resolution
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Guidance note: Disclosure in financial order cases

This Guidance was reviewed in January 2016. The law or procedure may have changed since that time and members should check the up-to-date position.

Guidance note: Disclosure in financial order cases

Introduction

Disclosure is required prior to the making of a court order for financial remedy or other financial orders, if the process leading to the order being made is:

- a contested application to court
- arbitration
- mediation
- the collaborative process
- negotiation between solicitors.

Increasingly one or more parties will be litigants in person.

There is a fundamental principle that full and frank financial disclosure is needed in order for any consensus to be capable of forming a binding agreement, arbitral award and/or court order, irrespective of the process used to get there. This principle has been established for many years, although tested from time to time in the courts – sometimes with unexpected results. The law continues to develop.

This Good Practice Guide aims to assist you to address these issues in compliance with the Resolution Code of Practice, in the best interests of the clients and families that we serve. It is not a legal textbook, nor an exposition of the current legal and procedural position. Whilst this area of law and practice evolves, and the competing rights to privacy and to a fair trial teeter in the balance, the issues facing families remain the same: how to disentangle the family finances when a relationship breaks down.

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It does not consider a lawyer's duty to disclose to the appropriate authorities in the context of safeguarding and child protection, or anti-money laundering or counter-terrorism.

There is reference to disclosure in respect of pre- and post-nuptial agreements in the *Good Practice Note on Marital Agreements*.

Throughout this guide we have linked to cases and statutes where possible. However, some of the older cases are not freely available and we have not been able to link to them all.

The legal framework

The area of law is complex, involving competing human rights (the right to respect for one's private and family life and the right to a fair trial), common law jurisprudence (f the law of confidence and the evolving tort of misuse of private information), statutory obligations (for example, under the Data Protection Act (DPA) 1998, Computer Misuse Act (CMA) 1990, the Regulation of Investigatory Powers Act (RIPA) 2000 and the Copyright Designs and Patents Act (CDPA) 1988) and, of course, obligations arising under the Matrimonial Causes Act (MCA) 1973, Children Act 1989 (CA) (Schedule I) and the Family Procedure Rules (FPR) 2010.

Statutes may impose civil or criminal sanctions for breach and may result in possible actions in tort for breach of statutory duty. Other actions in tort or for breach of contract are also possible.

Criminal sanctions bring potential problems for lawyers advising clients who have unlawfully obtained documents, who may be aiding, abetting, counselling or procuring a criminal offence and legal professional privilege cannot be relied upon to protect against the disclosure of criminal actions.

Family Procedure Rules 2010

The overriding objective of the procedure must always be borne in mind, of: '*enabling the court to deal with cases justly, having regard to any welfare issues involved*', (rule 1.1).

Rule 1.2 explains that dealing with a case justly includes, as far as is practicable:

- ensuring that it is dealt with expeditiously and fairly; dealing with the case in ways that are proportionate to the nature, importance and complexity of the issues
- ensuring that the parties are on an equal footing
- saving expense, and
- allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Rule 1.3 requires the parties 'to help the court to further the overriding objective', and rule 1.4 sets out the court's duty to manage cases, with examples of how that is to be done.

Practice Direction (PD) 9A to part 9 of the Family Procedure Rules (FPR) addresses the issue of financial disclosure in the context of all financial order applications, with specific reference to various rules, and has annexed to it a pre-application protocol that refers to this guide. The protocol underlines the obligation of parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues, and reminds practitioners that:

> "*Solicitors owe their clients a duty to tell them in clear terms of this duty and of the possible consequences of breach of the duty, which may include criminal sanctions under the Fraud Act 2006. The duty of disclosure is an ongoing obligation and includes the duty to disclose any material changes after initial disclosure has been given.*
>
> "*The pre-application protocol annexed to PD9A governs the steps parties should take to seek and provide information from, and to, each other prior to the commencement of an application for financial orders. Paragraph 12 states that 'If parties carry out voluntary disclosure before the issue of proceedings the parties should exchange schedules of assets, income, liabilities and other material facts, using the financial statement as a guide to the format of the disclosure. Documents should only be disclosed to the extent that they are required by the financial statement. Excessive or disproportionate costs should not be incurred'*."

The emphasis in the FPR is very much on promoting non-court dispute resolution. It is now necessary for most applicants for financial orders to attend a Mediation Information and Assessment Meeting (MIAM) prior to the issue of an application in accordance with PD3A. Then, when the court process is engaged, the rules are aimed at cases proceeding expeditiously, assisted by active case management, although the possibility of adjourning for further attempts at non-court dispute resolution is also encouraged (see FPR rule 3.3).

This recognises that for non-court dispute resolution to be effective, the time when it is undertaken is an important factor in whether it will be successful in achieving a consensual resolution. For those who are doubtful about the likelihood of success of mediation, particularly in difficult cases, consider Al-Khatib v Masry and others [2004] EWCA Civ 1353, [2004] 3 FCR 573. At first instance, adverse inferences were drawn following inadequate disclosure. There was then an appeal to the Court of Appeal which was compromised with a subsequent successful mediation. See the good practice notes on non-court dispute resolution section on page 28.

It appears that there is a shift from a position where pre-application disclosure was actively encouraged by the current pre-application protocol's predecessor – presumably because of the added emphasis on non-court dispute resolution – to a situation where it is specifically discouraged in some situations. The guidance notes to the pre-application protocol annexed to PD9A at paragraph 2 remind practitioners that:

"*In considering the options of pre-application disclosure and negotiation, solicitors should bear in mind the advantage of having a court timetable and court-managed process. There is sometimes an advantage in preparing disclosure before proceedings are commenced. However, solicitors should bear in mind the objective of controlling costs and, in particular, the costs of discovery and that the option of pre-application disclosure and negotiation has risks of excessive and uncontrolled expenditure and delay. This option should only be encouraged where both parties agree to follow this route and disclosure is not likely to be an issue or has been adequately dealt with in mediation or otherwise.*"

Para 3.4 of PD9A states that: "…*any breach of this practice direction or the pre-application protocol annexed to it will be taken into account by the court when deciding whether to depart from the general rule as to costs*", and so should be borne in mind. Time will tell whether any more costs orders are made in this context.

Since the Family Proceedings (Amendment) Rules 2006 (SI 2006/352) came into force, the general rule on costs in applications for financial orders has been that the court will not make an order requiring one party to pay the costs of another party, but may do so if appropriate because of the conduct of the party in relation to the proceedings (whether before or during them). This rule is encapsulated in rule 28 FPR 2010.

