



Guidance for Solicitors Providing Legal Services in Garda Stations

December 2015



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1. Foreword

1.1 This is the first edition of the Law Society's *Guidance for Solicitors when Providing Legal Services in Garda Stations* [the "Guidance"] when advising a person in garda detention or attending an interview in a garda station.

1.2 Solicitors were first permitted to attend garda station interviews on 7 May 2014. For some time previous to this in Ireland, solicitors were only allowed to attend garda stations to provide legal advice to detained persons. Access to legal services provided by a solicitor in garda stations now comprises a blend of constitutional, statutory and administrative rights.¹

1.3 Providing legal services during interviews presents unique challenges for solicitors with complex legal issues to be navigated quickly, the potential for hostility and the need to be conscious that clients might be especially vulnerable people.

1.4 It is hoped that this Guidance will become an essential reference document for every solicitor when they provide legal services in garda stations. It has been designed for all solicitors - principals, partners, sole practitioners, assistant solicitors and newly-qualified solicitors throughout Ireland.

1.5 As this relatively new area of legal services progresses, the profession's experience of providing garda station legal services will evolve and this Guidance will be revised as required.

1.6 Solicitors can communicate their availability to attend particular garda stations on a divisional basis by registering their contact details on the Law Society's *Find a Garda Station Solicitor* web search by visiting www.lawsociety.ie/gss.

1.7 This Guidance has been greatly informed by the first-hand experience of Law Society Criminal Law Committee Members who have attended garda station interviews since May 2014. The Committee's input and careful consideration is gratefully acknowledged.

Simon Murphy
December 2015

¹ A suspect is entitled to legal advice before they are questioned by An Garda Síochána except when there be wholly exceptional circumstances involving a pressing and compelling need to protect other major constitutional entitlements such as the right to life. *DPP v Healy* [1990] ILRM 313 and *People (DPP) v Gormley* [2014] 6.3.2014 S.CT

2. Introduction

Scope and objective

2.1 The provision of legal services in garda stations requires solicitors to make a professional and subjective assessment which will be greatly dependent upon the particular set of circumstances in each case; no two garda station attendances or interviews will ever be the same.

2.2 This Guidance has been designed to assist solicitors by identifying best practice to help navigate this complex and evolving area of legal practice; it does not constitute legal advice. An Garda Síochána published a *Code of Practice on Access to a Solicitor by Persons in Garda Custody* [the Code] in April 2015. Solicitors can download the Code [here](#) or from An Garda Síochána's website www.garda.ie.

The nature of the solicitor's role in garda stations generally

2.3 The solicitor's duty is owed to the detainee. Solicitors are required to protect and advance their client's rights without fear or favour. The detainee's fair trial rights, which are the primary basis for the right to a solicitor being present during interview, commence the moment a solicitor is asked to provide legal services to a detainee. It is now well accepted that the trial process begins, at the latest, the moment a person is detained.

2.4 An Garda Síochána's Code equally acknowledges the importance of a solicitor's role. It describes a solicitor's only role in garda stations as being to protect and advance the legal rights of their client.² The Code requests gardaí to recognise this role by understanding the role of solicitors which is to act in the best interests of their clients. The Code recognises the role of solicitors in the investigation process including legislation concerning arrest, detention and interview of suspects.³

2.5 Paragraphs 7.4 to 7.6 detail the role of solicitors during interviews as described in An Garda Síochána's Code.

Interacting with gardaí

2.6 The Law Society recommends that solicitors familiarise themselves with An Garda Síochána's Code in advance of attending an interview and to also bring a copy of the Code when attending garda stations.

2.7 Solicitors, as officers of the court, should at all times treat members of An Garda Síochána in a professional and courteous manner. The Code similarly recognises the importance that An Garda Síochána enable solicitors to discharge their duties to their clients in a courteous and professional manner and requests that solicitors similarly understand the responsibilities and duties of members.⁴

2.8 Solicitors should be aware that unprofessional conduct can be reported to the Law Society's Regulation Department and An Garda Síochána's Code makes reference to this fact.⁵

² Section 1, page 2

³ Section 5, page 4

⁴ Section 1, page 2

⁵ Section 10, page 9

Solicitor-detainee discussions must be private

2.9 The Code acknowledges the privacy requirements for solicitor-client consultations both via telephone and/or in person;

The suspect should be permitted to speak privately to the solicitor by telephone to provide instructions to the solicitor and receive advice. This initial private telephone consultation may indicate if a personal private, face to face, consultation will subsequently take place. A consultation with a solicitor should be in private but at a minimum take place in the sight but out of the hearing of a member.⁶

Legal fees

2.10 Solicitors should ascertain directly with the detainee the manner in which their fees will be paid.

2.11 Detainees are eligible for legal aid if they are in receipt of social welfare payments or in employment and their earnings are less than "20,316 per annum (gross). Relevant legal aid [guidance, forms and fees](#) are available on the Legal Aid Board's website www.legalaidboard.ie.

