's Family Law Protocol recognises the value of these guides and says that all family lawyers should follow them.

The guides have been updated to take account of the latest version of the Solicitors' Code of Conduct (July 2007) and the Family Proceedings (Amendment) (No 2) Rules 2009. The guide on disclosure in ancillary relief proceedings also incorporates the latest guidance resulting from recent case law.

The guide on dealing with clients contains a precedent paragraph for a retainer letter explaining that the case will be handled in accordance with the Resolution Code of Practice. Members are urged to consider incorporating such a paragraph so that the Code is at the forefront of everyone's mind from the start and so that the client can be reminded of it if they instruct you to do or say something in breach of the Code.

Whilst the guides as a whole are recommended reading, they stand alone as useful reference points so that if you have a query or concern about, for example, an aspect of disclosure you can simply look up that guide without reading them all. If there are areas of practice that have not been covered and on which you feel a good practice guide would be useful, please contact Jacqui Jackson – details below.

The guidance is periodically revised, so please keep an eye on the Resolution website for updates.

Separate practice aids on retainer letters, dealing with FDRs and on instructing experts in ancillary relief cases or in children cases are available to purchase from central office at info@resolution.org.uk or on 01689 820272.

Considerable thanks are due to the original authors of the guides and to the current members of the Standards Committee who are responsible for maintaining and updating the guides.

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Code of Practice

Membership of Resolution commits family lawyers to resolving disputes in a non-confrontational way.

We believe that family law disputes should be dealt with in a constructive way designed to preserve people's dignity and to encourage agreements.

Members of Resolution are required to:

- ✓ Conduct matters in a constructive and non-confrontational way.
- ✓ Avoid use of inflammatory language, both written and spoken.
- ✓ Retain professional objectivity and respect for everyone involved.
- ✓ Take into account the long-term consequences of actions and communications as well as the short-term implications.
- ✓ Encourage clients to put the best interests of the children first.
- ✓ Emphasise to clients the importance of being open and honest in all dealings.
- ✓ Make clients aware of the benefits of behaving in a civilised way.
- ✓ Keep financial and children issues separate.
- ✓ Ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional.
- ✓ Inform clients of the options, eg counselling, family therapy, round table negotiations, mediation, collaborative law and court proceedings.
- ✓ Abide by the Resolution Guides to Good Practice.

This Code should be read in conjunction with the Law Society's Family Law Protocol.

All solicitors are subject to the Solicitors Practice Rules

www.resolution.org.uk

Guide to Good Practice for Family Lawyers in Dealing with Clients

1. Introduction

The professional relationship between lawyer and client is of central importance when representing the client, and needs to be nurtured from the outset and maintained throughout the period of instruction. The lawyer must ensure that the client appreciates and understands the lawyer's role and function in representing the client. In family cases, the work is often difficult and demanding, and of a sensitive nature, and the following good practice guidance is intended to assist lawyers practising in this area.

This guide should be read in conjunction with:

- The Resolution Code of Practice.
- Guide to Good Practice in Family Law on Disclosure in Ancillary Relief Proceedings.
- Guide to Good Practice to Correspondence.
- The Solicitors Regulation Authority Solicitors' Code of Conduct.
- Family Law Protocol.
- Legal Services Commission Transaction Criteria.

2. First telephone contact with client

The first contact with the client will be when he or she contacts the firm (usually by telephone) to make an appointment. It is important to ensure that an appropriate system is in place to handle such enquiries and that the following information is obtained:

- The nature of the enquiry and whether or not an urgent appointment is needed.
- The extent of the client's means, as the client may need the assistance of public funding and the firm may or may not offer this service.
- The potential costs of the first meeting. Some firms offer a free first meeting and therefore the client may think all firms offer this facility. Clarification concerning the cost of the first meeting may avoid embarrassment for both the lawyer and the client.
- Sufficient details to check whether there is a potential conflict of interest.

Ask the client to bring documents to provide proof of identity (passport/driving licence and utility bill or credit card bill less than three months old) to comply with the Money Laundering Regulations.

3. Meeting with client

3.1 Clients seeking legal advice and assistance in family matters are, in many cases, daunted at the prospect of consulting a lawyer and the initial meeting can be traumatic and emotional. It is therefore important for the lawyer to maintain a sympathetic, calm and objective approach to help the client feel at ease, but, at the same time, gather essential information from the client to assess the client's problems and give advice.

3.2 The aims of the first meeting are:

3.2.1 To gather relevant information including all contact details. Agree methods of future communication including the address to which correspondence should be sent and whether the client's email is confidential.

3.2.2 To discuss with the client and provide advice with regard to the following:

- (a) The possibility of a reconciliation.
- (b) Whether a divorce or judicial separation is appropriate.
- (c) The merits and use of mediation, collaborative law or other methods of ADR that may be considered as an alternative route of resolution at any stage throughout the proceedings. (There is a helpful section on ADR on the Resolution website www.resolution.org.uk and in Part VII of The Law Society's Family Law Protocol.)
- (d) The problems the client is experiencing and what outcome will meet the client's needs. Consider initial steps to be taken, including any emergency steps that are necessary (see 4 below). Explain to the client the benefits of trying to resolve issues constructively and non-confrontationally and the impact of such an approach on costs.
- (e) Whether counselling could help the client to cope with distress/anger/depression and other emotions clients often suffer in the early stages of a relationship breakdown.
- (f) The possible timescale and potential costs involved. Confirm that a client care letter will be sent setting out terms of business.
- (g) How the legal costs will be funded. Help the client to be aware of and keep in mind at all times the principle of proportionality with regard to steps to be taken, possible outcome and likely cost in resolving issues.
- (h) The making of a will and the severing of any joint tenancy in respect of jointly owned property if relevant.

3.3 Remember:

- (a) If the client is uncertain as to the way forward, they may need time to reflect and consider the advice given.
- (b) At the first meeting the client may merely be seeking initial advice and may not require the solicitor to do anything further for the time being.

- (c) When giving advice, it is important to use clear language that the client can understand.
- (d) There is only so much information that a client can absorb, particularly at a time of stress and when presented with unfamiliar terminology.
- (e) It will usually be appropriate for advice given to be recorded in a letter to the client (see 6.3 below).

4. Consider any emergency steps needed

- 4.1 Ascertain whether it is necessary to take urgent steps to safeguard the client's personal safety or whether children are at risk or assets need safeguarding.
- 4.2 Apply for Land Registry Official Copies to check ownership and charges, notices and restrictions on property and to check whether or not a notice needs to be registered, or a restriction sought, to safeguard the client's interest.
- 4.3 Consider if any alternative remedy is available to avoid immediate injunction proceedings. If not, consider and advise the client on appropriate steps that can be taken.
- 4.4 Advise the client on court procedure, the costs involved and the implications of an adverse costs order.

5. Role of the lawyer

- 5.1 Explain that the role of a lawyer as a legal adviser is to give impartial and empathetic advice and not to act as a counselling service.
- 5.2 Emotions can run high. Care must be taken by the lawyer to avoid heightening such emotions.
- 5.3 The client needs to be aware of the lawyer's duties to other parties such as the court and the Legal Services Commission.
- 5.4 It is good practice and assists clients if they are made aware that the lawyer is a member of Resolution and they are provided with a copy of the Resolution Code.

6. First letter to the client

- 6.1 On receipt of instructions the client must be sent a letter confirming terms of business and the extent of the firm's retainer, and setting out the firm's charges pursuant to Solicitors' Code of Conduct Rule 2.03. Resolution publishes a precedent letter of engagement and a bullet point guide to the contents of such a letter. The letter could also contain a standard paragraph as follows:

AB who will be acting for you is a member of Resolution which means that he/she is required to comply with a Code of Practice, a copy of which is enclosed. When disputes are resolved in the constructive and non-confrontational way promoted by the Code the outcome can be much better, both financially and emotionally, for all concerned. By signing and returning this letter you agree to your matter being handled in this way.

Then if, subsequently, the client asks you to do something in breach of the Code, you can refer back to this agreement.

- 6.2 At the outset provide the client with the names and roles of the individuals they are likely to come into contact with on their case. Give them the name of someone they can contact when the lawyer is unavailable, for example the lawyer's secretary. Explain what steps they should take in the event of an emergency out of office hours.
- 6.3 It is usually good practice to follow up the initial meeting with a letter to the client containing a summary of advice given, steps (if any) to be taken, and an indication of the way forward.
- 6.4 If the client is eligible for public funding the initial letter must explain the public funding scheme and comply with the requirements of the Legal Services Commission. If an emergency certificate cannot be granted immediately, the client should be warned that it may take some time for the Legal Services Commission to consider the application for a public funding certificate and that either no work may be carried out until the certificate is issued or, alternatively, that the client may be billed privately for work carried out prior to the issue of the certificate.
- 6.5 If the client is or may be eligible for public funding, but has indicated their intention to instruct their lawyer on a privately paying basis, they must still be made aware of their potential entitlement to public funding and, where appropriate, be referred to a firm that can assist. They should also be made aware of the costs protection that arises in favour of a client who has the benefit of a public funding certificate.
- 6.6 The client must also be made aware of the implications of costs orders that could be made in any action taken.

7. Letter to the other party or their lawyer

On writing to the other party or their solicitor, it is important that the contents of that first letter are discussed with the client. If appropriate the client should have the opportunity to approve the letter in draft before the letter is sent. The correspondence should not contain confrontational language, but should aim to help resolve matters, and to open up dialogue between the lawyers and, if possible, the parties. See the Guide to Good Practice on Correspondence. If writing to the other party who is unrepresented, they should be advised to instruct their own lawyer for independent legal advice. It may be helpful to enclose an additional copy of the letter and any other documents that can be handed to the lawyer instructed. See the Guide to Good Practice on Dealing with Litigants in Person.

8. Conduct of the case

- 8.1 In order to maintain a good working relationship, the client needs to be informed on a regular basis of the progress of their case. It is good practice to have a system in place where there is a regular review of the file to avoid any unnecessary delays. Clients seek advice in correspondence, by telephone and at meetings. To ensure that there is an accurate record of instructions given, it is prudent to:
- (a) Ensure that all significant advice given, instructions received and action agreed upon is confirmed in writing to the client. If the client refuses to fund such correspondence and does not wish advice given to be recorded in writing, consider whether it is appropriate to continue to act.
 - (b) Keep on file a full record of all attendances on the client, by telephone and by appointment, to ensure there is a clear record of all matters discussed, instructions received and advice given. This record helps to protect the lawyer if there are any future problems or queries.
- 8.2 Disclose all relevant correspondence to the client. However, consider whether it is appropriate to charge a client for a covering letter if the correspondence it attaches is self-explanatory; will correspondence enclosed under cover of a compliments slip suffice? See the Guide to Good Practice on Correspondence. If the tone or content of the correspondence is unnecessarily hostile or personal and you believe it could upset your client, heighten emotions between the parties and possibly prevent agreement, consider whether to paraphrase the content of it to your client or to invite your client in to discuss the content.
- 8.3 Discuss with the client any important correspondence addressed to the other party before it is sent. Such correspondence should usually be approved by the client, in draft, to ensure that the client's instructions are understood and followed and that the client fully understands what will be stated on his or her behalf.
- 8.4 Ensure the client's file is kept in good order and is easy to follow. Consider devising a standard structure for files of all fee earners within the department, so that any fee earner can locate relevant material without difficulty.
- 8.5 Maintain a case plan if appropriate.
- 8.6 Make settlement proposals as soon as the appropriate level of disclosure has been achieved.
- 8.7 Be prepared and have an agenda of what needs to be discussed when meeting the client. If information is required, tell the client prior to the meeting.
- 8.8 Ensure correspondence is always written in clear language that the client can understand. To assist clients, it may be necessary to set out different matters under different headings or in separate letters (see the Guide to Good Practice on Correspondence).
- 8.9 Avoid being a post box. Ensure that each letter has a purpose and moves matters forward.
- 8.10 Clients feel reassured if they have access to their lawyer by telephone. However, beware of lengthy telephone calls. Clients sometimes do not appreciate that charges arise, even if they are making the call. Help the client to be concise and to appreciate that a lawyer's time costs them money.

- 8.11 It is important and courteous for communications from clients, however received, to be responded to promptly. Aim to return telephone calls within 24 hours. If there is likely to be a noticeable delay in contacting the client to deal with their query, it will usually be good practice for them to be contacted, perhaps by a lawyer's secretary, to inform them of the anticipated delay and when they may expect to hear from their lawyer. Managing the client's expectations is key in this area.
- 8.12 The Pre-Action Protocol should be followed. If settlement cannot be reached by reasonable negotiation and mediation cannot assist, it will be necessary to initiate proceedings. The client should be informed in writing of what is involved, the estimated costs and the likely timetable.
- 8.13 Ensure costs updates/interim bills are rendered on a regular basis, so the client is always fully aware of costs arising. Give the client appropriate notice of large sums being required on account of future costs, for example before a hearing.
- 8.14 Where issues relate to children, the client should be informed that the court treats the needs of the children as paramount.

9. Offers of settlement and their impact on costs in financial cases

- 9.1 Full, frank and clear disclosure must be provided, supported by appropriate documentation from the outset. It helps to give the client a Form E (or such financial questionnaire as is considered appropriate) at the initial meeting, or shortly thereafter.
- 9.2 As soon as all information is available, the importance of putting proposals forward and the merits of making an offer must be impressed on the client. All offers put forward on behalf of the client should first be approved by the client, preferably in writing, before being sent to the other side.
- 9.3 Similarly, all offers received should be sent to the client, together with a covering letter explaining in very clear terms the merits and limitations of the other party's offer.
- 9.4 It should also be explained to the client that, once ancillary relief proceedings have begun, attempts at settlement must continue throughout the proceedings.
- 9.5 Clients must continue to be made aware of not only the level of their own costs, but also whether there is any risk of an adverse costs order being made against them. Costs incurred have a serious impact on the question of settlement.
- 9.6 Consider obtaining a second opinion from a barrister if appropriate.

10. Preparation for hearings

- 10.1 Within family proceedings there are various applications that can be made. Clients must understand the nature of each application in which they are involved. They need to know the purpose of the application and whether or not they may be called upon to give evidence at the hearing.

- 10.2 In preparing for hearings, the cost benefits of negotiating a settlement should always be explained.
- 10.3 A court hearing can be a very daunting experience for clients, and it assists them if the lawyer explains the layout of the courtroom and the sequence of events. It might also be appropriate and helpful to discuss appropriate dress and conduct in court, including how to address the judge. Clients should be made aware that if they do not understand any question put to them they can ask for clarification.
- 10.4 Clients often complain that they feel pressurised during FDRs and so particular care should be taken. Resolution publishes guidance on dealing with FDRs.
- 10.5 The client should be forewarned if limited facilities at the court will make private discussions difficult.
- 10.6 Since 27 April 2009, the media has been allowed access to the courts in certain circumstances and so the client should be warned of this possibility and consideration given to whether to make an application to exclude the media. There are still restrictions on what the media can report. Please see the Resolution website www.resolution.org.uk for guidance on this.
- 10.7 Clients need to be totally conversant with their case, and the lawyer should ensure that the client has copies of all documents and understands the paperwork involved. If there is a bundle of court documents, it may be helpful for the client to have a court bundle so that they are familiar with the documents prior to the hearing.
- 10.8 If a barrister is instructed to represent the client at a hearing, the client needs to be informed why it is appropriate to involve a barrister and why the lawyer recommends that particular barrister. If appropriate, bearing in mind the cost of barristers, it can be helpful for the client to meet and have a conference with the barrister prior to the court hearing. This assists the barrister in getting to know the client, obtaining additional information and assessing the client's ability to give evidence. Clients should, wherever possible, meet their barrister, to have an opportunity of discussing their case and to hear the barrister's views prior to the hearing.
- 10.9 It is helpful for clients to understand the role of the lawyer and the role of the barrister within proceedings. This should be explained carefully to clients and, if necessary, confirmed in writing when they are informed of who will be representing them at court. It is also good practice to obtain the client's approval of an estimate of the barrister's fees before they are incurred. This helps to avoid any dispute as to costs at a future date. Remember that the barrister's fees are the lawyer's liability. With private paying clients, it is prudent to obtain payment on account of the barrister's fees. With publicly funded cases, ensure that public funding covers this expense and that the case can proceed within the limitation of costs. If it cannot, then an extension of the costs limitation must be applied for in good time.
- 10.10 The client should be informed that there will be an opportunity to negotiate with the other party through their legal representative at court prior to the hearing. Clients should be forewarned about the possibility of settlement occurring at the court door. It should be explained to the client that such a settlement, endorsed in a court order, becomes a binding and enforceable order. Furthermore, they should be made aware that heads of agreement reached

between the parties by way of settlement are likely to constitute a binding and enforceable agreement.

