



THE BAR  
OF IRELAND

*The Law Library*

Submission by Council of The Bar  
of Ireland to the Legal Services  
Regulatory Authority concerning the  
Draft Code of Practice for Practising  
Barristers

19 November 2018

## **PREAMBLE**

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Bar of Ireland is long established and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Legal Services Regulatory Authority has invited submissions as part of a public consultation in relation to a Draft Code of Conduct for Practising Barristers.

Under section 22(1) of the Act, the LSRA may, having regard to the objectives specified in section 13(1) and 13(4) of the Act, issue a code of practice where it considers it necessary to do so for the purposes of setting and improving standards for the provision of legal services in the State. The LSRA may issue a code of practice that relates to the provision of legal services by legal practitioners generally or in respect of legal practitioners of such class or classes as may be specified in the code.

The Authority should ensure that the purpose of the Code of Conduct for Practising Barristers is to deal with the conduct of Practising Barristers in a professional capacity and that the parameters of the Code do not extend beyond this purpose.

The Council of the Bar of Ireland (hereinafter referred to as “the Council”) is strongly of the view that the Code should not deal with, or include provisions in relation to, sections of the Act that have yet to be commenced by the Minister and in respect of which no secondary legislation has been enacted until such sections have been enacted and, where necessary, secondary legislation is in place.

## OBSERVATIONS ON THE DRAFT CODE

1. Clause 1.4 of the draft Code provides that “The Authority may amend this Code as it deems necessary, in accordance with the relevant statutory procedure and may further issue guidance to assist Practising Barristers to comply with the Code. It shall be the duty of each Practising Barrister to ensure that he or she meets the requirements of this Code *as explained in any guidance issued by the Authority,*” [emphasis added].
  - 1.1. The clause in italics should be omitted from the Code. It is sufficient that the Code impose a duty on practising barristers to meet the Code’s requirements.
  - 1.2. We acknowledge that it can be helpful, and indeed at times desirable, for guidance to be issued in relation to the operation of a Code for the assistance of those to whom the Code applies. However, the Code should speak for itself and should fall to be interpreted in accordance with its own terms and with the principles of statutory interpretation. Otherwise there is a risk that the proper meaning of a provision might be changed through the issuing of guidance purporting to interpret the provision. Although the code cannot be amended without going through the required statutory procedure, imposing a requirement to comply with the code as explained in any guidance issued by the Authority could effectively impose a requirement to comply with something that is not contained in the Code or even which is contrary to the Code.
2. Clause 1.5 of the draft Code provides that “A failure to comply with any provision of the Code *may constitute or give rise to the provision of legal services of an inadequate standard and/or misconduct and* may be the subject of a complaint, inspection or investigation under the Act.”
  - 2.1. It is not clear to the Council what the purpose of this provision is, in particular in relation to the inclusion of the provision of legal services of an inadequate standard. Should the Authority wish, we are happy to discuss it further. Otherwise, our view is that this provision of the draft Code is contained within the Act and is included here unnecessarily.
  - 2.2. Insofar as there is to be any reference to the provision of legal services of an inadequate standard, it should be by reference to the definition contained in section 49(2) of the Act.
3. Clause 1.6 provides that, “This Code is not intended to be an exhaustive statement of the rules applicable to Practising Barristers. Other standards, requirements and rules that govern the conduct of Practising Barristers are found in the Act and in the general law

(including the law relating to contempt of court), and in professional codes, including the Code of Conduct for the Bar of Ireland (which is applicable to members of the Law Library) and the Professional Code of the Honorable Society of Kings' Inns (which is applicable to all Qualified Barristers). *Furthermore, the standards of professional conduct set out herein should not be confused with the requirements of the general law of contract, of tort, of criminal law or of equity, even though the requirements of professional conduct may in some cases follow, or closely parallel, the general legal requirements.*"

