

## PART 1

# Main Protocol

### 1.1 THE FIRST MEETING

- 1.1.1** Solicitors are reminded that the Civil Partnership Act 2004 will come into force on 5 December 2005. The Act will give same sex couples the opportunity to register their relationships and thereby acquire rights and responsibilities almost entirely analogous to those of married couples. Any reference to marriage, unless the contrary is expressly stated, should be taken to refer also to civil partnership, while any reference to spouse should be construed as referring also to a civil partner unless this is specifically excluded.
- 1.1.2** Solicitors are reminded that they must identify their clients in accordance with the requirements of the Money Laundering Regulations 2003. Clients should be asked to bring two forms of appropriate identification to the first meeting. The Law Society's guidance to the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 can be found on the Society's website at [www.lawsociety.org.uk/professional/conduct/guideonline.law](http://www.lawsociety.org.uk/professional/conduct/guideonline.law) as new Annex 3B.
- 1.1.3** In all family law matters it is important that at the first meeting or early in the case, solicitors should consider certain matters as follows.

#### **Reconciliation**

- 1.1.4** When instructed by clients facing family breakdown solicitors must, during the first meeting (unless it is clearly inappropriate to do so), discuss with clients whether the relationship is over or whether there is a possibility of saving the relationship.

- 1.1.5 In cases where recent or serious domestic abuse or any other form of abuse is alleged, the question of whether a relationship or marriage can be saved is rarely an appropriate question to ask clients, especially if they are from backgrounds in which they have already been placed under pressure to save their marriage. It is more appropriate to inform such clients as to their rights in civil law so that they can make an informed choice.
- 1.1.6 Solicitors must keep an up-to-date list of referral agencies including local relationship and other counsellors, Relate, etc. and refer clients to them where appropriate. Solicitors need to bear in mind their clients' ethnic, cultural and/or religious background when considering referral agencies and should be aware of the benefits of referring clients to agencies with knowledge of their particular background.
- 1.1.7 The prospect of saving the relationship and/or the benefits of support groups or family, personal or relationship counselling should be kept under review throughout the case.
- 1.1.8 However, solicitors must consider carefully whether family support networks are beneficial where members of minority communities are concerned. Many clients from minority backgrounds face acute pressures from members of their extended families to save their marriages. Wider family networks, and even the community to which they belong, may add to the pressures on the clients. It is therefore important to bear in mind such difficulties when advising.

### **Other support services**

- 1.1.9 Solicitors should be aware of any support services (for example debt counsellors, child contact centres, Citizens' Advice Bureaux, domestic abuse services, organisations for persons with addictions and/or their families) that may assist clients in coming to terms with problems underlying their relationship breakdown or which have come about as a result of that breakdown. Solicitors should advise clients of the existence of these organisations and encourage clients to use these services when appropriate.

## **Interpreters**

- 1.1.10** Where English is not a client's first language, solicitors should always consider whether an interpreter should be present throughout an interview. Solicitors should consider whether they can act for a client when they do not speak the language of the client and no interpreter is available. Solicitors should be aware that it is generally inappropriate to use family members, especially children, as interpreters. This is most important in cases where domestic abuse is alleged but should be seen as a general rule. There will also be some cases in which a client may be unwilling for a member of their community to act as an interpreter and solicitors should abide by this decision.
- 1.1.11** Solicitors should not make assumptions about which language and dialect is required and should ensure that the services of the correct interpreter are sought. Interpreters must be independent and non-judgmental and solicitors should ensure that interpreters know that their role is limited to interpreting exactly what is said. Clients seeking advice must feel confident that their solicitor and interpreter are acting in their interests alone and that the facts of their case are confidential. It is preferable where possible to use an interpreter of the same sex as the client.

## **Family dispute resolution**

- 1.1.12** If reconciliation appears to be unlikely, there are a number of ways to resolve disputes arising from family breakdown. When first instructed by clients, solicitors must:
- (a) explore carefully clients' legal needs and establish exactly what clients are trying to achieve;
  - (b) establish whether clients' circumstances might affect the choice of a resolution procedure, for example due to cost or accessibility;
  - (c) consider the most appropriate form or forms of dispute resolution for the case or for individual parts of the case and keep them under review throughout the case. In cases where domestic abuse is alleged, the safety of the victim and any children is a prime concern and any proposed form of dispute resolution should always be viewed in the context of safety and protection. Victims of domestic

abuse should not be pressurised to meet with their violent partner in an attempt to reach an agreement;

- (d) consider whether, and if so how, vulnerable clients and clients under a disability within the meaning of Part IX Family Proceedings Rules (FPR) 1991, SI 1991/1247 can engage in family dispute resolution. The matters raised in **paras. 1.1.34–1.1.39** below must be considered before any negotiation or step in the proceedings can be taken.

