

Foreword to the third edition by the Right Honourable Sir Nicholas Wall

It is five years since the second edition of the Law Society's Family Law Protocol and much has changed in the law and practice of family law. However, some aspects remain unaltered and in the second edition, Sir Mark Potter stated: 'I commend the Protocol's emphasis on attempting to achieve resolution by means of ADR and its insistence that court proceedings should be a last resort.' Five years on, I repeat and fully endorse this requirement upon solicitors.

The Protocol distils the important elements of practice and procedure, and provides clear and helpful guidance to family practitioners. Adherence to **Part 1** will assist them in achieving the 'overriding objective' to enable courts to deal with cases justly.

I recommend this good practice guide to all who work within the field of family law.

Nicholas Wall
President of the Family Division
November 2010

PART 1

Main protocol

1.1 SCOPE

1.1.1 This chapter details those overarching matters family lawyers must consider in order to promote their clients' best interests. The subsequent chapters provide a wealth of information as regards particular areas of practice.

1.2 RESOLUTION CODE OF PRACTICE

1.2.1 The Family Law Protocol endorses the Resolution Code of Practice, namely a commitment to resolve a dispute in a non-confrontational and constructive way to preserve people's dignity and to encourage agreements.

The Resolution Code of Practice is set out in full at **www.resolution.org.uk**.

1.3 GUIDES TO GOOD PRACTICE

1.3.1 The following books have been published by the Law Society:

- *Good Practice in Child Care Cases* (2nd edn, Law Society, 2010).
- *Resolution Family Law Handbook* (2nd edn, Law Society, 2010).
- *Resolution Family Disputes Handbook* (2nd edn, Law Society, 2010).

1.3.2 The following Resolution guides are to be found on the public part of the Resolution website at **www.resolution.org.uk**:

- Dealing with Clients
- Correspondence
- Litigants in Person
- Working with the Bar

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- Disclosure in Ancillary Relief
- Service in the Family Law Context

1.4 SOLICITORS REGULATION AUTHORITY

1.4.1 All solicitors must comply with:

- the Solicitors' Code of Conduct 2007 (at www.sra.org.uk); and
- the need to check for evidence of identity and address under the Money Laundering Regulations 2007, SI 2007/2157.

1.5 FIRST MEETING

Children

1.5.1 Do:

- emphasise the need for parents to accept parental responsibility for their children;
- promote the child's welfare as the paramount consideration;
- encourage separation of addressing the children's needs from those of the parents;
- encourage the use of mediation and other methods of dispute resolution;
- provide information about local support/guidance services;
- provide information about parenting apart.

Resolution has a dedicated information section on its website: www.resolution.org.uk.

Reconciliation

1.5.2 Do consider with the client whether their relationship is at an end and have available details of referral agencies who can assist.

Dispute resolution

1.5.3 Do consider with the client the following alternatives:

- agreement between the parties;
- negotiation between the parties' solicitors;
- mediation;
- collaborative law;

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- family arbitration (when available);
- court application.

Inform the client that these may be used in combination and are not mutually exclusive.

Domestic abuse

1.5.4 Do be aware of:

- the incidents of domestic abuse, the need to screen for it and to make a risk assessment;
- the civil and criminal remedies.

Jurisdictional issues

1.5.5 Do consider if there are such issues including, for Europe, the impact of EU Council Regulation (EC) 2201/2003 ('Brussels II revised').

1.6 CLIENTS UNDER A LEGAL DISABILITY

1.6.1 Solicitors must bear in mind that they cannot be retained by clients incapable of giving instructions (Solicitors' Code of Conduct 2007, rule 2.01(6)(a)(iii) and rule 2.01(10)). Such clients will be those under 18 (subject to the provisions of the Family Proceedings Rules (FPR) 1991, SI 1991/1247, rule 9.2A and the Family Procedure (Adoption) Rules (FP(A)R) 2005, SI 2005/2795, rule 51) and may be those with learning disability, mental health problems, brain injury (including dementia) or any combination of these difficulties, if they come within the definition of 'protected party' as set out in FPR 1991, rule 9.1 and FP(A)R 2005, rule 6. A solicitor consulted by a client who cannot give instructions must identify a willing and suitable next friend/guardian ad litem/litigation friend (hereafter all referred to as 'litigation friend') to conduct any litigation (FPR 1991, rule 9.2; FP(A)R 2005, rule 50). The Official Solicitor is the litigation friend of last resort. He will act in the absence of anyone else willing and suitable (see *Practice Note (Official Solicitor: Appointment in Family Proceedings)* [2001] 2 FLR 155).

1.6.2 Equally, solicitors must be alert to any information suggesting that the other party may be under a disability and in need of a litigation friend. There are specific rules about the service of a petition on a person under a disability (FPR 1991, rule 9.3; see also FP(A)R 2005, rule 52(2)–(3) with regard to proceedings under the Adoption and Children Act 2002).

