

Choosing, instructing and doing business with a solicitor and barrister

(Some reflections and suggestions)

www.liamog.com Liam Ó Gógáin 29/03/05

I have often been asked by people who come to Parental Equality as to how they may go through the process of finding, choosing, instructing and doing business with a solicitor and barrister in terms of representing them in their family law cases. Reflecting now in February 2005 on my involvement with the legal system since 1990, in terms of civil and family law, both as a lay litigant and having been represented by a solicitor and barrister and from the thousands of conversations that I've had with end users of legal services providers, I will attempt to set out some guidelines which may be of use to the listeners.

One of the memories that spring to mind is of the very early 1990's when I was embroiled in my own family law litigation. I was traumatised by the legal process and mindful that my children were very young (one and a half, and two and a half at that time) and there were repeated custody struggles in court. I remember coming across an American men's health magazine, where I read a small article in it from a contributor who made some suggestions in relation to hiring a family law solicitor which I thought were quite interesting.

I thought it quite useful that the process of setting out a number of questions which a person might consider when engaging legal professionals would help to: -

1. focus the mind of the person engaging the legal personnel and
2. also help to structure their thinking in such a way that, when reflecting later on either the quality of the service provided, or on the costs which might emerge, they would have some traceability to questions that they may have asked and answers that they may have been given by the solicitor and/or barrister.

I am also struck by the huge percentage of the people that I have spoken to over the last number of years who, when I ask them for the name of their solicitor or barrister, or the names of the other

side's solicitor and barrister, or even the name of the judge who heard their case, their minds suddenly go blank. It's not just that they don't know these details, it's that these people who come from all walks of life, ranging from those with reading disabilities to professionals who have paid out up to €200,000 in legal bills, don't even seem to think that it's abnormal that they don't know either the name of their own solicitor or barrister, etc.

When I ask these people about records of the legal communications between the parties, or for copies of court records, transcripts of court hearings etc it's incredible how often this question simply draws a blank. It's almost as if this is the first time that these people have ever heard such questions or even considered such questions. When I ask people who are in the middle of a legal process (sometimes cases that have been going on for years) to give me some sense of the costs accrued to date, they look at me sheepishly and once again the question draws a blank.

The sums of money sometimes run up in these cases can be in the order of tens of thousands of Euro. Having heard the queries coming from me as part of a series of investigative questions, the penny slowly begins to drop and they start to realise for themselves that these are questions, for which perhaps they ought to have answers, but that they have never thought of them before.

Sometimes I reflect with people about how they themselves would carry out a similar transaction, such as the acquisition of a service from another provider.

For example, when hiring a plumber to fix a water problem in your house, in recognition of the fact that you yourself can't fix a problem with the water system, you turn to a plumber to come in and sort the problem out. Often these situations happen in an emergency. You might be lucky to get a plumber and therefore you're not really in a position in advance to put the job out to tender and then consider the various tenders from different plumbers. However, invariably people seem to be quite clear that if they brought in a plumber they would have some definition about the specification of the work that they wish this plumber to carry out.

They would have some expectation that the plumber would explain to them exactly what he or she did to fix the problem and that the plumber would give them a breakdown of the elements of the work involved, the cost of the various parts required and the amount charged for labour.

When I asked people about this type of job, they would always have some ballpark figure in mind before the job started of the types of

levels of fees (do we call a plumber's charges "Fees", I wonder?) that they might be charged. While it's true that they might be out in their estimates from between say 50% to 200% they would always expect that if the plumber came across a problem which they considered to be extremely costly or unusually costly, then the plumber would always refer back to them explaining to them the reason for the unusual cost that would arise in this case and laying out to them the various alternative options available, before carrying out the work, and that the plumber would seek assurance from the client that they were in agreement with paying the sums of money concerned.

Now, I accept that there are a minority of cases which turn into nightmares (House on Horrors ITV comes to mind), but I'm talking here about a normal expectation of a vast range of people that I have spoken to in relation to how they would approach employing somebody to supply a service.

The same generally holds true when I ask people about going to a dentist, (although when I talk about going to a doctor and having a medical problem there are elements of the potential costs of the medical treatment which are fairly open ended). However, the client is generally aware of the level of fees that are involved in a consultation with either a doctor or with a consultant and that they have a sense that prior to a procedure being carried out they are given a ballpark figure in relation to costs which is generally fairly accurate.

People dealing with hiring a solicitor in a family law case seem to suddenly operate on a different level completely. The very same people, who on a day to day basis work out their family budgets, make projections about buying cars and how to pay for them, about moving houses and furnishing them, paying for their children's education, engaging

'It's almost as though there's an element of embarrassment or even subservience to the professional by being almost too shy to ask the question in relation to costs or querying the performance or the strategies being used by the legal professionals.'

builders, architects, maintenance personnel, paying tuition fees and grinds etc and are generally quite competent at doing so, suddenly seem to throw all of the rationales of competence aside when engaging solicitors. It's almost as though there's an element of embarrassment or even subservience to the professional by being almost too shy to ask the question in relation to costs or querying the performance or the strategies being used by the legal professionals. Sometimes, when I reflect back with people on the apparent anomaly, between how structured and organised they are

in dealing with the costs in certain areas of their lives and engaging certain services, and the total contradiction in how they fail to ask even the most basic question of their legal professionals, they start to give me some half-hearted and weak explanations. Some people suggest that they tried to ask the solicitor questions and that they felt they weren't being heard, and that often when they meet the barrister who is almost like a distant, uncommunicative person that they are talked down to and that they are given the impression that they are almost fortunate that such a lofty individual would bother to talk to them; and that certainly when it comes to matters of law that the lay person would do best to leave this to the professionals and not ask any questions.