- 3.1. In our view, it is unnecessary to include the italicised clause above. The requirements of law operate irrespective of the provisions of a code of conduct and that the inclusion of a possibly incomplete list may at some future point be used to limit any relevant obligations under the Code.
- 3.2. The word "Kings'" in clause 1.6 should be changed to "King's".
4. Clause 1.9 provides a summary of the provisions of the Act which define 'Practising Barrister'.
  - 4.1. While we note that the full text of the relevant provisions is set out in Schedule A of the Code, we feel that it is unwise to provide a summary in the body of the Code. This may lead to confusion and there could be a difference in emphasis between the summary and the Act. The Authority should consider setting out the full text in clause 1.9 or, preferably, simply stating in clause 1.9 that the definition of "Practising Barrister" is set out in the Act and is reproduced in Schedule A of the Code.
5. Clause 2.2 provides that "A Qualified Barrister whose name is not entered on the Roll of Practising Barristers is an "unqualified person" for the purposes of the Act and it is an offence for such person to provide legal services as a barrister."
  - 5.1. The Council observes that this provision is perhaps unnecessary in that it is the corollary of clause 2.1. Nonetheless, we acknowledge that it is useful for it to be clearly stated that the provision of legal services by an unqualified person is an offence.
6. Clause 2.3 provides that "Every Practising Barrister, whether self-employed or a partner or employee in an organisation or entity, must have in place a policy of professional indemnity insurance in respect of the legal services being provided by him or her either directly or, if applicable, *through the entity or organisation*, unless deemed by the Authority to be exempt from the requirement to have such insurance in place. Such exemptions shall be specified in regulations made by the Authority."

- 6.1. The Council endorses entirely the requirement for Practising Barristers to have in place policies of professional indemnity insurance.
- 6.2. However, the reference to “entity or organisation” that has been italicised above is unclear and might better read, “...or, if applicable, through the entity or organisation of which he or she is a partner or employee...”.
7. Clause 2.4 provides that, “The aforementioned policy, whether it be an individual policy, a group policy *approved by the Authority* or an entity policy must comply with such regulations, in particular in respect of minimum terms and conditions, as are made by the Authority.”
- 7.1. This provision, as worded, could be taken to mean that a group policy approved by the Authority could be at risk of being subsequently found not to have been in accordance with the regulations. Section 46(3) provides that the Authority may approve a group policy where it is satisfied, inter alia, that the scheme complies with the regulations. It would be more straightforward to remove the italicised words above. They are simply a repetition of what is subsequently stated and their presence renders the subsequent use less clear.
- 7.2. It is unclear what is meant by the phrase “entity policy”. This should be clarified in the provision. It is assumed that an entity policy would not be applicable to members of the Bar of Ireland.
8. Clause 3.1 provides that “A Practising Barrister is obliged to uphold the rule of law and to facilitate the administration of justice. Where he or she appears before a Court or tribunal established by the State, a Practising Barrister owes a *duty of candour* to the Court or tribunal, which duty prevails over any conflicting duty owed to his or her client, any other legal practitioner associated with the proceedings or any other party to the proceedings.”
- 8.1. A duty of candour is a new duty in this context and it is not required as a general rule by statutory provision. It is not clear what the source of this proposed duty is nor what it entails.
- 8.2. A duty of candour is a significantly higher duty than any duty that has heretofore been required of barristers, other than in very specific and limited circumstances, such as seeking leave for judicial review in asylum matters. In such limited and specific cases a breach of a duty of candour could constitute a misleading of the Court and would, therefore, be covered by the draft Code in any event.

- 8.3. The more appropriate and, in our view, correct duty is one not to deceive or knowingly mislead the Court. This is the duty required of barristers under the Bar of Ireland's 2016 Code and the current 2014 Code. It is also the duty required in clause 4.2 of the draft code.
- 8.4. While clause 4.37 of the draft Code provides that, in a criminal case, Defence Counsel is not required to inform the Court of previous convictions omitted by the Prosecution, such provision is not explicitly exempt from the proposed general duty of candour. Such a duty could be inconsistent with the continued defence of clients, in accordance with clause 4.33, where such client has made a confession of guilt. Further, is Defence Counsel thereby required to draw the Court's attention to relevant evidence contained in a book of evidence where that has been overlooked by the Prosecution?
- 8.5. In a civil case where a plaintiff has failed to give evidence to substantiate a particular part of his or her claim, but the defence knows that such evidence exists, is the defence required to so inform the court to the detriment of their own client?
- 8.6. "Duty of candour..." should be replaced by the phrase "duty not to deceive or knowingly mislead...".
- 8.7. This provision confines itself to Courts or tribunals established by the State. As drafted, it does not apply to Practising Barristers appearing in a mediation or before an arbitrator or any other person exercising judicial or quasi-judicial functions, such as, for example, the disciplinary bodies of various sporting organisations or professional bodies. A duty not to deceive or knowingly mislead the Court should also apply in such cases. We note that clause 4.16 of the draft Code provides that the rules in Part D (II) that relate to Courts also apply to other fora.
9. Clause 3.4 provides that "A Practising Barrister must act ethically and honestly *at all times*, applying the highest standards of dignity and courtesy in his or her interactions with members of the public".
- 9.1. Such duties, for the purpose of the draft Code, should not apply at all times. Rather, they should apply only when a Practising Barrister is acting in a professional capacity. Insofar as it might be the intention of the draft Code only to impose such a duty on a Practising Barrister when acting in a professional capacity, the draft Code as published does not so limit the duty. Any such duty should be clearly and expressly limited.