- 10.11 If the lawyer who has had the conduct of the case will not be attending the hearing, then this should be explained to the client and they should be introduced to the firm's representative who will be attending the hearing. Occasionally, it will only be necessary for the barrister representing the client to be present at the hearing, as the lawyer's costs may not be justified. This is particularly relevant in publicly funded cases. This should be discussed carefully with the client, and the client should feel comfortable with this arrangement. The barrister should also be informed.
- 10.12 If a lawyer has more than one case being heard at court on the same day, it is courteous to forewarn the client and explain how their case will be conducted. The lawyer should ensure that they can provide the client with appropriate support during any pre-hearing negotiations at court and at the hearing.

11. The hearing

- 11.1 The client should be introduced to the barrister, and helped to feel at ease with him/her. If possible, a room should be obtained so that the barrister can discuss the case in private with the client.
- 11.2 If negotiations with the other party take place, then it is important for the client to understand what is being discussed and not to feel pressurised into reaching an agreement. A careful note should be made of all such negotiations. The lawyer's role in these negotiations is very important, as they should have established a working relationship with the client and have a clear understanding of the dynamics of the case.
- 11.3 If a settlement is achieved, it is necessary to explain to the client the meaning of a consent order, and the lawyer and barrister should go through the actual draft consent order with the client before the order is put before the court. The lawyer should ensure that all relevant issues are dealt with in the draft order, even if it is drafted by the barrister.
- 11.4 The client should be provided with writing materials so that instructions can be passed to the barrister or the lawyer in court. They should be advised to avoid interrupting the barrister or commenting during the proceedings.
- 11.5 If the client is part way through giving their evidence and the court is adjourned, the client must be told they cannot discuss the case with anyone, including their lawyer and the barrister.
- 11.6 If judgment is given, it is important that time is spent with the client afterwards explaining the judgment and, if necessary, explaining the reasons given by the judge in reaching that decision. It may also be necessary to consider an appeal.
- 11.7 The client must be notified in writing of the terms of the court order and if appropriate the timescale for implementation of an appeal. The lawyer should consider sending to the client a copy of the note taken of the judge's summing up to help the client understand the judge's reasoning. The client must be supplied with a sealed copy of the order.

12. Confidentiality

12.1 The duty of confidentiality is fundamental to the relationship of lawyer and client. The client will need to be assured that their case will be treated confidentially, but, at the same time, they must also be made aware that they must be honest and open with the information they provide. The client must also realise that the lawyer cannot withhold relevant information from the other party or the court. The client will need to be informed that, in following the instructions of the client, the lawyer has a duty not to mislead the court by any act or omission. If appropriate the client needs to be advised that:

- (a) information that the client wishes to conceal usually comes to light in the course of proceedings, and it could be very detrimental to the client's case to have to make disclosure only when the information is discovered,
- (b) the lawyer cannot work towards settling issues unless all the relevant information is disclosed,
- (c) there are penalties for non-disclosure including the risk of an adverse costs order being made against the client, and
- (d) trust is a vital element of resolving a dispute in a constructive and conciliatory way and any trust will be destroyed if non-disclosure comes to light.

The lawyer must also consider the risk of being personally criticised by the court for concealment of relevant information by the client which was known to the lawyer. In certain circumstances, the lawyer must consider whether it would be appropriate to continue acting for the client.

12.2 In cases involving children, a lawyer may have to consider disclosing confidential information to an appropriate authority if a child is at risk of significant harm. The lawyer must consider whether the child's life or health, either mental or physical, are at risk of significant harm such as to justify a breach of the duty of confidentiality to the client.

12.3 It must be borne in mind that the Money Laundering Regulations and Proceeds of Crime Act 2002 may override the duty of confidentiality in certain circumstances.

12.4 Where a lawyer is uncertain about the application of the exceptions to the rule of confidentiality in a particular circumstance, they should consider contacting the Professional Ethics helpline of the Solicitors Regulation Authority for advice before deciding how to act.

13. End of the case

The lawyer should ensure that the client has all the information that they will require for future reference and the client must be informed how long their file of papers will be kept by their lawyer. All original documents should be returned to the client.

14. Client terminating instructions of lawyer

If there are fees outstanding, the lawyer is normally entitled to retain the client's file of papers until those costs are settled by the client. In respect of a publicly funded client, on receiving notification that the public funding has been transferred into another lawyer's name, the lawyer is required to send the client's file of papers to that lawyer, and the newly instructed lawyer should be required, before transfer of the papers, to undertake to include the previous lawyer's costs in the assessment of costs at the end of the case. Please also refer to the Solicitors' Code of Conduct.

15. Lawyer terminating retainer with the client

- 15.1 Instructions should be terminated if a conflict of interest arises at any stage.
- 15.2 If the client requires the lawyer to act unprofessionally or illegally, then the lawyer must terminate the retainer.
- 15.3 The lawyer should seriously consider the merits of continuing to act for a client who is insistent on the case being conducted, against all advice given, in a manner which could result in an adverse costs order against the client.
- 15.4 Lawyers should never place themselves in positions which would in any way compromise their professional reputation or threaten their safety and, if such a case arises, they should terminate the retainer immediately.
- 15.5 Obviously an application to come off the court record is necessary if there are ongoing court proceedings and the client refuses to sign an application to act in person. Also remember to serve your application to come off the court record only on the client and not the other party.

16. Family lawyers and personal relationships with clients

The Solicitors' Code of Conduct does not preclude personal relationships between solicitors and clients. However, given the vulnerability of the client and the nature of the relationship between lawyer and client, Resolution recommends that particular care should be taken.

- 16.1 Family lawyers should not have a sexual relationship with their clients. If such a relationship exists or develops during the course of the lawyer's retainer then the lawyer should immediately explain to the client that he or she can no longer act and, on the client's instructions, either transfer the case over to a colleague and have no further involvement in the case, or cease to act and allow the client to instruct another firm.
- 16.2 If the relationship between lawyer and client becomes intimate, but non-sexual, during the course of the retainer, the question arises whether the lawyer can maintain his or her objectivity and continue to act in the client's best interests. If the professional relationship with the client is or is likely to be affected to the detriment of the client, the lawyer should cease to act personally.

16.3 If the lawyer and client are relatives, close friends or their children are close friends the lawyer should consider whether they can maintain their professional objectivity.

Note

1. This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional conduct.
2. Good practice guidance can inevitably only deal with the generality of situations. It cannot be an absolute rule. The facts of any particular case may justify and/or require a lawyer to depart from these guidelines.
3. This guidance applies to all family law cases for the better conduct and approach of family breakdown issues and not just to cases between Resolution members.

Guide to Good Practice on Correspondence

*'THE PEN IS MIGHTIER THAN THE SWORD'
EDWARD BULWER-LYTTON*

1. Introduction

Lawyers' correspondence is generally the main method of communication used in a family matter. With fewer cases proceeding to trial, it is in lawyers' correspondence that points of principle are made, merits are argued and issues are addressed. Often, it is the lawyers' correspondence that has the potential to take on the full intensity of the dispute between the parties. It is for this reason that it is important that family lawyers consider and adhere to the Resolution Code of Practice in order to avoid inflaming what may already be a highly emotive situation.

Drafted well, lawyers' correspondence can reduce conflict, help to resolve the issues and arrive at an early settlement. However, drafted badly, lawyers' correspondence can prolong the case, heighten the temperature, increase the costs and generally diminish the chances of a sensible settlement being reached.

The criticisms and shortcomings of lawyers' correspondence are extensive and many of the complaints made to Resolution are received from clients who are aggrieved by the content of correspondence written either by their own lawyer, or by the lawyer acting for the other party.

Of course, it is not always possible to write a perfect letter. However, it is hoped that with proper consideration of what is written, lawyers' correspondence can help improve the relationship between parties and increase the likelihood of their reaching an agreement.

This Good Practice Guide deals with a number of general issues and then provides specific guidance on content and style within correspondence.

2. Resolution's Code of Practice

It is important at the outset to reiterate the Code of Practice, all of which is relevant to correspondence.

Members of Resolution are required to:

- conduct matters in a constructive and non-confrontational way,
- avoid use of inflammatory language, both written and spoken,
- retain professional objectivity and respect for everyone involved,
- take into account the long-term consequences of actions and communications as well as the short-term implications,
- encourage clients to put the best interests of the children first,
- emphasise to clients the importance of being open and honest in all dealings,

- make clients aware of the benefits of behaving in a civilised way,
- keep financial and children issues separate,
- ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional, and
- inform clients of the options, eg counselling, family therapy, round table negotiations, mediation, collaborative law and court proceedings.

3. Planning for the court hearing

Lawyers should remember that if the case does not settle, their correspondence may be put before the court.

It is good practice always to respond to correspondence in a courteous manner, even if the letter to which you are replying is contentious and inflammatory. Certainly, engaging in contentious correspondence is likely to inflame the matter further and will not be helpful or beneficial to your client if read by the court: it will simply give the court the impression that your client is tarnished with the same brush as their spouse.

The adverse impact of correspondence on a case is well seen in *F v F* [1996] 1 FLR 833, in which Holman J condemned the first letter written on behalf of the husband, which then set the tone for all that followed in a very adversarial case. He also commended the wife's solicitor's initial letter, which he quoted approvingly in full in his judgment.

In extreme cases and where the content of correspondence is deemed by the court to be unreasonably hostile and inflammatory, costs orders can be sought on the basis of litigation misconduct and made against the offending party or lawyer. This is especially so if the correspondence had an adverse effect, eg a polarisation of the parties, or simply making settlement much less likely.

4. Faxes and emails

Some lawyers routinely send letters by fax or email. However, they should not expect the other lawyer to respond in a similar way. The manner of communication of each letter should be considered separately. The speed of fax or email can often result in a lawyer's letter being overtaken or quickly superseded by a later one, or a reply being hastily written which is later regretted. When receiving a fax or email, a family lawyer should consider whether an immediate reply is appropriate or whether it would be better to wait before sending a reply. If there is a flurry of faxes or emails, it may be better to wait and to reply to a group of letters at one time.

On occasion, it is appropriate to confine issues to separate letters. However, where a case demands frequent letters, by fax or email, on different issues, it is important to ensure that the correspondence remains a tool of settlement, rather than an armament of battle. Certainly, correspondence should not be written in a way that could be interpreted as bullying or intimidating and the lawyer should ensure that the different issues do not become blurred or confused.

Be aware that use of email can lead to unconstructive correspondence. It is easier to be aggressive and/or un-conciliatory when typing direct rather than dictating via a secretary. Whilst letters are considered in draft as hard copies, the same generally does not apply to emails. Email transmission is more spontaneous and instantaneous and does not allow retrieval from a post room an hour or so later should one have second thoughts about its contents. Email has many benefits, but lawyers should remain aware of its dangers and should give proper consideration to what is being said before the email is sent.

Caution should also be exercised when sending draft documents by email. All changes to draft documents should be tracked so that subsequent changes are clear. It is also important to check documents very carefully if changes are made through tracked changes via email to make sure that all changes are up to date.

If a document is being emailed to the other party, his or her lawyer, or anyone other than the client, particular caution should be exercised to ensure that past changes to a draft document cannot be viewed by the recipient.

As a general rule, all email correspondence, save generally that sent to a client, should be sent in PDF format so that the correspondence cannot be tampered with. In certain circumstances, email correspondence to a client should also be sent as a PDF, for example an important letter of advice.

5. Aims and priorities in correspondence

The aim of this guide is to encourage family lawyers to develop a constructive and conciliatory environment through their correspondence and thus create the right forum for settlement.

When drafting correspondence, a family lawyer should bear in mind that the aim of lawyers' correspondence is:

- to address and safeguard children's needs,
- to give/obtain reasonable disclosure and to identify and resolve issues,
- to advance the proceedings,
- to record issues of conduct/fact (if it would be material to the court if there were a final hearing).

It is important, as a competent Resolution lawyer, to ensure that letters are not written unless they serve a constructive purpose in moving the matter forward and that they take into account the interests of the client and the family as whole. Avoid writing letters for the sole purpose of:

- satisfying the client's feelings,
- satisfying the lawyer's feelings,
- creating/perpetuating conflict between family members,
- attacking the other lawyer.

6. Timing of correspondence

Be aware that the timing of correspondence with the other party should be considered before sending letters or documents. This should be discussed with your client if it relates to particularly sensitive issues or matters that can impact on the family, for example if children are taking exams or a birthday is coming up. Correspondence sent at the wrong time or without notice may be hurtful or unnecessarily upsetting and could hinder the constructive and conciliatory progress of the matter.

If the content of a lawyer's letter is likely to cause distress to the other party, for example a letter serving divorce proceedings, then the lawyer should discuss with their client when it would be best to send the letter. For example, it might be better to wait until after the Christmas holiday or a weekend, or when the other party is not with the children, before sending the letter.

7. Effect of letters

The client is better placed than the lawyer to know how the other party will react to the content of a letter. Therefore it is often sensible for draft letters to be sent to your client for consideration and approval before they are sent to the other party or their lawyer. Not only will this ensure that the lawyer has the client's authority to send the letter, but in addition, it may enable the client to point out to the lawyer anything which might be misinterpreted or misconstrued by the other party so that the letter can be amended.

Before the lawyer sends the letter, they should consider what impact it will have on the recipient and comply with the Code of Practice by ensuring that the letter is not inflammatory or hostile. Correspondence should be carefully considered for its potential effect on other family members as well.

8. Points to consider in practice

The following are examples of good and bad practice with alternatives where appropriate. The context and/or content should be considered in conjunction with each other.

8.1 Underlining of words or phrases or marking in bold

Example

*'Your client **must** respond to our client's questionnaire **within 7 days** failing which she will issue an application and seek costs against your client.'*

Effect

This style is aggressive and appears rather hysterical. The marked words are read as if the writer is barking commands and tends to detract from other parts of the letter, which might be overlooked as a consequence.

Good practice

'We should be grateful if your client would provide a reply to our client's questionnaire within 7 days failing which we will have no option but to issue an application as the reply is now 28 days overdue. It is hoped that

this will not be necessary, but in the event of our client having to issue an application, an order for costs will be sought against your client.'

8.2 Use of 'inverted commas' for direct speech or allegations

Example

'Your client's 'change of circumstances' needs to be verified before our client can consider any variation to the rate of her maintenance.'

Effect

This immediately suggests that the writer doubts that the change of circumstances is genuine, which may indeed be the case, but it has a similar effect to the use of the word 'alleged', which suggests suspicion. Although these suspicions may be well founded, inverted commas are likely to do little other than further antagonise the other party.

Good practice

'We await details of your client's new financial circumstances. We will then discuss with our client your client's request for a change in the maintenance.'

8.3 Use of language denoting hostility, battle or victory

Example

Smith –v– Smith (as heading of letter)

'We will seek an order that your client is condemned in costs.'

'As our client won at court last week...'

Effect

The effect of these examples is hostile and confrontational and suggests that there are opposing sides involved in a fight. They are in breach of the Code, which requires matters to be conducted in a constructive and non-confrontational way. The lawyer should encourage the search for fair solutions and discourage the attitude that a family dispute is a contest in which there are 'winners' and 'losers'. One should avoid using words or phrases that suggest, or could create, a dispute where there is none.

Good practice

Mr and Mrs Smith

Jane and John Smith

'Thank you for your help in preparing the bundles.'

'Following the court order last week...'

8.4 Personalisation/over-involvement of lawyer

Example

'We think the way you are conducting the case against our client is threatening and intimidating and you must stop it.'

Effect

Using such phrases as 'we think' or 'you are' immediately personalises the issue and suggests that the writer is giving his or her own personal opinion, as opposed to his or her client's view. It also treats the lawyer receiving the letter as if he or she is the other party, which is bound to raise the temperature.

Over-involvement and identification of the lawyer with a client's case is a chief cause of complaint to Resolution. It can also make the other party feel that he/she is taking on both their spouse and lawyer. It is considered bad practice to step into the arena and you should read each letter carefully to ensure that what is being said is the view or comment of your client and not of yourself.

Good practice

Make it clear that comments and observations are those of the client, eg:

'Our client instructs us that ...'

'He/she believes...'

'We understand that...'

'Our client's view is that...'

'After advice, our client's case is that...'

8.5 Comments written purely to satisfy clients

Example

'Substantial tax debts appear to have arisen because your client, who was controlling his own finances, became a spendthrift, wasting a small fortune on cars to his benefit exclusively and ignored his responsibilities to our client. The offer to pay £1,000 per month for a period of one year is manifestly useless. Your client would undoubtedly default and the offer of payment in this fashion would not be worth the paper on which it was written.'

Effect

The inevitable result is mud slinging and should be avoided at all cost. The use of emotive language ('spendthrift', 'small fortune', 'manifestly useless' etc) is not constructive and instead confrontational and antagonistic. It is likely to increase or create conflict rather than reduce it.

The lawyer should take the 'rant and rave' out of their client's view of the situation and present it in a calm and reasoned manner.