A few years ago a friend of mine in discussion with me compared and contrasted the roles of an "advocate" (*somebody, for example, a lawyer, who pleads another's case in a legal forum*) and a "plenipotentiary" (*invested with complete authority to act independently*) His experience had been that had been that he had employed a solicitor and a barrister to provide a legal service in his upcoming divorce case. He himself had carried out an enormous amount of the work in terms of preparing chronologies, details, financial discovery elements etc (scanned and produced as PDF files on CD-rom) and had been quite participative in communicating with his legal representatives and keeping up to date with the details of the case. Then at one point he found himself shocked to find out that his solicitor and barrister had made an agreement with the legal representatives on the other side to defer proceeding on his case for a period of a number of months. He pointed out that his solicitor and barrister made the decision to agree to defer the case without reverting to him to first explain the possible scenarios and consequences of different strategies in relation to a decision on deferring the case, then allowing him to consider their advice and allowing him to make the decision in relation to deferral and that they would then make the agreement on the basis of his instruction to them. What he discovered in fact was that his legal advisors had moved from the role of being his advocates to being plenipotentiaries. In his view the role of an advocate is:-

"advocate" (somebody, for example, a lawyer, who pleads another's case in a legal forum)

"plenipotentiary" (invested with complete authority to act independently)

1) To provide advice to the client setting out the different possibilities and consequences based on the range of their

professional experience. For example, a solicitor and a barrister could advise that in 70% of cases this type of approach tends to be successful, or for example this particular judge seems to have a known preference for a particular outcome in certain circumstances. This specialist expertise is uniquely what those legal professionals have to sell.

2) The professional legal people should also have the skills of knowing which rules apply in which cases, how to effectively and efficiently fill in the appropriate forms and what procedures to implement in following a legal action.

In true advocacy the advocate would then invite the client to consider the advice and then to come back to the advocate with a decision as to which route to take. The advocate at this stage, acting strictly on the instructions of the client, simply operates as a highly skilled technician would in this situation, specifically carrying out the instructions of the client. On the other hand if a legal representative acts as a plenipotentiary, then what happens is that a client effectively hands over the decision-making about which scenario to choose and to implement. Complete power is now vested in the hands of the solicitor and barrister, and in a sense the only role that a client has here is to carry the responsibility for the outcome and to pay whatever costs emerge from taking the action.

There is a fundamental question here for anybody who wants to employ legal services from a solicitor and/or barrister: -

a) To determine whether or do they wish to have their legal representative/s act as a plenipotentiary and basically hand over effectively the powers of attorney or the decision-making powers to the legal representatives, trusting that the legal representatives would do the best deal for them or in their interests.

b) Or whether they want to be an active part of the process of consideration of the different strategies and trajectories to use where the role of the legal representatives becomes that of: -

1) Technical advisors, in terms of clarifying and providing the technically correct details.

2) Mentor in terms of bringing to the table the vast range of their legal experience.

3) Providing their advice to the client but accepting that fundamentally the client will make the decisions, and that the

advocate at all stages will implement the decisions to the best of their professional ability and under the direct instruction from the client.

In an ideal situation, in order to ensure that there's no comeback by the client against the legal representatives, there would be some traceability of the clear instructions provided by the client to the solicitor and/or barrister. I think that this is a little akin to a customer specifying, for example, a machine to be built by a manufacturer. Effectively, there needs to be a specification document. This document supplies details of the product to be delivered, clearly specified in such a way, that if, at some later point in the development of the product, there is some disagreement in relation perhaps to the expectations of the customer and what is finally delivered, the disagreement can be referred back to the specification document. At this point any mismatch of expectations which exists can be identified. In fact, even if the two parties can't agree, there is a record and a procedure and methodology whereby arbitration could be implemented at that point.

One could argue that in terms of the stress, trauma and tensions that are involved in family law cases, that lots of decisions seem to be made on the steps of the court and under pressure, or perhaps often in the middle of the court case, that often it doesn't lend itself to taking the time, to set out, either in writing, or in some other traceable accountable and recordable method, the clear instructions as given by the client to the solicitor and barrister. Often people recount to me stories where they say that what they asked the barrister for was not in fact what the barrister actually requested, either in the court, or in the negotiations. And yet one can imagine the barrister's response, that their understanding of what the client has said was in fact what they had sought.. What I would argue is that the environment and ambiance of these type of court cases is constructed in such a way, in terms of both creating the drama and pressure through the austere nature of the court environments, and that the very formal and cold modes such as the formal dress code and mode of addressing people in formal terms such as "Your Honour" and "Your Lordship" etc., in a court, all lends itself to making clients extremely emotionally uncomfortable and feeling that they have to make decisions under enormous pressure.

One wonders what would happen to the quality of a judicial system if in fact there was almost a cooling off period about any proposal made and if there were a more effective timing or time-management of the process so that there would be "more speed and less haste".

Reflecting on about the number of times I have been to court where there were adjournments for what can only be described as spurious reasons, I focus on the unnecessary increase in the legal costs for all of the parties, the increase in the levels of tension for everybody involved and the extension of the period of acrimony. If all of the procedures in terms of negotiations and mediations etc had been structured in a more effective manner the costs would have been a lot less, the issues and disagreements would have been a lot clearer and it would have been possible for the judge in case to get to the nub of the situation much quicker. The resource of time and monies so saved above could be utilised: -

- 1) To allow the judge to reflect before make an instant seat-of-the-pants decision.
- 2) To allow the parties to reflect on the decision before perhaps just continuing with the legal struggle.