- 9.2. Further, a provision of this nature may have unintended consequences in circumstances where the public has a constitutional right to be present in court, i.e. a Practising Barrister's workplace. A Practising Barrister attending court does so on behalf of his or her client. The presence of members of the public who might wish to interact with a Practising Barrister should not place an onus on the Practising Barrister to respond to the detriment of his or her duty to the client.
- 9.3. A duty to apply the highest standards of dignity and courtesy in dealings with members of the public could interfere with a Practising Barrister's duty to his or her client, for example, in the conduct of adversarial court proceedings.
- 9.4. Clause 3.8(c) of the draft Code requires a Practising Barrister to treat clients with respect and courtesy. Clause 3.5 requires Practising Barristers, in their interactions with the Judiciary, Court personnel and other legal practitioners, to act respectfully and professionally. It is not clear why a different standard is proposed in respect of members of the public. Our view is that the more appropriate duty is for Practising Barristers, when acting in a professional capacity, to act respectfully and professionally towards members of the public.
10. Clause 3.9 provides that "A Practising Barrister should only accept instructions to act in a matter if he or she is available to so act."
- 10.1. The Council agrees with the sentiment of this provision but submits that it requires amplification and clarification.
- 10.2. It is often the case that when instructions are initially accepted no hearing date has been fixed for the matter and the Practising Barrister cannot know in that circumstance whether he or she will be available to act. It is noted that clause 4.5 of the Bar of Ireland's 2016 Code provides that "briefs are in general accepted on the understanding that the barrister concerned may be unavoidably prevented by a conflicting professional engagement from attending the case." Provision is made for the course of action to be adopted in such a situation. Further, clause 3.9 in that regard appears to be inconsistent with the provisions of clause 3.16 of the draft Code.
- 10.3. It is submitted that clause 3.9 would be more appropriately worded as follows:
- 10.3.1. "A Practising Barrister should not accept instructions to act in a matter if he or she knows that he or she is not available to so act at the time at which the instructions are given."

11. Clause 3.10 provides that “A Practising Barrister should not accept instructions to act in a matter which he or she believes to be beyond his or her competence *or experience.*”

11.1. This provision, as drafted, goes beyond any equivalent duty previously imposed on barristers. The corresponding duty contained in both the 2010 (4.4) and 2016 (3.21) Codes of the Bar of Ireland require a barrister not to act in a matter which he or she believes to be beyond his or her competence. It is submitted that the duty in clause 3.10 should not extend beyond competence. A Practising Barrister may have sufficient competence to perform a particular piece of work, but if he or she has never undertaken such work then he or she would be obliged under the rule as drafted to refuse the instructions on the basis of not having the necessary experience. A Practising Barrister starting his or her career at the Bar would never be able to accept instructions on the basis that, no matter how competent, all work would be beyond his or her experience.

11.2. The words “or experience” should be deleted from this paragraph.

12. Clause 3.11 provides that “in contentious matters, save where otherwise expressly stated in this Code, a Practising Barrister should not take instructions directly from a client.”

12.1. The Council has no difficulty with the injunction contained in clause 3.11 and acknowledges that it is appropriate.

12.2. However, express provision does not appear to have been made in the draft Code for the situations envisaged by clauses 3.27 and 5.26 of the Bar of Ireland’s 2016 Code and we recommend their inclusion.