Writing letters purely to satisfy the client is an issue the lawyer must first resolve with their client before engaging in lawyer's correspondence. If the client is insistent that letters be written in this vein, then it is the duty of a good and competent lawyer to explain why that approach should not be adopted and if the client refuses to take the lawyer's advice and insists on such letters being written, then there is a problem in the lawyer/client relationship, which needs to be addressed.

The negative effects, both short- and long-term should be explained so that the client can understand that it is likely to impact not only on the parties personally but also on the conduct and progress of the case. The client should also be advised to avoid bringing the emotional elements of the breakdown of the marriage into the correspondence and the lawyer should encourage them to deal with such matters, and the impact of the divorce, elsewhere, such as in counselling.

Often, one of the lawyer's most difficult and time-consuming tasks in enabling a client to reach a sensible agreement is helping the client come to terms with the situation and accept that there is no need for such letters to be written. Sometimes the understanding and co-operation of the other lawyer is needed, but if this is unavailable because the other lawyer is not taking the same stance with their client, then the lawyer still needs to ensure that their client adheres to the Code of Practice, as a failure to do so will just increase the hostility and tension and make any prospects of settlement less possible. It will also significantly increase both parties' costs.

Good practice

'Our client is concerned about the debts, which she instructs us have been accrued by your client during the marriage. She also tells us that since the separation, the financial provision made by your client has been irregular, which has placed her in financial difficulties. She is currently considering his offer of maintenance but it would be helpful if he would put forward proposals for secured periodical payments which would provide her with some security during this period.'

8.6 Questioning professionalism

Example

'We note the absurd line you take in the ultimate paragraph of your letter. It appears to us that you are gearing this case to the most expensive form of litigation that you can conceive.'

Effect

The intention of comments such as these is to try to encourage the other party to lose confidence in their lawyer. This is unprofessional and unhelpful and does not encourage the parties to adopt a conciliatory approach and work towards an agreement. It suggests that the recipient lawyer intends to do whatever is possible to maximise costs in the case and has no real concern for their client.

Good practice

'We do not agree with the approach set out in your last paragraph, which we are concerned may increase costs unnecessarily.'

8.7 Questioning expertise

Example

'Indeed, there was no need for the document to have been sent to us in the first place. We put this down to the inexperience and excessive emotional involvement of the person dealing with the matter.'

Effect

This is patronising, hostile and inflammatory and is likely to jeopardise any working relationship that the lawyers may have and which otherwise might assist the parties in reaching a settlement. It would be better simply to acknowledge receipt of the letter and say nothing further.

8.8 Acting as a postbox

Example

'We can do no better than to send a copy of our client's letter to us in which he/she responds to your letter of...'

'Our client replies to your letter as follows: 1. I think...'

Effect

The client's letter and/or direct instructions are likely to be emotive and adversarial and therefore, save in exceptional circumstances, the client's letter should not be sent to the other party. Invariably it is laziness on the part of the lawyer, who does not want to edit and/or instead wants the client to see that their views are being promoted.

A lawyer should not allow him/herself to be placed in a position where he/she is used as a conduit between the parties. If the client wishes to be represented by a lawyer, the letter should come from the lawyer. By way of good practice, the lawyer should draft the letter, taking into account the instructions, comments and views of the client but ensuring that it does not contain any emotive language or unnecessary or adversarial comment.

Allowing oneself to be used as a postbox does not create the required standard of professionalism expected by a member of Resolution. Further, it gives the impression that the lawyer is weak, incompetent or endorsing what the client has to say – none of which is likely to be constructive.

Some lawyers send copies of correspondence with the other lawyer to the client simply with a 'with compliments' slip. It enables speed, keeps clients up to date with developments, makes the client feel involved and keeps costs down. However, it should be used with care, as the client may misinterpret the mildly assertive letter from the other solicitor as a declaration of war, or misunderstand the terms referred to, or become confused as to what is expected of him or her. If you do consider sending a copy with a compliments slip, make sure that there is nothing in the letter that the client may find upsetting or which requires any explanation. In any other situation, the letter should be sent with a covering letter or you should inform the client of the substance of the letter without the emotive or aggressive language.

8.9 Mentioning children and financial matters in the same letter

Example

'My client is not going to allow your client to see the children until he starts paying maintenance.'

Effect

The issues and merits of disputes regarding children and finance are often totally separate. Children should not be used as bargaining tools. However, many clients view it as reasonable to negotiate arrangements concerning the children with the financial settlement. This is rarely in the child's best interests.

Combining the issues in the same letter blurs that distinction and can lead to an overflow of contentiousness on one aspect into another and make both issues more difficult to settle. It also wrongly conveys to clients that the two issues are linked and may be viewed by the client as an acceptable way in which to deal with matters, when it is not.

Good practice

Where there are real issues or disputes, it is good practice to write separate letters, one dealing specifically with the children and the other with finances, the divorce itself etc. The reasons for this should be explained to the client so that the cost of separate letters does not become an issue.

8.10 Mixing open and privileged correspondence in the same letter

Effect and good practice

The effect of combining the issues in both open and privileged letters is that it can sometimes be unclear which parts are open and which privileged. It also makes it immensely difficult when preparing copies for bundles.

It is good practice to ensure that privileged matters are dealt with in separate letters. See Resolution's Guide to Good Practice on Disclosure in Ancillary Relief Proceedings for more on the proper use of privilege in family law work.

8.11 Misusing privilege

Effect and good practice

Privileged correspondence between parties is a resource aimed at helping achieve a settlement and should be fully utilised by lawyers on behalf of clients. (See Resolution's Guide to Good Practice on Disclosure in Ancillary Relief Proceedings.) However, privilege must be correctly used. For example, adding the words 'without prejudice' does not automatically make a letter privileged. Factual matters of disclosure or on which the other party may wish to rely in coming to a decision or view should not be deemed privileged and should be set out in open correspondence.

8.12 Informing a client of 'the bad news'

Example

'I am afraid I have bad news. We lost your case.'

Effect

Unless the client was expecting this news and is prepared for it, it is far better to inform the client of the outcome of their case personally at a meeting, or on the telephone. Reactions can then be controlled, put into context and discussed with the client. The way forward can be considered and discussed. It also encourages the client to discuss any issues of concern with the lawyer, instead of going straight off to instruct another lawyer. Of course, a client should have been kept as well informed as possible throughout the case and so should have as few unexpected surprises as possible.

In any event, the lawyer should not use words such as 'lost' and should remind clients that a family dispute is not a contest and that there are no winners or losers.

8.13 Costs

Example

'I attach my bill of costs for my work throughout the case for your early attention. I anticipate the amount will be a shock for you.'

Effect

It almost certainly will be a shock if the lawyer thinks it will be and a bill should never be presented in this way.

The amount of the final bill should not be a surprise or a shock and informing a client in advance and during a case about the level of billing is not only good practice, but is made mandatory by the Solicitors Code of Conduct Rule 2.03, which provides that clients should be given the best information possible about the likely overall cost of a matter at the outset and at other appropriate times. This means providing them with details of charging rates and, ideally, an estimate of the likely cost implications of proceeding with a matter at the start of a case. All costs information should be provided in writing and should be updated from time to time as a case progresses.

Of course, the final cost of a family dispute is always impossible to predict and so, at the outset of a case, the client should ideally be given a range of costs within which their case is likely to fall, which estimate is updated as the case progresses, and should be billed on an interim basis with frequent requests for money on account. In addition, where a course of action is proposed, particularly one which was not envisaged at the start of the case, the client should be given an estimate of the cost of proceeding with that action so that they can make an informed decision as to whether or not to proceed.

Where estimates of costs are required by a court, these should be shown to the client.

A lawyer must also make the client aware of the risk of adverse costs orders and the benefits of any step to be taken must be balanced against the likely costs.

8.14 Bad communication between solicitor and client

Example of bad practice

'I attach hereto copy letter dated 5th ultimo received from the Petitioner's solicitor setting out proposals for settlement prior to the FDR. I await your instructions thereon at your early convenience.'

Effect and good practice

The client may be confused by the wording and uncertain about whether he can expect advice from his lawyer. One should avoid the use of legal jargon and all letters should be written in plain English so that they can be clearly understood by the client. If legal terminology is used, then its meaning should be explained.

If an offer or proposal is put forward, then the lawyer should send the offer to the client under cover of a clear letter of explanation, which contains the lawyer's advice as to the merits of the offer.

9. Examples of good practice

Much of the above illustrates the worst in correspondence. Family lawyers should approach letter writing by not only looking to avoid bad practice, but also by seeking ways to enhance the prospects of a successful problem-solving process. A simple example might be the use of the parties' forenames rather than 'my client' and 'your client', if appropriate.

The following are some examples of good practice aimed at creating a constructive environment at the start of a case:

'From listening to Ann I know that neither of you alone is responsible for your marriage breakdown but I do know that recent events have caused Ann to conclude that the breakdown is irreversible. Because of the way the divorce laws were drafted it is only possible to obtain a no-fault divorce providing a period of at least two

years has expired since a couple stopped living together. In order to obtain a divorce sooner couples have to rely on the fault-based facts of adultery and unreasonable behaviour. I believe that adultery is not relevant so the purpose of this letter is to ask whether you would agree to a petition based on your behaviour. Please note that the reason for the breakdown of the marriage has no bearing on either the financial outcome or on the arrangements which will be made with regard to the children. We will let you have a draft of the divorce petition before we commence the divorce proceedings so that, if possible, this aspect of the divorce can be dealt with by way of agreement.'

'Ann would like the divorce to proceed with dignity and has instructed me to make the allegations of behaviour as mild and uncontentious as possible.'

'We enclose by way of service, Ann's Form A. The purpose of issuing ancillary relief proceedings is solely in order to impose a timetable and framework within which a settlement can be achieved.'

'In relation to financial matters, your proposal to deal with disclosure by way of exchange of Forms E seems a sensible one.'

'It is Ann's wish to resolve financial matters as fairly and as sensibly as possible and with the minimum of expense.'

'Ann recognises that it is important for the children to see Robert as much as possible and would welcome his proposals for contact.'

10. Conclusion

This guide and examples, both good and bad, show that with care, thought and consideration of the impact on the recipient, there can be a significant improvement in the conduct of family law work through correspondence.

It also shows what an important role the family lawyer can play in ensuring that the matter is conducted in the most constructive way possible. By the same token, the use of emotive and inflammatory language in correspondence does little other than antagonise the parties and indeed can irretrievably damage the relationship between them. This is particularly detrimental and damaging to the family when there are children.

To sum up:

In order to comply with the Resolution Code of Practice, a member should ensure that correspondence:

- is constructive, informative and effective,
- does not use inflammatory or emotive language,
- does not use 'clever' writing and complicated language to put forward the writer's views.

Note

1. This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional conduct.
2. Good practice guidance can inevitably only deal with the generality of situations. It cannot be an absolute rule. The facts of any particular case may justify and/or require a lawyer to depart from these guidelines.

3. This guidance applies to all family law cases for the better conduct and approach of family breakdown issues, and not just to cases between Resolution's members.

Guide to Good Practice on Dealing with Litigants in Person

1. Introduction

Subject to the rules on vexatious litigants, anyone is entitled to act in person. However, there is a tendency to treat people who do so as a nuisance.

'All too often the litigant in person is regarded as a problem for judges and the court system rather than a person for whom the system of civil justice exists.'

Lord Woolf, Access to Justice Interim Report June 1995

'In a funny sort of way, and this is counterintuitive, I find it is often easier dealing with cases if the parties are appearing as litigants in person because what you are actually getting is the facts of the case as they see it without the assistance, and some people might put that word in inverted commas, of lawyers.'

Mr Justice Munby, Evidence to the Constitutional Affairs Committee on Family Justice:
The Operation of the Family Courts 2004

2. First contact

- 2.1 Your first contact with your client's spouse or partner may set the tone for the way in which the whole case is dealt with. Therefore, it is vitally important to have the Resolution Code of Practice and the ethos behind it at the forefront of your mind.
- 2.2 The Code does not only apply to your dealings with your client. It applies to everything you do in connection with your family law work. By becoming a member of Resolution, you have committed yourself to adhering to the Code. Resolution can and does deal with complaints from the client's spouse or partner or, indeed, anyone else involved in the matter such as a judge, barrister or CAFCASS officer.
- 2.3 Spend a little time thinking about why this person is not instructing a lawyer. It could be because they:
 - (a) cannot afford to,
 - (b) think that matters are agreed or very straightforward so that there is no need,
 - (c) believe that lawyers are only interested in making money out of their misery,
 - (d) believe that they are capable of dealing with the matter as well as any lawyer.

- 2.4 If the reason should be from points (a)–(c) above, it is possible that the person will start off feeling at a disadvantage. They are likely to be totally unfamiliar with the law, procedure and language. They may be particularly sensitive to anything they receive from you and be on the defensive from the beginning.
- 2.5 When you write your first letter to this person, you may not know what the reasons are for them not instructing a lawyer so you should be sensitive to all of the above.
- 2.6 You may not know anything about them – their emotional state, the effect of the separation or dispute on them, or their ability to express their feelings or wishes. We are encouraged to consider the stages our client may be going through – shock, grief, anger etc – and we are able to do that by observing and talking to him or her. We cannot do that with the spouse or partner. We are either forming a view and making judgments based on our client’s instructions or, if we are able to stand back and take an objective view, acting in the dark. Your first letter might be the first indication the recipient has that the dispute is serious. When you write, be aware of the influence of your client’s instructions and try to be sensitive to whatever state the recipient might be in or whatever level of communication they might have or any cultural issues which might affect them.
- 2.7 Paragraph 1.3 of the Family Law Protocol Part 1 says the initial letter should briefly address the issues and avoid protracted, clearly one-sided and unnecessary arguments or assertions. In drafting the first letter, solicitors must:
- (a) where practicable, obtain approval from clients in advance,
 - (b) when writing to unrepresented parties, recommend that they seek independent legal advice, and enclose a second copy of the letter to be passed to any solicitor instructed.
- 2.8 You should strongly recommend that the other party consults a Resolution member, but be sensitive to the fact that they may not be able to afford representation. Many people say that they find such a recommendation threatening and aggressive. If they thought matters were agreed with their spouse or partner, they can construe this recommendation as implying that matters are no longer agreed and that some advantage could be taken of them if they do not seek advice. Therefore, it is important to explain why it might be helpful for them to consult a lawyer and/or refer to this suggestion as being recommended good practice. You could suggest other advice agencies and consider with your client suggesting mediation as, for various reasons, this could be a more effective or appropriate option in certain cases. You could explain that the court office can advise on procedure and refer them to the court service website www.hmcourts-service.gov.uk.
- 2.9 You should advise, negotiate and conduct matters so as to help settle differences as quickly as is reasonable for the parties. You should recognise that your client may need time to come to terms with their new situation and so also may their spouse or partner.

Many people say that they feel pressured into responding quickly when time limits for replies or actions are imposed at an early stage. Clearly there may be reasons for speedy action in certain circumstances, but you should advise your client to be sensitive to the time the spouse or partner needs and to allow scope for agreement to be reached. It can be helpful to explain that sometimes matters take time to resolve.

3. Communications generally

3.1 See the Resolution Guide to Good Practice on Correspondence.

3.2 When dealing with someone who is not represented, you should take even greater care to communicate clearly and try to avoid any technical language or legal jargon.

It is very easy to use language that we are very familiar with, without thinking about whether the recipient will understand it. Petition, petitioner, respondent, decree nisi, decree absolute, injunctions and periodical payments are not words in everyday use. A litigant in person who is already feeling at a disadvantage may be further intimidated and antagonised by the use of such language. Take care not to give unsolicited legal advice to the litigant in person.

3.3 The Code of Practice says: *'Avoid use of inflammatory language both written and spoken.'*

You should avoid using words or phrases that suggest or cause a dispute where there is none.

Emotions are often intense in family disputes. You should avoid inflaming them in any way. You should not express any personal opinions on the behaviour of the other party.

3.4 Correspondence should be carefully considered for its potential effect on other family members. Any communications should aim to resolve issues and settle matters, not antagonise or inflame them. Threats or ultimatums should be avoided.

Paragraph 1.3 of the Family Law Protocol Part 1 says that lawyers must show courtesy and be professional and should not give personal opinions or comments within letters.

Many complaints to Resolution concern the giving of personal opinions and comment. It is easy to be drawn into your client's case and to feel that you are acting in your client's best interests by being assertive and criticising the spouse or partner. However, it is unprofessional and does nothing to further the case. It may simply make you and/or your client feel better temporarily. If any comment is absolutely necessary, preface it with 'My client instructs me that...'

Also, bear in mind, especially when raising a matter for the first time, that your client's version of events, given to you as fact, may not necessarily be accurate.