Rule 28.3(5) contains the general rule that the court will not make an order for costs against a party in proceedings for a financial order except an order for maintenance pending suit/an order pending outcome of proceedings, an interim periodical payments order or any interim order related to financial order applications (variation applications are covered by PD28A).

The court may make a costs order at any stage of the proceedings where it considers it appropriate, as a result of the conduct of a party in relation to the proceedings, whether before or during them (rule 28.3(6)), in other words, litigation misconduct. The considerations that the rule 28.3(7) require the court to take into account when deciding whether to make a costs order in this context include:

- any failure by a party to comply with the rules, any order of the court or any practice direction the court considers relevant
- the manner in which a party has pursued or responded to the application or a particular allegation or issue
- any other aspect of a party's conduct in relation to proceedings which the court considers relevant.

Once proceedings for financial orders have been issued, the timing and extent of disclosure is regulated by the court. The procedure prior to first appointment is set out in rule 9.14 FPR. Disclosure is initially restricted to completing the financial statement on Form E five weeks prior to the first appointment. Rule 9.14(2) provides for the exchange of financial statements. These must be:

- verified by a statement of truth, and
- accompanied by the following documents only:
    - any documents required by the financial statement
    - any other documents necessary to explain or clarify any of the information contained in the financial statement
    - any documents provided to the party producing the financial statement by a person responsible for a pension arrangement, either following a request under rule 9.30 or as part of a relevant valuation, and
    - any notification or other document referred to in rule 9.37(2), (4) or (5) which has been received by the party producing the financial statement. Rule 5.2 states that "subject to any rule or practice direction, unless the court directs otherwise, a form must have attached to it any documents which, in the form, are (a) stated to be required; or (b) referred to".

Two weeks before the first appointment, the documents specified in rule 9.14 must be filed with the court and served on the other party, including a statement of concise issues and a questionnaire or request for information and documents that must be referable to the statement of issues.

Statements of truth are now required on replies to questionnaires. Rule 5.2 states that: "*Subject to any rule or practice direction, unless the court directs otherwise, a form must have attached to it any documents which, in the form, are (a) stated to be required; or (b) referred to*".

Proceedings for contempt of court may be brought against the person who makes, or causes to be made, a false statement in a document verified by a statement of truth without having an honest belief in its truth (FPR, r 17.6 and PD17A, para 6).

Rule 9.14(3) deals with the situation where documents are not yet available and rule 9.14(4) deals with restrictions on disclosure prior to first appointment.

The duties of the court at the first appointment are set out in rule 9.15. The district judge must determine the extent of the questions to be answered and decide what further documents are to be produced. After the first appointment neither party is entitled to the production of further documents except by permission of the court (rule 9.16). At any stage either party may apply for further directions (rule 9.16(2)).

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 for other interim remedies, such as an order for inspection or preservation of property. Interim remedies are set out in part 20 FPR. Oral evidence may also be given at an interlocutory appointment (see OS v DS (Oral disclosure: Preliminary hearing) [2004] EWHC 2376 (Fam)).

Statutory provisions in the context of self-help

For more details, see the good practice notes section on page 28.

- **Intercepting mail addressed to another may be a criminal offence under section 84 of the Postal Services Act 2000 (see also section 1 of the RIPA).**

  Telephone tapping of a public telephone may be a criminal offence (section 1 RIPA) and is likely also to be an actionable breach of confidence and/or breach of privacy under the Human Rights Act (HRA) 1998. 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 – section 1(6)), there may be issues arising under the HRA. 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, for secretly taping a telephone conversation with another lawyer, it is not recommended.

- **Misuse of electronic and other data**

  The Computer Misuse Act (CMA) 1980 makes it an offence to have unauthorised access to computer material and to modify computer material without authority. The consequences may be both criminal and tortious, and the sanctions include potential imprisonment/fines. The Act predates the technology it now has to deal with, and it seems that the term ‘computer’ now has a meaning that is wider than could possibly have been anticipated when the legislation was enacted.

  It is safest to assume that computer material may include any information held on any electronic device with capacity for memory storage/access including, for example, home or business computers/servers/networks, laptops, external hard drives, memory sticks/disks/CDs, tablets, mobile phones and information contained within any private email account or private social network.

  The Data Protection Act (DPA) 1988 requires those who hold personal data to deal with it in accordance with principles and rules, and applies to private individuals and businesses. Higher standards apply to sensitive personal data.

Sanctions for breach may include fines, criminal sanctions, and possible civil claims (for example, for breach of statutory duty). There have been a number of cases where a data handler has misused the information (eg to track down an ex-wife or child). See the BBC website for an article about figures obtained by the Press Association, which highlights how many police officers have been reprimanded or dismissed for mishandling data.

The Copyright Designs and Patents Act (CDPA) 1988 protects works, which may include text, pictures, data and software, created by individuals. If, for example, another individual copies the work of another, then damages may be awarded for any economic loss suffered as a result.

Case law

If there is a failure to provide full disclosure, the practical effect of that has been referred to in developing case law for decades. Livesey v Jenkins [1985] AC 425 established the two stage test of:

- Was there material non-disclosure? And
- Was it so important that the original order should be set aside. The House of Lords decided that there was an obligation on the wife to disclose her engagement immediately?

In E v E [1990] 2 FLR 233 a husband failed to disclose information about Swiss bank accounts and land, which 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.

Wilson J (as he then was) then considered this in T v T [1994] 2 FLR 1083 when he said:

"*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 [[1994] 1 FCR 293] 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.*" See also the current costs rules in FP(A)R 2006 rule 28.

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 proceedings. 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 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, adverse inferences were drawn following a failure to provide full and frank disclosure.

The judgment in GW v RW [2003] 2 FLR 108 (and that in W v W (ancillary relief: non-disclosure) [2003] EWHC 2254 (Fam)) set out 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. GW v RW [2003] has since been over ruled in Jones v Jones [2011] EWCA Civ 41 in respect of the approach to be taken to quantifying a spouse's earning capacity, but these comments were not discredited on appeal.

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.

You must not mislead the court, for example, by only putting 50% of a client's assets on Form E, as in W v W [2004] 1 FLR 494. In that case the husband had since remarried and 50% of his assets were not included on his form E on the basis that they should be attributed to his second wife.

