



## Confidentiality duty when previous instructing solicitors are sued

<b>Purpose:</b>	To advise barristers in relation to their duty of confidentiality to their lay client when the previous instructing solicitors are sued
<b>Overview:</b>	Duty to lay client – Implied waiver of confidentiality and privilege – Providing a witness statement
<b>Scope of application:</b>	All practising barristers
<b>Issued by:</b>	The Ethics Committee
<b>Reissued:</b>	January 2014
<b>Last reviewed:</b>	November 2021
<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.</b>

### General Approach

1. Your instructing solicitor is sued by their former lay client; they approach you who were instructed on the client's behalf to request that you provide the solicitor with a witness statement of your recollections for use in the solicitor's defence. What is your duty?
2. Your primary duty as between your lay client and professional client is owed to the lay client (BSB Handbook, rC15(3)). You have a positive obligation to preserve the confidentiality of your (former) client's affairs (BSB Handbook, CD6, rC15(5)).
3. A client who sues their solicitor impliedly waives privilege and confidence in relation to their dealing with that solicitor (see *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183). The client is precluded from asserting a breach of duty while also enforcing the professional confidence where such enforcement would deprive the solicitor of their defence to the allegation of breach of duty. The implied waiver does not ordinarily extend to privileged communications between the client and a third

party. But it may extend to the written advice of other lawyers which the client agreed to the solicitor seeing for the purpose of the matter on which the client was seeking the solicitor's advice: see *Paragon* (above) at 1194B.

4. There can be no doubt that where you are sued, there is a corresponding implied waiver in relation to you. It has further been suggested that, in a case where the solicitor only is sued, there is automatically an implied waiver in relation to duties of counsel instructed by that solicitor. The Ethics Committee considers that whether there is such an implied waiver is a matter of law and may well be dependent on the particular facts of an individual case. If you decide to provide a witness statement on the basis that the former client's conduct in relation to the solicitor amounts to an implied waiver in relation to yourself, you will take the risk that the court, the BSB or a Disciplinary Tribunal might disagree with you. Similar considerations may arise with regard to the question whether information has lost any character of confidentiality through being placed in the public domain.

5. There is no objection to you informing the solicitor (if it is the case) that you are willing to provide a witness statement if the written consent of the former lay client is obtained which allows you to do so. Such consent can be given by the client's new solicitor on their behalf.

6. Problems of professional conduct and complaint are liable to arise where such consent is requested and refused. It is not your duty to arbitrate, on this question of implied waiver, between the interests and arguments of your former instructing solicitor and those of your former lay client. If consent is refused, or simply not provided, you would be wise to decline to provide a statement until provided with a suitable court order - being a 'compellable, but non-voluntary witness'.

### **Important Notice**

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