This Guidance was revised in September 2016. The law or procedure may have changed since that time and members should check the up-to-date position.
Guide to Good Practice on Correspondence

‘The pen is mightier than the sword’
George Bernard Shaw

Introduction

Written correspondence, such as emails or letters, is the main method of communication in family disputes. The impact of letters and emails can be significant; therefore, consider who the recipient is and what you hope to achieve with the communication.

The Resolution Code of Practice should always be at the forefront of your mind when drafting communication. In order to comply with the Code, correspondence should be:

- constructive, informative and effective
- without emotive or inflammatory language
- easily understandable, without jargon or complicated language.

Firing off letters without sufficient thought can be counterproductive to your client’s case and damage your reputation. Most complaints to Resolution are about the content of letters.

Although this Guide is about correspondence, similar consideration should be given to the drafting of statements or questionnaires.

The use of emotive and inflammatory language will antagonise the recipient and damage the relationship between the parties. This needs to be avoided, particularly when children are involved. Drafted well, correspondence can reduce conflict and help to achieve an early settlement.

In extreme cases the court can deem the correspondence to be unreasonably hostile and inflammatory and amount to litigation misconduct, leading to costs penalties for your client, or you.

In the case of F v F [1996] 1 FLR 833 Holman J condemned the first letter written on behalf of the husband, which set the tone for all that followed in a very adversarial case. He commended the initial letter written on behalf of the wife and quoted it in full in his judgment.
Aims of correspondence

There should be a purpose for all letters. They should be constructive in moving the matter forward and take into account the interests of the client and the family as a whole. They should be limited to:

- addressing or safeguarding the children’s needs
- giving or obtaining reasonable disclosure
- identifying and resolving issues
- advancing the proceedings
- recording issues of conduct or fact, which could be material to the court if there is a final hearing.

Recipients

Communication with lawyers may be worded differently to communication with clients or the unrepresented other party. However, similar principles are relevant to all correspondence. Always avoid referring to ‘our client’ and ‘your client’ or ‘the opponent’. Use the couples’ names; for example, ‘Mr and Mrs Smith’ or ‘John and Jane’.

Writing to clients

Your client needs to know what the current position is, what issues still need to be resolved and the way forward. If the correspondence from the other party is written in such a way that it is likely to upset or antagonise your client, you should refrain from sending a copy of the letter and, instead, summarise the relevant points to your client.

Your client will still have sufficient information to make a decision about how to proceed without being distracted by the emotive language from the other party. When under attack the instinct is to run and hide, or to fight back. Therefore, your client is likely to react to an antagonistic letter by feeling unable to deal with it and failing to provide instructions, or wanting to send an angry letter back. Neither is conducive to reaching a resolution.

Writing to another lawyer

Communication with a lawyer can sometimes be more succinct and written in more technical language than a letter setting out similar information to an unrepresented person. However, bear in mind that the other lawyer may simply forward the letter to their client.
Full reasoning needs to be given for proposals or requests for documents and information, so that the lawyer and their client can see why the proposals or requests are being made. It makes it less likely that the letter will be ignored or rejected without full consideration.

Writing to an unrepresented person

Communication with an unrepresented person needs to be easy to understand and clearly reasoned. It is usually preferable to also provide information about what they need to do in response or the next steps in proceedings, so they know what is expected of them. However, care needs to be taken to avoid unwittingly giving them advice.

If you receive inflammatory correspondence from the other person, always respond in a courteous manner. Unrepresented people may be particularly defensive and appear rude and offensive in their communications. Engaging in contentious correspondence is likely to inflame the matter further and will not be helpful or beneficial to your client, especially if it is read by the court.

Please also see the Guide to Good Practice for Family Lawyers on Working with Litigants in Person.

Practical considerations

Domestic abuse cases

Letters sent to the other party containing allegations of incidents of abuse do have to be firm, factual and make clear the consequences of continuing with the alleged conduct. They do not have to use inflammatory language.

Please also see the Guide to Good Practice in Domestic Abuse Cases.

Client instructions

Clients may give instructions to write a letter in a way that is not in accordance with the Code of Practice. The instructions cannot be ignored, but the effects of such correspondence and the benefits of adhering to the Code of Practice should be pointed out.