3.5 The Code of Practice says that you should encourage clients to put the best interests of the children first. You should keep disputes about finances separate from disputes about children. These matters should be covered in separate letters because children are not bargaining tools and by dealing with finance and children in the same letter it may appear that they are being used as such. It can also make each aspect more difficult to resolve.

The stock answer to complaints that child and money matters have been dealt with in the same letter is that the client is a private client and costs are being kept to a minimum. If a member has explained to his or her client at the outset the approach to be taken in the case, the client cannot complain about any additional costs incurred in dealing with such matters in separate letters.

3.6 Paragraph 1.3.6 of the Family Law Protocol Part 1 warns lawyers about the care to be taken with email correspondence as it is not a secure medium. It is also important to take care, if asked to

communicate by fax or email, that the recipient is aware, agrees and can receive faxes or emails in a confidential environment. Complaints have been received that communications were sent to the place of work and were seen by numerous other people first.

4. The petition or other proceedings

- 4.1 Paragraph 1.4 of the Family Law Protocol Part 1 says, 'Prior to the issue of proceedings of any nature, solicitors acting for applicants or petitioners should notify those acting for respondents (or respondents themselves where unrepresented) of the intention to commence proceedings at least seven days in advance, unless there is good reason not to do so.'

One complaint received by Resolution concerned a member who had dictated a letter saying that her client was willing to negotiate the particulars in the petition, the letter had been held up in a typing backlog and by the time it was sent the petition had been issued. Always check letters before they are sent out.

- 4.2 The Code of Practice says you should:

- *take into account the long-term consequences of actions and communications as well as the short-term implications,*
- *ensure that consideration is given to balancing the benefits of any steps against the likely costs – financial or emotional,*
- *make clients aware of the benefits of behaving in a civilised way.*

If a particular step may appear hostile or is capable of being misunderstood, you should consider explaining the reasons for that step to the other party.

4.3 Do not lightly/routinely seek costs

Pay particular attention to claims for costs in divorce petitions. If the claim would not be pursued if the petition proceeds on an undefended basis, make that clear in the petition or at least explain to the spouse in advance so as to avoid it being construed as a hostile act. Explain what other claims eg for ancillary relief may be about and why it is necessary to include them in the petition. These are often seen as hostile acts.

4.4 Try to achieve consensus before issuing any application

Paragraph 2.4.1 of the Family Law Protocol Part 2 says that you should provide the respondent's solicitors (or the respondent where unrepresented) with the fact or facts on which the petition is to be based and the particulars, with a view to coming to an agreement or minimising misunderstanding unless there is good reason not to do so. Many people report that no attempt has been made to agree divorce particulars in advance. Members may respond by saying that no one in their area ever does it, that it increases costs because of the negotiation that ensues or that they have considered it with their client but decided not to. Of course, it is impossible to disprove this. Some people say that particulars were sent, but that there was no attempt to

negotiate. Remember that the benefits of achieving consensus at this early stage could affect the progress of the whole matter. It will show respect to the spouse or partner, allow them some dignity and encourage working together to find solutions rather than an 'us and them' culture. If the couple can work together at this stage they are more likely to be able to work together later when you drop out of the picture.

4.5 Domestic abuse

The relationship with the spouse or partner can be difficult if there are allegations of domestic abuse. It is essential that such allegations are treated seriously, but it is also important to remain objective and to allow for the possibility that they may be untrue or exaggerated. Paragraph 6.4 of the Family Law Protocol Part 6 sets out the options to be considered, ie noting the incident but taking no action, visiting the GP, asking the police about a Protection from Harassment Act prosecution, writing to the spouse or partner to record the incident, demanding cessation of the abuse and indicating further action might or will be taken if it does not cease, and applying for an injunction. Many people say that letters demanding cessation feel threatening and raise the temperature, so it is important to be sure that such a statement is truly warranted in the circumstances.

5. Service of proceedings

- 5.1 See the Resolution Guide to Good Practice on Service.
- 5.2 If you do not have a private address for service of proceedings on the spouse or partner, it may be tempting to serve them at their place of work or when they collect the children for contact. You should avoid serving them in front of the children because of the potential impact on them. You should consider the impact of serving them at their place of work and whether arrangements can be made for service in a neutral, private place.

6. Children disputes

The Code of Practice says: *'Encourage clients to put the best interests of children first.'*

- 6.1 Many complaints to Resolution concern contact disputes. Spouses or partners allege that members have conspired with the parent with care to deny contact and that their actions amount to child abuse. It is to be hoped that the government's early intervention initiatives will reduce the number of contact disputes but, in the meantime, it is important to remain objective and to do as much as possible to ensure that the best interests of the child really are being put first.
- 6.2 Paragraph 3.9 of the Family Law Protocol Part 3 says that Form C1 or other documents should be simply worded, using non-inflammatory language and setting out clearly the order sought. Solicitors should avoid drafting statements using emotive and/or inflammatory language and/or expressing subjective opinions. A complaint to Resolution involved a C1 alleging violence against the child and stated that the child was on the At Risk Register. Both allegations were false and caused considerable damage. It is accepted that there is a limit to how much cross-checking can be done, but registration is relatively easy to check.

7. Agreements and consent orders

- 7.1 Some litigants in person complain that they have reached agreement with their spouse or partner, but then when the solicitor is instructed the solicitor insists on full and frank disclosure and/or advises the client that the agreement is unfair and the whole thing falls apart.
- 7.2 Obviously, you could be found negligent if you do not advise on the dangers of incomplete disclosure and the consequences of financial orders, on whether the agreement is in the client's best interests and what other options are available. Paragraph 1.5.1(6) of the Family Law Protocol Part 1 says that you 'need to bear in mind all the implications including the benefits attached to settling on an amicable basis and the cost, risks and time involved in further negotiations, mediation or litigation (especially if the agreement is within the range that the court might order)'.
- 7.3 Your client should be given the options and advised on the implications of each option so that they can make an informed decision. If your client accepts your advice that disclosure or more disclosure is required before an assessment of the reasonableness of the agreement can be made, then explain to the spouse or partner that you can only act for one of them, recommend that he or she obtains independent legal advice and explain why you are seeking that disclosure.

8. Contact at court

- 8.1 You will need to use your own judgment about whether to speak to the litigant in person outside court. It is possible that he or she will be feeling extremely nervous. Your duty is to represent your client as effectively as you can. You should, however, speak to the litigant in person in such a way as to ensure that you do not give them the opportunity to allege that you have intimidated them.
- 8.2 If the litigant in person is willing and comfortable talking to you then you may negotiate, but take care to avoid abusing a position of superior knowledge of the law and practice of the courts. For example, it would be acceptable to say 'Are you prepared to agree to one overnight stay a fortnight?' but not acceptable to say 'The courts in this situation would never award more than one overnight stay a fortnight so I suggest you agree. If you insist on fighting it out then the court could award costs against you.'
- 8.3 If you feel that the litigant in person might allege that you have acted improperly, consider whether it would be appropriate to speak to them in the presence of, for example, a trainee from your firm who has accompanied you to court.

9. Constant harassment

- 9.1 The spouse or partner is constantly wanting to talk to you on the telephone, faxing you or emailing you several times a day and, at various stages, has accused you of being aggressive, taking your client's word on everything without checking, not considering the best interests of

the children and increasing the costs unnecessarily. Eventually they are personal and abusive or even threatening. Your blood is boiling. What do you do?

9.2 People have complained to Resolution that a member has refused to speak to them or to answer their letters, faxes or emails, or has told them that they do not have to speak to them because they are not their client.

9.3 Try to be civil and polite at all times – however tempting it might be to retaliate.

- Do not shout, threaten, accuse, confront or otherwise act in anything but a professional manner.
- Explain verbally, and confirm in writing, that the costs of your work are dependent on your instructions from your client and that that may dictate the extent to which you can respond.
- Keep a file note of every discussion and confirm any agreements reached or important discussions in writing.
- If the spouse or partner instructs a lawyer, explain that you can no longer discuss matters direct. Make sure that you are clear about the extent of that lawyer's retainer. If they are only instructed to deal with financial matters, you may still need to deal with the person direct on other issues.
- If a step has been taken which has increased the costs, explain why that step was considered necessary.
- If the litigant in person cannot speak to you without being rude and aggressive, explain that unless they cease that behaviour you will refuse to speak on the telephone and will only correspond with them. Confirm that warning in writing.

9.4 Discuss the problem confidentially with a colleague or use the Resolution mentoring scheme – see the Resolution website for details.

10. Dealing with lay advisers

10.1 The spouse or partner may seek the assistance of an organisation such as Families Need Fathers, Children Need Fathers or the Equal Parenting Council and ask you to deal with them. Resolution has received complaints that members refuse to deal with such organisations.

10.2 Discuss with your client whether he or she is happy for you to deal with a lay adviser taking account of the following factors:

- they are not officers of the court,
- they may lack objectivity,
- they may not belong to any professional organisation which regulates their conduct,

- they may not have any professional indemnity,
- they may not be bound by rules of confidentiality.

If your client is happy for you to deal with a lay adviser, ensure that you have clear instructions as to which issues you can talk to them about and which documents you can disclose to them.

10.3 The right to disclose information to a lay adviser

In *Re O (Children): Re W-R (A child): Re W (Children)* [2005] EWCA Civ 759, [2005] 2 FCR 563, [2005] All ER (D) 238 (Jun) the court held that:

'... whilst good practice requires the litigant in person to identify and obtain the court's agreement to his use of a particular McKenzie friend, it should not be considered a contempt of court for a litigant in person to seek advice prior to any application to the court from a proposed McKenzie friend, in the same way that it will be legitimate for a litigant in person to consult an organisation such as the Citizen's Advice Bureau, or Families Need Fathers, or a particular mediation service. In seeking that advice, we are of the opinion that it is not a contempt if the litigant in person shows court documents to the person from whom the advice is being sought. The critical point is that those to whom the documents are shown appreciate that they are being shown the documents for the purpose of giving advice, and that wider dissemination of the documents is not permissible.'

The Family Proceedings (Amendment) (No 2) Rules came into force on 27 April 2009 and provide that a party may communicate any information relating to the proceedings to a lay adviser, a McKenzie friend or a person arranging or providing pro bono legal services to enable the party to obtain advice or assistance in relation to the proceedings. A lay adviser is defined as a non-professional person who gives advice on behalf of an organisation in the lay advice sector. A McKenzie friend is defined as any person permitted by the court to sit beside an unrepresented litigant in court to assist that litigant by prompting, taking notes and giving him advice.

10.4 McKenzie friends

President's Guidance: McKenzie friends

Date 14 October 2008

In the light of the recent decision of Munby J in the case of *Re N (A child) (McKenzie friend: rights of audience)* [2008] EWHC 2042 (Fam), the President's Guidance of 14 April 2008 requires amendment to the penultimate paragraph headed 'Rights of Audience'. The Guidance of 14 April is therefore now withdrawn and reads as follows in its reissued form:

In the light of the growth of litigants in person in all levels of family court, the President issues this guidance, which supersedes that of 13th May 2005, [2005] Fam Law 405, and is to be regarded as a reminder that the attendance of a McKenzie friend will often be of advantage to the court in ensuring the litigant in person receives a fair hearing.

- A litigant who is not legally represented has the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend ('MF'). This is the case even where the proceedings relate to a child and are being heard in private.

- A litigant in person wishing to have the help of a MF should be allowed such help unless the judge is satisfied that fairness and the interests of justice do not so require. The presumption in favour of permitting a MF is a strong one.
- A litigant in person intending to make a request for the assistance of a MF should be encouraged to make the application as soon as possible indicating who the MF will be.
- It will be most helpful to the litigant in person and to the court if the particular MF is in a position to advise the litigant in person throughout the proceedings.
- A favourable decision by the court, allowing the assistance of a MF, should be regarded as final and not as something which another party can ask the court to revisit later, save on the ground of misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice.
- When considering any request for the assistance of a MF, the Human Rights Act 1998 Sch 1 Part 1 Article 6 is engaged; the court should consider the matter judicially, allowing the litigant reasonable opportunity to develop the argument in favour of the request.
- The litigant in person should not be required to justify his desire to have a MF; in the event of objection, it is for the objecting party to rebut the presumption in favour of allowing the MF to attend.
- Factors which should not outweigh the presumption in favour of allowing the assistance of a MF include
 - o the fact that proceedings are confidential and that the court papers contain sensitive information relating to the family's affairs
 - o the fact that the litigant in person appears to be capable of conducting the case without the assistance of a MF
 - o the fact that the litigant in person is unrepresented through choice
 - o the fact that the objecting party is not represented
 - o the fact that the hearing is a directions hearing or case management hearing
 - o the fact that a proposed MF belongs to an organisation that promotes a particular cause
- The proposed MF should not be excluded from the courtroom or chambers while the application for assistance is made, and the MF should ordinarily be allowed to assist the litigant in person to make the application.
- The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience and confirming that he/she has no interest in the case and understands the role of a MF and the duty of confidentiality.
- If a court decides in the exercise of its discretion to refuse to allow a MF to assist the litigant in person, the reasons for the decision should be explained carefully and fully to both the litigant in person and the would-be MF.

- The litigant may appeal that refusal, but the MF has no standing to do so.
- The court may refuse to allow a MF to act or continue to act in that capacity where the judge forms the view that the assistance the MF has given, or may give, impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.
- Where permission has been given for a litigant in person to receive assistance from a MF in care proceedings, the court should consider the attendance of the MF at any Advocates' Meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction, Guide to Case Management in Public Law Proceedings.
- The litigant in person is permitted to communicate any information, including filed evidence, relating to the proceedings to the MF for the purpose of obtaining advice or assistance in relation to the proceedings.
- Legal representatives should ensure that documents are served on the litigant in person in good time to seek assistance regarding their content from the MF in advance of any hearing or advocates' meeting.

What a McKenzie Friend May Do

- Provide moral support for the litigant
- Take notes
- Help with case papers
- Quietly give advice on:
 - o points of law or procedure;
 - o issues that the litigant may wish to raise in court;
 - o questions the litigant may wish to ask witnesses.

What a McKenzie Friend May Not Do

- A MF has no right to act on behalf of a litigant in person. It is the right of the litigant who wishes to do so to have the assistance of a MF.
- A MF is not entitled to address the court, nor examine any witnesses. A MF who does so becomes an advocate and requires the grant of a right of audience.
- A MF may not act as the agent of the litigant in relation to the proceedings nor manage the litigant's case outside court, for example by signing court documents.

Rights of audience and rights to conduct litigation

- Sections 27 and 28 of the Courts and Legal Services Act 1990 (the Act) respectively govern rights of audience and the right to conduct litigation. They provide the court with a discretionary power to grant unqualified persons, including MFs, such rights in relation to particular proceedings.
- While the court should be slow to grant any application under s27 or s28 of the Act from a MF, it should be prepared to do so for good reason bearing in mind the general objective set out in s17(1) and the general principle set out in s17(3) of the Act and all the circumstances of the case. Such circumstances are likely to vary greatly: see below paragraphs 40–42 of the judgment of Munby J in *Re N (A child) (McKenzie friend: rights of audience)* [2008] EWHC 2042 (Fam).
- If the litigant in person wishes the MF to be granted a right of audience or the right to conduct the litigation, an application must be made at the start of the hearing.

Personal Support Unit & Citizens' Advice Bureau

- *Litigants in person should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at cbps@bello.co.uk or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.*

Paras 40-42 of judgment of Munby J in *Re N (A child) (McKenzie friend: rights of audience)* referred to in President's Guidance above:

*40. But this is not to say that, as a general principle, such an order can be made only in 'exceptional' circumstances. As Clarke LJ pointed out in *Clarkson v Gilbert* [2000] 2 FLR 839 at para [28], that would be, in effect, to read restrictive words into a statute which confers an unfettered discretion. Moreover, both Waller LJ (at para [26]) and Clarke LJ (at para [30]) were quite clear that the judge at first instance (Eady J) had misdirected himself in law and applied the 'wrong test' in saying that such an order could be made only in exceptional circumstances.*

41. As Clarke LJ said (at para [28]), 'There is a spectrum of different circumstances which may arise so that it is difficult to lay down precise guidelines. Cases will vary greatly.' He added (at para [29]), 'All will depend upon the circumstances.' At one end of the spectrum there will be the 'professional' McKenzie friend who acts also as an advocate, the person, as Lord Woolf CJ put it (at para [20]), 'setting themselves up as an unqualified advocate' or, as Clarke LJ put it (at para [28]), 'holding himself out as providing advocacy services, whether for reward or not.' There, as a general principle, the court will make an order only in exceptional circumstances. At the other end of the spectrum there will be the McKenzie friend who is the litigant's spouse or partner, though even there, as Clarke LJ was careful to point out, the circumstances may vary widely. In between – and Mr Holden falls somewhere between the two ends of the spectrum though as it seems to me much nearer the spouse / partner McKenzie friend end of the spectrum than the 'professional' McKenzie friend advocate end of the spectrum – there will be a very wide range of circumstances which it is futile and indeed impossible to classify or

categorise. One is, after all, faced with a spectrum and not, as some of Mr Bogle's submissions tended to suggest, a set of pigeon holes.

