# Compendium of **Frequently Asked Litigation Questions**

Law Society of Ireland

### What is the date of the most recent MIBI Agreement?

A new MIBI agreement has been put in place from 30 January 2009 which is applicable to all accidents occurring after that date. The previous agreement (May, 2004) applies to all accidents occurring before that date.

### Do clients have to attend Injuries Board medical examinations?

Practitioners have an obligation to their client in that, when a medical appointment is received, the claimant should be informed of the appointment and of the importance of attendance. The Litigation Committee recognises that there will always be certain circumstances in which clients cannot or will not attend. A solicitor is not responsible for the non-attendance of a client but should simply ensure that a claimant is aware that, in those circumstances, the Injuries Board can only assess the claim with the benefit of the medical records available. Therefore, in order to ensure that the claimant has the opportunity to place his or her full claim before the Injuries Board and achieve the fairest possible award, attendance is in the claimant's best interests.

### VHI undertakings – should I sign the standard format of undertaking?

The Society has issued a number of practice notes, advising members of on-going difficulties with the form of undertaking which VHI is issuing to practitioners for completion.

The issue giving rise to the difficulty is VHI's requirement that solicitors undertake, subject to any court order to the contrary, to repay to VHI, out of the proceeds which come into the solicitor's hands, all monies paid by VHI on behalf of the client/subscriber. Previously, the solicitor undertook to reimburse to VHI whatever sum had been recovered in respect of monies paid out by VHI.

The Society considers this new requirement to be inequitable and unreasonable. For example, if a subscriber sustains injuries due to his own fault, then all monies paid out by VHI in respect of that subscriber will be discharged by VHI. However, if damages are recoverable from a third party, VHI demands to be reimbursed all the monies it has advanced even where a subscriber has recovered only a proportion of it in the litigation. If for example, 25% is recovered in the litigation, the subscriber will have to pay the 75% balance out of damages. The subscriber could be left with little or no compensation as a result.

The Society is aware of instances where clients are pressuring solicitors into giving the undertaking, notwithstanding the fact that it may be against the client's best interests in the long term. Solicitors are faced with clients who have been refused cover for future treatment unless the undertaking is signed. It has also been reported that VHI has refused to pay hospital bills unless the undertaking is signed. This resulted in the hospital referring the matter to a debt collection agency. The Society recommends that solicitors do not furnish the VHI undertaking in its current format.

## Is there an agreement in place between the Law Society and the medical profession regarding doctors' fees for medico-legal work?

No. Agreements purporting to set scale fees are contrary to the provisions of the Competition Act, 2002.

## What is the position regarding solicitors' undertakings to doctors re: fees and issuing of subpoenas?

Some members of the medical profession now require solicitors to furnish an undertaking to the effect that the solicitor will be responsible for the doctor's stand-by and court attendance fees. The Society does not approve of the giving of such undertakings.

Solicitors are under no obligation to furnish such undertakings. However, where an undertaking is given, the solicitor will be personally liable and failure to honour its terms is prima facie evidence of professional misconduct.

Conventionally, solicitors do not subpoena medical practitioners where the practitioner has confirmed in writing that he/she will be in attendance or on stand-by, as the case may be, on the trial date. Where such confirmation of availability has not been received in due time, on a basis acceptable to the solicitor, or where the solicitor has any doubt whatever regarding the medical practitioner's attendance, it is incumbent on the solicitor to secure the medical practitioner's attendance, if necessary by way of subpoena.

## What recourse do I have if an insurance company delays in forwarding my costs cheque?

Difficulties and delays in the issuing of insurance company cheques primarily arise in relation to costs cheques, with some practitioners reporting delays of a number of months before payment is received.

Section 41 of the Civil Liability and Courts Act, 2004 provides that interest on **costs, charges and expenses** awarded to a party in proceedings in court is not payable until the date the costs are agreed between the parties or, in default of agreement, a certificate of taxation is issued by a Taxing Master or the costs are measured by a County Registrar. Interest is payable at a rate of 8% (Debtors (Ireland) Act, 1840) from the appropriate date aforementioned, until that amount is paid.

Note: In the case of **judgments,** a rate of 8% (SI 12/1989) applies from the time of judgment until payment is made.

## Can I give an undertaking in an infant case?

Order 22 of the Superior Court Rules governs the procedure governing the settlement or compromise of actions in infant cases.

Order 22, rule 10(1) provides (among other things) that no settlement or compromise or payment or acceptance of money paid into court, either before,

at or after trial, shall, as regards the claim of an infant, be valid without the approval of the court. The absolute jurisdiction of the court in such cases cannot be compromised or pre-empted by undertakings given before the matter has been ruled. Practitioners should therefore decline to furnish undertakings in such cases.

## Must a Civil Bill be served in order to stop the running of time?

No. In order to stop the Statute of Limitations running, Civil Bills must be stamped and issued in the local Circuit Court office.

## What are my obligations regarding discharge of Counsels' fees?

Occasionally, Counsel report experiencing delays in the discharge of their fees by solicitors. The witholding of fees cannot be condoned and practitioners are urged to discharge barristers' fees as soon as they are put in funds to enable them to do so.

Where a solicitor has not been put in funds, no personal liabilty attaches to the solicitor in respect of discharge of Counsels' fees. Solicitors should however use their best endeavours to ensure that Counsels' fees are discharged.