Conflicts between you and your client about the way their case is run may be avoided by making your client aware of what being a Resolution member means at the first meeting.

If they want a different approach to their case they have the opportunity of instructing someone else from the outset. You may then refer back to that conversation if difficulties arise.
If possible, before sending out any such correspondence, try to give your client time to reflect, so that correspondence is not sent in the heat of the moment.

Please also see the Guide to Good Practice on Working with Clients.

Client’s approval of correspondence

Your client is better placed to know how the other person will react to a letter and therefore it is always preferable for them to approve an initial letter. It is also recommended that any communication to the other person or their lawyer setting out proposals or issues should be approved by your client first. This ensures that your client has given authority for the letter to be sent and can point out anything that might be misinterpreted.

Timing of communication

Think about the timing of a letter. Avoid sending letters that relate to sensitive matters at times that may prove particularly unsettling; for example, anniversaries, birthdays, during holidays or at the time of children’s exams. The timing of sending a draft petition or reference to the issue of any proceedings is particularly important. Try to avoid sending any such communication to an unrepresented party that will arrive when they will not be able to take advice, such as late on a Friday afternoon.

If a matter is urgent, a telephone call should be considered in preference to a letter especially where child arrangements are involved. If this isn’t possible, then we recommend that you provide an explanation in the letter about why the letter was necessary and urgent, and address how the issue may be resolved prior to the weekend, if required.

Arrangements for children

Children arrangements should not be referred to in letters about the financial arrangements. The issues should be kept separate and there should be no suggestion that the children are being used as bargaining tools.

Correspondence in proceedings

Bear in mind that any correspondence, by letter or email, to the other lawyer or party may be disclosed to the court by you or the other party. Even ‘without prejudice’ correspondence can be disclosed if privilege is waived by both parties.

Without prejudice correspondence

Privileged correspondence is written to reach a compromise without making any open admissions on behalf of the client.

Care should be taken to ensure that any letters marked ‘without prejudice’ should be limited purely to this. Adding ‘without prejudice’ does not automatically make a letter
privileged. Nor does failing to mark a letter ‘without prejudice’ automatically make it an open communication.

Factual matters of disclosure on which the other person may wish to rely in making a decision will not be privileged and should be set out in open correspondence.

Avoid combining open and privileged information in one letter.

Email

Email is a very quick and useful way of communicating, but there are pitfalls. There isn’t a time lapse from composing the communication to sending it in the same way as there is with a letter and therefore there is no time to reconsider the contents.

If communicating with anyone other than your client, we recommend that the letters are sent in PDF format rather than Word format so that changes cannot be made easily by the recipient, either intentionally or accidentally.

We also recommend that you send important letters containing advice to your client in PDF format.

When sending any communication by email it is advisable to pause and consider carefully before sending:

- Is the email address correct?
- Is it spelt correctly?
- Do you have your client’s instructions to send it?
- Is it advisable to send communication in those terms at that time?

Once the email has been sent, it cannot be withdrawn or cancelled.

We recommend that each email is sent as a new message and not as a reply. This avoids long chains of emails. With a chain of email conversation there is a risk that someone else will be copied into the email at a later stage and will have access to the whole email conversation, which may not have been intended.

By delaying responding to an email (unless of course the enquiry is urgent) you can avoid an email conversation or a flurry of emails.

It will also give you time to consider your response and call your client if more information is needed before you respond. If you do reply immediately without all the information, the communication may continue throughout the day and distract you from dealing with other matters.

Just because one lawyer prefers to communicate routinely by email or fax does not mean that the other lawyer has to do likewise, and an immediate response to an email or fax should not be expected unless the matter is urgent.
When sending draft documents use track changes, or similar, to show any changes made. Care should be taken to ensure that the latest version of a document is used and save each version so there is a record of the original draft and amendments made by all. If sending a draft to the other party, ensure any past changes made by your client cannot be seen by the other party. You may want to keep separate working drafts to use with your client and the other party.

Examples of bad correspondence

The following are some examples to avoid when drafting letters and emails.