12.3. If Practising Barristers are to be instructed by Solicitors to appear in District Court criminal matters without being attended by a solicitor, it would in many cases not be possible for them to act were they not permitted to take instructions directly from a client in the absence of their solicitor.

12.4. These exceptions to the general rule only pertain where a Practising Barrister has received his or her instructions from a solicitor but where the instructing solicitor is not present.

13. Clause 3.18 provides that “a Practising Barrister shall not hold moneys of clients.”

13.1. The Council notes that the proscriptive language used in this clause properly reflects the language used in section 45 of the Act.



14. Clause 3.21 provides that “A Practising Barrister may not permit any recording, by electronic or by any other means, of any privileged or confidential conversation between him or her, his or her solicitors, clients or other person in any circumstances without the authority of such person.”

14.1. It is noted that this clause is similar in provision to clause 3.7(b) of the Bar of Ireland’s 2016 Code and clause 3.5 of the 2010 Code. However, the Codes of the Bar of Ireland prohibit the recording of privileged or confidential conversations without the consent of the client. The Authority’s draft Code prohibits it without the consent of the person being recorded.

14.2. In circumstances where the privilege in such conversations attaches to the client, it is the Council’s submission that it should be the authority of the client that is obtained rather than of the person being recorded. Should the recording be in circumstances where the law requires the consent of the person being recorded, then such requirement exists independently of any Code and it is unnecessary for it to be expressed in a Code.

14.3. Where the draft Code provides “... without the authority of such person,” it should say “...without the authority of such client.”

14.4. If, by reference to “person” rather than “client”, there is a particular mischief sought to be dealt with, we would be grateful if the Authority would indicate what it is and the Council would be happy to discuss it further.

15. Part C (V) of the draft Code makes provision in relation to advertising by practising barristers. We repeat the observation made at Part 2 of this submission that the draft Code should not deal with, nor include, provisions in relation to sections of the Act that have yet to be commenced by the Minister and in respect of which no secondary legislation has been enacted.

16. Clause 3.38 provides that “A Practising Barrister who is subject to offensive behaviour by a client can withdraw from so acting if his or her professional conduct is being impugned.”

16.1. It is noted that this clause reflects the first portion of clause 3.22 of the Bar of Ireland’s 2016 Code. However, the Bar of Ireland’s Code contains as a first principle that, notwithstanding a client having behaved in an offensive manner, a barrister must continue to act unless justified in assuming that their professional conduct is being impugned. It is our submission that, while it may amount to the same thing, the emphasis is different.

- 16.2. It is further noted that the Bar of Ireland's Code also allows withdrawal where the trust of the client in the barrister's professionalism has been undermined by the offensive behaviour. It is submitted that this further condition be included in the Authority's Code.
- 16.3. The Bar of Ireland's Code contains, what is in our view, an important caveat to withdrawal in that it is only allowed where withdrawal will not have the effect of jeopardising the client's interests. As drafted, the Authority's Code does not include this protection for clients. The Council's view is that this caveat should be included in the Authority's Code.
17. Clause 3.44 of the draft Code lists a number of factors to be taken into account when an assessment of the reasonableness of a Practising Barrister's fees is undertaken. The factors listed mirror the factors as they appear in Schedule 1 to the Act. Item 3.44(j) refers to *"the use and costs of expert witnesses or other expertise engaged by the barrister and whether such costs were necessary and reasonable"*.
- 17.1. By making reference to the clause in italics the draft Code appears to envisage a situation where a Practising Barrister engages third party expert witnesses (perhaps engineers, doctors, actuaries etc.) directly.
- 17.2. The Council notes that Section 45(1) effectively prohibits barristers from holding client moneys.
- 17.3. While it is also noted that Practising Barristers will be entitled to receive instructions directly from a person who is not a solicitor in matters other than contentious matters, in the absence of specific reference in the draft Code to the prohibition on Practising Barristers holding client money the inclusion of the above clause could lead to confusion.
- 17.4. The Council submits that the draft Code should be supplemented with a statement to the effect that Practising Barristers are reminded of the operation of Section 45(1) of the Act.
18. Clause 3.47 of the draft Code imposes an express obligation on Practising Barristers to furnish a "Fee Notice" in all cases. The first line of clause 3.47 provides as follows: "On receiving instructions in a matter or as soon as practicable thereafter, a Practising Barrister shall provide the solicitor with a notice in clear and easily understood language that discloses the legal costs that will be incurred in relation to the matter or the basis on which they will be calculated ("the Fee Notice")."