2.12 In circumstances where a client is not eligible for legal aid and the solicitor believes that they will not be in a position to discharge their fees privately, the solicitor is not obliged to attend the garda station. Solicitors should immediately inform the member in charge that they are not in a position to act citing professional reasons and requesting that the gardaí obtain an alternative solicitor.

2.13 Solicitors should be aware that in Ireland, unlike in England and Wales, there is no statutory protection for legal fees lawfully earned. Accordingly, solicitors cannot receive legal fees in circumstances where they are suspicious about the legality of the source of funds (including tax and social welfare offences).

Find a Garda Station Solicitor web search facility

2.14 The Find a Garda Station Solicitor search facility on the Law Society website is a service designed to help a detainee to find a solicitor's contact details when in garda custody. This new facility will enable gardaí to search, by division, for a solicitor available to attend their local garda station to provide legal advices and attend interviews.

2.15 It has been designed so that a garda can print a random list of available solicitors for their selected division on the day that an individual is detained (in circumstances where a detainee does not nominate their own solicitor).

2.16 Solicitors can view how the search operates and also register their own contact details by visiting www.lawsociety.ie/gss and following the instructions.

2.17 Assistance is also available for solicitors when registering. For solicitors who do not know their solicitor number, which is required to log in to the website, this is located on individual practising certificates or solicitors can email records@lawsociety.ie. For assistance with passwords or completing the registration form, please email webmaster@lawsociety.ie.

⁶ Section 8, page 7

3. Initial phone calls

First contact from An Garda Síochána

3.1 The first conversation will likely be with the member in charge of the garda station where the detainee is being held.

3.2 Solicitors should note the date and time of the initial telephone call.

3.3 Best practice is to obtain as much information as possible from the member in charge during the first telephone call including:

- name, title and contact details of the member of An Garda Síochána making contact
- name of the station
- name and address of the person detained
- statutory powers under which the person is detained
- time and location of arrest
- time at which the detainee arrived at the garda station
- name of investigating member(s)/member in charge
- nature of alleged offence
- disclosures if available over the telephone
- the current estimated duration of detention
- the current estimated duration of interview and potential number of interviews
- relevant detainee requirements (eg medical, translator, vulnerable)

3.4 Solicitors should inform the member in charge of:

- the estimated time of their arrival at the garda station
- any limitations on the amount of time for which they can attend the garda station (prior court hearing, appointments, family obligations etc.) so that, if necessary, a different solicitor can be contacted.

First contact from a relative or friend of a detainee

3.5 Solicitors may initially be contacted by a family member or friend of a detainee.

3.6 Important information to obtain at this stage includes the name of the person arrested, the name and contact telephone number of the family member/friend and the name of the garda station where the person is being detained.

3.7 Solicitors should telephone the member in charge of the relevant garda station and ascertain if the detainee wishes to speak by telephone and/or require a consultation and/or the solicitor's attendance at an interview.

Telephone call with detainee

3.8 An Garda Síochána's Code requires that the initial telephone call between solicitor and detainee should take place within 30 minutes of the call from the gardaí to the solicitor.⁷

⁷ Section 4, page 4

3.9 Frequently, solicitors have a telephone conversation with detainees before attending garda stations or as an alternative to attending (see further paragraphs 3.13 to 3.17). Solicitors should request a private telephone conversation with the client when they first speak to the member in charge.

3.10 During this initial contact, solicitors can obtain important information and also provide initial advices.

3.11 Information which might be obtained during an initial phone call includes:

- Whether gardaí are present with the client,⁸ in these circumstances, the confidentiality of phone call advices cannot be guaranteed (conversations on phones might be easily overheard)
- If the client is already known to the solicitor
- Whether the client will be eligible for legal aid by ascertaining their income. If legal aid is not available, solicitors can enquire as to how their legal fees will be discharged
- Client requirements including medical assistance, special needs or whether the client might be a vulnerable person
- The client's knowledge about the reasons for their detention, the details of allegations and potential outcomes if successfully prosecuted

3.12 Initial advices which a solicitor might provide during this first telephone call include:

- Outlining the relevant detention powers, durations and possible extensions
- Explaining the role of solicitors when providing garda station legal services
- If attending in person, an estimated time of arrival
- Instructing the client to decline to answer questions relating to any allegations pending the arrival of their solicitor
- Advising that questioning should not commence when it has been indicated that their solicitor will attend the garda station within a reasonable amount of time

Can telephone advices alone suffice?