**1.1.13** The five most commonly used forms of dispute resolution in family cases are:

- (a) agreement between the parties;
- (b) negotiation between solicitors, including meetings between solicitors acting for each of the parties and their clients where appropriate;
- (c) mediation or other forms of alternative dispute resolution (ADR) including collaborative law;
- (d) court-based conciliation (where available);
- (e) adjudication by the court.

These are often used in combination.

**1.1.14** Solicitors must ensure that clients who are dissolving a marriage are aware that in financial matters an agreement must be embodied in a final consent order sealed by the court on dissolution by divorce, judicial separation or nullity to be binding on the other party.

**1.1.15** Solicitors must:

- (a) at an early stage, unless it is clearly inappropriate to do so, explain the mediation process or such other form of ADR as may be appropriate and advise clients on the benefits and in particular the costs benefits and/or limitations of mediation and other ADR methods in their particular case, as well as the role of the solicitor in supporting the mediation or other process;
- (b) keep the suitability of mediation and other ADR techniques under review throughout the case;
- (c) encourage clients to go to mediation or use some other form of ADR when and where it is appropriate and safe to do so.

For more information and best practice relating to ADR, see **Part 7**.

### **Domestic abuse**

- 1.1.16** Solicitors must be aware of the widespread incidence of domestic abuse (whether violent or otherwise) and the remedies available. Information and best practice guidance (including a definition of domestic abuse, the meaning of screening, needs and risk assessment and safety planning) is provided in **Part 6**. Solicitors must:
- (a) treat the safety of clients and any children as a priority;
  - (b) screen appropriately to identify domestic abuse;
  - (c) where domestic abuse is not revealed at the first meeting, continue to keep the possibility of it under review, remembering that it can affect both men and women and can occur in all manner of family relationships (and can cause harm to children who witness violence or are abused themselves);
  - (d) when domestic abuse is disclosed, undertake a needs and risk assessment and safety planning with clients; the appropriate remedy for each client's individual needs must be discussed and kept under review. Solicitors may wish to make referrals to local domestic abuse services or advise clients of advocacy and support services available, including refuges. Solicitors should ensure that clients are aware of the crossover between domestic abuse and child protection issues. Solicitors should be aware of the effect of the Domestic Violence, Crime and Victims Act 2004 (shortly to come into force) in this area and its potential impact upon choice of remedy.

### **Urgent issues**

- 1.1.17** Solicitors need to establish the basic facts of a case, establish whether there are any urgent issues in addition to those mentioned above, and advise on how it is appropriate to deal with them.
- 1.1.18** Examples of issues that may require consideration at an early stage are:

- (a) the need to establish whether any without notice orders are needed;
- (b) the need to consider whether there is a risk that a child may be removed from England and Wales without the knowledge or consent of the client (see **para. 3.4**);
- (c) the need to establish whether there are any relevant criminal proceedings pending (in which the client may be a complainant, a witness or a defendant);
- (d) the need to agree or apply for interim maintenance for the client;
- (e) whether maintenance for children can be agreed or whether reference to the Child Support Agency (CSA) should be made;
- (f) the need for clients to be advised about welfare benefits;
- (g) the immediate housing needs of clients and any relevant children;
- (h) the need to sever a joint tenancy of a family home if it is in the interest of the client to do so;
- (i) registration of rights of occupation of a family home (solicitors should advise clients that owners of property are now notified by the Land Registry if a matrimonial home notice or restriction is placed on their property);
- (j) the need to make/revise wills, bearing in mind the intestacy rules, the effect of divorce on wills, the possibility of appointing testamentary guardians and the fact that the marriage subsists until the decree absolute is made;
- (k) the need to close or freeze joint accounts or to make them joint signatory accounts;
- (l) the need to limit access to credit cards;
- (m) the need to limit draw down facilities on existing loans and mortgages which secure future loans by either party;
- (n) the consideration of nominations for death in service benefits;
- (o) the need for transfer of assets between spouses in the fiscal year of separation in order to defer capital gains tax liability;
- (p) the need to consider an application under the Matrimonial Causes Act 1973, s.37 to prevent either the dissipation of assets or the giving of notice to quit by one of two joint tenants;

- (q) the need to consider whether a ‘race’ to issue a petition in a particular jurisdiction (following EU Council Regulation (EC) 2201/2003, ‘the revised Brussels II’) is being undertaken by the parties;
- (r) the need to consider immigration and asylum issues. Family lawyers should be aware that this is a complex and fast changing area of law and that immigration status can impact directly on the rights of a client in respect of their options for safety and protection. Appropriate advice should be sought from an immigration specialist if necessary.