I have attended at district court callovers where there are numerous cases listed and they get keep getting adjourned. The accumulated waste of time leads to a situation where judges are under extreme pressure to race through cases. Judges are therefore seldom in the position to give cases a sufficient amount of time to deal with them properly, due to the inefficient time and resource management in the court system. It all creates a landscape of unnecessary fuss. The consequent stress and tension works against an environment where clients and their legal representatives can operate and develop a common and agreed understanding of the specification of the work that is laid out by the client to be carried out by the paid professionals.

I wish to look out at how one might map out a sequence of activities and questions one might use when seeking to engage a solicitor and/or barrister for a family law case. The structure of the court system that applies in Ireland: -

- 1) The lowest level of court hearing is in the District Court which is generally held within let's say at most twenty to thirty miles radius from clients homes. Case are typically heard once a month.
- 2) Next level up from that is the Circuit Court of which there are a number of circuits in Ireland. Typically a Circuit Court

sits every two or three months in an area of maybe two to four counties.

3) The next level of court up is the High Court again which sits on circuit in different areas of the country probably two or three times a year and then consistently sits in Dublin as well.

4) Finally there's the Supreme Court which sits in Dublin.

In terms of the rules about legal representation (as I understand them), in the District Court rules there is a reference which talks about what's called "The right of audience". Everybody has the right to represent their own case as a lay litigant, but in terms of being represented by someone else, the District Court rules set out that someone representing me for example must be a qualified solicitor. I would seriously question the confining injustice of such a ruling and particularly its effect in terms of monopoly whereby I believe that an individual should be perfectly entitled to appoint anyone to represent their case or advocate their case to a court. I suggest that it's reasonable that there should be an obligation on a judge to point out to a person who employs a non-professional or a untrained individual to represent them, that there are possible negative consequences for them in doing so, in that they might take bad advice but I believe that this decision should be left to the individual themselves. For example, if I were mute/orally impaired and therefore couldn't speak and I decided that I had a perfectly good relationship with an individual who could speak on my behalf, then I believe that I should be able to appoint that person to represent my views, and that the person shouldn't need to be a solicitor.

The other issue which I question is the role of a barrister in a case. My understanding is that an ordinary person or a lay litigant cannot engage the services of a barrister directly because of the rules and restrictive practices implemented by the barristers organisation and perhaps by the solicitors organisations, and that the protocol is that one must first employ a solicitor or retain the services of a solicitor and the solicitor then separately retains the services of a barrister; As I understand it there is no direct contract between the client and the barrister but that the contract is with the solicitor who then separately engages a barrister.

The tradition has been up until recently past is that certainly beyond the District Court, a solicitor always engaged a barrister to present the case, so that a lay person going to a Circuit Court hearing would

be expected to have a solicitor and a barrister, and that this would also apply both in the High Court and in the Supreme Court but that it was common practice for solicitors to represent the client in the District Court. However, as a result of challenges, (I believe brought to the surface by people such as Alan Shatter as a solicitor), I understand that solicitors now have the right to represent clients certainly in the District, Circle and High Court and possibly also in the Supreme Court. So the first thing that someone should recognise in terms of employing legal representation is that if you employ a barrister and a solicitor there is a lot more money involved than just if you employ a solicitor alone, but that in the vast majority of cases, technically it is possible that the solicitor could represent your interests.

Again I have been regularly told by people that when they asked for this service and asked the solicitor alone to represent them, that at very best a solicitor would make it awkward for the lay person not to engage a barrister, telling them "Well we normally work this way and it would be better if you did this etc", and that at worst, in many cases, the clients simply say that have been misled and been told by solicitors that this is what has to happen.

It is important to recognise the imbalance of information that exists between a lay client who has never had any exposure to the legal system going into the austere offices of a solicitor. Consequently, it is very easy to manipulate the mind of a lay person and make them believe that not only is it traditional practice but that it would be frowned upon if you didn't have a barrister.

Point number 1 to recognise is that one can actually just employ a solicitor. Consider the difference in roles between a solicitor and a barrister. When employing a solicitor a client is likely to have much more regular contact with their solicitor and that the writing up of the papers of the case of the details would effectively be the role of the solicitor. The brief, which is a synopsis of the case, is presented to the barrister. Then the barrister would basically use their honed and practiced skills in terms of how to manipulate or how to use particular aspects of a particular law to get the desired outcome for their client. Then normally there would be a number of consultations between the client, their solicitor and their barrister, with essentially the solicitor being the facilitator of that consultation by having a working relationship with the barrister and by having a detailed understanding of the client's case. During negotiations you might have a situation where the barrister would actually go off to do the negotiations with the other side's barrister and that information would filter back down through the solicitor back to the

client. If the concept of advocacy were to be held in focus then the flow of decision-making would be as follows: -

1. Information and advice being fed from the barrister to the solicitor to the client.
2. Reflection of this advice by the client.
3. A decision by the client being fed back through the solicitor and then to the barrister for the barrister to implement.

