

# Draft Code of Conduct for Solicitor Advocates

## PART I – INTRODUCTION

- 1.1 For the purpose of maintaining the proper and efficient administration of justice this Code sets out the principles and practice standards which should be observed by solicitor advocates. These obligations complement those imposed by law or required generally by Law Society of Northern Ireland Practice Regulations.
- 1.2 In this Code except where otherwise indicated:
- “advocates” means any solicitors exercising their right of audience in any court
- “brief” means instructions to advocates to appear in person at or before a court
- “client” includes a prospective client
- “court” means any court or tribunal or other person or body before whom a solicitor is entitled to exercise a right of audience
- “lay client” is the person or organisation on whose behalf an advocate is instructed.
- “professional client” is the solicitor or member of a recognised professional body by whom an advocate is retained or instructed.
- 1.3 This Code should be observed by advocates in all proceedings whether involving Criminal, Civil, Family or Employment law and all or any branch of the law in which advocacy is practised. The duties specific to advocates instructed for the Defence in the Crown Court are set out in Part VIII of this Code.
- 1.4 Failure to observe the provisions of this Code may be treated as professional misconduct.
- 1.5 The Interpretation Act (Northern Ireland) 1954 shall apply to the interpretation of this Code as it applies to a statutory instrument.
- 1.6 This Code was approved by the Lord Chief Justice of Northern Ireland on...

## PART II – CORE PRINCIPLES

- 2.1 Advocates must:
- (a) uphold the rule of law and the proper administration of justice;
  - (b) act with integrity;
  - (c) not allow their independence to be compromised;
  - (d) act in the best interests of their clients;
  - (e) provide a proper standard of service to their clients; or

- (f) behave in a way that maintains the trust the public places in them and the provision of legal services.
- 2.2 Advocates must not:
- (a) engage in conduct whether in pursuit of their profession or otherwise which is:
    - (i) dishonest or otherwise discreditable to advocates;
    - (ii) prejudicial to the administration of justice: or
    - (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
  - (b) engage directly or indirectly in any occupation if their association with that occupation may adversely affect the reputation of advocates or prejudice their ability to attend properly to the interests of clients.
- 2.3 Advocates have an overriding duty to the Court to ensure in the public interest that the proper and efficient administration of justice is achieved. They must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.
- 2.4 Advocates:
- (a) must promote and protect fearlessly and by all proper and lawful means the client's best interests and do so without regard to their own interests or to any consequences to themselves or to any other person (including professional clients or fellow advocates or members of the legal profession);
  - (b) subject only to compliance with the specific provisions of Legal Aid legislation owe their primary duty:
    - (i) as between their lay client and their professional client; and
    - (ii) as between the legal aid authorities and the lay client:to the lay client and must not permit the legal aid authorities or professional clients to limit their discretion as to how the interests of the lay client can best be served;
  - (c) must act towards clients at all times in good faith.
- 2.5.1 Advocates must not, in relation to any other person, (including a client or another advocate or counsel) on grounds of race, colour, ethnic or national origin, gender, religion, sexual orientation or political persuasion treat that person for any purpose less favourably than they would treat other such persons.
- 2.5.2 Advocates must not decline to accept instructions to act as such:
- (a) on grounds relating to the race, colour, ethnic or national origin, gender, religion or sexual orientation or political persuasion of the client;

- (b) on the grounds that the nature of the case is objectionable to advocates or to any section of the public;
- (c) on the grounds that the conduct, opinions or beliefs of the client are unacceptable to advocates or to any section of the public;
- (d) on any ground relating to the source of any financial support which may properly be given to the client for the proceedings in question (for example on the grounds that such support will be available under the Legal Aid legislation).

2.6 Nothing in the Code is to be taken as requiring advocates to accept instructions if there are reasonable grounds for them to consider that having regard to:

- (i) the circumstances of the case; or
- (ii) the nature of the advocate's practice; or
- (iii) the advocate's experience and standing;

they are not being offered a proper fee.

2.7 Advocates must not:

- (a) permit their absolute independence and freedom from external pressures to be compromised;
- (b) do anything in such circumstances as may lead to any inference that their independence may be compromised;
- (c) compromise their professional standards in order to please their clients, the court or a third party;
- (d) except as permitted by law, accept a brief on terms that payment of fees shall depend upon or be related to or postponed on account of the outcome of the case or of any hearing.

2.8 Advocates are individually and personally responsible for their own conduct and for professional work. They must exercise their own personal judgement in all their professional activities and must not delegate such responsibility to another advocate or counsel.

