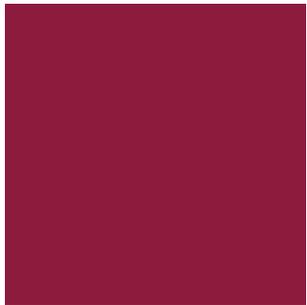


# In-House Counsel Regulatory Masterclass

Tuesday 21 November 2017



Dublin

London

New York

San Francisco

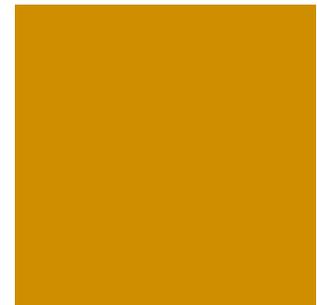
# Welcome

Declan Black, Managing Partner



# Preparing Witness Statements and Affidavits

Rossa Fanning SC



# The common law tradition

- **Adversarial system**
- **Defining feature of trial on oral evidence**
- **Benefit is that opposing party has an opportunity to challenge the evidence**



**“Cross-examination is  
the greatest legal  
engine ever invented  
for the discovery of  
truth”**

John Henry Wigmore







# The “creep” of written evidence

- Historically, all hearings were based on oral evidence
- Criminal cases are still based on oral evidence
- In District Court and Circuit Court, affidavit and witness-statement based hearings are extremely rare
- Many High Court civil hearings are now based on written evidence
  - Judicial Review
  - Statutory Appeals
  - Summary Summons proceedings
  - Special Summons proceedings
  - Interlocutory Injunctions
  - Preliminary issues
  - Commercial Court cases

# Why the increase in written evidence ?

- Written evidence saves Court time and increases efficiency
- Legal disputes are increasingly complex, detailed and technical
- Preliminary issues and modular trials are being utilised more frequently
- Injunctions satisfy client demand for an urgent remedy
- Recession has increased the volume of Summary Summons and Special Summons litigation brought by banks and funds

# Affidavits v Witness Statements

- Affidavits are evidence the moment they are sworn
- Witness statements are intended evidence that must be confirmed in oral evidence before they have the status of evidence
- In the Commercial Court, witnesses confirm the accuracy of their witness statement at the outset of their testimony and adopt it as their evidence in chief

# The deponent must "own" the affidavit

- Golden rule: if the deponent could not give the evidence orally and is not personally aware of the facts in the affidavit, (s)he has no business swearing it
- Golden rule: every affidavit should be sworn on the basis the deponent will be cross-examined upon its content
- The (endemic) practice of lawyers drafting affidavits and deponents swearing to matters they personally know little of is debased, unethical and tends to mislead the Court

# Apply the “subsidiarity” principle

- The person with first-hand knowledge of the issue should swear the affidavit
- A summons server should swear an affidavit as to efforts to serve proceedings
- A solicitor should swear an affidavit grounding a Motion for judgment in default of defence
- Multiple affidavits are preferable to avoidable hearsay

# The lawyer's role

- Lawyers should not prepare the first draft of an affidavit or witness statement (they may provide guidance on issues or questions to be addressed)
- The witness should prepare an initial chronology / statement from which an affidavit or witness statement may be drafted
- If the witness will not do this, (s)he should do a recorded interview, from which transcript an affidavit or statement can be drafted
- Lawyers can then provide polish and can *moderate* (not, *heighten*) an inappropriately hostile tone

# Affidavits should be a rhetoric-free zone

- Deponents should *never* engage in argumentative language
- If you see *any* of the below phrases in a draft affidavit (or witness statement) the drafter has taken a seriously wrong turn
  - “*utterly misconceived*”
  - “*wholly unsustainable*”
  - “*quite remarkable*”
  - “*entirely incredible*”
  - “*completely implausible*”
  - “*disingenuous explanation*”
  - “*I strenuously reject the allegation that*”

# Appropriate language

- *I have read the Affidavit of Mr. X. I believe his evidence to be mistaken in a number of respects..*
- *I am fortified in my view that the evidence of Mr. X is inaccurate by the fact that...*
- *I am confident that my recollection on this issue is accurate...*
- *Whilst more properly a matter for legal submission, in summary the Plaintiff contends that...*

# Tracey v. