Best practice

Coming off the court record

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Most busy solicitors devote their time dealing with the substance of their cases and have little time to consider the logistics of coming on and coming off the record. This process is often smooth and requires relatively little consideration. However, occasionally the situation can sometimes be more complex – and it is important to get it right. Needing to apply to come off the record is fairly rare, so it is important to know the essential steps to take and potential pitfalls lurking for the unwary solicitor.

Going on the court record

Getting on the record is almost always fairly straightforward. Where a solicitor is instructed to act in family litigation, and their name therefore appears on either the application or acknowledgment of service, their business address will be the address for service and they will be on the court record. All documents served by the court or another party are then properly served at that address.

Once a solicitor is on the record, it will be presumed that they will remain on the record until the conclusion of the matter. This can have significant consequences for a client as the solicitor will then receive all of the court papers and correspondence, resulting in costs being incurred. It is increasingly common for clients to want 'unbundled' services, whereby they seek advice on specific points during the matter. If that is the case, then the client themselves will need to be on the record, and not their solicitors. A solicitor who is appointed solely for advocacy is exempted from going on the court record (Family Procedure Rules 2010 ('FPR 2010'), r 26.2(1)(b)).

Whilst a client can in principle sack their solicitor without giving notice or a reason, this in itself does not result in the solicitor coming off the record. A solicitor can only come off the record if the necessary notice is filed (see below), or by court order. The only exception to this is that if the client received public funding which has ceased, in which case the solicitor can simply file a copy of the notice of discharge/termination of the public funding certificate.

Coming off the record by mutual agreement

The client can end the retainer at any time and decide to either instruct new solicitors or act in person. If a new solicitor is instructed then that new solicitor will need to file a notice of change, giving their address for service. If the client is acting in person, he or she will need to file a notice of acting in person, again providing their address for service. In both cases the notice must be both served on the other party to the litigation and filed at court. (This is set out in FPR 2010, r 26.2(2).)

If a notice of acting is not filed, the original solicitor will remain on the record, and he or she will continue to receive all correspondence for the client. If they intend to act in person, the client should therefore be provided with the relevant form and advised on the steps they must take to effect the change. Sometimes it can be easiest for the client simply to provide the signed notice of acting to the original solicitor so they can ensure it is filed at court correctly on the client's behalf.

One increasingly prevalent problem arises where a client previously retained another solicitor or acted in person and the new solicitor files a notice of acting but it takes several weeks for the court to process the notice. Before they are formally on the

record, the new solicitor will not be entitled to receive information from the court and correspondence will still be sent to those still on the record.

This can cause delays and risks court deadlines being missed.

If the former client or his new solicitor does not file the necessary notice, the original solicitor should apply for an order to come off the record (see below).

Coming off the record by court order

If the client does not file a notice of acting in person the solicitor will have to apply to be removed from the court record. The only basis on which the application can be granted is that the solicitor is no longer the appropriate address for service because the retainer has been terminated. Terms of engagement should therefore ensure that the circumstances in which the retainer will be terminated are clear.

An application under this rule is made in accordance with FPR 2010, Part 18 and must state why the applicant is seeking the order (ie what event terminated the retainer) and be supported by evidence (FPR 2010, PD 26A, para 3.2) in the form of a statement from the solicitor. The client must have been informed of the solicitors' intention to terminate the retainer, served with the application and statement, and given an opportunity to respond.

It is the client who is the respondent to the application. The court may direct other persons to be added as respondents but, unless this occurs, the other parties to the claim must not be served.

In a simple case the application can be made on paper, to avoid taking up court time and an increase in costs. If this is the case, evidence that the application notice has been served on the former client will be required (FPR 2010, r 26.3(2)(a)). In more complex cases, a hearing will be required to determine the issue.

It is paramount given the retainer has been terminated for this application to be made and determined expeditiously.

When submitting the application to court, the covering letter should expressly state the application is not to be served on the other parties to the litigation. It should also ask that any hearing, if needed, is not listed at the same time or immediately before any hearing in the case.

Potential pitfalls

Confidentiality and privilege

Inevitably, the supporting evidence is likely to contain information which is confidential between solicitor and client and/or privileged. It should be made clear in the application and statement that these contain this type of information. It is also therefore crucial that the statement is not placed on the court file and is retrieved immediately after the hearing. It must not be served on the other party. The judge who hears the application must then recuse himself from any further hearings.

Too close to a hearing

It may be unacceptable to terminate a retainer if doing so would cause serious prejudice to the client's case. The most obvious example of this is immediately prior to a hearing, where it is too late for the client to obtain alternative representation. Careful thought therefore needs to be given to the timing of any application, and if required, it should be made early enough for the client to make alternative arrangements.

Examples of behaviour that might justify an order.

They include a conflict of interest, being asked to act unprofessionally or illegally, unpaid fees (although note that if the fees are in excess of costs estimates or where the client has not been given sufficient time to pay, this is unlikely to justify termination of the retainer), or being unable to obtain instructions.

Costs

If there are good reasons for the termination the solicitor may be entitled to his or her costs of the application to come off the record, if an application is necessary.

Dealing with outstanding fees

Where a solicitor has successfully applied to come off the record, he or she may have been left with significant outstanding fees. If that is the case, it is permissible to take a lien over the client's files and retain them until the fees are paid, although once again, this must not cause serious prejudice to the client's case, and therefore if there is a court hearing coming up, may not be permissible.

The general rule is that the retaining lien extends to any deed, paper or personal chattel which has come into the solicitor's possession in the course of his employment and in his capacity as solicitor with the client's sanction and which is the client's property.

If it not possible to retain the files (for example, if there is a forthcoming court hearing), then undertakings from the new solicitors may be an acceptable alternative.

As can be seen the principles applicable to coming on and off the record require careful consideration and attention. Solicitors should be aware of these and keep abreast of the status of the case to take appropriate action in a timely fashion, if needed