18.1. The clause as drafted assumes the existence of the relationship of Practising Barrister and solicitor i.e. instructions have been received from a solicitor. It would appear from a reading of Section 150 of the Act that the obligation to furnish a Fee Notice also arises in cases where a Practising Barrister has received instructions directly from a client. It is submitted that the clause should also refer to the more general obligation to furnish a Fee Notice.

19. Clause 3.47 (discussed above) imposes an obligation on Practising Barristers to furnish a Fee Notice in all cases. Corresponding statutory duties arise pursuant to Section 150 of the Act. Clause 3.48 provides that a Practising Barrister may enter into an agreement with a client in relation to fees and this clause refers to Section 151 of the Act.

19.1. It is the view of the Council that neither the above provisions of the draft Code nor the underlying statutory provisions sufficiently engage with the fact that many Practising Barristers undertake work on the understanding that fees will be charged, and thereafter discharged, in accordance with pre-determined cost scales or schedules.

19.2. For example, in the vast majority of cases undertaken in the criminal context, Practising Barristers will be entitled to charge a fee, and to be paid, in accordance with the set criminal legal aid fee scale. Clause 3.47 envisages the service of a Fee Notice in every such case. Section 150 imposes additional obligations.

19.3. It is not immediately apparent to the Council that the Act itself and by consequence, the draft Code, engages sufficiently with this aspect of legal practice. Section 151 would appear to be limited in its application and the reference in Section 151(1) to “legal services provided in relation to a matter” would appear to envisage the execution of a written agreement in respect of every individual case or matter.

19.4. It is submitted that the obligations to be imposed under Section 150 in cases where Practising Barristers are already subject to a pre-determined scale of fees or costs are in fact overly onerous and in any event not justified where there is no scope for fees to be charged other than in accordance with a scale or schedule. In the particular context of higher-volume work, to include certain types of work before the criminal courts, it is not apparent to the Council how Practising Barristers could, in practical terms, comply with the numerous Fee Notice obligations imposed.

19.5. It is respectfully submitted that a more fundamental review of the relevant underlying statutory provisions should be undertaken in early course.

- 19.6. The Council identifies this issue in the context of this invitation to make submissions on account of the fact that the above clauses of the draft Code are derived from the relevant underlying statutory provisions.
20. Clauses 3.5 and 3.54 of the draft Code adopt the term “fee note” in the context of non-payment of fees.
- 20.1. In order to ensure a level of consistency, the term “fee note” should be substituted by the term “bill of costs”
21. The Bar of Ireland’s 2014 Code contains a number of provisions that relate to the charging of reasonable fees in certain specific circumstances. These provisions do no more than reflect the realities of certain aspects of legal practice as a barrister
- 21.1. Clause 12.1(f) of the 2014 Code provides as follows, *“Where Barristers accept a brief on which no fee has been marked by the instructing solicitor and where no fee has been agreed in advance, they remain entitled to mark a proper and reasonable fee having regard to the nature and extent of the work undertaken and they are not bound to reduce the fee that would thus be marked by reference to the outcome of the matter.”*
- 21.2. Clause 12.2 of the 2014 Code provides as follows, *“In cases where Barristers have actually been briefed for the hearing then such Barrister shall, in the event of a settlement resulting from negotiations, be entitled to charge a brief fee.”*
- 21.3. The above provisions have been carried over into the 2016 Code and can be found at clauses 12.4 and 12.9 respectively.
- 21.4. No equivalent clauses appear in the draft Code.
- 21.5. Each of the above clauses recognises the common realities of certain aspects of legal practice. Clause 12.1(f) takes account a common feature of litigation, namely the concept of urgency. In many cases it may simply not be possible due to time constraints for a barrister to enter into discussions regarding fees, let alone to serve a Fee Notice. Further, clause 12.2 above recognises that while the majority of cases are resolved by way of compromise which, in turn, has a number of positive consequences (reducing the overall caseload of the courts, efficient use of limited court time and resources etc.) some cases are resolved at a late stage in the life of the case i.e. when counsel have already been briefed for the hearing of the matter.

