



The Bar Council

Disclosure of Unhelpful Material in Family Proceedings (Finance)

Purpose:	To assist barristers whose case includes material that is unhelpful to their client
Overview:	Unhelpful material - Relevant Handbook provisions – obligation of full, frank and clear disclosure – effects of legal advice privilege and litigation privilege – when withdrawal may be necessary
Scope of application:	All practising family barristers
Issued by:	The Ethics Committee
First issued:	September 2017
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Status and effect:	Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

Introduction

1. This document concerns the disclosure¹ of unhelpful material in applications for financial remedies. Unhelpful material in this context refers to matters of fact, as opposed to law. Thus it does not address the obligation to disclose unhelpful legislative provisions or case-law in financial remedy proceedings. As to the obligation to disclose unhelpful material in children proceedings, information may be found [here](#).

¹ For ease of exposition, the term “disclosure” is used herein to cover the provision of both information and documents, notwithstanding the reservation of the term “disclosure” for information, and the term “discovery” for documents, in *Tchenguiz v Imerman* [2010] EWCA Civ 908; [2011] Fam. 116.

2. Practitioners practising in financial remedy work need to be familiar with all of the Core Duties and the rules set out in the BSB Handbook. Some of the most relevant Core Duties and rules are set out below. You also need to have a good understanding of the legal duties relating to disclosure, the principles of privilege, particularly legal professional privilege and privilege against self-incrimination, and relevant case law. There is a brief outline of the relevant legal principles below.

3. It has become clear to those responding to ethical enquiries that if, at the outset, barristers were to explain to clients their professional obligations in the context of financial remedy proceedings, then difficulties which can emerge surrounding disclosure of information might be avoided.

4. Accordingly, the Ethics Committee suggests that you should advise the client of the following at the earliest appropriate opportunity:

- a. Your role is to represent your client and to present your client's case to the best of your ability;
- b. There is a duty of "full, frank and clear" disclosure that operates in financial remedy proceedings; and
- c. You are not in a position to conduct a trial or proceedings whilst withholding or concealing relevant information from the other parties and the court.

Provisions in the BSB Handbook

5. The issue of the disclosure of unhelpful material in applications for financial remedies engages a number of the Core Duties, in particular:

CD1: You must observe your duty to the court in the administration of justice

CD2: You must act in the best interests of each client

CD3: You must act with honesty, and with integrity

CD4: You must maintain your independence

CD5: You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession

CD6: You must keep the affairs of each client confidential

6. The rules in the Code of Conduct that are most likely to be relevant to the issue are rC3.1; rC3.5; rC4; rC5; rC6; rC8; rC9; rC9.1; rC9.2.a; rC9.3; rC21.5; rC25; rC25.2; and rC25.3 which provide as follows:

rC3: You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have (other than obligations under the criminal law). It includes the following specific obligations which apply whether you are acting as an advocate or are otherwise involved in the conduct of litigation in whatever role (with the exception of Rule C3.1 below, which applies when acting as an advocate):

.1 - you must not knowingly or recklessly mislead or attempt to mislead the court;

...

.5 - you must ensure that your ability to act independently is not compromised;

rC4: Your duty to act in the best interests of each client is subject to your duty to the court.

rC5: Your duty to the court does not require you to act in breach of your duty to keep the affairs of each client confidential.

rC6: Your duty not to mislead the court or to permit the court to be misled will include the following obligations:

.1 - you must not:

.a - make submissions, representations or any other statement;
or

.b - ask questions which suggest facts to witnesses,

which you know, or are instructed, are untrue or misleading.

.2 - you must not call witnesses to give evidence or put affidavits or witness statements to the court which you know, or are instructed, are untrue or misleading, unless you make clear to the court the true position as known by or instructed to you.

rC8: You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4).

rC9: Your duty to act with honesty and integrity under CD3 includes the following requirements:

.1 - you must not knowingly or recklessly mislead or attempt to mislead anyone;

.2 - you must not draft any statement of case, witness statement, affidavit or other document containing:

.a - any statement of fact or contention which is not supported by your client or by your instructions;

....

.3 - you must not encourage a witness to give evidence which is misleading or untruthful;

rC21: You must not accept instructions to act in a particular matter if:

....

.5 - your instructions seek to limit your ordinary authority or discretion in the conduct of proceedings in court; or

.6 - your instructions require you to act other than in accordance with law or with the provisions of this Handbook;

rC25: Where you have accepted instructions to act but one or more of the circumstances set out in Rules C21.1 to C21.10 above then arises, you must cease to act and return your instructions promptly. In addition, you must cease to act and return your instructions if:

...

.2 - the client refuses to authorise you to make some disclosure to the court which your duty to the court requires you to make; or

.3 - you become aware during the course of a case of the existence of a document which should have been but has not been disclosed, and

the client fails to disclose it or fails to permit you to disclose it, contrary to your advice.

7. You should refer to the Guidance contained in Bar Standard Board Handbook in relation to each these Core Duties and rules.

Suggested Approach

8. Although this document focuses on the Matrimonial Causes Act 1973, the approach required in other types of applications for financial remedies is likely to be the same.