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- 1.6.3** If a solicitor is in any doubt about whether a client (or the other party) is a protected party for the purposes of FPR 1991, rule 9.1 or FP(A)R 2005, rule 6, the Official Solicitor can provide his standard certificate of capacity to conduct the proceedings (and notes for guidance) to be completed by either an independent expert or a treating clinician.
- 1.6.4** Solicitors are reminded that when asking for an expert opinion on a party's capacity to conduct litigation it is the solicitor's responsibility to ensure that the expert is given the appropriate guidance as to the legal test. As part of that guidance the expert's attention should be drawn to the fact that the test for capacity is issue-specific. The expert should be provided with a description of the litigation in respect of which they are being asked to assess the client's litigation capacity, including a description of the issues which the client will be expected to understand and the decisions that will be required. Solicitors may find it helpful to refer to the May 2010 guidance published by the Public Law Committee of the Family Justice Council 'Parents who lack capacity to conduct public law proceedings' which annexes precedent letters of instruction and provides guidance on information to be given to the client about any assessment (available at www.family-justice-council.org.uk/publications.htm).
- 1.6.5** An application to the court for the appointment of a litigation friend pursuant to FPR 1991, rule 9.2 or FP(A)R 2005, rule 54 should be made at the earliest possible opportunity upon receipt of evidence confirming the client's incapacity.
- 1.6.6** In the event that such evidence is inconclusive or the solicitor has difficulties in obtaining such evidence, then the matter ought to be referred to the court for directions.
- 1.6.7** Solicitors may also find it helpful to refer to the website of the Official Solicitor (www.officialsolicitor.gov.uk); alternatively his office can be contacted for further guidance (see **Appendix B**).
- 1.6.8** Solicitors should bear in mind that they may be personally liable for costs for purporting to act without authority on behalf of a person under a disability, whether or not that disability has been established by medical evidence (*Yonge v. Toynbee* [1910] 1 KB 215).

1.7 CLIENT CARE

1.7.1 Rule 2.02 of the Solicitors' Code of Conduct 2007 states:

- (1) You must:

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- (a) identify clearly the client's objectives in relation to the work to be done for the client;
 - (b) give the client a clear explanation of the issues involved and the options available to the client;
 - (c) agree with the client the next steps to be taken; and
 - (d) keep the client informed of progress, unless otherwise agreed.
- (2) You must, both at the outset and, as necessary, during the course of the matter:
- (a) agree an appropriate level of service;
 - (b) explain your responsibilities;
 - (c) explain the client's responsibilities;
 - (d) ensure that the client is given, in writing, the name and status of the person dealing with the matter and the name of the person responsible for its overall supervision; and
 - (e) explain any limitations or conditions resulting from your relationship with a third party (for example a funder, fee sharer or introducer) which affect the steps you can take on the client's behalf.

1.8 COSTS

1.8.1 Rule 2.03 of the Solicitors' Code of Conduct 2007 states:

- (1) You must give your client the best information possible about the likely overall cost of the matter both at the outset and, when appropriate, as the matter progresses. In particular you must:
- (a) advise the client of the basis and terms of your charges;
 - (b) advise the client if charging rates are to be increased;
 - (c) advise the client of likely payments which you or your client may need to make to others;
 - (d) discuss with the client how the client will pay, in particular:
 - (i) whether the client may be eligible and should apply for public funding; and
 - (ii) whether the client's own costs are covered by insurance or may be paid by someone else such as an employer or trade union;
 - (e) advise the client that there are circumstances where you may be entitled to exercise a lien for unpaid costs;
 - (f) advise the client of their potential liability for any other party's costs; and
 - (g) discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained.

Note the requirement at (1)(d)(i) to discuss eligibility for public funding and that this duty continues as the matter progresses.

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1.8.2 It is essential to provide the client with a retainer letter setting out your standard terms of business and to comply with the above rule 2.02 and rule 2.03 requirements.

1.9 COMMUNICATION WITH THE OTHER PARTY AND LEGAL ADVISERS

1.9.1 Do:

- communicate in a non-confrontational and constructive manner designed to preserve dignity and encourage agreements;
- adopt the Resolution guide to good practice on correspondence at www.resolution.org.uk.

1.10 DEALING WITH LITIGANTS IN PERSON

1.10.1 There are an increasing number of litigants in person and ‘McKenzie Friends’ so the likelihood of finding yourself dealing with them is also increasing.

1.10.2 Successfully managing this challenge will help your client to achieve his/her objectives and setting the right tone at the outset is essential.

1.10.3 Patience, courtesy, good humour and an effort to understand why the person is not instructing a lawyer will get you off on ‘the right foot’.

1.10.4 Do read the Resolution guide to good practice on dealing with litigants in person at www.resolution.org.uk.

1.10.5 Consider the President of the Family Division’s *Guidance on McKenzie Friends* issued on 12 July 2010 (see **Appendix A**).

1.11 GIVING NOTICE OF THE ISSUE OF PROCEEDINGS

1.11.1 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.

1.11.2 It is bad practice for proposed respondents to then issue proceedings to pre-empt the proposed application and this will result in:

- the court’s disapproval;

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- costs implications;
- greater difficulty in reaching agreement.

1.11.3 There may be good reason for breaching the above, particularly if Brussels II revised applies, but the onus is on the party in breach to justify their actions.

1.11.4 Do read Resolution guide to good practice on service at **www.resolution.org.uk**.