3.13 The necessity to attend in person to provide legal services depends on the circumstances of each case and the wishes of a client.

3.14 Solicitors should decide whether telephone advices alone might suffice on a case-by-case basis considering circumstances such as the familiarity of a client with the process or the potential adequacy of advices provided exclusively by telephone.

3.15 In circumstances where the detainee does not wish the solicitor to attend, the solicitor should remind the detainee that they are entitled to in-person legal advices and also to have a solicitor present during interview.

3.16 The Code states that a detainee can at any stage reverse a decision to waive their right to in-person legal advice or solicitor presence at interview.⁹ Solicitors should ensure that detainees waiving their right to legal advice are provided with information about reversing this decision at any time.

⁸ Gardai can maintain sight of the detainee but should not be so close as to hear confidential conversations with solicitors

⁹ Section 9, pages 7 and 8

Confirming a visit to a garda station

3.17 Solicitors should inform the member in charge if it is agreed that the solicitor will attend to provide advices and/or attend an interview, requesting that the interview commence only after the client has received in-person legal advices. Solicitors should also indicate to the member in charge their expected time of arrival at a garda station.

3.18 If a solicitor is not in a position to attend, they should inform the detainee and the member in charge as soon as possible. To assist in finding another available solicitor, the member in charge can be directed to the Law Society's Find a Garda Station Solicitor search facility at www.lawsociety.ie/gss.

4. Initial in-person legal advice

4.1 The first in-person consultation with a detainee is likely the most important. Solicitors should seek to speak to the detainee as soon as possible after they arrive at a garda station.

4.2 A solicitor's advice can make the difference between a person being charged, convicted or acquitted. Solicitors must determine the course of action that is in their client's best interests and advise accordingly. Ultimately, it is the detainee's discretion as to whether to follow legal advice.

4.3 Solicitors should take a careful note of the advice they provide. Whatever course of action the client elects to pursue, a note should be made of it and ideally the client should countersign those instructions for the solicitor. This is especially true in serious cases.

4.4 At the initial consultation, solicitors should introduce themselves (referencing photographic identification if necessary) and explain the following:

- Their role in the process, their independence and the role of a solicitor to protect a detainee's rights
- Arrest powers and detention periods
- Solicitor-client confidentiality
- The client's right to silence and the privilege against self-incrimination to the extent that the client is not obliged to give any account to the authorities, or their solicitor; the exception being when the inference provisions are invoked
- The process that will follow, including the need for the solicitor to request disclosure
- Once disclosure is made, a further pre-interview consultation should take place to discuss that disclosure
- Disclosure is not always made fully or promptly and that, if there are concerns about the extent of disclosure, the likely legal advice will be not to make any comment until full disclosure is made
- The special difficulties that arise in respect of inference provisions. Solicitors may need to advise clients that, if the inference provisions are invoked during an interview, a subsequent consultation in private will likely be required so as to further advise the client in the context of new information and the developing situation
- The nature of garda powers to take forensic samples
- Interviews are recorded in writing and on video/DVD which may be used in evidence if the detainee answers questions or fails to answer questions if inferences are invoked
- Not to talk about the alleged offence off camera

4.5 In the course of the first consultation, solicitors should be careful to observe any reasons that an interview should be held such as client vulnerability, intoxication, injury etc. Concerns of this kind should be brought to the attention of the member in charge immediately and recorded on the custody record.

4.6 The solicitor should then seek to meet with the member in charge of the investigation and seek pre-interview disclosure.

5. Disclosure

Ordinary pre-interview disclosure

5.1 Following on from initial in-person advices and in advance of the first interview, solicitors should request pre-interview disclosure from investigating gardaí.

5.2 Solicitors should obtain as much disclosure as possible to ensure they have all relevant information to be able to advise their client comprehensively. There are no statutory guidelines which prescribe a uniform disclosure procedure and solicitors have experienced varying disclosure processes.

5.3 Interviews are perceived by gardaí as forming part of the investigation. Accordingly, some gardaí may withhold information from pre-advise disclosure and seek to introduce it during the interview instead. However, it is accepted that the trial process begins at the commencement of detention. The inherent competing interests of investigation and legal representation of the rights of detainees can lead to inadequate disclosure.

5.4 An Garda Síochána's Code acknowledges the competing interests:

An Garda Síochána is not obliged to disclose any information that could prejudice an investigation. In this regard, the premature disclosure of information/details may sometimes impede or interfere with the investigation. It must be remembered that an interview is part of the investigation process and there must be some spontaneity about the actual interview. If information is handed out first, the suspect can make up his/her answers and there is no spontaneity about the matter.¹⁰

5.5 The Code states that pre-interview disclosure is not required. However, it highlights the impracticalities of adopting such an approach:

There is no legal requirement to have a meeting with a suspect's solicitor, or to provide information prior to interview. Whilst there is no requirement to meet or share information with a suspect's solicitor, not doing so may increase the likelihood of a no comment interview, or interviews being interrupted by the suspect requesting a consultation with his/her solicitor.¹¹

5.6 In circumstances where pre-interview disclosure is being refused, solicitors may find it helpful to inform investigating gardaí that, in the absence of full and proper disclosure, clients cannot receive comprehensive legal advice. An Garda Síochána's Code notes at Section 6:

Whilst there is no requirement to meet or share information with a suspect's solicitor, not doing so may increase the likelihood of a no comment interview, or interviews being interrupted by the suspect requesting a consultation with his/her solicitor.+

5.7 In addition, solicitors may find it beneficial to refer to the [EU Directive on the Right to Information in Criminal Proceedings](#) to which Ireland is a party. The Directive required transposition into Irish law by June 2014. The Department of Justice and Equality has advised the Law Society that it has informed the European Commission of

¹⁰ Section 6, page 5

¹¹ Section 6, page 5

pre-existing provisions of Irish law, including statutes, constitutional law and the jurisprudence of the superior courts which give effect to the Directive in the criminal justice system.

5.8 An Garda Síochána's Code identifies the following as information which should be provided as a general principle:

- Confirmation of the suspect's identity;
- The alleged offence;
- The suspect's state of health or physical condition (*information concerning medical or vulnerability issues relating to the suspect which may have a bearing on the solicitor's contact with the suspect or have a bearing on the safety of the solicitor*);
- The names of the arresting member(s);
- Time of arrest;
- Reason for arrest;
- Time of arrival at the Garda station;
- Whether an interview has already taken place;
- When legal advice was first requested;
- Salient points - admissions/denials made by the suspect;
- Any available material evidence provided it does not prejudice an investigation.

5.9 All information received from the gardaí should be noted carefully. In some circumstances, solicitors may find it necessary to repeat from their notes the information provided by the investigating Garda so as to obtain confirmation as to the extent of disclosure at that point in time.

Disclosure for adverse inference interviews

5.10 In order to introduce adverse inferences during an interview, a pre-interview briefing between solicitor and gardaí must take place.¹²

5.11 Solicitors should be aware of section 7.3 of the Code:

A pre-interview briefing with the investigator and the solicitor should take place prior to conducting an adverse inference interview. The provision of information in these circumstances should not be confused with the duty on the prosecutor to disclose all relevant material, post charge, which might reasonably be considered capable of undermining the case for the prosecution, or assisting the case for the defence. It is essential that during this briefing the investigator demonstrates knowledge of the relevant legislation and supporting case law in relation to the offence under investigation. If the solicitor attempts to enter into a debate over the admissibility of evidence or the questions the member intends putting to their client, the member should not engage in a discussion. The member should explain that the questions he/she intends asking are relevant to the investigation and the issue of admissibility may well arise in court at a later date if a prosecution ensues.

The provision of information to a solicitor at a pre-interview briefing has its basis in the suspect's right to a fair trial. This does not mean that the member has to detail every aspect of what he/she has uncovered but enough information that enables the solicitor to perform his/her role without compromising the interview process. In this respect, where the relevant adverse inference provision(s) has been invoked or is likely to be invoked, the solicitor should be provided with certain basic facts that contextualise the

¹² Section 7.3, page 6

matters to which the questions are going to relate in order for the solicitor to advise appropriately in relation to the suspect's decision to answer or remain silent.+

5.12 The meeting between gardaí and solicitors for pre-interview adverse inference disclosures can be recorded. Solicitors should be aware of section 7.4 of the Code in this regard:

This briefing (adverse inference interview pre briefing) should if possible be electronically recorded using the suspect interview room electronic recording equipment. In the event that sufficient information is not provided, admissibility of silence or failure to comment may become an issue at trial. An overview of the operation of the inference provisions, inclusive of the pre-interview briefing and access to a solicitor, is set out at Appendix A. It is imperative that the time and details of the conversation with the solicitor and the information provided to him/her be noted as to what in fact was said and provided in order to obviate any potential issue arising later in Court. If the solicitor does not consent to the electronic recording, the solicitor should be asked for a countersigned receipt of the master copy of information and/or any document(s) disclosed to him/her.+

6. Legal advice following disclosure

6.1 With the benefit of the garda disclosure briefing, solicitors should then consult in private with the detainee once more to discuss the disclosure obtained.

6.2 Detained persons should be advised that they can remain silent even to their own lawyer or, alternatively, provide the solicitor with further instructions.