21.6. The Council recognises that Section 150 provides for a limited number of contingencies where certain obligations under Section 150 are by-passed. On a combined reading of sub-sections (4), (7) and (8) of Section 150, it would appear to be the case that the Fee Notice shall identify a specific period of time (sub-section (4)(f)) within which no work shall be carried out by the legal practitioner concerned. This obligation not to undertake work in a particular window can be overridden if the sub-section 7 criteria are engaged i.e. if the client agrees to a waiver of the period of time, or if the case falls into a sub-section (8) category of case.

21.7. Sub-section 8 in turn provides that the legal practitioner shall undertake work, thereby ignoring the prohibition on undertaking work during the sub-section 4(f) period, if any one of the following situations arise:

21.7.1. in the professional opinion of the legal practitioner, not to provide those legal services would constitute a contravention of a statutory requirement or the rules of court or would prejudice the rights of the client in a manner that could not later be remedied,

21.7.2. a court orders the legal practitioner to provide legal services to the client, or

21.7.3. where the matter involves litigation, a notice of trial has been served in relation to the matter or a date has been fixed for the hearing of the matter concerned.

21.8. The effect of sub-sections (7) and (8) is, it would appear to the Council, to allow for a circumscribing of the sub-section 4(f) time period in certain limited circumstances. In other words, and crucially, these provisions do not envisage a situation where a Practising Barrister has not had the opportunity to deliver a Fee Notice. In simple terms, the obligation to deliver a Fee Notice in all cases pertains, and the fact that Practising Barristers may fulfil their Section obligations by serving a Fee Notice on their instructing solicitors does not relieve the Practising Barrister of the overriding obligation to deliver a Fee Notice. The only obligation that is in fact by-passed is the obligation to wait for a specific period of time before undertaking work.

21.9. The practical consequences of this mandatory and seemingly blanket obligation will, it is submitted, be seen in the context of the application of Section 157(6) of the Act:

21.9.1. *“A Legal Costs Adjudicator shall not confirm a charge in respect of a matter or item if the matter or item is not included in a notice referred to in section 150 or, as the case may be, is not the subject of an agreement referred to in section 151*

*, unless the Legal Costs Adjudicator is of the opinion that to disallow the matter or item would create an injustice between the parties.”*

- 21.10. It would appear therefore that the default position in relation to work undertaken on the clause 12.1(f) basis, is that Practising Barristers’ fees will not be confirmed as a charge during the Adjudication process, unless and until the Practising Barrister can demonstrate that an “injustice” will arise between the parties.
- 21.11. In the case of both clauses 12.1(f) and 12.2 above (clauses 12.4 and 12.9 respectively of the 2016 Code) the absence of equivalent clauses in the draft Code is, it is submitted, cause for concern for Practising Barristers, and as is seen in the case of the analysis of clause 3.47 (above), the Council makes these submissions on account of the fact that the underlying statutory provisions are, it is submitted, problematic.
22. Clause 4.2 provides that “A Practising Barrister must not deceive or knowingly mislead the Court *or allow the Court to be misled*. A Practising Barrister must take appropriate steps to correct any misleading statement made by him or her to the Court as soon as possible after he or she becomes aware that the statement is misleading.”
- 22.1. It is noted that this is analogous to the duty contained in the Bar of Ireland’s Codes. However, the duty in those Codes is one not to deceive or knowingly mislead the Court. The existing duty is that covered by first part of the draft Code. It is unclear what is the provenance or rationale of the requirement not to allow the Court to be misled. As drafted, this provision imposes a new duty on Practising Barristers which will require them to police the conduct of other people in Court.
- 22.2. Insofar as the italicised words are a reference to the duties referred to in Clauses 4.13 to 4.15 inclusive of the draft Code, it is better, in our view, not to deal with the duty in clause 4.2. Rather, it is better that they are dealt with on a standalone basis in clauses 4.13 to 4.15.
- 22.3. It is also noted that the clause only imposes a requirement on a Practising Barrister to correct any misleading statement made by him or her. Given that it is not proposed to specify how a Practising Barrister is to give effect to a duty not to allow the Court to be misled nor to set out any step that is to be taken, the additional obligation should be removed.
- 22.4. A duty not to allow the Court to be misled in this context is problematic in the context of an adversarial system. It arguably places an onus on a Practising Barrister to correct any evidence from opposing witnesses which is, in that Practising

Barrister's perception, incorrect. It would also apply to statements made by opposing Counsel. A situation could arise where hearings are disrupted and unnecessarily prolonged by interruptions on the pretext that opposing counsel or witnesses have misled the Court.

