

Practice notes

ADMINISTRATION OF OATHS BY SOLICITORS

When a client is swearing an oath or making a statutory declaration, there must be strict adherence to all the formalities required by law to be observed, both by the deponent's own solicitor and by the solicitor administering the oath or taking the declaration.

Client leaflet

A client leaflet has been prepared by the Guidance and Ethics Committee for the assistance of solicitors. The leaflet explains in simple terms what is involved. The leaflet can be handed to clients to read before they swear an oath or make a declaration. A sample of this leaflet is being sent to every solicitor. Leaflets will also be on sale from the Law Society.

The oath

Over the centuries and in most cultures, it has been the established wisdom that there are occasions when it is crucial that the truth of a matter be established. On these occasions, an individual should be asked to pause and consider and then to confirm formally that they are telling the truth. This is what is happening when an oath is administered or a declaration taken. This is of crucial importance for the administration of justice, for the transaction of business and for many other aspects of society today.

Solicitors undertake considerable responsibility when they are involved in the process.

Statutory basis

The statutory basis for administering oaths was originally the *Commissioners for Oaths Act 1889*. Statutory declarations are provided for in the *Statutory Declarations Act, 1938*. Until 1994, if it was necessary for an individual to swear an oath or make a declaration, the oath could only be administered by a commission-

er for oaths or, if the document being signed was a declaration rather than an affidavit, it could also be signed before a peace commissioner. Commissioners for oaths were, and still are, appointed by the chief justice and supervised by him via the Supreme Court office. Peace commissioners are appointed by the minister for justice. The names of peace commissioners active in a particular district are available from the local superintendent of the Garda Síochána.

When the *Solicitors (Amendment) Act, 1994* was enacted, section 72 provided that solicitors holding current practising certificates would have the same powers as commissioners for oaths to administer oaths and take declarations. This was presumably to ease the workload of the existing commissioners for oaths and to make it more convenient for clients to swear oaths or make declarations. Clients would be more likely to find a solicitor, rather than a commissioner for oaths, geographically close to them.

A practising solicitor who is not also a commissioner for oaths, in exercising his or her powers pursuant to section 72, is subject to all the acts, regulations and rules of practice to which a commissioner for oaths is subject.

Misconduct

Every practising solicitor exercising his or her powers pursuant to section 72 must at all times be fully aware of the importance and solemnity of the proper exercise of such powers and adhere to the duties laid down.

In the *Solicitors Acts*, the definition of misconduct includes any breach of any section of the *Solicitors Acts* themselves. Accordingly, any breaches of duties by solicitors in administering oaths or taking declarations will be investigated by the Law Society as a con-

duct issue. The matter will come to the notice of the society if a complaint is made or it may be discovered in the course of the investigation of any complaint.

Prohibition on individuals administering oaths in matters in which they have an interest

All the legislation is quite clear that the individual administering the oath or taking a declaration should be independent of the situation in which the oath is required. Rules 17 and 18 of order 40 of the *Rules of the Superior Courts* deal with the prohibition on a solicitor administering an oath for a party for whom he or she, his clerk or partner, is acting. This requirement is restated in section 72(2) of the *Solicitors (Amendment) Act, 1994*. This is to ensure the absolute independence of the deponent when taking the oath or making the declaration and to avoid duress or undue influence.

A solicitor cannot exercise the powers in contravention of any relevant condition on his or her practising certificate.

The definition of 'solicitor' in the *Solicitors (Amendment) Act, 1994* includes 'a firm of solicitors'. Therefore, in exercising his or her powers pursuant to section 72, a practising solicitor must regard himself as having an interest in any proceedings or in any conveyancing, probate, commercial or other matter in which his or her principal, partner, associate, consultant or assistant is engaged as a solicitor or has an interest.

Accordingly, the requirement is that the deponent swears or makes a declaration in the presence of somebody outside the solicitor's firm that is transacting the client's business.

The independent administration of the oath or the taking of the statutory declaration is a safeguard for clients. A solicitor independent of the situation asks whether the contents of the docu-

ment are understood by the client. This lessens the risk of undue influence for vulnerable clients, for instance, in a family situation.

The independent administration of the oath or the taking of the statutory declaration is equally important as a safeguard for solicitors. The client is the person who is swearing to the truth of the contents. If the client, unknown to the solicitor, is telling lies, but the solicitor involved is distanced from the swearing, no doubt is cast on the solicitor's credibility.

Powers of a commissioner for oaths/practising solicitor

The powers of a commissioner for oaths include the power to administer oaths relating to any affidavit, affirmation, statutory or other declaration for the purpose of any court in this jurisdiction, the registration of any instrument or in compliance with any statutory requirement.