6.3 If adverse inference provisions will be invoked, the effect on the right to silence should be explained.

6.4 If a detained person wishes to assert a positive defence, for example, an alibi then a careful decision should be made as to whether it is appropriate to make the defence at this stage or to remain silent unless inferences are invoked.

6.5 Detainees should be advised that in some instances some defences are most effectively deployed by being volunteered as early as possible in the interview.

6.6 Alibis, for instance, are likely to be checked during the period of detention and, if the alibi is false, this fact is likely to be established.

6.7 Whatever course of action the client elects to pursue, a note should be made of it and ideally the detainee should countersign those instructions for the solicitor. This is especially true in serious cases.

6.8 Solicitors should prepare the detainee for the interview by describing the traditional format and structure.

6.9 An aspect of preparing a detainee for interview will likely include Guidance to the effect that the detainee can look to the solicitor should they encounter a difficulty and the solicitor can indicate whether it might be appropriate to answer a question or not. This communication could be non-verbal, for example, a tap on shoulder.

6.10 If new information is revealed during the interview, the detainee can ask to speak to their solicitor or provide a ~~no comment~~ answer. This is particularly relevant where the suspect is answering questions during the course of an interview and the interview could be described as free-flowing. There is an opportunity for advantage to be gained from a sudden disclosure. A solicitor must be able to ensure that they have spoken to the client in advance to deal with this particular eventuality so that the client will either seek to speak to the solicitor or say ~~no comment~~. It is open also to the solicitor to intervene to say that, on the basis that information was not disclosed previously, it needs to be discussed with the detainee or that the detainee will reply ~~no comment~~ because information had not been disclosed prior to interview.

6.11 Solicitors should ensure that detainees understand the disclosure information that has been furnished to them and the client should be prepared for certain scenarios that might occur during the interview. It is beneficial at this stage to discuss conduct and seating arrangements during interviews and also ensuring that the client is aware that they can stop the interview at any time in order to speak to their solicitor.

6.12 Solicitors may wish to advise detainees to be prepared for long periods of silences while questions and answers are being written down. Some people find this very uncomfortable particularly if they are unfamiliar with the process.

6.13 Solicitors should try to ascertain from the detainee how, having received legal advices, they intend to approach the interview.

6.14 Options for detained persons during interview include:

- ~~No comment~~ interview . the detainee indicates that they intend to answer no comment and avail of their right to silence. Solicitors may wish to advise that, should this option be pursued, perhaps a no comment approach should be adopted consistently throughout the interview.
- Answering questions . the detainee indicates that they will answer questions; they have a defence, they may wish to outline denials or, in circumstances where there is overwhelming evidence, they may wish to make admissions in the hope that they will be treated leniently in court at a later stage. Solicitors should ensure that they have advised detainees who wish to make an admission comprehensively.
- Mixture of ~~no comment~~ answering questions . this can be a challenging scenario from a solicitor's point of view as clients can lose control of the process quite easily, especially if they are not familiar with the process. An approach like this can arise where a detained person wishes to outline certain matters which are beneficial to them but decline to answer any questions that are prejudicial. The difficulty is that, once the interview has commenced, the detainee could unintentionally answer questions to which they did not intend to reply. A consistent approach to the interview can work well to avoid difficulties. It can also be difficult for a solicitor to retrieve such a situation and solicitors may need to interrupt to give appropriate additional advice.
- Prepared statement . this can be done in advance of an interview and it could be to set out a defence or alternatively to make a limited admission or exculpatory account. In such circumstances, the gardaí usually seek to ask questions after the contents of the prepared statement have been read out. Detained persons should be advised to answer ~~no comment~~ to all questions so as to maintain the integrity of the prepared statement. There is a danger that, as with mixed interviews, the gardaí can always introduce information which tends to contradict something in the statement or in answer to a question. This may have been information not previously disclosed. If so it is very important that the solicitor intervenes to say that the information was never disclosed and to advise the detainee not to answer.

7. During the interview

7.1 Section 10 of the Code describes An Garda Síochána's practice regarding the presence of a solicitor during interview.

Location of solicitor in interview room

7.2 The Code states that solicitors should sit within view of the camera immediately adjacent to the detainee/prisoner.

7.3 It is desirable for detainees and solicitors to be able to make eye contact during interviews. Detained persons must be accommodated to be in a position to look to their solicitor for Guidance as to whether to answer a particular question and the solicitor must be able to intervene to quickly discuss a question or answer with a detainee.

The role of solicitors during interviews

7.4 An Garda Síochána's Code describes the role of solicitors during interviews as follows:

During the interview the arrested person's solicitor will be monitoring the interview process and may intervene during questioning. This may be to:

- ~ Seek clarification,
- ~ Challenge an improper question put to their client or the manner in which it was put,
- ~ Advise their client not to reply to a particular question(s), or
- ~ To request suspension of the interview if they wish to give their client further legal advice.