42. At the end of the day one has to remember that, as Lord Woolf CJ put it (at para [17]), 'The overriding objective is that the courts should do justice.' And one also has to bear in mind, as he observed, the reality that legal aid is not available as readily as it was in the past, leading, as the President's Guidance: McKenzie Friends [2008] 2 FLR 110 comments, to the growth of litigants in person in all levels of family court. Moreover, as the Guidance reminds us, 'the attendance of a McKenzie friend will often be of advantage to the court in ensuring the litigant in person receives a fair hearing.' Similarly, in my experience, there will be occasions – sometimes; sometimes not – when the grant of rights of audience to a McKenzie friend will, to adopt the President's words, be of advantage to the court in ensuring the litigant in person receives a fair hearing. Sometimes, indeed, it will be essential if justice is to be done and, equally importantly, perceived by the litigant in person as having been done.

Note

1. This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional conduct.
2. Good practice guidance can inevitably only deal with the generality of situations. It cannot be an absolute rule. The facts of any particular case may justify and/or require a lawyer to depart from these guidelines.
3. This guidance applies to all family law cases for the better conduct and approach of family breakdown issues, and not just to cases between Resolution members.

Guide to Good Practice for Lawyers on Working with the Bar in Family Cases

1. Introduction

Family proceedings should be conducted cost effectively without compromising the quality of advice that clients crave and deserve whilst balancing the benefits of any steps taken against the likely costs – financial or emotional. Many family cases are now concluded without the involvement of barristers. However, certain clients will benefit from representation by an effective team of lawyer and barrister in order to achieve an appropriate balance between cost and quality,

When the relationship between the lawyer and barrister is good, the results can be very positive. Issues can be resolved at an earlier stage than may otherwise have been the case. Equally, if it is necessary to go to court, the client benefits from the smooth conduct of the relationship between the lawyer and barrister.

In recent years, there has been a marked shift in emphasis in the way that specialist family lawyers and barristers work together for the benefit of the client. However, there remain practitioners from both branches of the profession who are unsure of the reasonable expectations which each may have of the other. With a view to improving the working relationship between the family lawyer and barristers, this Guide deals with the following issues:

- What are the respective roles of the family lawyer and barrister?
- When should a barrister be instructed?
- The selection of a barrister for a particular case.
- How should the barrister of choice be instructed?
- Managing communication between barrister and lawyer.
- Managing conferences.
- Specific issues of good practice in applications for ancillary relief.
- Preparation for hearing and papers for consideration.
- The hearing.
- Fees.

2. What are the respective roles of the family lawyer and barrister?

The lawyer is entitled to expect that the barrister will:

- (a) provide the client with independent, objective legal advice and draft documentation where necessary in good time, and represent the client in court, and
- (b) operate as a team player with the lawyer, lay client and any other person involved with the proceedings.

The barrister is entitled to expect that the lawyer will:

- (a) Select the appropriate barrister and wherever possible provide instructions in good time.
- (b) Ensure that the client understands:
 - (i) the respective roles of the barrister and the lawyer;
 - (ii) that each has duties to the court and to the Legal Services Commission which may have to take precedence over the client's aims and wishes; and
 - (iii) the likely nature, purpose and objectives of hearings and conferences.
- (c) Filter and focus information for the barrister.
- (d) Manage the paperwork, ie ensuring it is easily located and identified and selecting the appropriate documentation to be provided to the barrister.
- (e) Define the issues either alone or in conjunction with the barrister.
- (f) Ensure that the client fully understands the advice and/or the issues discussed in conference.
- (g) Prepare and file documentation and compile and provide bundles for the court with input from the barrister as may be appropriate.
- (h) Take such other steps to promote and protect the client's interests and ensure the effective presentation of their case as may be appropriate taking into account the barrister's advice.
- (i) Support the client and provide an interface between the client and barrister throughout the proceedings.

3. When should a barrister be instructed?

- (a) It will not always be necessary for a barrister to be instructed. The decision to instruct a barrister should be analysed carefully and discussed with the client. For example, it may be that the complexity of an application for ancillary relief requires an opinion from a barrister as to quantum or that there is a particular technical issue which would benefit from the specialist advice which the barrister can add. Equally, it may be more appropriate for a barrister to undertake the advocacy on a particular application for a wide variety of reasons.
- (b) When a barrister is instructed, the instructions should be given in good time so that their early advice on tactics, steps to be taken and prospects of settlement can be acted upon; early instruction also helps to ensure the barrister's availability for a hearing.
- (c) The lawyer should endeavour to fix hearing dates as early as possible in conjunction with the barrister's clerk and court listing.

- (d) Once a barrister has been instructed, the lawyer should discuss with him/her (in public law children cases in particular), whether he/she should be instructed to attend significant directions hearings. Account should be taken of the expectation under the Family Proceedings (Amendment No 2) Rules 1999 that the legal representatives attending the first appointment and the FDR appointment will have full knowledge of the case. The lawyer should therefore consider who is the most appropriate advocate to attend. Where a barrister has been instructed, it may be necessary for him/her to attend these appointments (although a number of specialist lawyers prefer, for cost and other reasons, to attend themselves without a barrister).

4. The selection of a barrister for a particular case

The careful selection of a barrister is critical to the success of the team representing the lay client. It is a legal services contract requirement that family lawyers retain a preferred list of barristers which is regularly updated to record the particular strengths and weaknesses of individual barristers. Less experienced lawyers, or those who are new to a geographical area, will often find that experienced local Resolution members will be pleased to assist them in identifying a barrister appropriate to a particular case.

The personality of both the lawyer and lay client and the dynamics of their relationship will be important factors in the decision to instruct a particular barrister. The seniority of the barrister will also be relevant. It is advisable to enquire of the lawyer representing the other party to the case whether they have consulted a barrister and, if so, whom – it may be that he or she works particularly effectively with another barrister in searching for an equitable, constructive and non-confrontational solution to cases.

Consideration will sometimes need to be given to the instruction of leading counsel. This will often be the case in weighty public law Children Act cases. It may also be appropriate to instruct a leader on a complex application for ancillary relief. It is a fairly recent trend at the Bar for there to be more flexibility in the role which leading counsel is prepared to play in a particular case. For example, for a heavy application for ancillary relief which is neither the most complex nor most paper-intensive case, the leader may well be prepared to represent the lay client without the necessity for the expensive addition of a junior barrister. The barrister's clerk should be content to discuss issues of this nature with the lawyer to ensure that the client's representation is tailored to his or her case.

5. How should the barrister of choice be instructed?

(a) Timing

Instructions should always be provided to the barrister sufficiently in advance of the court hearing or conference to which they refer so that the barrister has time to prepare fully and call for any additional papers or information that may assist him in advising in conference.

It should be remembered that the barrister may be in court each day, sometimes some distance away from chambers, and that these commitments reduce the time available for preparing cases. Where last-minute instructions have to be given, it is advisable to contact the barrister's

clerk before dispatching the papers in order to check whether it is most efficient to send papers to chambers or whether another arrangement would be more effective.

The barrister and their clerk should be aware that it is not appropriate to accept instructions on their behalf if it is known that the barrister will have insufficient time to prepare properly for a conference or hearing. If it becomes apparent that, because of unforeseen circumstances, the barrister will have difficulty in fulfilling his or her commitments with regard to a case, including insufficient time to prepare fully for a conference or hearing, the lawyer should be informed of this at the very earliest opportunity.

It is considered unproductive, unprofessional and short-sighted of the clerk to accept work for a barrister which cannot be done properly and in good time.

(b) The contents of instructions

Basic information

Certain basic information should always be included in instructions to the barrister, in particular:

- (i) The party for whom you are acting.
- (ii) The ages of the parties and their children.
- (iii) The form the proceedings take (for example, a residence application under the Children Act).
- (iv) A statement of the current issues and identification of what advice or action is required.
- (v) Where attendance at a court hearing is required, full details of the time and venue should be included in a prominent place on the papers, preferably where the barrister's clerk can readily find them.
- (vi) It is helpful if the instructions provide the contact details of the instructing lawyer, including the telephone number and the name of the particular lawyer with conduct, as the covering letter which should also record this information is sometimes retained by the barrister's clerk, or mislaid.
- (vii) Care should be taken to confine the papers sent to the barrister to those which are relevant to the current issue, or strictly necessary for background reading. Documents should not be sent to the barrister if it is not expected that he or she should read them.

(c) Documents/enclosures

The barrister's role is not that of a filing clerk!

Documents included in the brief should be identified and their relevance to the case explained unless it is self-evident. This can be done either in the instructions or in the index.

No originals should be submitted to the barrister except by express prior agreement (eg where they are exceptionally bulky or cannot be copied).

Papers should always be sorted logically in chronological order and in separate, clearly indexed bundles including:

- (i) Applications and orders.
- (ii) Statements.
- (iii) Experts' reports section.
- (iv) Notes of advice given previously to the client, whether by the lawyer or by the barrister (eg previous advices of the barrister, notes of conferences and hearings, and letters and attendance notes setting out advice given to the client by the lawyer). In this way, the barrister can be alert to the need to explain to the client any actual or apparent changes of advice or differences of opinion and will be assisted in recognising those cases where a client has particular difficulty in understanding advice or may unreasonably be refusing to accept it.
- (v) Attendance notes taken by the lawyer of important meetings eg proofs of evidence.
- (vi) Party and party correspondence.
- (vii) Schedule of assets.
- (viii) Child Support calculation.
- (ix) A copy of the public funding certificate (and of the notice of the other parties' public funding if appropriate) should be enclosed. The barrister should be informed of any subsequent amendment to the public funding certificate and provided with legible copies of the relevant documents. If not clearly legible, transcripts of hand-written documents should be provided.
- (x) A costs schedule or statement of the costs incurred to date, the amount paid and any costs outstanding.

All documents should be tethered in some way but not permanently; ring binders are preferable to more elaborate binding systems, though they need to be packed carefully for despatch to the barrister in order to avoid damage in the mail or DX system.

(d) **'People issues'**

It can assist the barrister to make a realistic assessment of the case if the instructions explain any difficulties that the lawyer has identified with regard to the client or potential witnesses, for example unwillingness to give evidence, difficulty in recalling events or extreme nervousness. The barrister should be made aware of any specific language problems, disabilities or cultural issues which are relevant to the case.

6. Managing communication between barrister, lawyer and the client

- (a) The vast majority of barristers welcome direct contact with the lawyer outside conferences. The barrister will need to be informed of important recent developments as they occur and

communicating by fax, telephone or email is the quickest way of achieving this. If the barrister is asked to advise over the telephone it is good practice to ask them to provide a short note of the advice given or to follow it up with your own attendance note of the call to ensure that you have fully understood what is being said. If you are in any doubt about how best to communicate with the barrister outside a conference, ask them.

- (b) For the lay client, counsel's bedside manner and attitude to the other people concerned with the case are often as important as intellectual ability. For example, at a hearing, whilst the outcome is likely to be of paramount importance to the lay client, the way the case is conducted can be equally or even more important in terms of enabling that client to accept the decision and maintaining or even promoting positive long-term continuing family relationships.
- (c) The lawyer and the barrister should speak plain English to the lay client. Language should be adapted to the needs/understanding of the client. The lawyer and barrister should ensure that any technical exchanges between them are 'translated' for the benefit of the client.
- (d) It must be remembered that it is the lay client's case and they should not be made to feel excluded, patronised or bewildered.
- (e) The lawyer should ensure that the client has understood the key points of the barrister's advice and of any hearing that may have taken place. A written summary of the conference and of the outcome of the hearing should be prepared for the client. The barrister should be provided with a copy of the summary and of any order that the court has made.
- (f) There may be situations, hopefully rare, in which there has been little time for the barrister to consider the papers properly, for example where essential material has only just been made available. Where this happens, the lawyer and barrister should explain the circumstances to the client and it should be understood that the best course may be for the barrister to take further time to reflect upon the issues before advising and, if necessary, re-arrange the conference. The barrister's advice should, of course, be given within a reasonable period thereafter and the client advised of the likely time for receiving it.
- (g) In appropriate cases, it is appreciated that children's guardians welcome the opportunity to be included in all aspects of the case but it is undesirable for this to include guardians joining legal representatives in the robing room/advocates' room. There are also certain negotiations/drafting exercises which are more appropriately carried out in the absence of guardians.
- (h) Whilst there may be occasions when the lawyer or barrister considers the other's conduct of the case is open to criticism or they differ in their opinions as to the case, each must be mindful of the need not to undermine the lay client's confidence in their legal advisers at a time when the client may well already be under great stress. Care should be taken that the matter is raised sensitively and ensuring that professional objectivity and respect for everyone involved is retained. The lawyers should try to discuss the matter in private first. However, it should be recognised that the duty to the client overrides the duty to the lawyer/barrister.
- (i) The barrister should not depart from the advice given in conference as trial approaches without good reason and without explaining to the lawyer in advance, save in very exceptional circumstances.

- (j) The barrister should stay within the parameters of settlement given by the client when negotiating with the other party's representatives.
- (k) Neither the barrister nor the lawyer should criticise the other lawyer/barrister in the case in conference or in court unless it is essential to the conduct of the case. Should it be necessary to make such a criticism in court, wherever possible this should be specifically discussed and agreed with the lawyer and, where appropriate, also with the client beforehand.
- (l) In an ongoing case of some weight it may be prudent for lawyer and barrister to keep each other aware of any prolonged absence from the office or chambers.

7. Managing conferences

- (a) Every attempt should be made to arrange conferences at times and locations which are convenient to all those who will be attending. It is helpful if an estimate can be made in advance of how long the conference will take and consideration given to who will be attending. If this is not straightforward, the lawyer should speak with the barrister about it, raising issues such as the desirability/propriety of the client's family or friends attending and whether it is appropriate for work experience students to be present.
- (b) Conferences need not always be held in chambers and it may be better, in some cases, for the barrister to attend at the lawyer's office. Other possible venues include the professional address of an expert witness (such as an accountant or doctor) or even the client's business premises if there are substantial business records which are material to the case. Full consultation with the barrister's clerk should enable the most convenient arrangements to be made.
- (c) Provided that it is practical and cost effective, the lawyer with conduct of the case or a representative from their firm who has a working knowledge of the file should attend the conference. If this is not possible, the barrister should be told in advance in order to avoid embarrassment and to ensure that any material issues can be discussed between the lawyer and barrister by telephone or raised by letter prior to the conference. Alternatively, the lawyer should endeavour to make themselves available so that the barrister can telephone them during the conference should the need arise.
- (d) The barrister should not give the impression that their attention is engaged elsewhere, for example, by over-using computers during a conference. The barrister can be expected to be aware of the need for the conference to be conducted in such a way that the lay client is confident that his or her case is of importance to the barrister. The lay client should feel able to tell the barrister everything that may be material to the issues and to ask for clarification if he or she has not understood fully what is being said. Interruptions or distractions during the conference can be off-putting for clients and damage their confidence in the barrister.
- (e) References by the barrister to the fact that the papers were being studied late the night before do not inspire confidence in the client. It is important for the barrister to convey to the client that they have studied the papers and have a sound grasp of the facts and the issues and, for example, know the names of not only the client but also the relevant family members. How this is done will vary from barrister to barrister and will depend on the circumstances of the case. The care that the barrister

has taken in preparation can be revealed by the preparation by them in advance, of documents such as a table of assets, a chronology, a statement of issues or an agenda for the conference.

- (f) The barrister should provide instructing lawyers with copies of notes for the conference, any cases which are referred to, and any spreadsheets which have been prepared, either before or during the conference. If possible, this information should be made available to instructing lawyers before the conference.
- (g) Both lawyer and barrister should remain alert to the lay client's understanding of the advice given/ issues discussed and be prepared to repeat tactfully if necessary.

8. Specific issues of good practice in applications for ancillary relief

- (a) Work should be commenced at an early stage on a table/schedule of assets (which needs to include valuations of all significant assets). The barrister's instructions should include a copy of the table/schedule, identifying what agreement has been reached and, where full agreement cannot be reached, setting out the precise nature of the disagreement.
- (b) Where clear and definite agreement has been reached about particular assets (eg as to the valuation or division thereof between the parties), it may not be necessary to send the barrister all the paperwork that underlies that agreement. The question needs to be given individual attention in each case.
- (c) Where the barrister is to be sent documents regarding a particular asset, consideration should be given as to whether it is necessary to send historical documents. For example, an outdated valuation of an endowment policy may be relevant where it relates to a significant moment in history of the marriage (eg the date of separation) but it may otherwise be unnecessary paperwork.
- (d) Where child support is material, a child support calculation should be included with the instructions wherever possible.
- (e) It is essential for the barrister to be provided with as much information as possible about proposed experts (availability, area of expertise, etc) prior to any directions hearing at which the issue is likely to arise.
- (f) An estimate of costs to date needs to be provided to the barrister at all stages. This always needs to identify what payments on account the client has already made and, in some cases, it is necessary to tell the barrister from which fund the client has drawn the money paid.