In K v K (Financial relief: 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 since been extended by the financial orders process, which promises 'active case management' by the court, and which is given even more focus by FPR 2010 (rule 1.4 and Part 4).

Seeking disclosure from a third party should be considered (see Charman v Charman [2005] 2 FLR 422).

In respect of whether there is an ongoing duty to provide disclosure after a final order has been made, see Den Heyer v Newby [2005] EWCA Civ 1311. There may be an obligation to provide sufficient information to enable a potential claim to be evaluated, for example, where there is a substantial joint lives periodical payments order.

In respect of the impact of non-disclosure on the final orders made by the court, on appeal in M v M [2006] EWCA Civ 1852 (second appeal following Peter Hughes QC's judgment referred to above) Wall LJ (as he then was) said: "*In my judgment, the wife is entitled to choose the option [for sale of a property] in which she has the greater confidence*". It is at this point that the husband's litigation conduct returns to haunt him. Had he behaved properly during the proceedings, had he given full frank and clear disclosure, had he not breached his undertakings and dissipated funds, I do not think we would be where we are or that we would be having the current argument.

In L v L and H [2007] EWHC 140 (QBD) the husband successfully applied for delivery up of copies of his laptops' hard drives 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.

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 was 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. Leave to appeal was refused.

In I v I [2008] EWHC 1167 (Fam), Charles J found that 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).

Charles J did not allow the wife's application to set aside the consent order where the husband had failed to disclose advanced negotiations in respect of new employment at a significantly higher income in that case. This decision was overturned by consent on appeal, and, unusually, the Court of Appeal gave a brief judgment anyway so as to make clear its preliminary conclusion that it would have allowed the appeal (see Bokar-Ingram v Bokar-Ingram [2009] EWCA Civ 412). Charles J's comments may still be useful though – since the Court of Appeal actually went further in its decision than Charles J did.

Where there has been a long period of time between the date of separation and the application for financial orders, it would seem that the duty to disclose financial developments may not be quite as vigorous (see Gordon (formerly Stefanou) v Stefanou [2010] EWCA Civ 1601).

Where an order is vitiated by non-disclosure, the court may, where appropriate, make additional or different provision without setting aside the whole order and there being a new hearing (Kingdon v Kingdon [2010] EWCA Civ 1251). See also Ben Hashem v Al Shayif [2008] EWHC 2380 (Fam) and Mahon v Mahon [2008] EWCA Civ 901.

The Court of Appeal considered the impact of self-help in a pre-emptive application for strike out in White v Withers LLP and Dearle [2009] EWCA Civ 1122 (at first instance reported as Re Z (Restraining solicitors from acting) [2009] EWHC 3621 Fam). The husband's appeal against the striking out of his claim for damages against his wife's divorce lawyers was allowed, and the Court of Appeal held there was a case to answer relating to trespass to goods and/or conversion, and the claim could not be struck out as an abuse of process.

The case arose from the actions of the wife in intercepting the husband's post and taking and passing to her solicitors original and copy documents, including private family letters and correspondence. The action ended in May 2011 with an out of court settlement and a public apology by Withers to the effect that they had applied the law as they reasonably understood it to be at the time.

The Court of Appeal in R v K [2010] 1 FLR 807 related to a criminal prosecution in the context of tax evasion. The court drew a clear distinction between disclosure that is legally required as a matter of law and in relation to which

- a client is not entitled to invoke the privilege against self-incrimination (which includes disclosure compellable in proceedings for financial orders), and
- information that is volunteered without compulsion (in that case, in a without prejudice round table meeting), to which the privilege against self-incrimination did not attach.

The court held that the FPR, which had the approval of parliament, must have been intended to abrogate the privilege, since the court could not discharge the duty imposed on it by s25 MCA 1973 unless the parties were required to disclose all relevant information, even if tending to incriminate them. The purpose of the legislation would be frustrated if the parties could withhold relevant information, whether relating to their financial affairs or other matters, on the grounds that to disclose it would tend to incriminate. The court went on to say that the public interest in prosecuting crime outweighed the public interest in the settlement of disputes.

Admissions made in the course of 'without prejudice' negotiations were not inadmissible in criminal proceedings simply by virtue of the circumstances in which they were made, but could in the exercise of discretion be excluded if their admission would make that criminal trial unfair.

Imerman v Tchenguiz [2010] EWCA Civ 908 provides a comprehensive review of the law in relation to confidence and privacy, and you are encouraged to read the judgment itself. See also the subsequent judgment in this case reported as Tchenguiz-Imerman v Imerman [2013] EWHC 3627 (Fam) in respect of orders for disclosure against third party beneficiaries, joined as parties to the proceedings.

Adverse inferences must be properly drawn and reasonable, and the court may attempt to quantify the non-disclosed assets using direct evidence, and evidence of business activities and lifestyle, with the aims of ensuring that the non-discloser is not better off by failing to disclose and not producing an unfair result; Mostyn J in NG v SG (Appeal: Non-disclosure) [2011] EWHC 3270.

See also UL v BK (Freezing Orders: Safeguards: Standard Examples) [2013] EWHC 1735 for detailed judicial guidance about freezing and search orders. The wife had illicitly obtained documents from H's safe and briefcase, and her application for the continuation of a freezing order she had obtained preventing her husband from dealing with various assets was dismissed. Her self-help approach and her lack of 'duty of candour' did not assist her. The husband had separately (and successfully) brought an action for breach of confidence and misuse of private information in the Queen's Bench Division where an order had been granted requiring her to hand back the documents to her husband's solicitors.

N v N [2014] EWCA 314 Civ involved a successful appeal by the husband against an order obtained by the wife setting aside an order varying her maintenance. The CA found insufficient evidence for a finding of material non-disclosure and suggested that there was no duty of disclosure of changes in financial circumstances during the appeal process in family proceedings, since the appellate court does not look at the case afresh, but whether the trial judge was plainly wrong or not.

This appears to be different to civil proceedings (see rule 31.11 Civil Procedure Rules (CPR) (2010), which specifies that the duty to disclose continues until proceedings are concluded). The CPR continue to be the default rules if the position is not covered by the FPR, and the case law preceding CPR rule 31.11 suggests a common law duty of this nature. There seems to some uncertainty about this therefore.

Failure to provide disclosure resulted in the committal of Mr Young to prison for six months and the confiscation of his passport in Young v Young [2013] EWHC 34 (see also Young v Young [2013] EWHC 3637 for the final financial remedy order).

