

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, and should be read in conjunction with, 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 Practice Notes have been published by the Law Society and can be accessed under the Practice Notes section at www.lawsociety.org.uk/advice/practice-notes:

- Acting in the Absence of a Children's Guardian (21 August 2009)
- Attendance of Solicitors at Local Authority Children Act Meetings (9 January 2013)
- Unbundling Civil Legal Services (19 March 2015)

- 1.3.2** The Law Society has published under the Family Court Resources Section of the website dedicated tools and resources for solicitors working in family courts at www.lawsociety.org.uk/advice/family-court-resources.

- 1.3.3** Joint guidelines on dealing with litigants in person (LiPs) published by the Law Society, the Bar Council and CILEx are available to download from

www.lawsociety.org.uk/support-services/advice/articles/litigants-in-person-new-guidelines-for-lawyers-june-2015.

1.3.4 The following Resolution Guides to Good Practice are to be found on the public part of the Resolution website at **www.resolution.org.uk**:

- Collaborative Professionals
- Correspondence
- Discussing Dispute Resolution Options
- Domestic Abuse Cases
- International Issues
- Mediation
- Referrals to Contact Centres
- Service of Documents
- Social Media
- Working with the Bar in Family Cases
- Working with Clients
- Working with Litigants in Person
- Working with Vulnerable Clients

1.4 SOLICITORS REGULATION AUTHORITY

1.4.1 All solicitors must comply with the mandatory principles as set out in the SRA Code of Conduct 2011 at **www.sra.org.uk**. This Code sets out outcomes-focused conduct requirements so that solicitors can consider how best to achieve the right outcomes for clients, taking into account the way that solicitors work and their client base. The Code is underpinned by effective, risk-based supervision and enforcement.

1.5 ANTI-MONEY LAUNDERING

1.5.1 All solicitors need to be compliant with anti-money laundering requirements. These include the Proceeds of Crime Act 2002, the Terrorism Act 2000, the Money Laundering Regulations 2007, and all amending legislation. See the Law Society's Practice Note: Anti-money Laundering (October 2013), at **www.lawsociety.org.uk/advice/practice-notes**.

1.6 FIRST MEETING

1.6.1 Solicitors should in all cases discuss with clients at the first meeting:

- method of communication with the client;

- possibility of counselling being appropriate to help the client with differing emotions following a relationship breakdown;
- timescale and potential costs involved and how their case will be funded (in particular, solicitors must consider whether clients are or remain eligible for public funding (see *Truex v. Kitchin* [2007] EWCA Civ 618));
- if any emergency steps are needed and the options available (including safeguarding the client, children or any assets);
- how best to proceed with next steps.

Children

1.6.2 Do:

- emphasise the need for parents to accept parental responsibility for their children;
- aim to 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 dispute resolution options;
- provide information about local support/guidance services;
- provide information about parenting apart.

Resolution has an Advice Centre and an Advice for Parents section on its website at www.resolution.org.uk/advice_centre.

Reconciliation

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

Dispute resolution options

1.6.4 Do consider with the client the following alternatives:

- agreement between the parties;
- negotiation between the parties’ solicitors;
- mediation;
- collaborative law;
- family arbitration;
- court application.

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

Domestic abuse

- 1.6.5** Do be aware of:
- any incidents of domestic abuse, the need to screen for it and to make a risk assessment;
 - civil and criminal remedies.

Jurisdictional issues

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

1.7 CHILDREN AND PROTECTED PARTIES

- 1.7.1** Solicitors must bear in mind that they cannot be retained by clients incapable of giving instructions (SRA Code of Conduct 2011, Chapter 1, indicative behaviour 1.6). The terms 'child' and 'protected party' are now used to replace 'under a disability'.

- 1.7.2** A 'protected party' means a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings – see rule 2.3 of the Family Procedure Rules (FPR) 2010, SI 2010/2955. Such a party must have a litigation friend to conduct proceedings on his or her behalf.

- 1.7.3** The procedure and basis for the appointment of a litigation friend are contained in FPR Part 15 ('Representation of protected parties') for adults, and FPR Part 16 ('Representation of children and reports in proceedings involving children') for children. See also each Part's associated Practice Directions.

- 1.7.4** Any application to the court should be made at the earliest available opportunity upon receipt of evidence confirming the client's incapacity. 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.

- 1.7.5** The Official Solicitor is the litigation friend of last resort. The Official Solicitor cannot be appointed to act as a litigation friend without consent which is subject to certain criteria. Enquiries can be made by:
- emailing enquiries@offsol.gsi.gov.uk;

- calling 020 3681 2754 (for all private law family proceedings, including divorce, civil partnership and proceedings under the Family Law Act 1996); or
- calling 020 3681 2755 (for public law children proceedings).

Further details can be found at www.gov.uk/government/organisations/official-solicitor-and-public-trustee.

- 1.7.6** Consider also the Official Solicitor’s Practice Note: *The Official Solicitor to the Senior Courts: Appointment in Family Proceedings and Proceedings under the Inherent Jurisdiction in Relation to Adults* [2013] Fam Law 744, and the President’s guidance written in liaison with the Official Solicitor: *Guidance in Cases Involving Protected Parties in which the Official Solicitor is being invited to Act as a Guardian Ad Litem or Litigation Friend* [2011] 1 FLR 943.
- 1.7.7** 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 children or protected parties (FPR rule 6.14).
- 1.7.8** 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).

1.8 CLIENT CARE

- 1.8.1** Chapter 1 of the SRA Code of Conduct 2011 provides information as to a proper standard of service, which takes into account the individual needs and circumstances of each client. This includes providing clients with the information they need to make informed decisions about the services they require, how these will be delivered and how much they will cost. This will enable solicitors and clients to understand each other’s expectations and responsibilities. Chapter 1 is also about ensuring that if clients are not happy with the service they have received they know how to make a complaint and that all complaints are dealt with promptly and fairly. The outcomes in the chapter show how the Principles apply in the context of client care. Chapter 1 refers to a number of indicative behaviours to achieve the required outcomes. See www.sra.org.uk/solicitors/handbook/code.

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;
- read Resolution's Guide to Good Practice on Correspondence at www.resolution.org.uk.

1.10 DEALING WITH LITIGANTS IN PERSON AND MCKENZIE FRIENDS

1.10.1 There are an increasing number of litigants in person (LiPs) and 'McKenzie friends' so the likelihood of finding yourself dealing with them is also increasing.

1.10.2 Maintaining professional and co-operative interactions with LiPs 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. Communicate clearly and try to avoid any technical language or legal jargon.

1.10.4 Do read the following:

- the guide issued by the Law Society, Bar Council and CILEx, *Litigants in Person: Guidelines for Lawyers* (4 June 2015);
- the Resolution Guide to Good Practice on Working with Litigants in Person at www.resolution.org.uk;
- the President of the Family Division's Practice Guidance: *McKenzie Friends (Civil and Family Courts)* (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;

- 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's Guide to Good Practice on the Service of Documents, at www.resolution.org.uk.