9. Preparation for hearing and papers for consideration

- (a) **The lawyer's role**
 - (i) The lawyer owes it to their client and to the barrister to prepare for all court hearings in good time. Whenever a barrister is to be instructed for a hearing, this should be done

sufficiently far in advance to allow time for the barrister to consider the issues and advise, for the barrister to settle any papers necessary for the hearing, for negotiations then to take place with a view to settlement and for any agreed order to be drawn up and forwarded to the court so that adjustments can be made with regard to the listing of the case. The lawyer should ask the barrister who will be acting to advise on settlement in sufficient time to allow settlement to take place.

- (ii) A bundle (which can ultimately be used for the court hearing) should be begun as soon as possible. This applies to small cases just as much as big ones. The barrister may wish to give advice as to the content of the bundle – in weighty cases this is advisable.
- (iii) The lawyer and barrister should discuss and agree at the earliest stage which of them will take responsibility for the drafting and filing of the Practice Direction Documents to be included in the bundle (see *Practice Direction (Family Division) (Family Proceedings: Court Bundles)* (2006)). The barrister will usually wish to prepare the skeleton arguments unless it is agreed that the lawyer should be responsible but responsibility for the drafting should be clearly defined between barrister and lawyer.
- (iv) The formal court bundle should be ready no later than seven days before a hearing and preferably earlier to enable the barrister and any expert witnesses to adopt the appropriate numbering scheme when preparing the case and when drafting documents for the court. The format of the bundle is set out in *Practice Direction (Family Division) (Family Proceedings: Court Bundles)* (2006).
- (v) Where a barrister has been instructed prior to the formal court bundle being prepared and is already in possession of documentation, the lawyer should ascertain whether the barrister prefers to make up and paginate their own bundle from existing documents; it should not be assumed that the barrister will do this. The barrister needs to be provided with a full photocopy of the court bundle unless the matter has already been discussed and he or she has indicated otherwise.
- (vi) The lawyer should give specific instructions to the barrister on any points which might be material with regard to costs, particularly where they are not apparent from the trial bundle, as may be the case, for example, where they arise from correspondence or from the preparatory handling of the matter.

(b) The barrister's role

- (i) The barrister should prepare thoroughly for the hearing, bearing in mind the need to allow the lawyer time to obtain instructions, to gather evidence, to re-manoeuvre and to make final preparations in the light of any advice that the barrister may give when they have read the brief.
- (ii) The barrister should avoid giving 'conditional' or 'preliminary' advice when having the full papers (ie requesting document/information that would be available to the solicitor) could have allowed complete advice.
- (iii) In the event that the barrister considers significant information/documentation to be missing from the papers, the barrister should contact the lawyer to ascertain whether it can

be made available within a reasonable period of time, rather than simply returning the papers with a 'conditional' or 'preliminary' advice.

10. The hearing

(a) The lawyer's role

The lawyer with conduct of the case should attend the conference with the barrister, if possible, any subsequent hearing and be present for negotiations at the door of the court. Whilst this will not always be practical or cost effective, the lawyer's representative should have a working knowledge of the case and the relevant issues. In addition, if the lawyer with conduct cannot be present, it is often helpful for them to discuss the case with the barrister by telephone and be available on the telephone during conferences or hearings.

(b) The barrister's role

- (i) The lawyer with conduct of the case should discuss with the barrister in advance whether he wishes to be present during any negotiations outside the court room. In the event that the barrister considers this to be unproductive in the particular circumstances of the case, they should explain the reasons for this view to the lawyer and discuss it with them.
- (ii) The barrister should keep the client and the lawyer informed of what is said in any material discussions with the other advocates.
- (iii) The barrister should see the judge in private concerning the case only if requested to do so by the judge or if the client agrees and, in any event, inform the client and the lawyer of what is said to the extent permitted by the judge.
- (iv) The barrister should not permit familiarity with another advocate to undermine the client's confidence in the barrister's commitment to present his or her case effectively.
- (v) The barrister should be receptive to receiving instructions and comments during the course of the hearing. However, the need for the barrister to be able to consider what a witness, another advocate or the judge is saying must be respected. The lawyer (or their representative) is responsible for maintaining the balance.
- (vi) Particularly in money cases, the barrister should be conscious of the fact that costs are not only emotive to the client but also potentially very significant financially. Therefore, the barrister should not capitulate too quickly if there should be any costs arguments at the end of the trial, and should give enough time, attention and argument to this issue.
- (vii) The matter of costs should be discussed in advance so that the client, solicitor and barrister are aware of the issues around whether costs orders are likely to be sought. The barrister should be prepared to argue any reasonable point on costs. If any aspect of costs is not reasonably arguable, wherever possible that should be explained by the barrister and understood before the matter is addressed in court.

- (viii) The barrister should be prepared to spend time with the client at the end of the case, especially if the outcome was disappointing.
 - (ix) The barrister should inform the lawyer promptly after the hearing of the agreement reached or order made, if there was no representative of the lawyer there.
 - (x) The barrister should be aware of the emotional needs of the client during the hearing and/or negotiations.
- (c) In the often highly charged negotiations at the court door, the lawyer and barrister should work together to ensure that the client feels, and will continue to feel, in control of any agreement reached and fully understands its terms and implications.

11. Fees

In privately funded cases (as opposed to publicly funded cases where the fixed scale of graduated fees apply) there can be advance discussion between the lawyer and barrister's clerk about fees or charging rates so that:

- (a) information as to the cost of instructing the barrister can be made available to the client,
- (b) where the client is paying privately, the lawyer can ensure that they have appropriate security for the barrister's fees,
- (c) instructions can be withdrawn from the barrister or declined, without compromising the ability of another advocate to prepare the case in time, if the fee to be charged or offered is not reasonable, and
- (d) the liability so far incurred for fees can be readily ascertained at any stage in the case, for example where information as to costs is required for a court hearing or where an unavoidable change of barrister occurs.

The lawyer owes a duty to his client to ensure that the barrister's fees are fair and reasonable and to negotiate where appropriate. The lawyer should seek the client's approval before concluding an agreement as to fees.

Where an estimate of fees has been given by the barrister, the barrister should alert the lawyer if it appears likely that the estimate will be exceeded, for example because of the complexity of the matter or developments in the case.

Where no prior agreement has been reached as to the barrister's fee for advising or drafting documents, the lawyer should not be afraid to challenge the clerk about the level of fee charged if it appears unsustainable in proportion to the issues involved and to the likely level of preparation time required.

The barrister should be prepared to justify any fee charged by reference to such factors as the time spent and the importance/complexity of the issues involved. It is helpful if a breakdown of the time spent is included on or accompanies the fee note.

Note

1. This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional conduct.
2. Good practice guidance can inevitably only deal with generality of situations. It cannot be an absolute rule. The facts of any particular case may justify and/or require a lawyer to depart from these guidelines.
3. This guidance applies to all family law cases for the better conduct and approach of family breakdown issues, and not just to cases between Resolution members.

Guide to Good Practice on Disclosure in Ancillary Relief

1. Introduction

The current ancillary relief procedure is designed to encourage openness and prevent delay. At the heart of the process is a framework to ensure that disclosure is given in an orderly, standardised format with strict timetabling fixed by the court. The emphasis is upon identifying issues at an early stage and upon the court regulating the extent of disclosure so that it is proportionate to the issues in question and the amount at stake.

The duty of disclosure must be considered in accordance with the law, judicial recommended practice, the Solicitors Regulation Authority's Solicitors' Code of Conduct (which replaced the Guide to Professional Conduct of Solicitors and the Solicitors' Practice Rules from 1 July 2007, see www.sra.org.uk), the Law Society's Family Law Protocol (its second edition was published in 2006), and of course the Resolution Code of Practice. Members are required to emphasise to clients the importance of being open and honest in all dealings. Failure to be open and honest is likely to lead to reduced trust between the parties which will make constructive and non-confrontational dialogue more difficult and settlement less possible. This guide includes a summary of the law as well as recommendations of good practice.

2. The duty to disclose

Disclosure relates to both facts and documents.

2.1 Finances ancillary to divorce

It is a duty owed to the court both by the parties and by their legal representatives to give full and frank disclosure in ancillary relief applications and also in all matters in respect of children.
(Practice Direction: Case Management 31 January 1995 [1995] 1 All ER 586)

Also see *Livesey v Jenkins* [1985] 1 All ER 106. Anything less may render it impossible for the court to carry out its balancing exercise as required under s25 of the Matrimonial Causes Act 1973, perhaps invalidating any order made.

The Family Proceedings (Amendment No 2) Rules 1999 (SI 1999/3491) amended the Family Proceedings Rules 1991 (SI 1991/1247) and require the court process to be managed with reference to the 'overriding objective', defined at r2.51D(1) as 'enabling the court to deal with cases justly'. At r2.51D(2) 'justly includes... (b) saving expense and (c) dealing with the case in ways which are proportionate...'. Furthermore, r2.51D(4) states that 'the parties are required to help the court to further the overriding objective'. As a matter of law and good practice, this must include an obligation to ensure that the court has been given full and frank disclosure by both parties, although r2.51D(6)(d) requires active case management by 'regulating the extent of disclosure of documents and expert evidence so that they are proportionate to the issues in question'.

The *President's Direction on Ancillary Relief Procedure of 25 May 2000* [2000] 1 FLR 1997 (reproduced in full in the Law Society's Family Law Protocol) and the pre-application protocol attached to that direction (the 'pre-application protocol') further underlines the obligation of the parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues in the context of pre-application disclosure. The Family Law Protocol repeats this obligation in the context of post-application disclosure (see para 4.8).

Per Charles J in *I v I* [2008] EWHC 1167 (Fam), the duty of full and frank disclosure includes: 'a duty to provide information that would set the other side on a line of enquiry, or a thought process, on matters to which the court must have regard under s25 MCA 1973... it includes a duty to inform the other side of information that may (a) result in the removal of uncertainty as to the value of assets, or the amount of a party's future income, or (b) inform the assessment of the income or earning capacity of a party to the marriage or the value of his or her assets.' Negotiations relating to the sale of a property or shares whose value is relevant, or to existing or new employment that would have an impact on income, should generally be disclosed (paras 114 and 115). It would also be prudent for estimates of discretionary bonuses or awards to be given (para 126). If there is any doubt about the effect of the information, disclosure should be given (para 116).

See also *GW v RW* [2003] 2 FLR 108 (and *W v W (Ancillary relief: non-disclosure)* [2003] EWHC 2254 (Fam)) in relation to the requirement for 'an honest and conscientious estimation of the true net worth of the party' and the duty to 'give a presentation that is immediately understandable by a solicitor of average financial sophistication' in Form E.

2.2 Generally in civil proceedings

Nowadays the general rule is that, whilst a party is entitled to privacy in seeking out the cards for their hand, once they have put their hand together, the litigation is to be conducted with all the cards face up on the table. Furthermore, most of the cards have to be put down well before the hearing (see *Naylor v Preston Area Health Authority* [1987] 2 All ER 353, per Donaldson MR at 360).

Since *Naylor* opinion seems to have hardened and it is now only in the rarest of cases that a court will sanction departures from the 'cards on the table' approach (see *McGuinness v Kellogg Co of Great Britain Ltd* [1988] 1 WLR 913 and *Khan v Armaguard Ltd* [1994] 1 WLR 1204). This position is supported by the Civil Procedure Rules 1998 (SI 1998/3132).

As an officer of the court, a solicitor has a duty not knowingly to allow a client to mislead the court by providing incorrect or inaccurate information. An imputed knowledge of facts could be attributed to a lawyer, for example if information about a client's financial circumstances is known by the firm even if within a different department and in a capacity other than the matrimonial proceedings. Conflict of interest searches must always be carried out within the firm and proper consideration given to whether the firm can continue to represent that client in the matrimonial proceedings. See also the Solicitors Regulation Authority's Solicitors' Code of Conduct on this point. Subrules 4.04 and 4.05 set out two situations where you can act even when material confidential information is held by another member of the firm. Both recognise for the first time that it can be acceptable to use information barriers. The first situation is where the party to whom the duty of confidentiality is owed consents. The second situation is where you are already acting and consent has not been given or cannot be sought.

2.3 Judicial involvement

There has been an increasing trend over recent years for greater judicial involvement in the management of family law cases, including the disclosure process.

In *F v F (Ancillary relief: substantial assets)* [1995] 2 FLR 45 at 70A Thorpe J (as he then was) said that: 'ancillary relief applications in the Family Division are not purely adversarial. The court has an independent duty to discharge the function imposed by statute. The court has from that duty the power to investigate and the power to ensure compliance with the duty of full and frank disclosure owed by litigants.'

In *OS v DS (Oral disclosure: preliminary hearing)* [2004] EWHC 2376 Coleridge J gave directions for a preliminary/oral discovery hearing to enable the husband to give evidence on oath about a number of central financial issues before requiring the disclosure or production of further documents. The hearing resulted in the case settling after the husband had been cross-examined.

In *K v K (Financial capital relief and the management of difficult cases)* [2005] 2 FLR 1137 at para 22 Baron J said: 'in my view, this type of case should be managed by an allocated High Court judge from the outset. These cases are demanding and obtaining disclosure is often pivotal.'

This has been extended by the ancillary relief process which promises 'active case management' by the court (r2.51D(5)).

Good practice

1. Disclosure is of such vital importance to the court as the means to produce a just outcome that, in giving disclosure, parties and their legal advisers should err on the side of too much rather than too little.
2. The Resolution Code of Practice requires members to emphasise to clients the importance of being open and honest in all dealings. The Family Law Protocol requires lawyers to aim towards avoiding mistrust between the parties by encouraging at an early stage full, frank and clear disclosure of information and openness in dealings. At the first client meeting, or very soon thereafter, or if appropriate before the first client meeting, the lawyer should consider whether, as a matter of good practice, to provide a client with a blank Form E to complete.
3. Although certain information must be given, eg in accordance with s25(2) MCA (as regulated in Form E), the duty to disclose extends to any fact within a party's knowledge which might materially affect the exercise of the court's discretion or powers. However, close regard must be had to the concepts of 'proportionality' and 'saving expense' (r2.51D (2)).
4. Consideration should be given to trying to obtain judicial assistance with active case management in an appropriate case, whilst recognising that, although desirable, this is often not practical due to lack of court resources. This could include an interlocutory oral hearing, or seeking a direction that the parties exchange lists of documents where one party believes the other is not giving full disclosure.

3. The importance that the court attaches to the duty of disclosure in financial cases

The courts regard failure to disclose as a reprehensible act. It may be regarded as 'conduct', and may give rise to an inference of greater assets. It may also result in costs orders against a party, possibly against a legal representative, and sometimes on an indemnity basis. Alternatively, costs orders may be

limited to the additional costs incurred as a result of the failure to provide full disclosure, and on a standard basis, and not used as a means of punishment (Peter Hughes QC in *M v M* [2006] WL 2049700). Failure to disclose will almost certainly result in a loss of credibility for the non-disclosing party.

In relation to the issue of costs, the ancillary relief procedure has been fundamentally amended by the Family Proceedings (Amendment) Rules 2006 (SI 2006/352). The new regime applies to ancillary relief applications (which will usually be made in the petition if the standard paragraph is included) issued on or after 3 April 2006. The general rule is now that the court will not make an order requiring one party to pay the costs of another party, but it may do so if appropriate because of the conduct of the party in relation to the proceedings (whether before or during them) (see r2.71(4)).

The factors which the court must take into account when deciding what costs order to make (if any) are set out in r2.71(5), and include any failure to comply with the rules, any court order or practice direction, and any other aspect of a party's conduct which the court considers relevant. Further, r2.61D(2)(e) provides that the judge at the first appointment, in considering whether to make a costs order, must have particular regard to the extent to which the parties have complied with the requirement to send documents with Form E. The *President's Direction of 20 February 2006* [2006] 1 FLR 865 supports the rules and makes clear that an order will only be made on the basis of a party's litigation conduct.

Although initially it seemed that costs orders might be more likely under the new costs regime, anecdotally this would seem not to be the case (although no concrete data is readily available).

On the issue of conduct and its practical effect, Wilson J (as he then was) said in *T v T* [1994] 2 FLR 1083: 'I appreciate that it has been held that a spouse's behaviour in the ancillary litigation, specifically a dishonest failure to make full disclosure amounts to [relevant s25(2)] conduct: *Desai v Desai* (1983) 13 Fam Law 46 and *B v B* [1988] 2 FLR 490. But I agree with Thorpe J in *P v P* [1994] 1 FLR 293 at p 306A–C that a dishonest disclosure will more appropriately be reflected in the inference that the resources are larger than have been disclosed, in which case it will fall within s25(2)(a) and/or in the order for costs.'