### **PART III – THE DECISION TO APPEAR**

3.1 Advocates should not accept any brief if to do so would cause them to be professionally embarrassed and for this purpose advocates may be professionally embarrassed:

- (a) if they accept a brief which does not include comprehensive instructions;
- (b) if they accept a brief or instructions which they believe to be beyond their professional competence;
- (c) if having regard to their other professional commitments they will be unable to appear in the matter or will not have adequate time and opportunity to prepare properly;

- (d) if the brief seeks to limit the ordinary authority or discretion of advocates in the conduct of proceedings in court or to impose on advocates an obligation to act otherwise than in conformity with the provisions of the Code;
- (e) if the matter is one in which they have reason to believe that they are likely to be a witness;
- (f) if, whether by reason of any connection of advocates (or of any partner or other associate of advocates) with the client or with the court or a member of it or otherwise, it will be difficult for them to maintain professional independence or the administration of justice might be, or appear to be, prejudiced;
- (g) if they have been responsible for deciding on a course of action and the legality of that action is in dispute in the proceedings; or if they are or have been a director of a company which is a party to the proceedings;
- (h) if there is, or appears to be, some conflict or a significant risk of some conflict between the interests of advocates and the interests of any one or more of their clients;
- (i) if the matter is one in which there is a risk of breach of confidences entrusted to them (or to any partner or other associate) by another client or where the knowledge which they possess of the affairs of another client would give an undue advantage to the new client.

3.2.1 When acting for a client requiring advocacy services, there is an ongoing duty to consider whether the interests of the client would be best served by the advocate continuing to act for the client.

3.2.2 Factors to be taken into account are the overriding responsibility to ensure that competent representation for their clients is provided, the nature and complexity of the case, the professional competence and ability of the advocate, the nature of their practice and the cost of the advocacy service.

3.2.3 Where advocates have a reasonable doubt as to whether a brief is not within their experience and professional competence, they should not accept the brief.

3.2.4 Advocates must not in any circumstances make it a condition of accepting instructions from any client that advocacy services should be provided by that solicitor advocate, their firm or their agent.

3.3 Where legal aid for two counsel has been granted, one counsel should be a Senior Counsel. Where, exceptionally, a Senior Counsel is not available, it is permissible for advocates to lead but such advocates should be experienced and save in exceptional circumstances should be of not less than ten years standing.

3.4 If advocates consider that the best interest of the client would not be served by their continuing to represent the client, they should immediately advise the client accordingly.

## **PART IV – WITHDRAWAL FROM A CASE**

4.1 Advocates should cease to act and return any brief:

- (a) if continuing to act would cause them to be professionally embarrassed within the meaning of paragraph 3.1;
- (b) if it appears to them that they are likely to be a witness on a material question of fact but they should withdraw only if they can do so without jeopardising the client's interest;
- (c) if having accepted a brief on behalf of more than one client there is or appears to be:
  - (i) a conflict or a significant risk of a conflict between the interests of any one or more of such clients; or
  - (ii) a risk of a breach of confidence;

and the clients do not all consent to the advocates continuing to act;

- (d) if in any legally aided case it has become apparent to them that legal aid has been wrongly obtained by false or inaccurate information and action to remedy the situation is not immediately agreed to and taken by the client;
- (e) if the client refuses to authorise them to make some disclosure to the court which their duty to the court requires them to make;
- (f) if having become aware during the course of a case of the existence of a document which should have been but has not been disclosed on discovery and the client refuses to disclose it;
- (g) if having come into possession of a document belonging to another party by some means other than the normal and proper channels and having read it before they realise that it ought to have been returned unread to the person entitled to possession of it, they would thereby be embarrassed in the discharge of their duties by their knowledge of the contents of the document provided that they may withdraw only if they can do so without jeopardising the client's interests.

4.2 Advocates may withdraw from a case where they are satisfied that:

- (a) the brief has been withdrawn or their retainer terminated;
- (b) their professional conduct is being impugned; or
- (c) there is some other substantial reason for so doing.