Duties of the deponent's own solicitor

- **The solicitor must check with the client that the contents of the affidavit or declaration are true.** When a client makes a statement to his or her solicitor relating to events that have happened, the solicitor then drafts the affidavit or declaration to record the statement. The solicitor must then ensure that the client reads the document and verifies that the statement has been accurately recorded by the solicitor and also verifies the truth of the statement. Where a document has been prepared by the solicitor without reference to the client, because it relates to a technical matter not within the client's expertise, the solicitor must ensure that the client understands the contents of the document

- **The solicitor must ensure that the form in which an affidavit is made is the appropriate form.** The solicitor should check whether the client will be taking an oath or, if he or she objects to doing so, would prefer to affirm. The solicitor must include an appropriate formula of words and jurat for an oath or affirmation in the affidavit as required
- **The solicitor should explain to the client the nature of the oath or affirmation or of the statutory declaration.** He or she should explain that the client is not simply being asked to sign a document but that the client is being asked to pause and consider whether they are telling the truth and to swear an oath, affirm or solemnly declare that they have done so. The client can be asked to read the Law Society explanatory client leaflet
- **The solicitor must ensure that the client swears in the presence of a commissioner for oaths or practising solicitor.** The solicitor can arrange that he or a member of his staff brings the client to a commissioner for oaths/practising solicitor. If the solicitor is sending the document to the client, the necessity for the oath to be sworn in the presence of a commissioner/practising solicitor should be explained.

Duties of the solicitor administering the oath

It has long been established that the responsibility for, firstly, the form of the affidavit and, secondly, the truth of the contents do not lie with the person administering the oath but rather with the deponent and with his or her solicitor. The duty of the person administering the oath is to do the following:

- Satisfy himself as to the identity of the deponent
- Ascertain that the person has read the affidavit or declaration or has had it read to him
- Ascertain that the individual understands the document

- Ensure that the oath is properly administered and that the necessary formalities are observed.

Solicitors should consult the publication *Handbook for the use of commissioners for oaths* by the late Gerard Frewen for more detailed instructions in relation to administering oaths.

The oath, affirmation or declaration

The formalities observed should follow those observed in court. If a testament is being used, the testament may be raised in either hand. The oath should be said aloud.

The following are suitable formulae for the oath, affirmation and the statutory declaration respectively:

- 'I swear (by almighty God) that this is my name and handwriting, that I have read the affidavit and that the contents of the affidavit are true'
- 'I solemnly and sincerely affirm that this is my name and handwriting, that I have read this affirmation and that the contents of the affirmation are true'
- 'I solemnly and sincerely declare that this is my name and handwriting, that I have read this declaration and that the contents of this declaration are true'.

The jurat

The following is the usual, but adaptable, form of jurat:

Sworn/declared by _____
[NAME OF DEPONENT]
 who is/are personally known to me (or who is/are identified to me by _____
 who is known to me)
 this _____ day of _____ 200 _____
 at _____
 in the city/county of _____
 before me, a commissioner for oaths/practising solicitor.
Commissioner for oaths/practising solicitor

If a deponent is affirming, the above jurat should not be used. Instead it should read:

Affirmed by _____
[NAME OF DEPONENT]
 who is/are personally known to me (or who is/are identified to me by _____
 who is known to me)
 this _____ day of _____ 200 _____
 at _____
 in the city/county of _____
 before me, a commissioner for oaths/practising solicitor.
Commissioner for oaths/practising solicitor

A solicitor who holds a practising certificate that is in force who is also a commissioner for oaths may continue to refer to himself in the jurat as a commissioner for oaths. A practising solicitor who is not also a commissioner for oaths shall refer to himself in the jurat as a practising solicitor.

Practices that are in breach of the legislation

- Leaving blanks in the document when it is sworn or declared and filling in the blanks after the document has been sworn or declared
- Asking the client to sign the affidavit or declaration in the presence of the solicitor or a member of his or her staff, to be 'sworn' later in the absence of the client
- Sending the affidavit or declaration out to the client, whether in the locality, in the jurisdiction or abroad, and simply asking them to sign the affidavit or declaration 'where marked with a pencil', with no further explanation as to the contents of the document or the significance of a

and declarations being made by clients of a firm to be signed by a commissioner/practising solicitor at regular intervals in batches, without the deponents being present.

Practical matters

There can undoubtedly be inconvenience for solicitors in arranging the proper administration of oaths and taking of declarations. However, proper swearing can be achieved with a little planning.

In some localities, it may be possible for solicitors' firms to come together to arrange a rota for specific hours or specific days when each firm will be available for the administration of oaths or the taking of declarations by practising solicitors or non-solicitor staff who have been appointed commissioners for oaths. This would ensure the best possible availability of commissioners or solicitors to swear oaths and also minimise interruptions for all the firms.

Firms should ensure that they have a copy of the Bible available for clients who are swearing on the Bible. The Guidance and Ethics Committee has prepared a laminated card on which the different formulae of words are set out, to be available for clients so that they can read out the relevant words when swearing or affirming or making a declaration. One of the cards is being sent to all solicitors with the client pamphlet already mentioned.

Fees

A practising solicitor who is not a commissioner for oaths, in exercising his or her powers pursuant to section 72, is subject to the same

SECTION 72 OF THE SOLICITORS (AMENDMENT) ACT, 1994

'Administration of oaths and taking of affidavit

72. (1) Subject to the provisions of this section, every solicitor who holds a practising certificate which is in force shall, subject to any condition to which that practising certificate is subject under the *Solicitors Acts, 1954 to 1994* (in this section referred to as a 'relevant condition'), have all the powers conferred by any enactment or statutory instrument (within the meaning of the *Statutory Instruments Act, 1947*) on a commissioner for oaths (including section 24 of the *Stamp Duties Management Act 1891*) and any reference to such a commissioner in any such enactment

or statutory instrument, whether passed or made before or after the commencement of this section, shall include a reference to such a solicitor, unless the context otherwise requires.