7.5 The Code indicates that solicitors cannot prevent the suspect from answering questions if they choose to do so.

7.6 According to the Code, solicitors cannot answer questions on their behalf or provide written replies for the suspect to quote, however, they can advise their clients not to answer certain questions or seek clarification in relation to same.

Circumstances which require solicitors to interrupt interviews

7.7 Solicitors should not hesitate to request that an interview be suspended where they deem it necessary. If they have a concern they should act on it immediately and speak to the client.

7.8 While it may be inconvenient to suspend an interview, best practice would be to proceed with caution when issues arise during interviews which require additional specific legal advices.

7.9 Solicitors should intervene if they become concerned about a question. Examples of circumstances which might necessitate that a solicitor intervene to seek clarification or challenge an improper question include questions which may include:

- Leading
- Oppressive or threatening
- Overly informal
- Insulting
- Based on an incorrect premise/assumption

- Based on undisclosed information
- Concern family or friends not relevant to the investigation
- Excessive interruption or cutting off of the suspect
- Negative statements about witnesses, for example, ~~are~~ are they telling lies?+
- Relate to previous convictions or criminal activity
- Statements by a garda which state their view of alleged facts
- Misrepresenting known facts
- Requesting the suspect's opinion
- References to someone else, for example, a garda belief about the situation

7.10 Solicitors should communicate any objection together with a brief explanation. Gardaí can then decide to reconsider their approach or proceed irrespective of a solicitor's objections. Most importantly, the issue which caused an objection has been raised and can be referred to later in the process.

7.11 Solicitors should advise clients not to answer questions that in the solicitor's opinion are improper or fall within the circumstances outlined above.

7.12 If, during the course of an interview, gardaí seek to introduce information not previously disclosed, solicitors should intervene and object due to inadequate pre-interview disclosure. Solicitors should request to discuss the issue with the detainee who can be advised to answer ~~no comment~~ on the basis of inadequate disclosure.

Solicitor note-taking during interviews

7.13 An aspect of a solicitor's role is to take notes during an interview.

7.14 A solicitor's notes during interview might include important matters that arise during interview and in particular any disclosures made during interview that were not made by gardaí prior to the commencement of an interview despite requests.

7.15 A particular note should be made of questions that have not been answered as this may be very relevant at a later stage.

7.16 At the commencement of an interview An Garda Síochána will summarise the disclosure that has been made and a solicitor should be in a position to cross reference disclosure made on the tape during interview with actual pre-interview disclosure.

7.17 Solicitors should note and record the manner in which gardaí might describe non-verbal responses during the interview.

Important things to do during interview

7.18 Solicitors should monitor the detainee's demeanour during the interview bearing in mind their health, age or state of intoxication in long interviews.

7.19 During interviews, solicitors should carefully navigate interview tactics to illicit information from suspects. Such tactics include: ~~we~~ just want to hear your side of the story ~~you~~ you need to help yourself here ~~we~~ we want to try and help you - all tend to give inappropriate reassurance to a suspect and disarm them. Similarly any attempts by the Gardaí to undermine, the legal representative, or the suspect or their family members can be objected to. It is always advisable to avoid general conversations and discussions about family or other persons that are unrelated to the investigation; they are only designed to construct a rapport with the detainee with the objective of encouraging the detainee to speak more freely.

7.20 Solicitors are not obliged to sign a garda's notes of interview as a witness to the detainee's signature and may politely decline to do so.

Circumstances where a solicitor may be removed from an interview

7.21 Solicitors should at all times remain calm, maintain their composure and professional standards for the duration of the interview irrespective of the behaviour of detainees or gardaí.

7.22 A solicitor may be required to leave if their conduct is such that it prevents, interferes with or unreasonably obstructs the proper questioning of a suspect or the suspect's responses being recorded.

7.23 The Code specifically provides:

- A solicitor may be required to leave the interview room by the investigator where the solicitor's approach or conduct prevents or unreasonably obstructs proper questions being put to the suspect or prevents the suspect's response(s) from being recorded by talking over them or constantly interrupting them when they are trying to respond.
- If the interviewer considers a solicitor is acting in such a way, they will stop the interview, report the matter to the member in charge and seek prior authorisation of the Superintendent, or Inspector if the Superintendent is not readily available, to require the solicitor to leave the interview room. After speaking to the solicitor, the Superintendent or Inspector, as the case may be, will decide if the interview should continue in the presence of that solicitor. If they decide it should not, the suspect will be given the opportunity by the member in charge to consult another solicitor before the interview continues and that solicitor given an opportunity to be present at the interview. The decision to require a solicitor to leave the interview room will be a measure of last resort.
- The Superintendent or Inspector, as the case may be, making the decision to require a solicitor to leave the interview room must be in a position to be able to satisfy a Court subsequently that the decision was properly made.
- A solicitor who disrupts an interview should be reported to the Law Society for unprofessional conduct.
- These matters shall be recorded in the Custody Record.¹³

¹³ Section 10, page 9

8. Law Society Best Practice . Note-taking, Communication Devices, Conflicts of Interest, False Identities and Messages

Note-taking

8.1 The importance of keeping detailed notes and records should not be underestimated. Good record-keeping is important from the moment a solicitor is first contacted to the cessation of detention.