4.3 Advocates should not:

- (a) cease to act or return a brief without having first explained to their client the reason for doing so;
- (b) pass a brief to another advocate or counsel without the consent of the client;

- (c) return or pass a brief which they have accepted and for which a fixed date has been obtained or (except with the consent of the client and where appropriate the court) break any other professional engagement so as to enable them to attend a social or non-professional engagement;
- (d) save as provided above return any brief or withdraw from a case in such a way or in such circumstances that their client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

## **PART V – CONDUCT OF THE WORK: THE CLIENT**

### **5.1 Advocates:**

- (a) must in all their professional activities be courteous and act promptly, conscientiously, diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the court's time and to ensure professional arrangements are fulfilled;
- (b) must not undertake any task which:
  - (i) they know or ought to know they are not competent to handle;
  - (ii) they do not have adequate time and opportunity to prepare for or perform; or
  - (iii) they cannot discharge within a reasonable time having regard to the pressure of other work;
- (c) must read all briefs delivered to them expeditiously;
- (d) must have regard to any relevant written standards adopted by the Law Society for the conduct of professional work;
- (e) must inform the client forthwith:
  - (i) if it becomes apparent that they will not be able to do the work within a reasonable time after receipt of instructions;
  - (ii) if there is an appreciable risk that they may not be able to undertake a brief or fulfil any other professional engagement which they have accepted.

5.2 Whether or not the relation of advocate and client continues, advocates must preserve the confidentiality of their clients' affairs and must not without the prior consent of the client or as permitted by law lend or reveal the contents of the papers in any brief to or communicate to any third person (other than an associate or any of the staff in their practice who need to know it for the performance of their duties) information which has been entrusted to them in confidence or use such information to their clients' detriment or to their own or another client's advantage.

5.3 Advocates must not in relation to any current matter in which they are or have been briefed offer their personal views or opinions to or in any news or current affairs media upon the facts of or the issues arising in that matter.

- 5.4 Advocates who form the view that there is a conflict of interest between their lay client and their professional client must advise that it would be in the lay client's interest to instruct another professional adviser and such advice must be given either in writing or at a conference at which both the professional client and the lay client are present.
- 5.5 Advocates must not when interviewing a witness out of court:
- (a) place witnesses who are being interviewed under any pressure to provide other than a truthful account of their evidence;
  - (b) rehearse, practise or coach witnesses in relation to their evidence or the way in which they should give it.
- 5.6 Advocates must not devise facts which will assist in advancing their client's case and must not draft any originating process, application, pleading, affidavit, defence statement witness statement or notice of appeal containing:
- (a) any statement of fact or contention (as the case may be) which is not supported by the client or by their instructions;
  - (b) any contention which they do not consider to be properly arguable;
  - (c) any allegation of fraud unless they have clear instructions to make such allegation and have before them reasonably credible material which as it stands establishes a prima facie case of fraud;
  - (d) in the case of an affidavit or witness statement any statement of fact other than the evidence which in substance according to their instructions advocates reasonably believe the witness would give if the evidence contained in the affidavit or witness statement were being given viva voce.

Provided that nothing in this paragraph shall prevent advocates drafting any originating process, application, pleading, affidavit, defence statement or witness statement containing specific facts, matters or contentions included by advocates subject to the client's confirmation as to their accuracy.

## **PART VI – CONDUCT OF THE WORK: THE COURT**

- 6.1 Advocates when conducting proceedings at court:
- (a) are personally responsible for the conduct and presentation of their case and must exercise personal judgement upon the substance and purpose of statements made and questions asked;
  - (b) must not unless invited to do so by the court assert a personal opinion on the facts or the law;
  - (c) must ensure that the court is informed of all relevant decisions and legislative provisions of which they are aware whether the effect is favourable or unfavourable towards the contention for which they argue and must bring any procedural irregularity to the attention of the court during the hearing and not reserve such matter to be raised on appeal;

- (d) must not adduce evidence obtained otherwise than from or through their client or devise facts which will assist in advancing their client's case;
- (e) must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy either a witness or some other person;
- (f) must if possible avoid the naming in open court of third parties whose character would thereby be impugned;
- (g) must not by assertion in a speech impugn a witness whom they have had an opportunity to cross-examine unless in cross-examination they have given the witness an opportunity to answer the allegation;
- (h) must not suggest that a witness or other person is guilty of crime, fraud or misconduct or attribute to another person the crime or conduct of which their client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to their client's case and which appear to them to be supported by reasonable grounds.

## **PART VII – COMMUNICATIONS WITH CLIENTS**

- 7.1 Advocates must have proper lines of communication. When instructed by a litigator they are normally entitled to rely on the litigator to communicate with the client. When instructed directly by a representative of the client who is not a litigator, they should ensure that the representative is properly authorised.
- 7.2 Where there is any reason to doubt the propriety of any action or proposed course of action, advocates should satisfy themselves that the client has received and understood any warnings or advice which it may be appropriate to offer. Where the client is a public or corporate body, this duty may include ensuring that the council, the board of directors, the governing body or others in positions of like authority have received the warnings or advice and that consequent instructions have their approval.