(2) A solicitor shall not exercise the powers conferred by this section in any proceedings in which he is solicitor to any of the parties or in which he has an interest, or in contravention of any relevant condition.

(3) A solicitor before whom any oath or affidavit is taken or made shall state in the jurat or attestation at which place and on what date the oath or affidavit is taken or made.

(4) A document containing the

statement in the jurat or attestation mentioned in sub-section (3) of this section and purporting to be sealed or signed by a solicitor pursuant to his powers as a commissioner for oaths or pursuant to this section shall be admitted in evidence without proof of the said seal or signature, and without proof that he is a solicitor or that he holds a practising certificate which is in force or that such document has not been so sealed or signed in contravention of a relevant condition.

(5) Nothing in this section shall affect the power to appoint commissioners for oaths under section 73 of the *Supreme Court of Judicature Act (Ireland) 1877*.

regulations as to fees as is a commissioner for oaths. The fees currently payable to a commissioner for oaths are set out in the Rules of the Superior Courts (*fees payable to commissioners for oaths*) 2003 (SI no 616 of 2003) and are as follows:

- i) On taking an affidavit, affirmation or declaration: €10
- ii) On marking exhibits therein referred to and required to be marked –
 - for each exhibit: €2
 - but not exceeding for all exhibits: €30
- iii) On attesting the execution of a bond: €10.

The Law Society will seek to ensure that the fees for the administration of oaths/the taking of declarations is reviewed on an on-going basis so that the fee reflects the importance of the task.

ENDORSEMENT OF CHEQUES

The exigencies of current conveyancing practice often require that cheques made out to clients are endorsed and passed on, without being lodged to the solicitor's client account.

Any such endorsement should

be made, preferably, with the written authorisation of the client or, in exceptional circumstances, on the client's oral instruction, if the prompt dispatch of the client's business requires it. A copy of the cheque and its endorsement

should be given to the client without delay and, in the case of an oral instruction, a letter should be written confirming that the cheque was endorsed in accordance with such instruction.

Practitioners should also note

that the provisions of the *Solicitors' accounts regulations* (and money-laundering legislation) require that a copy of such endorsed instrument be kept on the solicitor's file.

Conveyancing Committee

LEGISLATION UPDATE: 16 APRIL – 20 MAY 2005

Details of all bills, acts and statutory instruments since 1997 are on the library catalogue – www.lawsociety.ie (members' and students' area) – with updated information on the current stage a bill has reached and the commencement date(s) of each act.

ACT PASSED

British-Irish Agreement (Amendment) Act, 2005
Number: 6/2005

Contents note: Amends section 53(b) of the *British-Irish Agreement Act, 1999* to remedy a possible technical defect in relation to the protection of North/South implementation bodies as state authorities under *Landlord and Tenant (Ground Rents) legislation*
Date enacted: 6/5/2005
Commencement date: 6/5/2005

SELECTED STATUTORY INSTRUMENTS

Central Bank Act, 1942 (financial services ombudsman) regulations 2005

Number: SI 191/2005

Contents note: Extend the definition of 'regulated financial services provider' in section 2(1) of the *Central Bank Act, 1942* (as amended by section 2 of the *Central Bank and Financial Services Authority of Ireland Act, 2004*) for the purposes of part VIII of the *Central Bank Act, 1942* (financial services ombudsman)

Commencement date: 1/4/2005

Central Bank Act, 1942 (financial services ombudsman council) regulations 2004

Number: SI 190/2005

Contents note: Expand the defini-

tion of 'consumer' for the purposes of section 57BA(b) of the *Central Bank Act, 1942* (as amended by section 16 of the *Central Bank and Financial Services Authority of Ireland Act, 2004*) to include all unincorporated bodies (including partnerships, trusts, charities, clubs, and so on) and to include limited companies with an annual turnover of three million euro or less (SMEs); prescribe the maximum limits on the awards the ombudsman may make in respect of complaints generally and complaints in respect of annuities, for the purposes of section 57C(4)(d) and section 57C(5) of the *Central Bank Act, 1942* (as amended by section 16 of the *Central Bank and Financial Services Authority of Ireland Act, 2004*); retain the existing terms of reference of the for-

mer voluntary schemes pending the drawing up of comprehensive terms of reference save that where a conflict arises between the act or the regulations and the terms of reference, the act and the regulations will prevail

Commencement date: 1/4/2005

Commission of Investigation (Dublin and Monaghan bombings) order 2005

Number: SI 222/2005

Contents note: Establishes a commission of investigation to investigate and report on specific matters relating to the bombings in Dublin and Monaghan on 17/5/1974

Commencement date: 26/4/2005

Companies (fees) order 2005

Number: SI 179/2005