In terms of costs of taking legal action there's a very important piece of legislation called the 1994 Solicitors Act and a particular section in it called Section 68. This section sets out the procedures and the rules under which solicitors engage with clients, and it is very strong in terms of specifying that

detailed explanation of the issues surrounding Section 68 on the liamog.com website under the issues section
<http://www.liamog.com/solicitors.htm>.

before the actual contract of employment between the client and the solicitor takes place that the solicitor has given in writing an estimate of what this legal action will cost. I have recorded a very detailed explanation of the issues surrounding Section 68 on the liamog.com website under the issues section <http://www.liamog.com/solicitors.htm>. Over thirteen years and having discussed the experience of having employed solicitors and barristers with tens of thousands of people, I have yet to come across any situations whereby the specific details and rules laid out in Section 68 for solicitors have been implemented in full or even in part. It seems to have consistently been the order of the day that clients engage solicitors without a written estimate being provided beforehand without a constant briefing on costs as they are going along, and without a properly structured payment plan being worked out as the case develops, so that the client can make the most effective and informed choice in relation to:

- 1) Initially retaining these legal services.
- 2) Keeping these legal services within a maintained and sustainable budget.
- 3) In terms of paying the legal bills either when the case is finished, or if one withdraws the case prior to a full hearing.

The first question that comes to mind in terms of engaging a family law solicitor is "Are all solicitors the same, or equally skilled or qualified?"

- a) In terms of as every solicitor are they qualified in terms of dealing with family law, both technically and experientially?
- b) Are all solicitors the same or how does one tell the difference in terms of how good they are at what they do? This is further broken down into considering are they technically competent in terms of keeping detail, filling in forms and doing the paperwork correctly and separately are they good at getting results and when they act for clients what sort results do they actually get for clients?

Dealing with this question alone requires some research by a potential client in finding out "Where do I find a list of family law solicitors?" An initial step and all of these steps are based on the utilisation of the Internet as a research tool would be to look on the Law Society's website. Typically if I'm looking for the Law Society in Ireland I just put in Law Society Ireland into the search engine (www.google.ie) and keep going until I get to a Law Society website. Searching these websites one is looking for a list of solicitors, perhaps broken down into different categories. A second possibility is to in fact e-mail the Law Society and ask for a list of Family Law solicitors operating in a particular geographical area. Another way of finding out the list of possible solicitors who do family law is to look in the Golden Pages for a particular area and look at the various ads for solicitors. In some of these ads they may indicate Family Law as being a speciality within their firm. Another way of scoping this out is to go onto the Internet and look up for example fathers support groups, mothers support groups, or family law support groups and look onto the discussion boards or otherwise and see if there are names of any solicitors being discussed and perhaps some performance evaluation of these solicitors. By further contacting some of these groups a potential client can ask for advice in relation to how good various solicitors are, it's important to take this sort of advice very carefully because it's very anecdotal, the sample size is likely to be very small because of the nature of the secrecy of the family courts etc.

"Are all solicitors the same, or equally skilled or qualified?"

Having perhaps drawn up a list now of family law solicitors another question a potential client must consider is whether he/she would like to be represented by a solicitor in their own geographical area; They may decide, for example, if they are living in a local area like a town, that they wouldn't like to have a solicitor who almost knows the territory and would specifically like to engage a solicitor from another area or perhaps from the Greater Dublin area, where certainly things are possibly more anonymous. Again the question one has to ask here is if you contact a solicitor, whether they would be particularly interested in acting outside of their own geographical area for practical, pragmatic and financial reasons etc. It's going to be more costly to get a solicitor based in Wexford to represent a case for a client who is living in Dundalk and to expect them to come up and down to Dundalk but also makes it more difficult for the client to have regular face-to-face communications with their solicitor. On the other hand, some people might like to have some physical distance between themselves and their solicitor.

However, step number one is to research the various resources that I have mentioned about and to draw up a list of perhaps four or five solicitors whose firms practise family law. Again, if solicitors firms turn up in the search and there's no detail as to whether they do or don't practice Family Law, make a simple phone call to the number and ask the clear question "Does your firm specialise in practising family law?" and again to identify if it does include those firms on the list.

The second question is to seek an appointment to meet with the solicitor and to discuss whether the potential client would be happy to engage this particular solicitor. The question to ask at this point is; "Is there a consultation fee for a first consultation?" In many cases (and understandably so), a solicitor is looking for business and there's every good business reason why the sales pitch or the first consultation should actually be free. In fact in some adverts for solicitors in cases involving accident claims etc it's quite normal to have the first consultation free. A potential client should be looking at this first meeting with a solicitor as an interview wherein the potential client is evaluating the competencies and suitability of this particular solicitor as against other solicitors to see which legal service provider would suit the customers needs best.

I am introducing the concept of the potential client being a customer in a business relationship where they are hiring the services of a legal service provider, and it is a question of the

potential client getting it into their head that they have the financial resources, that they are buying legal skills and services with those resources and establishing a business relationship.

Having say contacted five solicitors firms and confirmed that they do practice family law, and having identified which one of those solicitors are prepared to give an initial meeting on a no fee basis, my suggestion would be to arrange a short meeting. It would probably be unreasonable to expect a solicitor to provide their time free for more than half an hour at an initial meeting. At that point if a potential client wishes to have a further meeting that they should then agree a cost for the next meeting, and I believe that this would be a requirement of Section 68 of the 1994 Solicitors Act. Note that the onus isn't on the customer to seek this but the onus is on the solicitor to provide this information on a fee, in advance, to the client. If a potential client and solicitor have an initial half hour meeting at no cost to the client, then it should be possible during this meeting for the client to broadly lay out what their expectations and desires are of a legal service or maybe to ask the solicitor what legal services are provided by their firm. The solicitor should lay out their sales pitch in terms of what services they provide. During this initial meeting the customer would be advised to ask the solicitor a set of questions, for example: -

- 1) Does this firm of solicitors or this solicitor have a specialist training over and above general training in family law?
- 2) How many years has this solicitor been practising family law and been practising family law in the particular court whether it be District, Circuit, Higher or Supreme Court that the client expects to operate in?
- 3) In relation to the particular solicitor what proportion of cases involved representing men and what proportion or percentage involved representing women?
- 4) The client should specify what they are interested in, for example, if they are interested in either seeking: -
 - a) maintenance,
 - b) custody or access,
 - c) guardianship,
 - d) divorce,
 - e) a separation

f) looking for the sale of a home.