The court in BE v DE (Evidence: Without Prejudice Privilege) [2014] EWHC 2318 (Fam) revisited the principle that written or oral communications made in a genuine attempt to settle a dispute will not normally be admissible in evidence, that the use of the words 'without prejudice' is not essential (although clearly advisable) and the content of such negotiations may not be relied upon subsequently in an open context. The test of whether the parties were trying to compromise the issue in dispute is an objective one.

In US v SR [2014] EWFC 24 the Family Court made a significant costs award (£427K) against the husband because of his deliberate and sustained non-disclosure, and in Colborne v Colborne [2014] EWCA Civ 1488 where the husband had failed to make full and frank disclosure, the trial judge awarded the wife all her costs as a result. The Court of Appeal said that whilst the trial judge has been entitled to reflect conduct in a costs award, the costs award had to be proportionate and reflect the actual impact of the conduct. The costs award was reduced down to 80% but interestingly impacted on the overall structure of the financial award because it was charged on a property. Clients need to be advised accordingly of that possibility.

D v D [2015] EWHC 1393 is a useful decision of Roberts J in which she sets out how to deal with a non-disclosure case and when a non-disclosure argument will be successful.

The well-documented joined appeals to the Supreme Court in Sharland v Sharland [2015] UKSC 60 and Gohil v Gohil [2015] UKSC 61 have established that on a subsequent challenge to the resulting order, those who fraudulently misrepresent their finances to the Family Court will have the burden of proving that the court would have been more likely than not to have made the same order if there had been full disclosure. Also, the parties cannot agree to waive the duty to give full and frank disclosure.

Regulatory issues

As an officer of the court, you have a duty to not knowingly allow a client to mislead the court by providing incorrect or inaccurate information (see W v W [2004]). 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 within a different department and in a different capacity. 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 relation to their family situation.

Chapter 4 of the SRA's Solicitors' Code of Conduct covers confidentiality and disclosure. Outcome 4.4 sets out when you may act even when material confidential information is held by another member of the firm, and outcome 4.5 requires effective systems and controls to be in place. The duty of confidentiality must be reconciled with the duty of disclosure, and where that is not possible, the protection of confidential information is paramount.

In respect of the duty to disclose all relevant information to the client, outcome 4.2 of the SRA's Solicitors' Code of Conduct requires that: "*any individual who is advising a client makes that client aware of all information material to that retainer of which the individual has personal knowledge*". Material information is not defined, but previous guidance has made clear that it must be information that is relevant to the specific retainer with the client and not just information which might be of general interest to the client and that would seem still to be the case. For more information, consult the Code of Conduct, and see also good practice notes below.

The Code states that the duty of disclosure to clients must be reconciled with the duty of confidentiality to clients. When it cannot be reconciled, then the protection of confidential information is paramount.

See also the Bar Council professional conduct guidance on illegally obtained evidence in civil and family proceedings.

When should you as the lawyer decline to act?

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

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

- If your client says they have an asset, but instructs you not to disclose, you cannot continue to act. You would be in breach of your duty to the court to not 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 of that Act .

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

- You must never compromise your professional integrity or your duty as an officer of the court.

See the Solicitors' Code of Conduct.

What is disclosure and what is the duty to disclose?

Disclosure relates to both facts and documents. A party discloses a document by stating the document exists or has existed, and inspection of a document occurs when a party is permitted to inspect a document disclosed by another person (see rule 21.1 FPR). For the purposes of disclosure and inspection, 'document' means anything in which information of any description is recorded; and 'copy', in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

The duty to disclose is: "*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*". Charles J in I v I [2008]. See also F v F [1995], GW v RW [2003] and W v W (ancillary relief: non-disclosure) [2003].

The duty extends to any fact within a party's knowledge, documents and information that 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. The parties must disclose: "*…facts, information and documents, which are material and sufficiently accurate to enable proper negotiations to take place to settle their differences*" (para 11, PD9A).

A failure to disclose in mediation or in the collaborative process may bring an end to that process if discovered during it, and if discovered later may mean that any agreement or consensus reached may be set aside.

A failure to disclose in negotiations between solicitors, in court proceedings or in arbitration may be regarded as conduct and may give rise to adverse inferences being drawn. For example, an inference that there are substantially more assets than those disclosed. 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, since costs orders are not intended to be 'used as a means of punishment' (Peter Hughes QC in M v M [2006]). See also E v E [1990], T v T [1994], Al Khatib v Masry [2002] and TL v ML [2006], and the good practice notes section on page 28.

A failure to disclose will almost certainly result in a loss of credibility for the non-disclosing party, and very often results in a case progressing through the court process settling part-way through any final hearing in a way beneficial to the other party, albeit with often huge and wasteful expenditure on legal fees.

A failure to disclose may also impact on the type of order that the court makes, as it did on appeal in M v M [2006] EWCA Civ 1852 (second appeal following Peter Hughes QC's judgment; see also Kingdon v Kingdon [2010]).

The criminal offence of fraud by failing to disclose information (s3 Fraud Act 2006) may be committed where there is a failure to comply with a legal duty to disclose, with the intention of making a gain or causing 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 against them or their spouse or civil partner.

In respect of the timing of disclosure, there is an obligation to disclose developments on an ongoing basis, without being asked. Livesey v Jenkins [1985] decided that there was an obligation on the wife to disclose her engagement immediately, and established the two stage test of:

- was there material non-disclosure? And
- was it so important that the original order should be set aside?

Reference is also made to timing of disclosure in PD9A and in Imerman v Imerman [2010]. After any court proceedings or non-court dispute resolution processes 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). Where there has been a long period of time between the date of separation and the application for financial orders, it would seem that the duty to disclose financial developments may not be quite as vigorous (see Gordon (formerly Stefanou) v Stefanou [2010] EWCA Civ 1601). There is no duty to disclose changes in financial circumstances during the appeal process, whereas there is in civil proceedings (N v N [2014]).

It may be appropriate to consider a preliminary hearing to address the issue of non-disclosure, as in OD v DS [2004]. For authority in respect of which court should be asked to deal with the issue and how case management powers should be exercised, see K v K [2005] (although that case was pre- FPR 2010, and the rules now require 'active case management' by the court; and see rule 1.4 and Part 4).

Privilege

Privileged communications are generally protected from disclosure in evidence in any civil proceedings. The law of privilege is complex. Quite different legal principles can apply to different forms of privilege. This guide provides a summary, but further consideration of this complex issue is beyond the scope of the guide. Privilege belongs to the clients (not the lawyers) and may be waived by them.