9. As section 25 of the Matrimonial Causes Act 1973 requires the Court to consider all the circumstances of the case, each party is under a general and continuing duty to make full and frank disclosure of all relevant information to the court and to the other party. As a result, material which damages the client's case is bound to be relevant to the statutory discretion. The prospect of the client's case being prejudiced proves that the material is relevant.

10. It is suggested that there is no scope for a *de minimis* exception, although in reality it is unlikely that a client will resist disclosure of material which, though unhelpful, is of little overall consequence. The same principle will apply if the client tells you that part of his evidence was untrue or misleading. You must advise your client that the evidence should be corrected, however insignificant the correction.

11. The current position appears to be that the privilege against self-incrimination does not apply to disclosure of information and documents in applications for financial remedies, regardless of whether the potentially incriminating information helps or hinders the client's case: *Regina v K (A)* [2009] EWCA Crim 1640; [2010] QB 343. On this basis, a litigant is not entitled to withhold relevant material in financial remedy proceedings on the grounds that its disclosure may reveal the commission of a criminal offence.

12. Legal professional privilege is frequently divided into legal advice privilege and litigation privilege. All confidential communications between the client and counsel, including advice on whether a document is disclosable, will be subject to legal advice privilege, unless a recognised exception applies. The duty to disclose unhelpful material does not override legal advice privilege and it follows that the client is not under a duty to disclose unhelpful material covered by legal advice privilege.

13. It should be noted, however, that where the client owes a duty to disclose material harmful to his case prior to communicating that material to counsel, the act of communicating it to counsel does not bestow legal advice privilege on that material or otherwise affect the client's pre-existing duty to disclose it. The duty to disclose the underlying material existed before the client provided the material in question to counsel and it continues to exist after counsel has received it.

14. It follows that, as a practical matter, the scope of the exemption from disclosure provided by legal advice privilege is likely to be limited. For example, legal advice privilege would protect counsel's advice from disclosure, but it would be unlikely to protect from disclosure the underlying facts or documents on which such advice is based.

15. Litigation privilege consists of communications between a client or his lawyer and *third parties* for the purposes of litigation. It has been held that this sub-head of privilege does not exist in children proceedings: *In Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16. In that case, the House of Lords held that litigation privilege is a product of adversarial litigation and that litigation under Part IV of the Children Act 1989 is non-adversarial. Considerable weight was attached to the interest of the child being paramount.

16. Whilst section 25 of the Matrimonial Causes Act 1973 places the Court under an obligation to consider the criteria set out in section 25(2), and section 25(1) requires first consideration to be given to the welfare of any minor child of the family, it is suggested that the better view is that the proceedings are also adversarial as the applicant is seeking to obtain money or property from the respondent. In the absence of any further authority excluding litigation privilege from applications for financial remedies, it is suggested that you are entitled to follow the general law of privilege and assume that litigation privilege applies in applications for financial remedies, including applications under Schedule 1 to the Children Act 1989.

17. In practice, any uncertainty as the application of litigation privilege in applications for financial remedies is likely to be of limited significance in relation to the disclosure of unhelpful material because communications between you and your client fall within legal advice privilege, not litigation privilege, even in the context of actual litigation. Legal advice privilege undoubtedly applies to financial remedy proceedings although, as mentioned, the scope of the exemption from disclosure provided by that privilege may be limited (see paragraphs 13-14 above).

18. Where the client has unhelpful material that s/he is under a duty to disclose, you should not disclose that material to the other side or the court unless your client

authorises you to disclose it. You owe a duty to keep the affairs of each client confidential (CD6) and you will be likely to be in breach of that duty if you disclose the material in question to the other side or the court without your client's consent (see particularly Guidance gC8). Your duty to the court does not require you to act in breach of your duty to keep the affairs of each client confidential (Rule rC5 set out above and Guidance gC8).

19. However where the client refuses to disclose, or to authorise you to disclose, you must cease to act and return your instructions. You cannot continue to represent a client when you know that s/he is in breach of his duty to the court to make full and frank disclosure and is refusing to comply with that duty.

20. **Your duty to cease to act and return your instructions where your client refuses to disclose, or to authorise you to disclose, unhelpful material that s/he is under a duty to disclose is clear and unqualified; see particularly Rule rC25 set out above and Guidance gC11 and gC13.**

21. You are not under any duty to disclose the reason for withdrawing from the case or, following withdrawal, to disclose to the other side or the court the unhelpful material that the client has refused to disclose. Further you should not disclose such material where, as will usually be the case, such disclosure will amount to a breach of your professional duties to your client and/or a breach of confidence (see paragraph 19 above and Guidance gC11 and gC13).

22. Paragraph 4 of the Practice Direction at [1995] 1 WLR 332 states that *"it is a duty owed to the court both by the parties and by their legal representatives to give full and frank disclosure in ancillary relief applications and also in matters relating to children"*. It is suggested that this Practice does not alter the position, as outlined above, in relation to applications for financial remedies. Practice Directions only direct the management of legal practice. They do not alter the substantive law or abrogate counsel from complying with the Code of Conduct. Consequently, it is suggested that this Practice Direction does not require you to give disclosure of material which your client refuses to authorise to disclose.

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal**

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