## **PART VIII – DUTIES OF ADVOCATES INSTRUCTED FOR THE DEFENCE**

- 8.1 Advocates briefed on behalf of a defendant should not allow any other commitment to interfere with the conduct of the defence or undertake any commitment which conflicts with their duty to the client.
- 8.2 Advocates who have accepted instructions are and remain under a duty to discharge those instructions irrespective of any belief or opinion which they may have formed as to the guilt or innocence of that person.
- 8.3 Advocates should endeavour to protect their client from conviction except by the court and upon legally admissible evidence sufficient to support the conviction of the offence with which the client is charged.
- 8.4 Advocates have a duty to be present throughout the trial and if due to any unforeseen circumstances they have to be temporarily absent, it is their duty to see that the client is not at any stage unrepresented and that they have the consent of the client or (where applicable) the consent of their instructing solicitor. If a client is represented by two



advocates (or by counsel and an advocate) neither may absent themselves except for a temporary period and only for a good reason.

- 8.5 Where, however, after the conclusion of the opening speech by the prosecution, advocates are satisfied that during a specific part of the trial there is no serious possibility that events will occur which relate to the client they may, with the consent of the client and (where applicable) their instructing solicitor and having informed the trial judge, absent themselves from the trial provided that they arrange for another defendant advocate or counsel to guard the interests of the client and to keep themselves free from other commitments which would make it impracticable for them to be available at reasonable notice if the interests of the client so requires.
- 8.6 If advocates have more than one more client and there is any lack of unanimity between their clients they should be very alert to the possible need for separate representation and they should try to hold a separate consultation with each client so that that particular client can be seen to have their undivided attention. This does not mean that a joint consultation with all clients should not also be held and in many cases such a consultation may be desirable.
- 8.7 Although in some cases it may be desirable that a client should give a written acknowledgement that he has received certain advice and has decided on a certain course of action the value of such an acknowledgement is minimal if it is given by the client when the trial is so close that he does not have a proper opportunity to consider the precise terms of the acknowledgement which has been tendered to him for signature and the giving of which acknowledgement may appear to a client to be a mere formality.
- 8.8 Advocates may appear for more than one defendant in a criminal trial provided they are satisfied there is no conflict of interest.
- 8.9 If during the course of the trial and prior to final sentence the client voluntarily absconds advocates retain an absolute discretion whether to continue to act. If they do continue they should conduct the case as if the client were still present in Court but had decided not to give evidence. In such circumstances they are free to use any material contained in their brief and may cross-examine witnesses called for the prosecution or call witnesses for the defence. Where advocates having received instructions from a solicitor and that solicitor withdraws from the case, then advocates should also withdraw.

- 8.10 Every accused person has the right to decide whether to give evidence in his own defence. Advocates must properly and adequately advise the client upon this but the client must make the decision.
- 8.11 Advocates are not under any duty to correct any mis-statement of fact made by the prosecution. If the Court has been led by the prosecution to believe that an accused person has no previous convictions advocates are under no duty to disclose facts to the contrary which are known to them or correct any information given by the prosecution if such disclosure or correction would be to the client's detriment. Advocates must take care not to lend themselves to any assertion that the client has no convictions or no more than a limited number of convictions or ask a prosecution witness whether there are previous convictions against the client in the hope that they will receive a negative answer.
- 8.12 If a client instructs an advocate that he is not guilty of the offence with which he is charged but decides not to give evidence himself it is the duty of the advocate to put his defence before the Court.
- 8.13 Guidance as to the duty of advocates whose client confesses to them is set out at Appendix 1 to this Code.
- 8.14 Advocates have a duty to advise the client as to the likelihood of a conviction and of the likely consequences of any course the client may choose, including the entering of plea of guilty.
- 8.15 Where, following advice, a client proposes to plead guilty advocates must explain to the client that such course of action should only be on the basis that the Crown case is true or substantially true and that such acceptance is implied in his plea of guilty.
- 8.16 Advocates appearing for a client who has pleaded guilty to a criminal offence with which he is charged is not entitled in mitigation of sentence to allege that other persons were involved with the client in the transaction or events out of which the charge arises unless this fact appears in the committal papers and/or any notice of additional evidence or is otherwise established in evidence before the Court.
- 8.17 In normal circumstances it is the duty of defending advocates to see the client after conviction and sentence and to advise, in writing as soon as is reasonably practicable, whether there are any properly arguable grounds of appeal.
- 8.18 Defending advocates have a duty to appear for the client in any appeal against conviction or sentence if instructed to do so unless the advocates have advised the client that he has no chance of success on appeal and advised against an appeal and the client has appealed despite the advice of the advocate in which event the advocate is relieved of any obligation to appear in the appeal.
- 8.19 Advocates should not withdraw from a criminal case and leave the client unrepresented because of the conduct of or anything said by the Trial Judge unless expressly instructed to withdraw or unless the advocates consider such a course to be in the best interest of the client.