Types of privilege

Legal professional privilege (sometimes referred to as solicitor/own client privilege) covers:

- communications between the client and their legal advisers (legal advice privilege), and
- any communications with a party and with third parties in the preparation and conduct of the case in the context of actual or contemplated litigation (litigation privilege).

The concepts of 'joint privilege' between various related parties with a joint interest means that privilege can be asserted by those parties against a third party but not each other (for example, trustee and beneficiary) and 'common interest privilege' between parties with a common interest at the time permits sharing of information between those parties without loss of privilege (for example, parent company and subsidiary).

Legal advice privilege was considered in G v G [2015] EWHC 1512 where the wife sought permission to appeal a consent order reached with the husband in 2010, alleging material non-disclosure. The preliminary hearing concerned whether an email sent by Deborah Bangay QC to Julian Ribet at Levison Meltzer Pigott was confidential or privileged. It was held that because of the circumstances, there was no legal advice privilege and the application failed. The case is a reminder that decisions about whether information is privileged are necessarily fact specific and involve consideration of the context in which the alleged privileged information was provided.

'Without prejudice' privilege attaches in specifically defined instances to correspondence and discussions between the parties and their advisers regarding the compromise of any dispute.

In SC v YD [2014] EWHC 2446 the father appealed an order allowing the mother to amend her pleadings in proceedings under the Trusts of Land and Appointment of

Trustees Act 1996, to refer to a document he claimed was a privileged offer of settlement. The High Court refused him permission to appeal as the document was found not to be privileged because the parties had not been in dispute at the time it had been drafted and given to the mother.

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 (see Instance v Denny Bros. Printing Ltd [2000] The Times, February 28, Ch D and Rush & Tompkins v Greater London Council [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. It is not possible to prevent the disclosure of documents that would otherwise be disclosable as a matter of law simply by marking them 'without prejudice' or referring to them in any negotiations (whether in mediation, at FDR, or as part of any other confidential dispute resolution process).

There exists, in some circumstances, privilege against self-incrimination. The law in relation to privilege against self-incrimination depends on the context of the disclosure (see R v K [2010] 1 FLR 807). In relation to disclosure that is legally required as a matter of law (which includes disclosure compellable in proceedings for financial orders), a client is not entitled to invoke the privilege against self-incrimination in those proceedings, although any information provided under compulsion cannot then be used against him in a criminal trial.

In relation to information that is volunteered without compulsion (as in R v K [2010], in a without prejudice roundtable meeting), the privilege against self-incrimination does not attach. The court held that the FPR, which had the approval of parliament, must have been intended to abrogate the privilege, since the court could not discharge the duty imposed on it by s25 Matrimonial Causes Act 1973 unless the parties were required to disclose all relevant information, even if tending to incriminate them.

The purpose of the legislation would be frustrated if the parties could withhold relevant information, whether relating to their financial affairs or other matters, on the grounds that to disclose it would tend to incriminate. The court went on to say that the public interest in prosecuting crime outweighed the public interest in the settlement of disputes. Admissions made in the course of 'without prejudice' negotiations were not inadmissible in criminal proceedings simply by virtue of the circumstances in which they were made, but could in the exercise of discretion be excluded if their admission would make that criminal trial unfair.

In relation to admissions at the FDR, reference should be made to PD9A, which makes clear that such admissions may not be admissible in evidence except in the trial of a person committing an offence at the appointment or in the very exceptional circumstances indicated in Re D (Minors) (Conciliation: Disclosure of Information) [1993] Fam 231.

It may be that a form of mediation privilege will develop as a separate category of privilege or confidentiality. Part 35 of the FPR and amendments to the Civil Procedure Rules 1998 came into force on 6 April 2011 to implement the EU Mediation Directive 2008/52/EC in respect of EU cross-border disputes in proceedings to which the rules apply. This area of law is likely to evolve and should be kept under review, particularly by those involved in EU cross-border disputes.

Misdirection of privileged communications and other privileged documents

This can result in two different situations arising.

First, the client may obtain privileged communications. Where a client tells you that they have obtained lawyer/client privileged communications belonging to their spouse/the other client, you should tell the client that you 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 you to forward on unread. Acting in this way prevents you coming into conflict with the client.

Where you receive information or documents from your client and realise that what you have received is privileged, you should not read the information/document. You must tell your client that they must forward the information/document directly to the other lawyer. Your 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 communications and is not required to disclose the existence of them to their client (see indicative behaviour 4.4 (d) of the

Solicitors' Code of Conduct). If a lawyer knows immediately that it was sent by mistake, they should stop reading.

If you read a material part of the document/communication, realise that it was not meant for you but have to concede that the information already read could be very useful to your client, you are under a duty to discuss the implications with your client. You must tell the client that you have a duty to immediately notify the other side that you have received this document by mistake and explain to your 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.

Confidentiality and privacy

This section of the guide contains a summary of the main issues. See the detailed Guide on *Privacy and Disclosure for Family Lawyers* published by Resolution for more detail and practical guidance. Confidentiality and privacy are terms that are often used interchangeably. There are specific legal meanings that may be relevant; for example, in the context of the human right to privacy, or an action for breach of confidence.

In Imerman v Tchenguiz [2010] EWHC Civ 908, the court regarded the question of whether the claimant had a 'reasonable expectation of privacy' in respect of information as a good test to apply when considering whether a claim for breach of confidence should be successful.

What is a confidential (or private) document?

The Court of Appeal in White v Withers LLP & Anor [2009] defined 'confidential documents' very widely: "*Communications which are concerned with an individual's private life, including his personal finances, personal business dealings, and (possibly) his other business dealings are the stuff of personal confidentiality*".

- It includes all documents connected with family or private life, personal and family assets or business dealings. This will include bank statements, correspondence relating to business or personal finances, and personal documentation such as diaries.

- It doesn't apply to documents regarding joint assets. It is advisable that clients are reassured that they are able to access and look for documents relating to joint assets; for example, statements of joint accounts or a joint mortgage. Many clients will be overly cautious and it is important that they understand that they have the right to locate these documents and forward copies to their solicitor.

- The location of the documentation will also have a bearing on its status as confidential and private. Imerman stated that: 'confidentiality is not dependent upon locks and keys or their electronic equivalent', and therefore it does not automatically mean that, because a document is not contained within a locked filing cabinet or a password-protected computer, the document can be assessed and copied.