## Children

- 1.1.19** In any case where the parties have dependent children, solicitors should exercise particular care and refer to **Part 3**, even where there is no apparent dispute between the parents of the child or children. If there are child protection issues, whether arising from domestic abuse, child abduction or any other matters, the safety and welfare of the children should be treated as paramount.
- 1.1.20** In all children matters it is important for solicitors to bear in mind and to emphasise to clients, throughout the case, the continuing nature of the relationship of parent and child and the benefits that cooperation between the parents and recognition of each parent’s continuing role brings to the children. Solicitors should emphasise to clients the importance of shielding children from criticism of the other parent.
- 1.1.21** When dealing with questions in respect of the upbringing of a child, solicitors always need to remember that the child’s welfare is the court’s paramount consideration (Children Act 1989, s.1(1) as reinforced by the revised definition of harm in Adoption and Children Act 2002, s.120). This amends the Children Act 1989 definition of harm to include ‘impairment suffered from seeing or hearing the ill-treatment of another’. Accordingly, when acting for parents, solicitors must be prepared to advise their clients that the court will be approaching the matter from the viewpoint of what is best for the child, and that this can override the wishes of either clients or children or both.

- 1.1.22** Solicitors should warn clients about the potentially damaging effects of involving their children in any ongoing family disputes. There are particular risks of harm to the children, in both the short and the long term, and of continuing conflict, where they are encouraged to take sides or become involved in their parents' disputes.
- 1.1.23** The Home Office published a document in 2004 entitled *Tackling Domestic Violence: providing support for children who have witnessed domestic violence* ([www.homeoffice.gov.uk/rds/pdfs04/dpr33.pdf](http://www.homeoffice.gov.uk/rds/pdfs04/dpr33.pdf)). This gives practical advice and information on domestic abuse and children and may be of use to solicitors and clients.
- 1.1.24** Solicitors should make clients aware that negotiations in relation to children are separate from negotiations on other disputes they may have with the other parent. Correspondence relating to children in particular should be separate from correspondence relating to financial and other aspects, or at least shown under separate headings. Clients should be made aware that the courts treat issues concerning children separately and independently from money issues, even if they relate to children.
- 1.1.25** Solicitors should use their best efforts to dissuade clients from making applications in respect of children when it is apparent that the applications are motivated by intentions other than consideration for the children's welfare. Examples are applications for contact or residence made from spite, from a wish to 'teach the other party a lesson', from a desire to track down or continue the abuse of victims of domestic abuse and their children, or from a perception that this would improve financial claims. Likewise, solicitors should attempt to dissuade parents from opposing an application for such reasons, while being aware that victims of domestic abuse may have good reason for opposing contact arrangements with a violent parent that they (and sometimes their children) consider to be unsafe for the child.
- 1.1.26** It is recognised that the Child Support (Maintenance Assessments and Special Cases) Regulations 1992, SI 1992/1815 (which provide for levels of child maintenance to be reduced by

a specific proportion depending on the number of nights that the children are with the non-resident parent) may cause particular difficulty in contact cases. Clients should be advised that the law relating to contact is separate and distinct from child support. Clients with residence should be discouraged from attempting to reduce contact and clients without residence should be discouraged from applying for increased contact when the prime purpose is to affect payment of child support.

- 1.1.27** Solicitors should encourage clients to consider what, when and how they intend to tell their children about a parental separation and to consider doing so with the other parent where it is safe to do so. In difficult cases couples may find that mediation or counselling on this single issue can be helpful although public funding for mediation is not available unless there is a potential dispute.
- 1.1.28** Solicitors need to be aware that under the Adoption and Children Act 2002, s.111 which came into force on 1 December 2003, unmarried fathers will obtain Parental Responsibility automatically if they have registered the birth of a child after that date jointly with the child's mother. Accordingly, where the birth has been registered after that date it will be necessary to check the full birth certificate so that the position can be established. The Act is not retrospective and thus does not apply to births registered before that date.
- 1.1.29** Unmarried fathers whose names are not shown on birth certificates and whose children's births were registered prior to 1 December 2003 can re-register the birth jointly with the mother and so obtain parental responsibility. However, fathers whose names are already shown on the birth certificate cannot re-register, and therefore cannot obtain parental responsibility by this method.
- 1.1.30** Solicitors should discuss with unmarried parents whether or not it is appropriate to enter into a parental responsibility agreement or seek a parental responsibility order, and/or make a will to appoint a testamentary guardian.