8.2 Maintaining detailed records throughout the entire process greatly assists the provision of legal advices and in considering all other relevant information.

8.3 In addition, comprehensive notes can assist solicitors who might subsequently be required to provide evidence in court about the detention or their legal advices. For example, a detainee might be represented by a different solicitor in due course and might consent to the waiving of legal professional privilege with their first solicitor. In such circumstances, years might pass between a detention and a trial; good notes can be of assistance to solicitors in such circumstances and, in particular, allow the advices provided to a client to be contextualised.

8.4 During particularly long detentions, solicitors may need to request that another solicitor provide cover; good records will greatly assist subsequent solicitors in fulfilling their role.

8.5 Good record-keeping might comprise information about:

- Detention durations - the duration of all detentions are statutorily time limited. Within the statutorily limited period of detention, for example, 24 hours, there are periods of interview which are regulated under the Custody Regulations which require that no one interview lasts more than four hours with provision for breaks. Accordingly, solicitors should maintain a timeline note to ensure that detention periods are not exceeded. Permissible breaks in the duration of detention must also be documented.
- Important times - first contacted to provide legal services, time first spoke with detainee, time spent advising detainees, time spent attending interviews, rest periods, potential delays in medical treatment, interjections during questioning
- The circumstances of an arrest
- Interactions with detainees - for example, a careful note of advice given, rationale for providing specific advices and requesting detainees to acknowledge their instructions and your advices
- Interactions with gardaí . for example, the communication of concerns about a detainee's welfare and responses
- Potential detainee injuries or medical requirements
- Allegation details
- Information about possible charges
- Disclosure
- I.D. Parades (formal/informal)
- Information which a detainee decides to provide
- The needs/requirements of vulnerable detainees
- Forensic evidence provided by detainees
- Items found on detainees
- Introduction of evidence not disclosed

- A member in charge entering the interview room to confirm extension of detention
- The introduction of exhibits
- Detainee replies which might contradict previous instructions to solicitors
- Potentially inculpatory replies to questions

8.6 If a solicitor forms the opinion that any delays may compromise the detainee, they should request that such concerns are noted in the custody record. If the Gardaí decline to do so, a solicitor's notes become even more important.

8.7 While interviews can be audio and video recorded with the consent of clients, there are benefits in a solicitor continuing to take detailed notes throughout the interview. For example, such note-taking provides an opportunity for potential errors during the read through of the Garda written note to be corrected at the end of interview.¹⁴ Routinely, applications are made to the District Court to extend the duration of a detention on the basis that questioning has not concluded. In such circumstances, it is important that the solicitor has a record of the actual questions that have been pursued.

Communication devices

8.8 The Code outlines An Garda Síochána's policy position regarding the use of communication devices, mobiles, laptops, tablets, in garda stations by solicitors during the provision of advices and while attending interviews.

8.9 Section 13 provides:

Prior to commencement of a consultation or an interview, attending solicitors should be requested by the member in charge to switch off their mobile phone or other communication/electronic devices for reasons of safety and security.

On commencement of an electronically recorded interview, the member conducting the interview should request that the solicitor confirm that any mobile phone or other communication/electronic devices in his or her possession is switched off. This applies to all other persons present including members of An Garda Síochána.

However, in exceptional cases it may be necessary to permit members and solicitors to leave their mobile phones on silent for the purpose of dealing with urgent matters. This will be a decision for the member in charge on a case by case basis.

8.10 In the event of any difficulty arising regarding communication devices, solicitors should raise their circumstances or concerns with the member in charge.

8.11 The Law Society's policy position as regards the use by solicitors of communication devices is that, except in the most exceptional circumstances, a solicitor should be allowed access to mobile phones, laptops etc. while attending detainees in garda stations. Common sense and courtesy should prevail in relation to the use of these devices during an interview.

¹⁴ Interviews are a crucial part of a Garda investigation file. The office of the DPP when considering whether to charge in serious matters may not always look past the written notes/memos of interview to the DVD/Video recording.

Conflicts of interest

8.12 Representing more than one co-accused in the same investigation/prosecution poses challenges for solicitors in deciding whether a conflict of interest might arise.