- It may be important how the parties conducted their affairs. If it is common practice that documents were and are left on the kitchen table then it may be arguable that any such document is not private or confidential, and/or that both parties should be able to access them. However, if the spouse knows that their spouse would not consent to a document being accessed, then it is safest to assume that it is confidential. Confidentiality cannot easily be lost. Confidentiality in a document cannot be lost simply by reason of the fact that it has been left lying around the house and is discovered unintentionally by your client.

Imerman v Tchenguiz [2010] EWHC Civ 908

Imerman v Tchenguiz [2010] provides a comprehensive review of the law in relation to confidence and privacy and family lawyers are encouraged to read the judgment itself. Most divorcing or separating couples agree to exchange financial information openly and honestly, as promoted by the Resolution Code of Practice, but there are always exceptions.

Most importantly, following Imerman, married couples are not excepted from the rule that each person has the right to privacy. Confidentiality exists between husband and wife whether prior to or after a breakdown in their relationship and whether divorce or other legal proceedings have been issued or not.

Imerman has confirmed that Hildebrand v Hildebrand [1992] 1 FLR 244 is only good law in relation to the rule that if you have a confidential (and relevant) document, it must be disclosed, at the latest, when you serve a questionnaire. The 'Hildebrand Rules' do not provide authority for a spouse, in circumstances that would otherwise be unlawful, to take, copy and retain copies of confidential documents – even if there is a suspicion that the other spouse is seeking to obscure assets from view. So any such documents must be returned. It is not sufficient to tell the solicitors acting for the owner that you have the documents and to provide copies prior to the questionnaire stage of proceedings.

The key question now, when assessing whether or not a document could and should be accessed is: 'would the other spouse consent to these documents being accessed and copied?'. If the answer is no, it is likely that the document is confidential and accessing it could lead to an actionable breach of confidence, action in trespass to goods, or criminal prosecution under the Data Protection Act 1998 and the Computer Misuse Act 1990. The court may also decide that the documents cannot be admitted as evidence in the financial proceedings and conduct may be penalised in costs, either in any injunction and/or ancillary relief proceedings.

The Court of Appeal in Imerman also stated that where confidential information has been passed onto solicitors, the court might think it right, and in appropriate circumstances necessary, to go so far as to prevent the client from continuing to instruct those solicitors in the proceedings. This obviously has implications for both you and your client.

On the other hand, you and your client may also be concerned that without accessing particular documents, it will be impossible to establish that the other person has the undisclosed assets that your client believes that they have, and it may be that a court will admit any such evidence if it is relevant, irrespective of the source of it. It may be a question of finely balanced judgement in a relevant case.

How to explain the issues around disclosure and potential or actual non-disclosure to clients

Clients should be advised about the current uncertainties in this area; both those who may be inclined not to disclose, and/or those who are concerned that their former partner may not, and the up-to-date position in the area of confidentiality/privacy law. There is no substitute for reading the judgments in Imerman v Tchenguiz [2010], Tchenguiz-Imerman v Imerman [2013] and UL v BK [2013].

Anecdotally, different courts are approaching this issue in very different ways ranging from 'business as usual; this doesn't really apply to us', to the strict application of the Court of Appeal's decision and approach in Imerman.

As a minimum you should consider explaining the following points to clients, probably in writing:

- What ‘confidential documents’ are, and that they do not include documentation regarding joint assets.

- There are very limited circumstances where a spouse can go looking for information concerning their spouse’s financial circumstances, and if they do search and find confidential documents then they may be criticised by the courts and may be subject to civil proceedings and/or even be committing a criminal offence: “*It is simply and categorically unlawful for a wife...to breach her husband’s privacy by furtively copying his documents whether they exist in hard copy or electronically. There may be factual issues about whether the documents are actually in the husband’s private domain; but if they are (and they almost always are) then it is wholly impermissible for the wife to access and copy them*” (Mostyn J in UL v BK [2013]).

In relation to hard-copy documents:

- If information is contained within a locked filing cabinet or equivalent they should not break into it or ask anyone else to do so on their behalf.

- If documents are in open files or in communal office areas, they should not look for, or copy, documents belonging to their spouse unless it is known that they would consent to those documents being viewed/copied.

- If information has been left out openly (ie not locked in a drawer or study) but it is known that the spouse would not consent to the information being copied, it should not be taken or copied. A client should be advised that it may be acceptable to make a mental note of what the documents say or contain, or take a written note of the key points, but that this cannot be guaranteed.

- If copies of private documents are taken then UL v BK [2013] makes clear that if the solicitor acting for the person who has taken copies knows about it, they: “*…must immediately seek to obtain all of them from the wife and must return them, and all copies, to the husband’s solicitor (if he has one)*”. It is a moot point whether any written notes made from memory following sight of private documents could be required to be delivered up to the spouse.

- Any information that is sent to you has to be disclosed to the owner and his/her solicitor.

- Original documents should not in any circumstances be taken without agreement.

Information on a computer

Information on a computer may include any information held on an electronic device with capacity for memory storage/access, including on a home or business computer, an external hard drive, memory stick or CD/disk, information held on the wide spectrum of handheld devices, or on cloud software and any private email or private social network. Confidentiality would not apply to information that is posted on a public 'wall'.

- If the information is password protected and the password is unknown to your client, then they must not obtain access to this information or ask anyone else to do so.

- If the information is unprotected, or available with a known password (or it was a joint password), then access to this information can be obtained if it is known that the spouse would agree.

- If computer access is freely available but it is known by your client that the spouse would not consent to this information being copied, then it should not be copied. A client should be advised that it may be acceptable to make a mental note of what the documents say or contain, or take a written note of the key points, but that this cannot be guaranteed. As above, if copies of private documents are taken then UL v BK [2013] makes clear that if the solicitor acting for the person who has taken copies knows about it, they: "…must immediately seek to obtain all of them from the wife and must return them, and all copies, to the husband's solicitor (if he has one)", and it is a moot point whether any written notes made from memory following sight of private documents could be required to be delivered up to the spouse.

- If information is sent to you, then it has to be disclosed to the owner or their solicitor, even if the spouse consented to the client accessing that information.