- 1.1.31** Solicitors should be aware of the potential benefits of a parenting plan and should consider their use from the outset. Parenting plans are available from the Department for Constitutional Affairs (DCA) either on their website at [www.dca.gov.uk/family/divleaf.htm](http://www.dca.gov.uk/family/divleaf.htm) or from county courts and magistrates' courts dealing with family matters, solicitors' offices, mediation services, CAFCASS offices, and many voluntary organisations working directly with children. At the time of writing the parenting plan material is being revised by the Department for Education and Skills and solicitors should be alert to the availability of a new guide and planner in due course.
- 1.1.32** During the case relating to children, solicitors should be sensitive to suggestions from clients that a child is showing any signs of serious emotional disturbance. Solicitors should refer where appropriate to other agencies that may be able to assist, for example the child's school, GP, health visitor or other health care professional, a counsellor, or any other agency that may be able to assist. Solicitors should be in possession of the names and addresses of any local referral agencies.
- 1.1.33** Since 1 March 2005 solicitors must consider whether England and Wales is the habitual residence of the parties (or the child if there are child matters to be resolved) for the purposes of EU Council Regulation (EC) 2201/2003. A country might have jurisdiction on the divorce but not on children issues.

### **Clients under a legal disability**

- 1.1.34** Solicitors must bear in mind that they cannot be retained by clients incapable of giving instructions (*The Guide to the Professional Conduct of Solicitors 1999*, Principle 24.04). Such clients will be those under 18, subject to the provisions of FPR 1991, rule 9.2A, and may be those with learning disability, mental health problems, brain damage (including dementia) or any combination of these characteristics, if they come within a definition of a 'patient' as set out in FPR 1991, rule 9.1. A solicitor consulted by a client who cannot give instructions must identify a willing and suitable next friend or guardian ad litem to conduct any litigation (FPR 1991, rule 9.2). The Official Solicitor will act in the absence of anyone

else willing and suitable (*Practice Note (Official Solicitor: Appointment in Family Proceedings)* [2001] 2 FLR 155, to be found at **Appendix 3** of this Protocol).

- 1.1.35** Equally, solicitors must be alert to any information suggesting that the other party may be under a disability and in need of a next friend or guardian ad litem. There are specific rules about the service of a petition on a person under a disability (FPR 1991, rule 9.3).
- 1.1.36** If a solicitor is in any doubt about whether a client (or the other party) is a patient for the purposes of FPR 1991, rule 9.1 the Official Solicitor can provide a standard medical certificate to be completed by the person's medical attendant (see **Appendix 17** for the address of the Official Solicitor).
- 1.1.37** Solicitors are reminded that when instructing an expert to advise on 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.
- 1.1.38** An application to the court for the appointment of a guardian ad litem or next friend pursuant to FPR 1991, rule 9.2 should be made at the earliest possible opportunity upon receipt of medical evidence confirming the client's incapacity.
- 1.1.39** In the event that such medical evidence is inconclusive or the solicitor has difficulties in obtaining such medical evidence, then the matter ought to be referred to the court for directions. 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 disability, whether or not that disability has been established by medical evidence (*Yonge v. Toynbee* [1910] 1 KB 215).

### **The initial letter of retainer**

- 1.1.40** At the commencement of every case solicitors should send to clients a letter of retainer confirming their instructions, the extent of their retainer and any limits placed upon them by clients. They should ensure that clients verify that the letters accurately reflect the instructions given, and that the clients understand the effects of the instructions and the limitations. Letters should normally be sent to clients following the first meeting.
- 1.1.41** Solicitors must warn clients of their duties under the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003 and solicitors' duties of disclosure of their clients' affairs and/or their opponents' affairs. Solicitors must be aware of the effect of the judgment in *Bowman v. Fels* ([2005] EWCA Civ 226) and its effect on the duty to report (see **Appendix 4**).
- 1.1.42** If at any time during the conduct of cases a client decides to ignore advice given by a solicitor or to act in a way that the solicitor considers to be unwise or detrimental to that client's interests, the solicitor must write to the client expressing these concerns and the consequences of the action proposed by the client. In publicly funded cases solicitors should also consider costs (see **paras. 1.2.1–1.2.13** below).

### **Provision of information**

- 1.1.43** At the first meeting, or immediately thereafter, solicitors should consider what standard information clients might find helpful. In particular, solicitors should consider giving clients leaflets on matters relating to their particular dispute (see the Law Society's website at [www.lawsociety.org.uk](http://www.lawsociety.org.uk) or **Appendix 17** for contact details of the Professional Ethics department), or alternatively should at least make clients aware if such leaflets are available. Any leaflets provided should be clear and easy to read and consideration given to provision of leaflets in languages other than English. Solicitors should also be aware that other organisations publish leaflets relevant to family matters. These include Resolution (formerly the Solicitors' Family Law Association), the Legal Services Commission (LSC) – see

[www.clsdirect.org.uk](http://www.clsdirect.org.uk) for details, the DCA and HM Courts Service.