This approach was taken in *E v E* [1990] 2 FLR 233, where a husband's failure to disclose information about Swiss bank accounts and land necessitated an expensive and rigorous investigation into his affairs. He was ordered to pay the costs of both sides for the investigation. Ewbank J also held that the husband's failure to disclose justified any inferences which were proper to be drawn against him. See also *Al Khatib v Masry* [2002] 2 FCR 539 and *TL v ML and others (Ancillary relief: claim against assets of extended family)* [2006] 1 FCR 465, where adverse inferences were drawn.

Good practice

1. It is essential to inform clients of their obligation to give full disclosure and explain the severity of the court's approach to non- or misleading disclosure. It would be advisable to do this both at the outset (perhaps in a terms of engagement letter) and at each relevant stage during the retainer. The parties are required to help the court (r2.51D(4)).
2. Litigation misconduct is now the only basis on which an adverse costs order may be made in ancillary relief proceedings, which undoubtedly may include a failure to provide adequate disclosure. The practical effects of this on a day-to-day basis, however, are still unclear. The costs implications of non-compliance with the duty to disclose should be considered by the court at the first appointment and throughout the proceedings. Clients must be advised of the risks: both of the possibility of an order being made, but also the reality that it is often very difficult to secure a costs order.

4. The mechanics of disclosure

4.1 Before an application for ancillary relief

The pre-application protocol governs the steps parties should take to seek and provide information from and to each other prior to the commencement of an application for ancillary relief. Paragraph 2.1 of the pre-application protocol states that: 'The court will expect the parties to comply with the terms of the protocol.' It is more than mere 'good practice' and accordingly must be adhered to by all Resolution members as, at para 1.3: 'If proceedings are subsequently issued, the court will be entitled to decide whether there has been non-compliance with the protocol and, if so, whether non-compliance merits consequences.' Such consequences may include a costs order (r2.51 (5)).

Pre-application disclosure is regulated in paragraph 3.5: 'the parties should exchange schedules of assets, income, liabilities and other material facts using Form E as a guide to the format of the disclosure. Documents should only be disclosed to the extent that they are required by Form E. Excessive or disproportionate costs should not be incurred.'

Good practice

1. The pre-application protocol should be considered before proceedings are issued, and the advantages/disadvantages of seeking voluntary disclosure weighed up, including the impact on costs, and the possibility of costs sanctions if the protocol is not followed.
2. Notwithstanding the provisions of the pre-application protocol para 3.5, it is recognised that where alternative methods of dispute resolution are being utilised (eg mediation or collaborative law), or where the circumstances of the case are particularly complicated, more disclosure than that required by Form E may be appropriate.
3. It is also recognised that in some circumstances it will be prudent to issue proceedings immediately, rather than pursue voluntary disclosure under the pre-application protocol (for example where there may be a forum dispute).

4.2 Ancillary relief procedure

Once ancillary relief proceedings have been issued, the timing and extent of disclosure is regulated by the court in accordance with the Family Proceedings Rules 1991, as amended by the Family Proceedings (Amendment No 2) Rules 1999 (SI 1999/3491) (and further amended by SI 2000/2267 and SI 2000/2922).

Disclosure is initially restricted to completing Form E five weeks prior to the first appointment. Two weeks before the first appointment the documents specified in r2.61B(7) must be filed with the court and served on the other party, to include a statement of concise issues and a questionnaire/request for information and documents that must be referable to the statement of issues.

At the first appointment the district judge must determine the extent of the questions to be answered and decide what further documents are to be produced (r2.61D(2)(a)). After the first appointment neither party is entitled to the production of further documents except by permission of the court (r2.61D(3), but see further paragraph 5 below). At any stage either party may apply for further directions (r2.61D(4)). It may be appropriate to seek a direction for the filing of narrative affidavits (see *W v W (Ancillary relief: practice)* [2000] Fam Law 473), or to apply for an inspection appointment in relation to documents in the possession of a third party (r2.62(7), see also RSC Ord 38 rr13 and 14).

Oral evidence may also be given at an interlocutory appointment (see *OS v DS (Oral disclosure: preliminary hearing)* at 2.3 above).

One must always have regard to the 'overriding objective' of the procedure (see paragraph 2.1 above).

4.3 The timing of ongoing disclosure

There is an obligation to disclose developments on an ongoing basis, without being asked. *Livesey v Jenkins* (para 2.1 above) decided that there was an obligation on the wife to disclose her engagement immediately. Reference is also made in the pre-application protocol.

The documents and information that must be disclosed during the proceedings are those which add materially to the overall picture, or alter disclosure already given, or are such as might reasonably affect the negotiating position or the exercise of the statutory discretion.

Failure to update disclosure could result in costs orders or adverse inferences being drawn.

After the proceedings are concluded, and where there is an enquiry made about a subsequent change of circumstances, there is probably an obligation to provide sufficient information to enable that enquiry to be evaluated, especially where there is a substantial joint lives periodical payments order (*Den Heyer v Newby* [2005] EWCA Civ 1311).

Good practice

1. Clients should be reminded of their ongoing duty of disclosure at every relevant stage of the retainer and specifically advised to notify their lawyer of any material changes in their disclosure, as soon as practicable.
2. Early disclosure will usually reduce the possibility of mistrust, save costs and expedite consideration of terms of settlement.
3. Clients should be advised that producing information at the last moment, including updating or varying disclosure, may lead to an adjournment and/or a penalty of costs. Sanctions may also be imposed on their legal advisers in some circumstances.

5. Privilege and disclosure

5.1 The law of privilege

Privileged communications are generally protected from disclosure in evidence in any civil proceedings. The law of privilege is complex. First, solicitor/client privilege covers communications between a party and their legal advisers and with third parties in the preparation and conduct of the case and regarding the litigation. Secondly, there is the privilege that attaches in specifically defined instances to correspondence and discussions between the parties and their advisers regarding compromise of any litigation. Thirdly, there is privilege against self-incrimination. Quite different legal principles can apply to these forms of privilege.

The basic rule of evidence is that communications between parties to a dispute that are written or made with the aim of genuinely attempting to settle that dispute cannot usually be admitted in evidence, whether in the same or subsequent litigation connected with the subject-matter and

irrespective of whether a settlement is reached or not (*Instance v Denny Bros Printing Ltd* (2000) *The Times*, 28 February, ChD, *Rush v Tomkins* [1989] 1 AC 1280). However, any admission or statement of existing facts, or a statement of the strength of a party's case, is not privileged and can be referred to at any hearing, even if marked 'without prejudice' (*Buckinghamshire County Council v Moran* [1990] Ch 623, CA). So, simply marking a letter as 'without prejudice' or 'without prejudice save as to costs' does not protect factual disclosure from being treated as open.

The client should be told that there is privilege against self-incrimination, but made aware that the court may draw inferences as a result.

Any further consideration of this complex issue is beyond the scope of this guide.

Good practice

1. Facts should not be disclosed in 'without prejudice' correspondence. There should be an open letter containing the disclosed information and a separate letter making any privileged proposals. Please refer to the Guide to Good Practice on Correspondence.
2. Where factual information is given in another lawyer's privileged letter that lawyer should be invited to repeat it in an open letter or be informed that otherwise the letter will be redacted (ie edited) to delete the privileged information so that it may be used in evidence. If necessary the issue will need to be adjudicated on at an interlocutory hearing or as a preliminary issue.
3. Great care must be exercised in using privilege correctly.
4. The issue of privilege and confidentiality is a complex one of law, procedure and ethics. Reference should be made to the Solicitors' Code of Conduct and in particular the guidance to rule 4.02. Assistance may be sought from the Solicitors Regulation Authority Professional Ethics Helpline.
5. The opportunity to use privileged communications between parties to litigation should encourage attempts to settle and should be fully utilised by lawyers on behalf of clients. The *President's Direction on Ancillary Relief Procedure of 25 May 2000* [2000] 1 FLR 997 states that the court expects parties to make offers and proposals and to give them proper consideration at the FDR appointment. There is a duty to negotiate, but it is necessary for there to have been proper disclosure before offers can be made (see Butler-Sloss LJ (as she then was) in *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 233).
6. Evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence at the final hearing, except in the very exceptional circumstances indicated in *Re D (Minors) (Conciliation: disclosure of information)* [1993] Fam 231, sub nom *Re D (Minors) (Conciliation: privilege)* [1993] 1 FLR 932 (para 3.2 President's Direction of 25 May 2000). See also *Myerson v Myerson* [2008] EWCA Civ 1376, on the issue of whether the FDR judge can hear a subsequent variation application.
7. Solicitors must always advise their clients to ensure that full and frank disclosure is made, should advise of the consequences of any failure to do so both in terms of potential civil and criminal liability, and should confirm the position in writing.
8. Clients should be advised to keep their own documents in a safe place at all times, particularly if they continue to share a property with the other party.

9. Caution should be exercised when communicating with clients and other lawyers by email.
10. It is good practice to consider the use of a separate correspondence address with a client, a password-protected email address or possibly the use of a post office box, to avoid the risk of information coming into the possession of the other party.

5.2 Fraud by failure to disclose information

The situation is complicated by the introduction of the criminal offence of fraud by failing to disclose information (s3 Fraud Act 2006). The offence is committed where there is a failure to comply with a legal duty to disclose, with the intention to make a gain or cause a loss, and the defendant realises that the failure is dishonest by the ordinary standards of reasonable and honest people. The privilege against self-incrimination is excluded by s13(1), but s13(2) makes any statement or admission by a person inadmissible in proceedings under the Fraud Act 2006 against them or their spouse or civil partner.

5.3 The misdirection of privileged communications and other privileged documents

The misdirection of privileged communications/documents can result in two different situations arising.

First the client may obtain privileged communications. Where a client tells their lawyer that they have obtained lawyer/client privileged communications, belonging to their spouse/the other client, the lawyer should tell the client that they do not want to know about the document or its contents and, further, tell the client not to read it, and to replace it, destroy it if it was only a copy, or send it to the lawyer to forward on unread. Acting in this way prevents the lawyer coming into conflict with the client.

Where a lawyer receives information or documents from their client and realises that what they have received is privileged, the lawyer should not read the information/document. The information/document must be returned to the client. The lawyer must also tell the client that they must forward them directly to the other lawyer. The client should be advised to disclose that they have obtained, and have read, privileged documents.

A conflict between lawyer and client only arises if the lawyer reads privileged documents and the client does not read them, or does not know about their contents. It does not arise if the client reads privileged documents and the lawyer does not know the contents of those documents.

Secondly, privileged communications may be wrongly sent to the other lawyer. In this situation, the lawyer should not read the letter or document and is not required to disclose the existence of the document to the client (see paragraph 21 of the guidance to rule 4.02 of the Solicitors' Code of Conduct). If a lawyer knows immediately that it was sent to them by mistake, they should stop reading.

If the lawyer reads a material part of the document/communication, realises that it was not meant for him/her but has to concede that the information already read could be very useful to their client, they are under a duty to discuss the implications with their client. The lawyer must tell the client that the lawyer has a duty immediately to notify the other side that they have received this document by mistake and explain to the client the likelihood of the other side obtaining an injunction concerning the document, the costs implications, and/or the case being more likely to go to court.

In *Ablitt v Mills & Reeve* (1995) *The Times*, 25 October, Blackburne J made an injunction restraining solicitors from continuing to act for a party in civil litigation where they mistakenly received privileged

documents sent to them by the other side's counsel's clerk and which on direct client instructions they had read. The judge said it offended elementary notions of justice if one party, having knowingly taken advantage of such a mistake, could nevertheless continue to have the services of advisers who now had an accurate view of the other side's adviser's views on the merits.

6. Disclosure and the Proceeds of Crime Act 2002 (POCA)

In certain circumstances, the lawyer will have a duty to disclose aspects of the client's position to the National Criminal Intelligence Service and this duty can override the lawyer's duty of confidentiality to the client. This is a complex area and guidance should be sought from the Solicitors Regulation Authority and from the Resolution website.

7. The legal limitations to self-help in obtaining disclosure

This area of law would require a large textbook to be covered comprehensively. What follows is a summary of the main issues that practitioners need to be aware of.

Most people in their personal, private family lives do not expect the legal system and legal wrongs (civil or criminal) to play a part. However, when family relationships break down, recourse to the legal system may become necessary. The courts have to grapple with personal private behaviour when it crosses the threshold into the legal arena. Disclosure, being fundamentally about access to data (in all its forms), is one of the issues defining that threshold. Inevitably there is a grey area in which it is difficult to predict the impact of particular behaviour.

Consideration needs to be given to when the ability to access data in a private household becomes a civil wrong or criminal offence, and how to establish when this transition will or has occurred. It has been suggested by some commentators that there has been, or will be, a shift from the focus on whether documents have been obtained by force (see *T v T (Interception of documents)* [1994] 2 FLR 1083) to a focus on whether one party had the implied or actual permission of the other to access the data. Alternatively, the approach may become one firmly based on the strict application of legal principle, so that perhaps self-help is only legally permissible when a potential civil wrong or criminal act will not result.

There appears to be a difference in the interpretation of the law in this area between some non-Family Division judges, who are more inclined to an approach based on the strict interpretation of legal principle, and some Family Division judges with a more purposive approach. It seems likely that this difference may continue for some time as the law develops to embrace new technological changes.

All this makes for real ethical and legal difficulties faced by clients and lawyers when the prospect of self-help arises or has been used in obtaining disclosure. Justice cannot be done without a significant degree of disclosure. The court may not condemn self-help if it can be justified. There may be exceptional cases where it is the only route, or certainly by far the quickest/cheapest route, to obtain satisfactory disclosure. Alternatively, self-help may result in other civil or criminal proceedings.

The client must be advised about the current uncertainties in this area, and the lawyer must keep an eye on the developing jurisprudence in the area of privacy law (both under the Human Rights Act 1988

and the old law of confidence) and in the context of statutory authority such as the Data Protection Act 1998 (DPA), Computer Misuse Act 1990 (CMA), Regulation of Investigatory Powers Act 2000 (RIPA) and Copyright Designs and Patents Act 1988 (CPDA). Statutes may impose civil or criminal sanctions for breach, and may also result in a possible action in tort for breach of statutory duty. Other actions in tort or for breach of contract may also be possible.

Good practice

1. Most importantly clients should be advised to consider the practical and procedural consequences of self-help including that it may:
 - raise tension and hostility between the parties,
 - encourage vindictive and/or corresponding action by the other party,
 - increase costs,
 - have an adverse effect on children,
 - result in an order for costs, and
 - make settlement much less likely.
2. Pragmatism and common sense in this area are commended, but practitioners should be aware, and make their clients aware, of the potential risks of self-help solutions, especially in cases which are particularly contentious and likely to be litigious. Clients should be advised that civil or criminal proceedings may follow as a result of self-help.
3. In appropriate cases clients should be advised of the court's powers to make search (Anton Piller) orders (now statutorily defined and incorporated in CPR Pt25.1(h), see also s37 Supreme Court Act 1981) and preservation orders (in ancillary relief proceedings the old RSC Ord 29 r2/ CCR Ord 13 r7 apply, but the power is also incorporated into the CPR Pt 25.1(1)(c)(i)). It is recognised, however, that cases where such action is appropriate are likely to be far fewer than those in which there are real concerns about non-disclosure. Whether the CPR or RSC/CCR apply will depend on whether there are existing family (ancillary relief) proceedings or not. An application under s37 Matrimonial Causes Act 1973 may also be a possibility.

7.1 When can self-help be justified?

The current position appears still to be as set out by Wilson J (as he then was) at [1994] Fam Law 506, when he said 'We would extend this beyond simple photocopying to other lawful action without force. But the burden of showing the justification is wholly on the person taking the action and it is a relatively heavy one, proportionate to the severity of self-help action taken. My feeling is that if the wife gives an account of her husband, which includes any past financial dishonesty, whether to herself or to a third party, or accounts any threat or statement by him such as reasonably leads to the conclusion that he is not likely within the divorce proceedings to give a full account of his financial position, it is permissible to advise her to take photocopies of such documents as she can obtain without the use of force.'

7.2 What action can be justified?

In *T v T (Interception of documents)* [1994] 2 FLR 1083, Wilson J did not condemn taking photocopies of such of the husband's documents that the wife could locate without force and by scouring the

dustbin. He did condemn using force to obtain documents. Lawyers should refer to the guidance he gave in that case.

A degree of caution should be exercised.