It is also recommended that in an appropriate case a letter should be sent to the other spouse/their lawyer asking whether they hold any originals or copies of documents in relation to your client's financial situation. This would also include documents such as solicitors' attendance notes (obviously redacted to remove privileged matters), counsel's notes, the spouse's own notes and any correspondence passing between solicitors or any third party relating to the confidential/Hildebrand material.

If your client provides you with 'Imerman' documents, then prior to returning the documentation (without reading it), you may ask for an undertaking that the spouse's solicitor will preserve the documents until the conclusion of the proceedings. However, there is no duty on the spouse's solicitor to retain the confidential information and they may refuse to give the undertaking, although: "*The husband's solicitor, who owes a high duty to the court, will read them and disclose those of them that are both admissible and relevant to the wife's claim, pursuant to the husband's duty of full and frank disclosure*" (UL v BK [2013]).

If this is the case, consider whether there should be an application to the court for the confidential documentation to be admitted as evidence in the proceedings if they show dishonesty (or likely dishonesty) on the part of the spouse or are in contradiction of existing disclosure in the proceedings. If the spouse does not have a solicitor, then UL v BK [2013] suggests that you should retain the documents unread and apply to the court for directions.

If you are dealing with a spouse who is being secretive then the alternative options should be discussed with the client (in the context of balancing risk, benefit and cost):

- Issue a court application to ensure that any failure to disclose may be a contempt of court.
- Production/disclosure appointments to require third parties, such as accountants or business partners to bring documents to court.
- Search and seize orders (previously known as Anton Piller orders). These can be for documents and/or electronic data whether at home or in the office. Data may also be stored on hand held devices etc.
- Freezing orders (previously known as Mareva injunctions), which can be used to freeze assets pending the resolution of a settlement (see UL v BK [2013]).
- If they find information or documentation that shows clearly an intention to hide/move assets to prejudice/defeat claims, then it may be advisable to take copies and give them to you, provided they are fully informed about the risks. This is not something that should be done without very careful consideration.
- If they do see any document or information suggesting the presence of undisclosed assets, they should probably make a mental note of what the document/information says or contains, again provided they are fully informed about the risks.
- Any application for a freezing order based on information obtained from illegitimately obtained documents will require the applicant to: "*…candidly reveal that her knowledge drives from...[those documents and she] must explain how she got them*" (UL v BK [2013]), even if this may lead to civil or criminal proceedings.

Transparency

The issue of transparency has been, and continues to be, the subject of much debate. Part 27 FPR and PD 27B and 27C have permitted duly accredited representatives of news gathering and reporting organisations (ie those who have UK Press Card authorisation) into 'private' proceedings since 27 April 2009, although not into hearings, such as FDRs.

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 (for example, s12 Administration of Justice Act 1960 [AJA 1960] and s97 Children Act 1989 [CA 1989], as amended). A media representative may apply to the court for sight of documents referred to during proceedings, and the court will balance the competing human rights (articles 8 and 10) in reaching a decision about whether to grant the application. If permission is granted, that does not of itself permit the publication of the contents of those documents, although the contents of the documents may be published if that is not prohibited by the AJA 1960 or the CA 1989, the general law relating to misuse of private information, rules of court (for example, FPR rule 12.73), or any other legal prohibition in force from time to time. Otherwise, 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' CM 7502), and specifically must not substantially prejudice the administration of justice or publish information that is protected by the implied undertaking of confidentiality, being information before a court sitting in private, not in the public domain, and produced as a result of compulsory disclosure.

Family proceedings are held 'in private' (Part 27, rule 27.10 unless the rules or other legislation provide otherwise, or the court directs otherwise and so the implied undertaking of confidentiality prevents either party from using information or documents that come to light in financial remedy proceedings elsewhere, where that information has been disclosed under the compulsion of court proceedings 'before, during and after proceedings' (per Butler-Sloss LJ in Allan v Clibbery [2002] EWCA Civ 45; albeit obiter). See DE v AB [2014] EWCA Civ 1064 for judicial consideration of open justice and privacy.

There has been a suggestion that it may be possible to restrict publication of information in financial remedy applications by application of the Judicial Proceedings (Restrictions of Reports) Act 1926.

This topic is the subject of ongoing consultation with further reform expected. For more information, see the Resolution Guide on *Privacy and Disclosure for Family Lawyers*. For more information, see also the Press Association Media Lawyer injunction applications alert service website and the standard order for use in reporting restriction cases.

In December 2015 the High Court determined the case of Associated Newspapers Limited (ANL) v Bannatyne and others [2015] EWHC 3467 (Ch). ANL was permitted access to court documents that referred to financial remedy proceedings in which the respondent had provided misleading evidence. It was held to be in the public interest to give ANL access, and that the implied undertaking of confidentiality in financial remedy proceedings accords with a party's Article 8 ECHR rights. It promotes full and frank disclosure provided under compulsion and extends to voluntary disclosure (Allan v Clibbery [2002]). The exception is where there is iniquitous conduct (Lykiardopulo v Lykiardopulo [2010] EWCA Civ 1315).

Breach of the duty to provide full and frank disclosure by commission is more serious than breach by omission. A party is not entitled to confidentiality if they provide false information. Against the backdrop of increasing transparency in family cases, the decision illustrates the potentially serious consequences for a party attempting to mislead the court in financial remedy proceedings. There is a public interest in exposing their conduct, even if they subsequently correct the position (which the husband did here).

Good practice notes

Non-court dispute resolution and MIAMs

All methods of non-court dispute resolution should be considered with the client at the outset and kept under review subsequently throughout the process of resolution. The client should be informed and reminded regularly about the options and if appropriate encouraged to attend a MIAM to find out more, and also should be informed of the need to attend a MIAM before issuing a contested application to court for financial orders.

The client should be assisted with identifying the most appropriate way of providing and receiving disclosure, depending on the dispute resolution process being used and the resources available.

For example:

- if in mediation, then with or without lawyers assisting the clients and the mediator with the disclosure process

- using the collaborative process with provision of disclosure on a voluntary basis
- with the clients' lawyers providing voluntary disclosure in accordance with the pre-application protocol
- within the timetable of court proceedings

The importance of giving disclosure

Disclosure is of vital and fundamental importance to ensuring a just outcome. The you and all those involved in court and non-court dispute resolution should encourage the separating couple at an early stage to give full, frank and clear disclosure of information and to be open in all dealings. The potential consequences of not doing or being so should be explained, at the outset in the terms of engagement letter, and at each relevant stage during the retainer; with specific reference to potential civil and criminal liability. Follow the guidance above in respect of how to explain the issues around disclosure and potential or actual non-disclosure to clients.