22.5. The words "or allow the Court to be misled" should be deleted from this clause of the Authority's Code.

23. Clause 4.8 provides that "In the event that a Practising Barrister is aware of, or becomes aware of, a scheduling difficulty that may compromise his or her ability to fully perform the legal services in respect of which he or she is instructed, he or she must immediately notify his or her client and/or instructing solicitor of the emergence of the scheduling difficulty, providing a reasoned assessment of the likelihood of and extent to which the scheduling difficulty will impact upon his or her capacity to fully perform the legal services (without prejudice to the Practising Barrister's right to be paid for the work previously done). *Any such assessment must never be contingent on the receipt of instructions from the client that are not manifestly in the client's best interests.*"

23.1. It is noted that this clause appears to allow a Practising Barrister to contact a client directly about a scheduling issue. It is submitted that the requirement should be to "immediately notify his or her instructing solicitor or, in the case of direct professional access in non-contentious matters, his or her client...". It may be that this is what was intended but, if not, it is the Council's submission that the emergence of a scheduling difficulty is not a good reason to interfere with the proper operation of the solicitor-client relationship.

23.2. It is likely that the complexities of this rule will cause unintended difficulties in practice.

23.3. This rule imposes a duty on a Practising Barrister once they are aware of a scheduling difficulty that *may* compromise his or her ability to perform the service in question. There can often be apparent scheduling difficulties well in advance of any hearing that will resolve themselves without compromising the interests of any client. Our view is that the better test is where it is unlikely that a Practising Barrister can attend to his or her instructions without significant delay or where there is an appreciable risk that the Practising Barrister will not be able to undertake a case in which they have accepted a brief.

23.4. It is not clear what is meant by the italicised words in paragraph 21 above nor what mischief they are intended to address. If there is a particular mischief sought

to be dealt with, we would be grateful if the Authority would indicate what it is and we would be happy to discuss it further.

24. Clause 4.26 provides that where a criminal brief is being returned due to a conflict that it must be returned promptly.

24.1. This is analogous to the duty contained in clause 10.3 of the Bar of Ireland's 2016 Code except that our Code contains the proviso that a barrister returning a brief in such circumstances "should do so as soon as possible and must do so in sufficient time to ensure another Barrister may be properly instructed in the matter." By that additional proviso, the Bar of Ireland's Code provides greater protection to clients in criminal matters than is given by the draft Code. Consideration should be given to the inclusion of a similar proviso in the draft Code.

25. Clause 4.28 provides that "Notwithstanding any other provisions of this Code, in accordance with the provisions of Section 215 of the Act, a Practising Barrister who has accepted instructions to appear in court on behalf of a client who is in custody may not withdraw from the client's case without obtaining permission from the court before which that client is next scheduled to appear."

25.1. It is noted that clause 4.28 is a reflection in the draft Code of section 215(1) of the Act.

25.2. Section 215(1) of the Act has yet to be commenced. It is our submission that it should not form part of the Authority's Code of Practice until it has been commenced by the Minister. To do otherwise would be for the Authority to assume a legislative function that properly belongs to the Minister. It is possible, if perhaps not likely, that the Minister will decide not to commence this section. In such a circumstance it should not be introduced other than by the proper legislative process.

25.3. It is further submitted that, were it to be introduced by way of the Authority's code before it has been commenced, the Court to whom any application made could not assume the guidance provided by section 215(2) and would be bound by the current rules relating to withdrawal. This would entail an unnecessary application which would result in a waste of Court time.

25.4. Further, were the rule to be promulgated before the commencement of the section, there would be no power to allow a Court hear such an application *in camera*, thereby causing possible prejudice to the client in custody.