5) The client should then ask the solicitor how many of these specific cases that solicitor has dealt with and what the outcomes were, say within the last two years.

6) The customer should ask the solicitor to specify the percentage success rate that they have had in representing in the last two years on these specific issues. So for example, if a client is seeking guardianship of their child as an unmarried father and if a solicitor has represented twenty of those specific cases in the last two years and if they have been successful in one of these cases and unsuccessful in the remainder of these cases then compared to another solicitor who has a 90% success rate the potential client is in the better position to make an informed judgment as to which of these two solicitors to employ.

7) Seek references from the solicitor that the potential client can make contact with and basically get feedback or testimonials on the performance of the solicitor. So for example, if I am seeking guardianship as an unmarried father then I would seek a couple of references from other fathers in a similar situation and ask them "How did this solicitor perform in their case for you?" If a solicitor is unwilling to give this information then the question that has to be asked is, is there something that they are not telling you, that you need to know? There is a question about the privacy of other clients, but if solicitors were faced with the reality that customers would only sign up if they could refer to testimonials, then in situations where they had previously worked for clients, perhaps one of the things that solicitors would ask clients is "do you mind if I use you as a reference referee just as people do when applying for jobs etc".

8) It is important also if one is dealing with a firm of solicitors clarify whether you are actually speaking to the particular solicitor who would actually be representing your case.

9) Ask the solicitor is what their projected workload is. There is no point in engaging a builder who is already tied up with twenty other contracts in the coming months when you are likely to need them, when they simply will not be available. Similarly it's of no benefit to you if you engage a solicitor to represent you in a Circuit Court case that they might be quite convoluted and then find out that they are actually separately and simultaneously contracted to represent other clients in a high court in some other location of the country. Too often this happens that on the morning of the court case, a client is left in the lurch being told that perhaps his solicitor or barrister isn't available to represent him and that it is suggested

that a stand-in solicitor or barrister can handle his/her case for you. Another barrister/solicitor just picking up your brief at the very last moment and purporting to deal properly with it is a very unsatisfactory situation. So essentially the question to ask of the solicitor is that if you were to engage them, what commitment they would give to the you, the client, in terms of their willingness to focus on the job and be available.

10) Ask the solicitor for a projection on the time frame that it would take to actually bring the legal action, or to conclude whatever negotiations. In other words, if I am seeking to apply for guardianship, get a definite timescale eg. are we talking here about a week, a month, six months or a year?

detailed explanation of the issues surrounding Section 68 on the liamog.com website under the issues section

<http://www.liamog.com/solicitors.htm>

11) The next thing to discuss with the solicitor is their scale of fees. Once again this is an obligation that's placed actually on the solicitor rather than on the client under Section 68. But in the practise, certainly as experienced in Ireland to date, the customer should clearly raise the question as regards what the scale of fees will be so that they would know exactly;

- a) how much per hour they are paying for a consultation,
- b) how much a solicitor charges to read a letter. For example if a letter is sent in response to a letter from the other side's legal team, the solicitor will charge a certain amount of money for reading a letter and also charge for writing a letter on ones behalf.
- c) How much is an appearance fee for a solicitor in terms of if they represent you in court? Do they charge on an hourly basis or on a daily basis and are you paying for mileage and meals etc.

12) A very important question to clarify at this point in time is whether the solicitor as a matter of routine will ensure that the client is provided with a copy of every communication that is both received and sent by the solicitor on the client's behalf. This is a very important issue because in too many cases the client doesn't end up with a copy of the correspondence

'Solicitors seem to be extremely reluctant to provide this information to their clients'.

pertaining to details of the case, or of court orders, or of letters written on their behalf to other parties. Subsequently, if a client wishes to move from that solicitor to perhaps another solicitor, or when their case is concluded this holding of the client's files becomes a point of leverage from the solicitors point of view. Solicitors seem to be extremely reluctant to provide this information to their clients. Whereas if an agreement were made at the outset that the solicitor must provide a copy of all documentation to the client on an ongoing basis this would prevent future problems, and if there is a premium to be paid for this then that it is specified right from the very outset.

13) Another question to raise is how accessible and immediately available will a solicitor be, particularly when issues such protection orders, barring orders or custodial wrangles etc, arise suddenly, for example at weekends or evenings, or at out-of-office times. In other words do you have access to the solicitors mobile phone number, what is the response time by a solicitor to an emergency call from a client? If one runs into a custody access difficulty on a Saturday morning can you consult with the solicitor immediately by phone and not have to go through the difficult situation unadvised, thus possibly very creating more problems if you don't have legal advice over the weekend.