Whichever dispute resolution process is used, at an early stage you should also consider whether, as a matter of good practice, to provide the client with a blank Form E financial statement or equivalent so they may see exactly what is required. In mediation, consider who is best placed to assist the clients in providing disclosure (ie whether their respective solicitors – if applicable – should do so, or the mediator, depending upon the circumstances of the case, as referred to above).

Where the circumstances of the case are particularly complicated, more disclosure than that required by Form E will be appropriate. However, if there are contested court proceedings, then documents should only be disclosed to the extent that they are required by the financial statement or may otherwise be justified as necessary.

Excessive or disproportionate costs should not be incurred either in seeking or providing disclosure (pre-application protocol annexed to PD9A, para 11), and regard must be had to the concepts of 'proportionality' and 'saving expense' (rule 1.1 FPR). Judicial assistance may be advisable to manage the process, and part 4 of the FPR contains a non-exhaustive list of possible general case management techniques that may be employed.

If a non-court dispute resolution process is being used, then all schedules of assets, income, liabilities and other material facts produced and/or exchanged should take account of the contents of the Form E financial statement as a guide to the format and extent of the disclosure. The disclosure process should be just as rigorous in non-court dispute resolution as in court proceedings, but may be streamlined and targeted to minimise expense provided that all material information is disclosed. The evidence produced in support of the disclosure process may be limited provided the potential risks of so-doing are fully understood and freely agreed to by the separating couple.

In cases in which the client, following advice, decides to issue proceedings immediately, rather than pursue voluntary disclosure or engage in non-court dispute resolution (for example where there may be a forum dispute), attendance at a MIAM may not be necessary, or alternatively part 4 on form FM1 may be completed by the solicitor acting for the applicant explaining why the applicant has not attended a MIAM. Part 4 should be used sparingly.

Privilege, and open and without prejudice communications

Everyone involved in assisting clients to resolve financial matters, and the clients themselves, need to understand the open nature of the disclosure process and the distinction between that and privileged without prejudice negotiations about the outcome of the issues in dispute. It is good practice to label documents appropriately and to ensure that all those involved understand the basis on which information is being shared when there may be some doubt (for example, schedules of future income needs). Facts should be disclosed in 'open' correspondence or documentation, whichever dispute resolution process is used, and separate correspondence or documentation should set out any privileged proposals or any provisional consensus reached in mediation pending legal advice (for example, in a memorandum of understanding).

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 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.

Where there is the suggestion that a client may have committed a criminal offence, they should be advised about the implications of divulging that information in different contexts in light of R v K [2010].

Clients should be encouraged to make proposals aimed at achieving a negotiated agreement as soon as possible. How this is done will differ on the process involved; but it is generally good practice to conduct negotiations and put forward proposals focused on and referring to the clients' 'interests' (as opposed to their 'positions'), and to emphasise the need for clients to be willing to compromise. PD9A para 6.3 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).

In court proceedings, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, 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.

Privacy and confidentiality of documents

Consideration should be given with clients to issues of privacy and security in respect of their documents and communications, and in particular advice from their lawyers, particularly if the separating couple continue to share a property. Caution should be exercised when communicating with clients and others by email, and it is good practice to consider whether separate correspondence addresses, password-protected email addresses or, possibly, if there is no other alternative, post office boxes should be used to ensure private documentation and communications are kept securely.

It is good practice to remind clients of the need for confidentiality at all times, both before, during and after proceedings.

The implied duty of confidentiality probably extends to information obtained prior to the issue of financial order proceedings, and as a matter of good practice, you should advise your clients that the same principles do apply, particularly given the developing privacy laws and in light of Imerman.

If specific confidential information is requested, particularly affecting third parties or of a market sensitive nature, it is good practice to ask the requesting party to sign an agreement/undertaking confirming that the information sought will remain confidential and will not be disclosed.

Self-help and financial disclosure

Irrespective of the potential legal consequences, clients should be advised to consider the practical and procedural consequences of self-help, including that it may:

- consequently have an adverse effect on their children, if they have any
- raise tension and hostility between the parties

- encourage vindictive and/or corresponding action by the other party
- increase costs
- result in an order for costs
- make settlement much less likely.

Pragmatism and common sense in this area are commended, but you should be aware, and make your clients aware, that civil or criminal proceedings may follow as a result of self-help.

In appropriate cases, you should advise clients of the court's powers to make search, preservation and freezing orders (and other interim orders) under part 20 FPR (see UL v BK [2013]). It is recognised that, in practice, cases where such action is appropriate are likely to be far fewer than those in which there are real concerns about non-disclosure. The potential cost and the risk of bringing such actions when the required evidence to justify it may not be readily available, or where the location and production of such evidence may bring with it the risk of criminal/civil proceedings, is undoubtedly a problem with no clear solution.

Be clear about your position, both personally and professionally, so that you do not potentially become liable for a criminal or civil action. Retain your 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. Keep up to date with developments in this area since there is a great deal of uncertainty about how the decision in Imerman will be interpreted and developed in the future.

The issue of whether illegally or improperly obtained evidence will be admissible also needs to be considered. Such evidence is not automatically inadmissible (Jones v University of Warwick [2003]); and in family proceedings involves a discretionary exercise guided by the balance of the parties' human rights and the overriding objective.

The use of private detective agencies cannot be recommended save in exceptional circumstances and with appropriate instructions being clearly given that information must be obtained lawfully, and that no unlawful action is to be taken (see R v Waters [2007] EWCA Crim 222).

Communications between lawyers

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 likely to be 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 such behaviour falls within the indicative behaviours at IB 4.4 of the Code (for example, that there is evidence that serious physical or mental injury will be caused to a person(s) if that information is disclosed to the client, 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.

Costs consequences in the event of non-disclosure

Litigation misconduct is now the only basis on which an adverse costs order may be made in court proceedings for financial orders, which undoubtedly may include a failure to provide adequate disclosure. The costs implications of non-compliance with the duty to disclose should be considered by the court at the first court appointment and throughout the proceedings. 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. 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.

There is a great deal of jurisprudence in respect of costs; in family and civil proceedings. It is difficult to predict the outcome of costs issues, even in cases where there has been a lack of, or late disclosure, and the issue of the proportionality of pursuing the issue must always be borne in mind.

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 special facts of any particular case may justify and/or require you to depart from these guidelines.

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.