### **Advising on outcomes**

- 1.1.44** At the end of the first meeting or at an early stage thereafter, solicitors should outline possible outcomes to clients in writing as far as this is practical on the information available. It is recognised that in cases where there has been little or no disclosure it will need to be a very broad outline, and this needs to be explained to clients. It is important that clients are not given unrealistic expectations, either of what can be achieved or of the time a matter may take to resolve.

## **1.2 COSTS INFORMATION**

### **Introduction**

- 1.2.1** Whether clients are privately or publicly funded, solicitors are reminded of their obligation to comply with the Solicitors' Costs Information and Client Care Code 1999 (Solicitors' Practice Rules 1990, rule 15). A serious breach of the Code, or persistent breaches of a material nature, could be treated as professional misconduct and/or inadequate professional services. Breaches which create prejudice for the other party or for the court could result in costs penalties.
- 1.2.2** In particular, in accordance with the Code, solicitors must:
- (a) give clients the best information possible about the likely overall costs, including a breakdown between fees, VAT and disbursements (it is recognised that in family law matters such an estimate may need to be in broad terms at the commencement of a case);
  - (b) discuss with clients how, when and by whom any costs are to be met and consider whether clients may be eligible for public funding;
  - (c) discuss with clients, and keep in mind at all times, the principle of proportionality between the likely outcome and the probable expense of resolving the dispute, having regard also to the impact of any possible costs orders;
  - (d) keep clients regularly updated about the level of costs.

### **Availability of public funding**

**1.2.3** Solicitors are reminded of their professional duty to consider and advise clients on the availability of public funding where clients might be entitled to such assistance. Accordingly, solicitors should be aware of the levels of eligibility for public funding. Although solicitors can discuss alternative methods of funding, if clients may be eligible this should be explained to them and they must be given the opportunity of applying for public funding. The availability of public funding must be kept under review throughout the matter.

**1.2.4** In discussing the availability of public funding, solicitors must explain to clients the effects of the statutory charge, the possibility of contributions, the reporting and mediation requirements of public funding and the costs protection that being publicly funded may provide in some cases. Solicitors must, however, be aware that cost protection does not apply to certificates granted and amendments made to add new proceedings to an existing certificate, on or after 25 July 2005. Solicitors therefore need to be particularly aware of the need to advise clients of the risk of an adverse order being made. Cost protection no longer applies to all proceedings under any one or more of the following:

- Matrimonial Causes Act 1973;
- Domestic Proceedings and Magistrates' Courts Act 1978;
- Matrimonial and Family Proceedings Act 1984, Part III;
- Child Abduction and Custody Act 1985;
- Children Act 1989, Parts I and II and Sched. 1; and
- Family Law Act 1996, s.53 and Sched. 7;

and proceedings which arise out of family relationships under either or both of the following:

- Inheritance (Provision for Family and Dependents) Act 1975;
- Trusts of Land and Appointment of Trustees Act 1996.

**1.2.5** If clients who may be eligible for public funding either at the outset of a case or at any time during it have consulted solicitors who do not undertake publicly funded work, they must be given the option of being referred to solicitors who do carry out publicly funded work (even if this means referring clients

to another firm). If clients eligible for public funding nevertheless wish to continue to instruct their original solicitors on a privately funded basis, the availability of public funding and their decision not to apply for it should be confirmed to clients in writing.

### **The requirements of public funding**

- 1.2.6** When clients are publicly funded, solicitors need to be aware of the requirements of public funding. In particular solicitors must make clients aware of the statutory charge and ensure that clients are aware that there are circumstances in which solicitors' duties under publicly funded work can override their duty of client confidentiality. The solicitor is required to make a report to the LSC, for example, where there is a belief that a publicly funded client requires their case to be conducted unreasonably or at an unjustifiable expense to the Community Legal Service Fund, or where the solicitor is simply uncertain as to whether it would be reasonable to continue acting. A costs officer is entitled to disallow all subsequent costs following a failure to report and it is important that the client should be aware of this. On client confidentiality, solicitors are referred to the Legal Services Commission (Disclosure of Information) Regulations 2000, SI 2000/442, reg. 4 (see the LSC Manual, vol. 1) and *The Guide to the Professional Conduct of Solicitors 1999*, Principle 5.03.
- 1.2.7** Solicitors are reminded of their duty to safeguard public funds and to ensure that the funding code criteria applicable to the case remain satisfied. Solicitors must ensure that they file and serve notice of issue of a Certificate of Public Funding and notice of discharge of that certificate.