- 8.20 Where a client charged with a criminal offence informs his advocates that he did not commit the offence but nevertheless insists on pleading guilty to it for reasons of his own advocates must continue to represent him, but only after they have advised what the consequences will be and that what can be submitted by the advocates in mitigation will have to be on the basis that the defendant is guilty.
- 8.21 It is and always has been the practice in Northern Ireland that advocates or counsel should have ready access to the Trial Judge but no discussion between advocates and the Judge should take place unless the opposing advocates or counsel are present or having had reasonable notice have declined to be present.
- 8.22 If opposing advocates or counsel object to such discussion taking place advocates should so inform the Judge at the start of any interview with him.
- 8.23 Advocates for the defence should only in very exceptional circumstances and with the permission of the Judge inform their client or give him to understand that there has been a discussion of any aspect of a case with the Trial Judge and they must never say or suggest to clients that they know what is in the Judge's mind or purport to quote what the Judge has said in private. It is essential for advocates at all times to maintain the confidentiality of the relationship between them and the Judge.
- 8.24 Advocates should familiarise themselves with the terms of the judgement of the Northern Ireland Court of Appeal in Attorney General's Reference (No.1 of 2005) Rooney & Others [2005] NICA 44 which sets out clear guidelines for the conduct of hearings during which a client may seek an indication from the court of the sentence which he is likely to receive in the event of a guilty plea.
- 8.25 Advocates are not under an obligation to accept an assignment for the defence of a prisoner unless the advocates are actually present in Court at the time that the assignment is made.
- 8.26 Advocates may not in cross-examination attribute to another person the crime with which the client is charged unless they can properly do so in accordance with the principles set out in this Code. Neither may they do so in any other part of the trial unless there are facts or circumstances which reasonably suggest the possibility that the crime may have been committed by the person to whom guilt is imputed.

## Appendix 1

### **GUIDANCE APPLICABLE WHEN A CLIENT CONFESSES**

1. In considering the duty of advocates retained to defend a person charged with a criminal offence who confesses to his advocate that he did commit the offence charged, it is essential to bear the following points clearly in mind:-
  - (a) that every punishable crime is a breach of Common or Statute Law committed by a person of sound mind and understanding;
  - (b) that the issue in a criminal trial is always whether the accused is guilty of the offence charged and not whether he is innocent;
  - (c) that the burden of proof rests on the prosecution.
2. It follows that that the mere fact that a person charged with a crime has in the circumstances above mentioned made such a confession to his advocate is not itself a bar to that advocate appearing or continuing to appear in his defence nor indeed does such a confession release advocates from their imperative duty to do all they honourably can for their client.
3. However, such a confession imposes very strict limitations upon the conduct of the defence, for advocates “may not assert that which they know to be a lie. They may not connive at, much less attempt to substantiate a fraud.”
4. While, therefore, it would be right to take any objections to the competency of the Court, to the form of the indictment, to the admissibility of any evidence or to the evidence admitted, it would be absolutely wrong in such circumstances to suggest that some other person had committed the offence charged or to call any evidence which they must know to be false having regard to the confession (e.g. evidence in support of an alibi) which is intended to show that the accused could not have done or in fact had not done the act charged viz advocates must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to them.
5. A more difficult question is within what limits, in the case supposed, may advocates attack the evidence for the prosecution either by cross-examination or in their speech to the Court charged with the decision of the facts. No clearer rule can be laid down than this – that they are entitled to test the evidence given by each individual witness and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged but further than this they must not go.
6. The foregoing is based on the assumption that the accused has made a clear confession that he did “commit the offence charged” and does not profess to deal with the very difficult statements which may present themselves to advocates when a series of inconsistent statements are made to them by the accused before or during the proceedings. Nor does it deal with the questions which may arise where statements are made by the accused which point almost irresistibly to the conclusion that the accused is guilty but does not amount to a clear confession. Statements of this kind hamper the defence, but the

questions arising on them are not dealt with here. They can only be answered after careful consideration of the actual circumstances of the particular case.