14) Determine what is the solicitor's position in relation to representing of their client in court on their own, or whether they normally would also engage a barrister. It would be normal for a solicitor to represent the client themselves in the District Court and so the question applies to a Circuit Court, Higher or Supreme Court hearing. If the solicitor states that they themselves will do the representing one should ask how many times a solicitor has actually done this in the past and what is their percentage success rate in these cases. If the solicitor's recommendation is that they retain the services of a barrister the question to be asked is does that solicitor use a preferred barrister and if so the name of the barrister? Once again ask for details of the records of the performance of that barrister in pursuing the specific aspect of family law that the potential client is dealing with and also a list of references that the potential client can contact to check the client's experience of that particular barrister.

15) A potential client should then ask the solicitor about their billing mechanism. Do they, for example, operate on a basis of demanding cash up front before taking on a case, or perhaps a cash down payment, do they invoice on an ongoing basis for example after each hearing or on a monthly basis, or do they do a deferred payment where they wait until the whole case is over and settle the bill when for example property is disposed of and the case is

completed. The solicitor may have a variation of those these options or another payment plan of their own and again the prospective client should get this in writing.

16) Ask the solicitor about their relationship with the prospective judges that they are likely to meet in the family courts. It's a fact of life that if solicitors and certain judges face each other on a regular basis that there will be a working dynamic in the relationship between them, involving certain tensions and understandings. Unfortunately and understandably from a pragmatic point of view, this relationship can work in favour of or against the interests of the client, and more importantly I suggest that it is necessary for the client to understand this relationship. In the midst of a court process the ambiance and the communication between their solicitor and the judge will reflect their relationship, so to understand the relationship beforehand will help the client to interpret the experience of the court hearing in a more meaningful way.

17) Ask whether the solicitor produces a traceable record of the evidence, the statements, the directions and decisions of the judge at each hearing, and whether the solicitor then provides a copy of this material to the client. For example, does the solicitor produce a written note, signed by themselves setting out the details about what actually occurred in court.

18) Ask the solicitor about their practice and timeframes for ensuring that court orders are produced, written up and perfected by the court, and how soon a copy will be made available to you, as the client, after the hearing.

19) In terms of potentially engaging a barrister the prospective client should ask the solicitor about the arrangements of the communications between the client, the solicitor and the barrister. For example, the questions to be asked as to whether there will be a initial meeting set up between the client, the solicitor and the barrister to establish a working relationship and so that the barrister and client get to speak directly to each other so that there's no confusion by either of them of their expectations of each other;

- a) Where will these briefings take place?
- b) Does it involve for example travelling to the Law Library in Dublin?
- c) When will the briefings take place?

20) It is important that particularly initial briefings between a client, solicitor and barrister should take place well enough in advance of a court hearing to enable: -

- a) The barrister to be properly briefed and to prepare properly for the case.
- b) The client to be able to reflect on how they perceive the barrister is handling the case and whether they need to change their strategy, objectives or provide further information to the barrister in order for them to perform their work effectively.

21) Another question relating to the barrister is in relation to getting a legal opinion from a barrister and what is the procedure in this matter. For example, if the client wishes to get an opinion from a barrister in relation to a specific aspect of their case then: -

- a) Will this opinion be put in writing by the barrister,
- b) Will the client be given a copy by the solicitor,
- c) What will the specific costs be for this particular element of the case.

Having asked this range of questions of the solicitor a potential client should finish up the meeting with the solicitor and take time to reflect on the conversation. If this first consultation has been free then the potential client should undertake to get back to the solicitor, as a matter of courtesy, within a predetermined time frame, to let them know if they wish to engage that solicitor's services. If there has been a fee for the consultation then the potential client should either ask for an invoice to be sent to them or if they decide to settle the bill there and then, they should request a receipt.

If they have a list of alternative solicitors to consult, they should carry out the same procedure of consultation with each of the solicitors, and then make their personal assessment of who is the most appropriate legal practitioner to engage. When they have decided which solicitor to engage they should contact

the solicitor and make a firm commitment to that solicitor clarifying that it's on the basis of terms that they had previously discussed. Once this relationship has been entered into with the solicitor, the client should commit themselves to becoming an active participant

'the client should commit themselves to becoming an active participant in this relationship, rather than simply expecting the solicitor to do all of the work'.

in this relationship, rather than simply expecting the solicitor to do all of the work.

In my conversations with end users of legal services over the years too often clients leave the whole process of the legal work solely to the solicitor, putting themselves at an arms length from all of the activities in the case. This is something similar to asking a plumber to come into your house, say to fix a problem in the bathroom and simply to go out shopping for the day, and then to come home expecting the work to be finished, house tidied as if the plumber was not there in the first place. In an ideal world perhaps that should be the expectation of a client when engaging a professional service; however that does not take into account the fact that during the day the plumber might need to consult with the client about an unforeseen situation that has arisen and may need the clients input to make a decision. It is common sense to suggest that if the client is at least generally present, even if they are not standing over the job, it acts as an extra incentive, from a quality assurance point of view, for the service provider to understand that their performance is being continually monitored and evaluated by a client, who by so doing, is showing that they themselves are interested in having a quality service delivered to them.

Similarly when one engages a solicitor, the quality of the work of the solicitor will certainly not be reduced by the continuing interaction with the client and by the monitoring by the client of the professional's work. I can understand that when it comes to family law issues the hurt and the trauma is often so intense that the client simply distances themselves from the details of what's going on in the case in order for them to survive emotionally. However, in the long term, all too often this decision, to blank out reality, subsequently comes back to haunt the client.

It is perfectly reasonable for a client to come back and talk to me some years later about the poor quality of the performance of the solicitor and/or barrister in their particular case. However, the fact remains that time will have already have passed, decisions will already have been made. If, for example, they have failed to keep their own records of their communications with their solicitor/barrister and they have not retained copies of documentation in relation to the case, then they are several steps behind in seeking to redress any alleged failure on the part of the solicitor or barrister to perform to a quality benchmark.

I believe that the quality of legal service will always be better insured and assured through quality control by the client. For example in speaking to solicitors, they often talk about the indecisiveness of their clients, the fact that their clients want one

thing one day and suddenly jump to wanting something completely different and then perhaps later changing their mind once again. In these circumstances I agree totally with solicitors that it is unreasonable to expect a solicitor to react by jumping from place to place like a puppet at the whim of a changeable client. That's not to say that it shouldn't be the client's prerogative to change their mind at any point in time in a process and that while it might cause the solicitor personal frustration, because much of their preparation has now to be set aside, as long as the client is paying for all of the work and all of the variations that they request, then the solicitor will not be out of pocket in this regard.

This is very similar to a contract with a builder where you have an agreed price and then where variations to the contract are requested. In this case costs are modified for every variation in the contract. In the contracts business it's perfectly understandable that contractors often help customers focus their minds by ensuring that there are proportionately heavier fees involved in implementing variations, because, from a contractor's point of view, chopping and changing effects the rhythm and thus the productivity of a service provider. However, it should be clear, upfront, what the cost implications are for variations and that any point of time when a variation is sought by the client, the solicitor clearly indicates the cost implications, in writing (as per section 68).

On entering the agreement to engage a solicitor I suggest that clients acquire a separate diary and set it aside specifically for entries relating to communications with their legal team. They should record notes, dates and times of phone calls and conversations etc. In the event of them

'I suggest that clients acquire a separate diary and set it aside specifically for entries'.

having a conversation with their solicitor which involves or ends up in a decision having been made by them to instruct the solicitor on a particular course of action, it is in the client's own interest to note down for themselves in their diary what their understanding is of the instruction that they have given to the solicitor. They should then put this instruction in writing to the solicitor.

All of this is fine when the activity in the legal case is happening at a relatively manageable pace. There are also situations which are going to occur, for example, on the morning of a hearing. In the way of the culture of adversarial law a large percentage of the negotiations seem to happen on the steps of court. This produces a build-up of tension and a focusing that inevitably happens on the morning of a court case. Often there is a flurry of activity, with

barristers and solicitors scurrying in their gowns, over and back, effectively haggling trying to deliver a solution. Under these circumstances, the client is under intense pressure to make off-the-cuff decisions on offers that may be drastically different to those that they had, either originally intended, or even possibly envisaged at any time.

Particularly in the area of decisions concerning custody and access of children, these are highly emotive and particularly traumatic situations. My suggestion is that clients should also bring with them to court, if at all possible, a friend of theirs, who is fundamentally level headed and has what I would describe as a capacity for detached involvement in their case. In so far as that, while they may genuinely care for the welfare of their friend, they will distance themselves from jumping in emotionally and basically mirroring their friends behaviour. Rather they will stand back and try to reflect on the various pieces of advice being given.

The legal situation vis-à-vis being accompanied to court is radically altered from the 1st April 2005 (April Fool's Day??). Under section 40(5) of Civil Liability and Courts Act 2005 it is legal to bring along someone to accompany one into a family court hearing. This change in the "In Camera" Rule has massive potential ramifications provided that the interpretation of the act is not restrictive.

Sometimes solicitors and barristers are very disapproving of this arrangement and make it clear and in no uncertain terms that they alone want to be effectively in control of the situation. In my personal experience they have often put it to their client that the client

Section 40(5) of Civil Liability and Courts Act 2005
(5) Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from being accompanied, in such proceedings, in court by another person

either listens to their advice or that they will walk away from the case if the client continues to take separate advice from their friend. Perhaps this is one of the questions that should be ironed out with the solicitor prior to engagement also as to how a solicitor would feel about a potential client bringing a friend along to the negotiations or to the court, whom they can turn to for personal advice in the situation. Personally I don't see any conflict of interest here or difficulty for truly professional legal personnel with integrity, in so far as if I was were attending on the day of the court with a friend of mine who was a client of a solicitor I would be offering a different prospective (not necessarily contradictory) on the situation than the legal specialists. My perspective would be taking into account the personal dynamics for the client, their family background and the other elements of the client's life that the

solicitor and barrister simply couldn't know about because of the limited timescale and depth of relationship that they would have had with their client. These insights would often, to a great degree, be redundant information, from the legal specialist's point of view.

The big difficulty that often arises here is when the friend starts to become the legal advisor in the situation, without having the responsibility and accountability which the legal professionals should have. On the other hand if a friend simply helps a client to frame specific questions to their solicitor or barrister then no professional and ethical legal practitioner should have a problem with this. A friend can be particularly beneficial, for example, in a situation where there are discussions concerning custody of children.

For example, I was involved in with father who was seeking joint custody. On the steps of the court he met with his solicitor and barrister. This man's level of education was relatively poor and his understanding of the intricacies and the technicality of the law were quite limited. I watched him effectively being browbeaten by being told that it was inevitable that sole custody would be given to the mother because that's just the way that things happen in these courts. I felt that my role as his friend, in that situation, was to support him, in having the moral strength, to recognise his role as the client was to be allowed to make his own decision in relation to instructing his legal team to go in and apply for joint custody. Here we had a typical situation where there was a conflict between whether the legal team were being advocates on behalf of this man or plenipotentiaries, and in this particular situation, because of an imbalance of power between the solicitor and barrister on the one hand and the traumatised father on the other in this situation I believe, they assumed for themselves the role of plenipotentiaries. I can understand that from their perspective it would have been much easier to go into court and to accept sole custody as an outcome, so that they could actually leave the court personally feeling that they hadn't lost. On the other hand, from the clients perspective, if sole custody were to be the predetermined outcome then was hardly any point in going to court in the first place.