### **The statutory charge under public funding**

- 1.2.8** Solicitors should consider and discuss with the client, where appropriate, the application of the statutory charge in cases which may result in the recovery or preservation of the possession of property (for example, the protection of a right of occupation of property or the unlocking of the value of property). If solicitors take over a publicly funded case from another firm they must still write to advise of the statutory

charge, even if their predecessor has done so. Such cases can give rise to the statutory charge, even where the title to the property is not in issue (*Parkes v. Legal Aid Board* [1994] 2 FLR 850). Solicitors should remember that the charge does now apply where property is recovered or preserved for the benefit of a third party, such as a child, and may do so even where the case was funded under the Legal Aid Act 1988.

- 1.2.9** Solicitors should be aware that the statutory charge arises where property which was at issue is recovered or preserved. Where the parties have been able to agree throughout on the disposition of an item of property, the charge cannot attach to it. Solicitors should endeavour to narrow the subject matter of the dispute.
- 1.2.10** Solicitors should consider and discuss with clients, where appropriate, the possibility of postponement of the statutory charge where property which is recovered or preserved is to be used as the client's home, or as a home for the client's dependants. This includes property recovered or preserved within actions brought under the Trusts of Land and Appointment of Trustees Act ('Trusts of Land Act') 1996. It should be borne in mind that where the necessary conditions are met, including the payment of interest, the statutory charge over the property may in some cases be postponed until future sale and transferred on to the purchase of a new property from the proceeds indefinitely, ultimately reverting to the recipient's estate.

### **Costs orders**

- 1.2.11** Solicitors must advise clients of the circumstances in which they may be successful in obtaining a costs order in their favour or find themselves having a costs order made against them. Solicitors need to recognise that the seeking of a costs order against the other party can be seen by that party as an aggressive tactic that might result in discouraging a constructive and conciliatory approach to the resolution of matters. Furthermore, the obtaining of a costs order can result in continuing satellite litigation over the amount of costs to be paid which itself can be expensive and uneconomic. Accordingly, solicitors need to consider carefully with their client the circumstances in which they intend to seek a costs order, including:

- (1) Within divorce proceedings it is acknowledged that costs orders frequently follow the event, particularly in the cases of allegations of adultery and unreasonable behaviour. However, as indicated in **para. 2.5.1(3)** of this Protocol which relates to proceedings for the dissolution of the marriage, solicitors should consider carefully with clients the possible aggravating effect of claiming costs from respondents and such claims should be made only when it is considered appropriate.
- (2) Within proceedings relating to children it would not be usual to seek costs orders, or for such orders to be made, unless the party against whom the costs order is being sought has been unreasonable in their approach to such an extent as to justify such an order.
- (3) Within financial claims, at the time of the preparation of the second edition of this Protocol, there are proposals for a fundamental change in the approach to costs rules. However, that change has not yet taken place and solicitors should consider and discuss with their clients the cost implications of the provisions of FPR 1991, rule 2.69 which are referred to in more detail in **para. 4.17**. Solicitors must be aware that change is likely to occur and familiarise themselves with any new rules as they come into force.
- (4) In proceedings for an injunction if a matter is heard and a determination made by a court it is usual for costs to follow the event.

**1.2.12** It is appropriate for solicitors to refer their own clients to the risks of costs orders being made against them to encourage them to comply with and act reasonably within the conduct of proceedings and to raise the threat of seeking a costs order against another party if it is considered that they are not acting reasonably. It is also acknowledged that there are many cases where the availability of finances to the parties is uneven. Solicitors acting for parties who have funds available should consider, in appropriate cases, ensuring that sufficient funds are made available to the other party to enable them to fund their legal advice, bearing in mind that courts can order contributions for costs to be made within interim spousal maintenance orders in certain circumstances. See also **para. 1.2.4** above regarding cost protection and public funding.

### **Instructing counsel**

**1.2.13** If solicitors propose to instruct counsel in respect of any aspect of work on a case, the costs implications of doing so must be explained to the client and authority to instruct counsel secured from the client. The following points should also be kept in mind:

- (1) In ancillary relief proceedings, an estimate of costs to date should be provided to counsel at all stages.
- (2) In private paying cases, solicitors should ensure that they have appropriate security for counsel's fees, remembering the personal obligation to be responsible for payment of the fees of counsel.
- (3) Solicitors should remember that they have a duty to the client to negotiate with counsel's clerk to ensure that counsel's fees are fair and reasonable. Solicitors should seek their client's approval before concluding an agreement as to fees, bearing in mind that under the Solicitors Act 1974 a disbursement which has not been agreed in advance with the client may not be recoverable by the solicitor.
- (4) In publicly funded cases, solicitors should be aware that the level of counsel's fees will impact upon any costs limitation and solicitors may need to provide verification of the work done by counsel to the LSC to support a claim for fees under the Graduated Fees Scheme.
- (5) Solicitors should be aware of the need to obtain the authority of the LSC before instructing counsel in proceedings in the family proceedings court, unless they wish to take the risk that such instruction will be capable of justification on costs assessment. No authority is required to instruct another solicitor advocate as agent.
- (6) Whenever counsel is to appear as an advocate on behalf of the client, the client must be aware, save in exceptional circumstances, of the identity of the barrister concerned and what arrangements are being made for attendance by any representative of the solicitor with counsel.