8.13 Guidance on conflicts of interest is available in Chapter 3 of the Law Society's *A Guide to Good Professional Conduct* (3rd Edition) (the *Guide*). This will be of relevance to solicitors when deciding whether or not to represent more than one client in the same alleged crime.

8.14 Paragraph 3.1 of the *Guide* states that a solicitor should not act where there is a conflict of interest and paragraph 3.4 further states, with regard to non-conveyancing matters, a conflict of interest arises between two clients in a particular matter in which the firm is acting, the firm must cease to act for either client in that matter.

8.15 Paragraph 3.2 explains how:

A solicitor, acting with ordinary care, would give different advice to different clients about the same matter, there is a conflict of interest between the clients, and the solicitor should not act for both. The solicitor is also likely to have a conflict if either client could reasonably take exception to what the other client has asked the solicitor to do.

Acting in a conflict of interest situation may involve the solicitor in a breach of the duty of undivided loyalty owed to each client, a breach of the duty to make full disclosure to each client in a matter, or a breach of the duty of confidentiality owed to each client.

A solicitor owes a duty to a client to disclose all relevant information to him. This follows from the fact that the solicitor is the agent of the client, who is the principal. In practice, this means that a solicitor must be careful not to accept information that is to be kept confidential from the client.

Where there may be a conflict of interest, it is a matter for the judgment of the solicitor whether or not he should act, based on the professional duty owed by a solicitor to every client. It is not a matter for the judgment of clients.

8.16 Accordingly, the question of whether there may be a conflict of interest arising in a garda station is not a matter for the gardaí to decide but rests with the solicitor. An Garda Síochána's Code, acknowledges that this decision rests with the solicitor:

Where two or more suspects are at a Garda station in relation to the same incident or incidents, the solicitor must decide for himself/herself whether a conflict exists. The decision whether a conflict of interest exists is not a matter for An Garda Síochána.¹⁵

8.17 In circumstances where a solicitor is requested to provide advice/attend interview/represent two or more co-accused, each solicitor must satisfy themselves that they can act in the best interests of each detainee and in accordance with paragraphs 3.1 and 3.2 of the *Guide*. When this is not possible, solicitors should decline to act for one or all clients. An Garda Síochána's Code states:

Likewise where two or more suspects are at a Garda Station in connection with unrelated matters and request the same solicitor, it is for the solicitor to

¹⁵ Section 11, page 9

decide whether it is practicable to advise both or if there is a risk of one suspect being prejudiced.

A solicitor cannot dictate Garda plans in relation to the sequencing of their interviews. If such a difficulty arises, the solicitor will have to nominate which detainee they will be advising and the other detainees can be advised to seek access to another solicitor.+

8.18 Where a conflict of interest does not arise but two or more detainees might be simultaneously interviewed about unrelated matters, it becomes physically impossible for the solicitor to attend two concurrent interviews. In such circumstances, solicitors should advise the detainees so that an alternative solicitor can be obtained.

8.19 When a solicitor decides that there is no conflict between co-accused and proceeds to represent more than one suspect in a case, they should not allow themselves to facilitate the improper transfer of information between suspects.

8.20 If, during the course of providing legal advices to co-accused, a significant disparity arises, solicitors must be careful not to facilitate the fabrication of instructions to reflect those of another co-accused. The circumstances may require that the solicitor reconsider their earlier decision to represent both co-accused and decline to continue to act for one or all suspects.

False identities

8.21 If a client is, to the knowledge of the solicitor, giving the Gardaí false personal information, the solicitor may continue to advise the client but cannot take an active role in the deception.

8.22 In such circumstances, clients should be advised that to continue the deception may not be in their best interests but the decision to furnish the correct details must be made by the client. Clients should also be advised that it is likely that Gardaí will discover the deception before the detainee is released from custody and the deception itself may attract a criminal charge.

8.23 If the client is intent on persisting in the deception the solicitor should cease to act.

8.24 The solicitor should not advise anyone other than the client of the reason that they are withdrawing.

Messages

8.25 If a solicitor is asked by a suspect in detention to pass on a message to a third party they should consider whether to do so might assist in perverting the course of justice.

8.26 If the solicitor suspects that passing on the information could, for example, facilitate the destruction of evidence or allow another suspect to evade justice, they should decline to pass on the message.

8.27 While the primary role of solicitors is the protection of detainee rights in custody, solicitors must also observe the law.

8.28 In some circumstances, a solicitor may decide that communications on behalf of a detainee with a third-party might be appropriate. Information should not be communicated to third-parties without the express authority of the client. Examples of

possible appropriate communications on behalf of a detainee include, information about the detainee's location, wellbeing, the nature of the allegation, the detention periods and possible bail conditions.