Certainly the use of private detective agencies cannot be recommended save in exceptional circumstances. In *R v Waters* [2007] EWCA Crim 222 the applicant (for leave to appeal against sentence) had been convicted of conspiracy to cause unauthorised modification of computer material, and sentenced to four months' imprisonment and ordered to pay £6,500 towards the prosecution's costs. He employed a private detective agency to install spying software on his wife's computer at their business premises. It enabled access to her on-line banking arrangements, her bank account and to documents relating to the divorce over the course of almost 11 months. Nothing of significance came to light and the wife did not suffer any financial loss as a result of this action. Leave to appeal was refused.

In *L v L and H* [2007] EWHC 140 (QBD) the husband applied successfully for delivery up of copies of the hard drive of his laptop obtained by a computer expert instructed by his wife. Tugendhat J found that the husband had established an arguable case that the laptop contained confidential information, including documents protected by legal professional privilege. He also declined to transfer the matter to the Family Division and pointed out that the previously reported ancillary relief cases on these issues had not considered the potentially wider legal implications of such self-help. He did not appear to consider that cases involving personal family relationships should be treated any differently than mainstream civil disputes. It remains to be seen whether and how the different approaches in the Family and Queens Bench Divisions of the High Court will be reconciled.

7.3 The timing of the return of documents obtained by self-help

Wilson J said at [1994] Fam Law 506 that his view was that (justifiably taken) copies 'are discoverable documents which should logically be disclosed at, but only at, discovery stage or earlier if the husband's solicitor so requests'. He indicated that such documents could be withheld until after the husband had made his disclosure (now, under the current procedure in Form E), but should be disclosed when delivering questionnaires (or when an earlier request is made for their return), or immediately if obtained later. In *T v T* (above), he said the wife's conduct in failing to reveal her possession of original and copy documents until late in the proceedings was unacceptable.

Good practice

1. Clients must be made aware that all documents obtained by self-help will have to be disclosed to the other party. Whilst it is usually appropriate for copies of relevant documents to be retained by lawyers, clients should be told that the lawyer will:
 - (a) serve a list of the documents retained by them on the other party, and
 - (b) return the originals to the other party promptly.
2. Furthermore, clients should be warned that there is a risk that the source of the documents may need to be disclosed, together with the location from where they were taken/obtained. The law is uncertain whether there is a duty to disclose the provenance of documents, and it is good practice to err on the side of caution and warn clients accordingly, as it may affect third parties.
3. Lawyers must retain their objectivity, professional judgment and a sense of proportionality. Self-help situations can be dramatic and can result in lawyers overlooking the complex issues of professional conduct and potential illegality that arise in this area.

4. If documents obtained through self-help are irrelevant or privileged, the other party is entitled not only to an order for the return of the documents, but also to injunctive relief preventing the unauthorised use of copy documents, or information contained within the documents. Lawyers should warn their clients that they could be subject to costs orders, suffer damage to their credibility and even risk contempt of court (depending on the facts) if irrelevant/privileged documents are obtained.
5. If an enquiry agency or private detective agency is instructed, that instruction should require any information to have been obtained legally and should require the agency to act at all times within the law. In particular the instruction should require the agency not to breach s55 of the DPA, under which a criminal offence is committed when a person knowingly or recklessly obtains or discloses personal data, or the information contained within such data, or procures the disclosure of such information to another person without the consent of the data controller.
6. As a matter of good practice, lawyers should ensure that the above guidance is given to all clients in all circumstances, whether or not proceedings have been issued.

7.4 Intercepting mail

Intercepting mail addressed to another may be a criminal offence (s84 Postal Services Act 2000, see also s1 RIPA).

Both opening another's post and/or not returning it to the addressee are disapproved of by the courts and may result in a sanction on costs (*T v T* above).

7.5 Telephone tapping/interceptions

Telephone tapping of a public telephone may be a criminal offence (s1 RIPA).

Although it is not a criminal offence under the RIPA for someone to record their private telephone line (if they have the right to control the operation or use of the system, s1(6)), there may be issues arising under the HRA. In addition, the secret taping of a private telephone conversation is potentially a breach of confidence and may be restrained by injunction (*D v L* [2003] EWCA Civ 1169).

Courts are often highly critical of parties who introduce telephone tapping evidence and clients should be positively discouraged from doing so.

Before taping telephone conversations between lawyers, the other lawyer should be warned that the conversation is going to be recorded. In a family law case, there is unlikely to be any justification for secretly taping a telephone conversation with another lawyer.

7.6 Computers/mobile phones

There has been a distinction drawn in case law between accessing information belonging to another without force (such as reading another's text messages/emails if one already has knowledge of a password or copying a hard drive) and accessing information by force (including hacking into a computer). See further *L v L and H* at paragraph 7.2 above.

In all cases, clients should be warned that their actions may result in separately actionable civil wrongs, or criminal proceedings. Injunctive relief could result.

The law is developing rapidly in this area, although it is probably still being outpaced by the technological advances of everyday life.

7.7 Entrapment

Entrapment is chiefly where a question is asked to which an answer is already known but which is intended to test the truthfulness of the person giving the answer. *Hildebrand v Hildebrand* [1992] 1 FLR 244 concerned an application by the husband to require the wife to answer a questionnaire to which she objected on the basis that the husband had by self-help obtained documents which enabled him to know and reveal the truthfulness or otherwise of answers to some of the questions.

The High Court held that the essence of the questionnaire procedure (and, by extension, the disclosure process) was a genuine enquiry in ignorance of true and complete facts. Where the requested documents or answers were already held/known, it would be oppressive to order replies.

Good practice

1. If a client has evidence of the other party having an asset in their possession that they have not disclosed, the non-disclosure should be raised in a questionnaire.
2. It is not good practice simply to ask the client if they have any assets.
3. It is good practice to state that the client is aware of a specific asset (and to identify it) and ask if there are any more that have not been disclosed.

7.8 Multiplicity of actions

As referred to above, there are a multitude of possible common law and statutory civil or criminal actions which could result from self-help.

Although there may be other causes of action for damages or civil remedies, the family court discourages a multiplicity of actions (see *Rossi v Rossi* [2006] EWHC 1482). The family court's discretion is wide enough to encompass such other remedies. Additional proceedings can increase costs, the amount of court documents and cause delay, yet not vary the final outcome.

There is nothing to prevent a separate civil action being taken and then consolidated with the family law proceedings. However the outcome of the 'separate action' will be in the context of the overall ancillary relief settlement and judicial criticism is likely. There may be costs consequences.

Where actions involve third parties, even those who are not members of the parties' family, there may still be a consolidation with the family proceedings. This includes cases where the connection with the divorce seems slight but the court may wish to avoid a multiplicity of actions and issues. Alternatively, or additionally, relevant third parties should be joined as parties to the ancillary relief proceedings at the earliest opportunity (*TL v ML and others (Ancillary relief: claim against assets of extended family)* [2006] 1 FLR 1263, see also *A v A* [2007] EWHC 99, Munby J). A dispute with a third party must be approached as if it were being determined in the Chancery Division (see *TL v ML* (2006), above)

8. Duty to disclose all relevant information to the client

Rule 4.02 of the Solicitors Regulation Authority's Solicitors' Code of Conduct provides: 'You must disclose to a client all information of which you are aware which is material to that client's matter regardless of the sources of the information, subject to... [specified exceptions].'

'Information which is material' is not defined, but the guidance to rule 4.02 states that it must be information which is relevant to the specific retainer with the client and not just information which might be of general interest to the client. For more information, consult the Code of Conduct.

Good practice

1. It is undesirable and unwise for a lawyer to pass onto another lawyer information that they do not want to be disclosed to the other lawyer's client. It is a breach of the Solicitors' Code of Conduct to accept/receive confidential information from the other lawyer and not disclose it to the client unless one of the exceptions within rule 4.02 applies (for example that the disclosure may be harmful to the client because of the client's physical or mental condition, or because the provisions in the money laundering legislation prohibit the disclosure). Some lawyers adopt the practice of having 'off the record' conversations with their counterparts. It is good practice to refuse to have such a conversation, in order to comply with the above rule.
2. When disclosing information to the client or to another person connected with a case, a lawyer must be certain that no offence is committed pursuant to POCA. If the lawyer is uncertain about the information that can be communicated, advice can be sought from the Solicitors Regulation Authority Professional Ethics helpline. Guidance can also be sought from the Solicitors Regulation Authority and Resolution websites.

9. Confidentiality

- 9.1 The issue of transparency has been the subject of ongoing review by the Ministry of Justice, and resulted in the publication of a post-consultation report, 'Family Justice in View' in December 2008 (www.justice.gov.uk/publications/cp1007.htm).
- 9.2 The Ministry of Justice review generated the Family Proceedings (Amendment) (No 2) Rules 2009 (SI 2009/857), permitting duly accredited representatives of news gathering and reporting organisations (ie those who have UK Press Card authorisation) into 'private' proceedings from 27 April 2009. In addition, pilots are underway in relation to making anonymised judgments more widely available, and the law is to be changed to produce a consistent set of reporting restrictions. The impact of these changes remains to be seen.
- 9.3 The fact that the media is allowed to attend a hearing does not currently mean they have the right to see documents that would otherwise be private and does not override the provisions of the statutes that are relevant to the publication of family proceedings (eg s12 Administration of Justice Act 1960 and s97 Children Act 1989). Reporting is expected to be general in nature, commenting on 'the processes involved and the principles by which decisions are made' (foreword of 'Family Justice in View').
- 9.4 Ancillary relief proceedings in chambers are still held 'in private' unless the court otherwise directs (*Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 FLR 565). The implied undertaking of confidentiality prevents either party from using information or documents that come to light in ancillary relief proceedings elsewhere.

Good practice

1. It is good practice to remind clients of the need for confidentiality at all times, both before, during and after proceedings.
2. It is unclear whether the implied duty of confidentiality extends to information obtained prior to the issue of ancillary relief proceedings, but as a matter of good practice, lawyers should advise their clients that the same principles do apply, particularly given the developing privacy laws (under the HRA and confidence laws). Disclosure of personal information might also result in other potential civil/criminal actions.
3. If specific confidential information, particularly affecting third parties or of a market-sensitive nature, is requested, it is good practice to ask the requesting party to sign an agreement confirming that the information sought will remain confidential and will not be disclosed.

10. When should the lawyer decline to act?

In certain circumstances of non- or misleading disclosure, the lawyer should not continue to act.

If the client refuses to disclose anything at all, the lawyer must advise them of the costs sanctions and the risk of inferences being made by the court. However, the lawyer can continue to act, provided they are not privy to any information that is not disclosed or is misleadingly disclosed.

If the client says that they have an asset, but gives instructions for the lawyer not to disclose, the lawyer cannot continue to act. The solicitor would be in breach of their duty to the court not to mislead it, and could also commit the offence of conspiracy to defraud, which survives the Fraud Act 2006, or fraud by failing to disclose information under s3 FA (see further paragraph 7 above).

If, after initial disclosure, the client admits to the existence of additional assets and disclosure is then given, the lawyer can continue to act. If the client refuses to disclose, the lawyer cannot continue to act.

A solicitor must never compromise their professional integrity or their duty as an officer of the court.

See further the Solicitors' Code of Conduct.

Note

1. This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional conduct.
2. Good practice guidance can inevitably only deal with the generality of situations. It cannot be an absolute rule. The special facts of any particular case may justify and/or require a lawyer to depart from these guidelines.
3. Resolution's view is that this guidance applies to all family law cases for the better conduct and approach to resolution of family breakdown issues, and not just to cases between Resolution members.

Guide to Good Practice on Service in the Family Law Context

1. Introduction

The Resolution Code of Practice and the ethos behind it require that family lawyers should pay particular attention to the sensitivities surrounding service of documents. They should consider carefully when, where and by whom service should take place and the possible effects such choices could have on the other party and the constructive and non-confrontational handling of the case.

2. Timing

2.1. *Service, personal or on a legal representative, should take place as soon after issue as is possible and reasonable.*

Delaying service until much nearer the hearing date, thus giving the recipient reduced time to prepare, is bad practice unless justified because: (a) there is a reasonable ongoing attempt/opportunity to settle an issue without thereby increasing costs or emotional temperature; or (b) there are other proceedings or similar action justifying delayed service.

2.2 *Personal service should preferably not be at a time when the recipient's opportunity to seek early legal advice is limited, eg Saturdays, the immediate pre-Christmas period, Bank Holidays or religious festivals. If deadlines for response have to be given, then adequate time for obtaining legal advice, information or copy documents should be allowed between the date of service and the deadline irrespective of any procedural rules. If there is a delay between a letter being dictated and its being sent out, then the deadline should be adjusted accordingly.*

2.3 *The client should be consulted about whether they are aware of particular times when it would be insensitive or unhelpful to arrange service, eg birthdays or anniversaries.*

3. Prior warning

3.1. *Originating process can be served in all circumstances on legal representatives duly instructed. It is good practice to send a letter before issuing proceedings and/or service unless there is a good reason not to do so. The burden is on the issuing party to justify a lack of prior notification and/or attempts to serve via lawyers.*

3.2 *Consider whether the recipient should only be made aware of the summons/without notice order on point of personal service. This could be appropriate when there is the likelihood of evasion of service, potential proceedings in another jurisdiction, injunctive relief, the risk of violence or without notice applications.*

- 3.3 *Write to an unrepresented recipient advising them of the entitlement to, and the benefit of seeking, legal advice.* This could include suggesting that the recipient instruct a lawyer to accept service and/or to arrange personal service. See the Resolution Guide to Good Practice on dealing with Litigants in Person.
- 3.4 *Write to the recipient's legal representative in order to advise of the intention to commence proceedings, or that proceedings have been commenced, and in order to enquire whether the lawyer will be instructed to accept service.* It is not good practice to attempt to issue proceedings first on receipt of such an enquiry, unless there is a good reason for doing so. Again, the burden will be on the issuing party to justify such action. The client should be warned of the court's disapproval, the possible costs implications and the impact of such action on the rest of the case.
- 3.5 *If there is to be personal service on a represented party, his/her legal representative should be informed that the serving lawyer would like to serve as inoffensively as possible with the least embarrassment to the recipient.* The serving lawyer should enquire whether the recipient will nominate a reasonable time and place in the next few days, as appropriate, for the service to take place, perhaps even at the recipient's lawyer's own office. If so, an enquiry agent or a member of the lawyer's firm or even the recipient's own legal representative should be instructed to attend for personal service.

4. Use of process servers

- 4.1 *Will enquiry agents/process servers be instructed?* Beware of the use of non-professionals for use in service in view of the risks of violence and sensitivity in the family context; especially avoid service by other family members save in exceptional circumstances. A party to family proceedings should not serve another party.
- 4.2 *It is good practice to ensure that the enquiry agent/process server is aware (as good, experienced ones already are) of the sensitivities of service in the family/children context.* The serving lawyer should consider sending him/her a copy of this good practice guidance. He/she should be instructed as to the preferred circumstances of service, rather than leaving it entirely to their discretion: the lawyer may be responsible for the process server's actions and will certainly have to deal with any consequences. It is vital that the process server is warned of any likelihood of violence from the recipient, that he/she may try to flee, or involve the children etc. Also, a photo or other good description should be provided – disputes on identity are the most common issues on service.
- 4.3 *The process server should be given a covering letter, addressed to the recipient (whether or not she/he is legally represented), which lists the documents being served, stating their urgency, the importance of taking legal advice on them and incorporating word for word the 'contempt' warning from the court order if applicable.* Care is needed to ensure that the tone/balance is correct and that there is no misrepresentation of the effect or content of the orders.

5. Venue for service

- 5.1 *Service must not take place at a time of contact with, or in the vicinity of, the children unless there is no reasonable prospect of service at any other time or place. Inevitably, it will be upsetting, distressing and bewildering for the children, could result in emotional outbursts and is likely to create yet further tensions and disputes. It is the service of last resort.*
- 5.2 *The cost, speed and convenience of easy locations for service should be balanced against the high likelihood of embarrassment and offence if service occurs at a place of employment, religious meeting place or social gathering. The impact of the circumstances of service on the rest of the case and on family relationships generally should be taken into account.*

6. After service

- 6.1 *If the recipient is legally represented, it is good practice to send to their lawyer immediately after personal service, by fax, email or certainly overnight, a copy of the documents served on the recipient, or the most urgent documents if they are bulky, so that they can quickly advise the recipient of the meaning of the contents. Failure to do so may lead the recipient and their lawyer to wrong conclusions about the proceedings taken, thus resulting in unnecessary costs and preparation, or inappropriate responses.*

Note:

1. This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional practice.
2. Good practice guidance can, inevitably, only deal with the generality of situations. It cannot be an absolute rule. The special facts of any particular case may justify and/or require a lawyer departing from these guidelines.
3. This guidance applies to all family law cases for the better conduct and approach to resolving family breakdown issues and not just to cases between Resolution members.
4. This guidance is endorsed by the two leading associations of private investigators, the Association of British Investigators (www.theabi.org.uk) and the Institute of Professional Investigators (www.ipi.org.uk).