- 25.5. It is our view that this clause should not be included in the Authority's Code until such time as section 215 has been commenced by the Minister.
26. Clause 4.32 provides that in Criminal Legal Aid matters it is not improper for a defence Practising Barrister, with the consent of the Accused, to apply on notice for the adjournment of a re-trial, where the accused is on bail, where the fees of the first trial remain unpaid. It further provides that "*In no circumstances should an adjournment be sought when an Accused is in custody*".
- 26.1 For the avoidance of doubt, the provision that no adjournment should be sought when an accused is in custody should be expressly confined to the circumstances contemplated by clause 4.32. The rationale for this is that there are often legitimate reasons, in other circumstances, that are in the best interests of an Accused why an application should be made, on his or her behalf, for an adjournment of trial notwithstanding that the Accused is in custody.
27. Clause 4.41 of the draft Code provides that "a Practising Barrister acting for the Prosecution must be familiar with and abide by the Guidelines for Prosecutors issued by the Office of the Director of Public Prosecutions from time to time."
- 27.1. The transposition of the Guidelines for Prosecutors into the Authority's Code would allow the Authority's Code to be amended by a third party without the oversight of the Authority and without the statutory process being followed.
- 27.2. It is also the case that not all prosecutions are subject to these Guidelines in that they only apply to prosecutions undertaken by the Director of Public Prosecutions and not, for example, to various regulatory prosecutions in the District Court.
- 27.3. The Guidelines acknowledge that barristers are subject to the professional standards of their profession and state that they are not a substitution for nor a detractor from such professional standards. The Guidelines are intended to set out the standards and conduct that the Director expects of those who act on her behalf for the purpose of ensuring that a fair reasoned and consistent policy underlies the prosecution process.
- 27.4. The Guidelines for Prosecutors make it clear that they are not intended to override the specific directions given by or on behalf of the Director in any particular matter. If the draft Code requires Practising Barristers to abide by the Guidelines, they could thereby be required to act in conflict with their instructions. Further, were a member of the public to make a complaint that a Practising Barrister had not abided

by the Guidelines in his or her conduct of a prosecution where the Director had given specific instructions, the Practising Barrister could be compelled to divulge privileged information that the Director of Public Prosecutions may not have intended to disclose. This could put the Practising Barrister in conflict with his or her client.

27.5. The draft Code should not contain any reference to the Guidelines for Prosecutors issued by the Office of the Director of Public Prosecutions.

28. Clause 4.45 provides that “A Practising Barrister must have regard to the obligation not to coach a witness when drafting any letter, pleading, witness statement, affidavit, notice of appeal or any other document.”

28.1. Clause 4.18 of the draft Code simply provides that a Practising Barrister may not coach a witness in regard to the evidence that is to be given by that witness. It is our view that the more straightforward approach of clause 4.18 covers every possible circumstance and that once a list of possible circumstances is produced, some currently unenvisaged circumstance might subsequently arise that turns out not to be covered.

28.2. Clause 4.44 of the draft Code provides that a Practising Barrister must not draft any pleading or document containing any fact or contention which is not supported by his or her client’s instructions.

28.3. The mischief sought to be addressed by clause 4.45 seems to be adequately addressed by the joint operation of clauses 4.18 and 4.44 and that, therefore, the inclusion of clause 4.45 is unnecessary.

29. The Council notes that a number of provisions of the Bar of Ireland’s Code that deal with the conduct of barristers in criminal matters have not been reflected in the draft Code. One such matter is the prohibition on barristers attending at Garda Stations for any professional purpose, including attending identification parades or the interviews of suspects. Such provisions in the Bar of Ireland’s Code are present on foot of experience. It is the Council’s view that such clauses that have been omitted from the draft Code should be included therein. Should the Authority wish to discuss its rationale for omitting such clauses or to discuss further with the Council why they should be included, the Council would be happy to engage further.

The Council of the Bar of Ireland is grateful for the opportunity to engage in this consultative process and remains willing to engage further with the Authority were that to be considered of assistance.



# THE BAR OF IRELAND

*The Law Library*

Distillery Building  
145-151 Church Street  
Dublin 7 D07 WDX8

Tel: +353 1 817 5000  
Fax: +353 1 817 5150  
Email: [thebarofireland@lawlibrary.ie](mailto:thebarofireland@lawlibrary.ie)  
Twitter: @TheBarofIreland  
[www.lawlibrary.ie](http://www.lawlibrary.ie)