## What is the Notice of Trial procedure in the Dublin Circuit Court?

The Dublin Circuit Court Office requires that a notice, in the form set out below and printed on the solicitor's headed notepaper, is completed and attached to all notices of trial for the Dublin Circuit Court.

(To be printed on solicitor's headed notepaper)

### NOTICE OF TRIAL

**Record no:**

**Title:**

**1)** ☐ No outstanding particulars on either side

**2)** ☐ All discovery dealt with (both sides)

**3)** ☐ Proofs advised

**4)** ☐ Up-to-date reports available (where applicable)

**5)** ☐ Matter not subject to application to transfer to the High Court (if applicable)

**6) Type of case**

☐ Personal injury ☐ Assault
☐ Debt collection ☐ Building contract
☐ Breach of contract ☐ False imprisonment
☐ Landlord and tenant ☐ Defamation

**7) Duration of case**

..........

**8)**

Dates to be avoided or any further notes

..........

Signed ..........

Solicitor plaintiff/defendant

..........

Date ..........

Solicitor's address ..........

..........

..........

### What are the arrangements for legalisation of foreign public documents/what is the 'Apostille' system?

Since 9 March 1999, documents intended for use in countries party to the Hague and Council of Europe Conventions abolishing the legalisation of foreign documents require only a single certificate, called an 'apostille' to be stamped thereon. In the case of Irish documents, this certificate will be affixed and signed by an officer of the Department of Foreign Affairs (fee €20.00). Reciprocal arrangements apply to foreign documents to be used in Ireland. The Department of Foreign Affairs maintains an updated list of the countries where an 'apostille' only is required. Documents destined for use in countries which are not party to the above Conventions still require to be submitted to a formal legalization procedure. Documents destined for, or originating from, Belgium, Denmark, France and Italy no longer need authentication of any kind.

Further information is available from Consular Services, Dept. of Foreign Affairs.

### What is the correct method of calculation of fees for Commissioners/Practising Solicitors taking swearings?

S.I. 616/2003 Rules of the Superior Courts (Fees Payable to Commissioners for Oaths) 2003 provides, inter alia, that the fee on taking an affidavit, affirmation or declaration is €10.00. Debate occasionally occurs between practitioners as to whether, where there are two or more signatories to an affidavit, the appropriate fee is €10.00 regardless of the number of signatories, or whether the fee is €10.00 per signatory. Clarification was sought from the Superior Court Rules Committee on the point, which advised that matters of interpretation are outside its remit. As different interpretations have been adopted in different areas of the country, practitioners are generally directed by whatever means of calculation has become established, by custom and practice, in their own locality.

### What is the proper procedure for transfer of a file?

- **Release of file:** The "new" solicitor should submit a written request for the file to the first solicitor, accompanied by an authority from the client for release of the file.
- **Costs:** If costs are due, a bill of costs should be furnished. Costs may be agreed, arbitrated or taxed. The first solicitor may opt to accept an undertaking in respect of the payment of costs as an alternative to exercising a lien on the file. "No foal, no fee" arrangements terminate if the client moves to another solicitor. At the conclusion of a litigation case, if the second solicitor recovers costs on a party and party basis, which includes the costs of work done by the first solicitor, he is accountable to the first solicitor for the appropriate portion of those costs.
- **Outlay:** Where the first solicitor opts to accept an undertaking in respect of

the payment of his costs, all outlays paid out by him should be immediately refunded to him.

- **Undertakings:** Where the first solicitor has undertaken a personal liability on behalf of the client, for instance, if he has given an undertaking, the client cannot determine the retainer without the first solicitor's consent.
- **Lien:** The common law allows solicitors to exercise a lien on a client's file until the solicitor's costs and outlay have been paid. A lien in respect of one particular file of a client can be exercised over all of the files of that client. A lien can be set aside by direction of the Law Society or by order of the court.

### My client's previous solicitor still refuses to release the file – what can I do?

- Proceeding without the file is not recommended.
- Where a solicitor first instructed in a matter has delayed in furnishing a bill of costs or, there being no costs or outlays outstanding, has failed to transfer the file, the solicitor secondly instructed can issue a Special Summons under the Solicitors and Attorneys Act requiring the production of the file and other papers.

### Are there any other matters in relation to movement/transfer of files that I should be aware of?

- When a new solicitor proposes to come on record for a client, the appropriate notice of change of solicitor to the court, the opposite party and the solicitor discharged must be filed and served before the notice takes effect. Such notices attract stamp duty at the relevant rate.
- When partnership changes occur in a practice and it is necessary to change the style and title under which the firm is practising, a letter should be forwarded to the relevant Court Office (in respect of each set of proceedings that are in being) setting out details of the change. Such letters do not attract stamp duty.
- If there are major changes in the ownership of a firm such as by dissolution, amalgamation or otherwise, there should be prompt notification to the clients of the firm, advising them of the changed circumstances and seeking confirmation of instructions regarding their file.
- An employee leaving a firm cannot, without formal authority, take the files of clients, even the files of clients introduced by the employee.

Published by
**The Law Society of Ireland**
Blackhall Place
Dublin 7
Tel. 01 672 4800
Fax: 01 672 4801
E-mail: general@lawsociety.ie

© Law Society of Ireland
November 2009