Getting personal, for example, ‘we think’ or ‘you are’. The letters should always convey your client’s views and not yours. The other lawyer is not the other party, their client is.

Questioning professionalism or expertise. For example, ‘There was no need for the document to be sent, we put this down to the inexperience of the person dealing with the matter’; or ‘... you are incurring costs needlessly.’ Such words can undermine the other party’s confidence in their lawyer and that is unprofessional and unhelpful. It will not encourage the parties to adopt a conciliatory approach.

Acting as a messenger, by forwarding a copy of your client’s letter in response to issues raised or repeating them verbatim, if the client’s comments are at all emotive.

Inflamatory text. For example, underlining or highlighting words in bold, which give the impression of issuing commands, or using inverted commas around a phrase to suggest that the other person may not be telling the truth.

Inflamatory language. For example, referring to winning or losing, which suggest being involved in a battle. Also making allegations or comments purely to satisfy the client, which will only inflame the situation and will not help reach a settlement.

Imparting bad news. If there is disappointing news to pass on to your client it is recommend that this is done over the telephone or in a meeting, rather than by letter.

Likewise, if costs are increasing at a greater rate than expected, don’t send a large bill without warning. The Solicitors Regulatory Authority expects all clients to have full information about the likely costs, but if something unexpected happens, it is better to discuss the higher costs with your client first and explain why they are being incurred.

Consider how your client will react when receiving the letter and, if it is at a weekend when they are unable to contact you to discuss it, it will lead to additional stress and damage your relationship with your client.
Examples of good practice

The following are just a few examples of how correspondence can be constructive:

Initial letter

‘I have been instructed by your husband and he tells me that sadly your marriage has broken down. John has asked for my help and advice in resolving the arrangements arising from your separation.

‘John is keen that all the arrangements are dealt with as amicably as possible. I am a member of Resolution. Resolution is a national family law association and all members follow a code of conduct. I recommend that you visit the Resolution website at www.resolution.org.uk to obtain more information. I recommend that you speak to a solicitor yourself and all the local lawyers who are members are listed on the website.

‘I look forward to working with you or your solicitor to resolve all the arrangements between you as quickly and as fairly as possible.’

Commencing divorce proceedings

‘Jane tells me that neither of you is solely responsible for your marriage breakdown but she does feel that it is irreversible. The law relating to divorce does not permit a no-fault divorce until a period of at least two years has expired since you stopped living together. In order to obtain a divorce sooner, couples have to rely on the fault-based facts of adultery or unreasonable behaviour.

‘Jane tells me that neither of you have formed a new relationship so the purpose of this letter is to ask whether you would be prepared to consider co-operating with a petition based on details of behaviour.

‘You can be assured that the reason for the breakdown of the marriage has no bearing on either the financial arrangements nor on the arrangements that will be made with regard to the children. I will let you have a draft of the divorce petition so that, if possible, this can be dealt with by way of agreement. Alternatively, if you would prefer to let me have some details of your behaviour that would be acceptable to you as the basis for a petition please let me have a draft. I enclose some sample examples that I have already provided to Jane to demonstrate the sort of things that may be referred to.

‘Jane would like both of you to retain your dignity throughout the divorce and the information about alleged behaviour will be as mild and uncontentious as possible.’
Starting financial proceedings

‘I have, on John’s behalf, issued a financial application at court in order to have a timetable and framework within which John hopes a settlement can be achieved. The application, which is called Form A, and the initial timetable from the court, is enclosed for your information.

‘The first step is for you and John to each complete a financial statement, called a Form E. A blank form is enclosed for your use. These documents should be completed by (date), etc....’

Contact arrangements

‘Jane recognises that it is important for the children to spend time with both parents. Please let me know what arrangements John would like to see put in place so that I can discuss these with Jane.’

Non-payment of maintenance

‘Jane tells us that, since the separation, the financial provision made by John has not been regular. This has made it difficult for her to budget and placed her in financial difficulties. Jane would welcome any proposals that John would like to make for regular payments that will provide her with some security during this period. Hopefully this might make it easier for John to budget too.’

Note

• This good practice guidance does not and cannot affect any obligations in law, specific court orders or rules of professional conduct.
• 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.
• 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.