I suggest that another important role that a friend can carry out by being present on the day of the court is to just by providing in terms of personal support to the client, given the particularly emotional nature of children's issues, in particular. A friend in can respond very quickly if the client becomes agitated, and perhaps take them aside and help them to calm down and refocus their attention to the decision that needs to be made at that point in time.

For example, if a client's expectations have developed over a period of time such that they are focused on achieving a particular outcome, for example a shared parenting arrangement for their children and suddenly, after perhaps a long day of to-ing and fro-ing between barristers, the barrister suddenly comes over and instead of an equally shared joint custody arrangement, the client is suddenly offered by their own barrister a picture of a best outcome of maybe one afternoon a week. The client can effectively go into a sudden mental spasm, wondering what's happening here? Often this the sudden release of an enormous tension, built-up, perhaps over months.

From a father's perspective, he may have been struggling against the paradigm which constantly sells the expectation that court outcomes are likely to be sole custody outcomes with custody invariably going to the mother. A father seeking joint custody will have had to mentally build himself up over a period of time to make himself believe the dream that he can achieve joint custody. If suddenly, at the last moment, his own legal team (particularly in the relation to the timing of this happening just on the steps of the court) suddenly offer him basically some sort of peripheral and effectively meaningless relationship of one afternoon a week with his children, the client can often go into effectively a breakdown situation where the mental faculties are not focused and the danger here is that they might make a sudden and rash decision that they will regret later on. That decision could be for example to simply accept, by giving up, or it could also be to demand that their legal personnel simply go in under instruction to fight for joint custody even though the legal advice is that this a hopeless situation.

It may have been a better option to instruct the legal personnel to actually go in and not seek joint custody but seek a different interim outcome which would be better than one afternoon a week. I think that the role of a friend in this situation can be to help the client to recognise the difference between making a pragmatic if unpalatable decision, particularly in light of the fact that in child custody cases judgements are "interlocutory" and can be revisited at another time, whereas an instant emotional decision to either give up or to force the impossible won't serve the client's long term objectives.

Another input that a friend can make in the middle of this situation is to seek on behalf of the friend/client some breathing space from the solicitors and barristers. Certainly at the end of a long day's negotiation it's understandable that a solicitor and barrister want to tidy up the case and get a decision made so that they themselves feel that they can move on and deal with other cases. Legal personnel can often also be emotionally tired themselves from the haggle of the day's negotiations. Tempers can be slightly frayed and

the legal team can be quite insistent that a decision is made there and then on the spot, which to a friend with this detached involvement can be seen to be quite unnecessary, and not in the client's interest. The friend is in a situation to recommend that perhaps the client should think about this overnight or even to leave the scene of the discussion for a period of half an hour. In this space they can objectively sit and have a cup of tea and think about it.

So much of the legal process and effectively the drama of the adversarial legal process is founded in the atmosphere of deliberately building up tension within the austere environments of court houses and using that dynamic to force through decisions. From the point of view of someone seeking to develop a family law solution, where the issues concern dealing with raising children over a period of a lifetime, and ongoing relationships on an inter-generational basis, the appropriateness of this process is highly questionable. However, this is the reality of the family law scenario that we have at present in Ireland and therefore a client would be well advised to consider the role of engaging a good, solid, reliable, level-headed friend to attend court with them. It is reasonable and courteous that a client should make it quite clear to the solicitor and barrister beforehand that they intend to bring along a friend.

To be fair to legal personnel it can often be quite destabilising for a client to suddenly introduce a friend, without forewarning, who is not known to anybody, at the last moment, at the steps of the court. Apart from everything else this could only serve to deflect the focus of the legal team on the day. In an ideal environment having discussed the case with their own solicitor and barrister a client may have in fact introduced their friend to their legal team in advance of the court hearing so that I presume that any personality issues etc are already out of the way by the time the court sits, and also the relative roles of the different people in this situation can have been at least tabled and explained by everyone and to everyone beforehand.

Conclusion:

- 1) Treat engaging a solicitor/barrister with you as customer hiring a professional service.
- 2) Set expectations for what you want.
- 3) Ask the series of questions set out in the document above.
- 4) Write down/record all details.

- 5) Clarify any confusion by asking questions. Remember! You are the customer and you are paying for the service.
- 6) "Measure twice, cut once" as the master carpenters do. Take time before making important decisions.
- 7) Bring along a friend. Make sure they are level headed and prepared to give challenging advice to you.
- 8) Make sure you get a copy of all correspondence, court orders etc.
- 9) If you are unhappy with the standard of service of your legal team; ask for explanations; register your dissatisfaction to them; collect evidence of poor performance and research how to make a complaint against a solicitor/barrister; Stick to facts!
- 10) Remember from the film Thelma and Louise "You get what you settle for"

29th March 2005-03-30

Liam Ó Gógáin

PS:- If you agree/disagree/ wish to flesh out/ recount your experience etc in relation to the above material, please email me at info@liamog.com. Read other associated documents and listen to streaming audio downloads at www.liamog.com