### 1.3 COMMUNICATION WITH THE OTHER PARTY AND WITH THE CLIENT

- 1.3.1** Solicitors, and parties where unrepresented, must show courtesy and solicitors must be professional in all communications with other solicitors or parties. Solicitors should avoid giving personal opinions or comments within letters. Solicitors are referred to Resolution's *Guide to Good Practice on Correspondence* (see **Appendix 17** for contact details).
- 1.3.2** Communications must focus on identification of issues and their resolution. They should be clear and free of jargon. Protracted, unnecessary, hostile and inflammatory exchanges and 'trial by correspondence' must be avoided. The effect of correspondence upon clients and other family members should be considered so that correspondence sent by solicitors does not further inflame emotions, antagonise or jeopardise the safety of any vulnerable persons.
- 1.3.3** The impact of any correspondence upon its readers and in particular the parties, must always be considered. It is crucial that solicitors or parties do not raise irrelevant issues nor unreasonably cause other parties or their own clients to adopt an entrenched, polarised or hostile position.
- 1.3.4** Solicitors should consider, where possible, sending any substantive items of correspondence to clients for checking initially, particularly if that correspondence contains proposals for settlement. They should send copies of all but routine letters to their clients as a matter of course, unless there is specific reason not to do so.
- 1.3.5** Clients' circumstances are so varied that it would be difficult to prepare a specimen first letter to the other party. However, the tone of the initial letter is important. It 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) where 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.

- 1.3.6** Solicitors using email are reminded that it is not a totally secure medium, and they should therefore exercise caution when transmitting confidential information to clients or others. In particular solicitors should ascertain whether clients want to be contacted by email. If so, clients should be made aware of the risks attached to using it, including the danger that their spouses or partners could access their emails perhaps by knowing or guessing their passwords. More detailed information on the use of emails generally can be found in *E-Mail Guidelines for Solicitors* published in March 2004 by the Law Society. It is published at [www.lawsociety.org.uk//documents/downloads/emailguidelines.pdf](http://www.lawsociety.org.uk//documents/downloads/emailguidelines.pdf) or a hard copy may be obtained from the Law Society's Professional Ethics department.
- 1.3.7** Solicitors should ensure that the address and location of victims of domestic abuse remain confidential if there is a risk to them if the perpetrator or any other party finds them. The address of refuges should never be disclosed in any communication.
- 1.3.8** Solicitors should be wary of agreeing to provide evidence for a client (e.g. as to events outside a courtroom). If solicitors do offer evidence they become potential witnesses of the court. They may have to obtain separate advice and if they do their firm may not be able to continue to act for that client.

## **1.4 GIVING NOTICE OF ISSUE OF PROCEEDINGS**

- 1.4.1** 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. Solicitors must in this context consider the effects of proposed respondents' attempts to 'forum shop' as a result of the effect of Council Regulation (EC) 2201/2003 that came into force on 1 March 2005. This repeals the earlier regulation that came

into force in 2000. It is bad practice for proposed respondents then to issue proceedings to pre-empt proposed petitioners issuing, unless a good reason for doing so exists. If respondents nevertheless instruct their solicitors to issue, their solicitors must warn them of the court's disapproval of such action, the possible costs implications and the impact of such action on the rest of the case (see Resolution's *Guide to Good Practice on Service*: see **Appendix 17** for contact details). It is accepted that the above guidance for best practice will not always be achievable in every case, depending on the client's instructions.

## **1.5 WHERE PARTIES HAVE ALREADY REACHED AGREEMENT**

**1.5.1** Separating couples may have reached an agreement on a matter prior to seeing solicitors. The agreement may have been reached in direct negotiation between the parties, in mediation or by some other method. In such circumstances, solicitors should do the following:

- (1) Inform separating couples that they can act for one party only and that the other party should obtain independent legal advice.
- (2) When first instructed send to the client a letter setting out, in full, the terms of their retainer and the limits placed upon it by the client. Particular care should be taken in confirming in writing any limits placed on the retainer by the client. Any modification of the retainer at a later stage should also be notified to the client in writing.
- (3) Establish that the client fully understands the terms and effect of the agreement and any alternative options available.
- (4) Establish whether the agreement has been reached on the basis of full and frank disclosure and emphasise the dangers of incomplete disclosure (this is of particular importance in financial matters and a clear warning should be given to the client of the consequences of the making of financial orders).
- (5) Discuss with the client any omissions or points that need clarifying.

- (6) Advise the client on the implications of the agreement reached and whether it is in the client's best interests, both in the short term and the long term. This includes, where appropriate, advising on other options available. In doing this solicitors 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) Consider sending a disclaimer letter to the client for signature and return by the client in cases where the solicitor is concerned that there is inadequate disclosure or a clearly inadequate settlement. In the event that the client refuses to sign such a disclaimer letter, solicitors should consider whether this gives grounds for termination of retainer (see *The Guide to the Professional Conduct of Solicitors 1999*, Principle 12.12).

- 1.5.2** If solicitors consider that duress or undue influence has been brought to bear on their client to enter an agreement that is unreasonable or unfair, they should tell the client and advise him or her in writing to review the agreement. If the client refuses to do so then solicitors should have regard to *The Guide to the Professional Conduct of Solicitors 1999*, Principle 12.04, which states: 'a solicitor must not accept instructions which he or she suspects have been given by a client under duress or undue influence'. If solicitors terminate a retainer and are already on the court record they will need to make an application to remove their name from the court record. If they make such an application, solicitors must draft any supporting affidavit with care, as client privilege continues to exist unless and until the client waives it and because of the principle relating to continued confidentiality of a client's affairs after termination of a retainer.
- 1.5.3** Solicitors should advise clients on the most appropriate way to record the agreement, and as appropriate draft and present to the court any necessary consent order or prepare any necessary agreement/documents.
- 1.5.4** When drafting financial consent orders, solicitors should refer to the further guidance given in **para. 4.19**. Failure to advise

fully and appropriately can result in negligence suits succeeding against the solicitors involved.

## **1.6 CRIMINAL PROCEEDINGS**

- 1.6.1** In some cases, for example those where domestic abuse is disclosed, solicitors must be aware that criminal and civil law remedies may need to be used in conjunction with each other. Whether their client is the alleged victim or the alleged perpetrator in criminal proceedings, solicitors must be aware of the current status of those proceedings and any orders made (particularly with regard to bail conditions), and consider how those proceedings might affect the civil/family proceedings and vice versa.

## **1.7 HUMAN RIGHTS**

- 1.7.1** Solicitors must have knowledge of the Human Rights Act 1998, the Strasbourg jurisprudence and case law arising, and must keep this knowledge up to date. Solicitors may find it useful to refer to the DCA's *Study Guide: Human Rights Act 1998* (second edition, 2002). This can be found at [www.dca.gov.uk/hract/studyguide/index.htm](http://www.dca.gov.uk/hract/studyguide/index.htm).
- 1.7.2** Solicitors should not use the Human Rights Act 1998 inappropriately to bolster weak cases or to bring inappropriate points, but they must carefully consider, and keep under review, whether there is a general issue as to whether clients' human rights have been breached. If so, solicitors should discuss with clients what further action should be taken. Solicitors should consider the content of the *Practice Direction (Family Proceedings: Citation of Authorities)* [2000] 4 All ER 288.

## **1.8 EU AND OTHER INTERNATIONAL LAW**

- 1.8.1** Solicitors must be aware that EU law affects family proceedings in England and Wales and must ensure that they remain up to date with the latest developments in the area. If solicitors do not feel comfortable dealing with cross-border issues or EU

law that is applicable in a particular case, they should consider seeking guidance from another solicitor regularly practising in this area or consider passing the matter to them to handle completely.

## **1.9 GOOD PRACTICE GUIDANCE**

- 1.9.1** Solicitors must comply with the rules contained in *The Guide to the Professional Conduct of Solicitors 1999* and updated at [www.lawsociety.org.uk/professional/conduct/guideonline.law](http://www.lawsociety.org.uk/professional/conduct/guideonline.law), including the Law Society's Anti-Discrimination Rules 2004, and with Resolution's Code of Practice (see **Appendix 2**).
- 1.9.2** The Law Society's Professional Ethics department can be contacted on 0870 606 2577 between 11 am and 1 pm and between 2 pm and 4 pm. They can provide guidance concerning issues of professional conduct.
- 1.9.3** The *Family Law Protocol* is supplemented by *Good Practice in Child Care Cases*. Written in 2004 by the Law Society in conjunction with the Association of Lawyers for Children, the Child Care Joint Liaison Group and Resolution, this covers public law cases involving children.
- 1.9.4** Resolution publishes guidance notes on good practice, which are updated regularly. There is currently guidance on:
- (a) service;
  - (b) correspondence;
  - (c) disclosure;
  - (d) acting for children;
  - (e) working with the Bar;
  - (f) cases with an international element.

Copies are obtainable from Resolution (see **Appendix 17** for contact details). Solicitors should read and follow these guides.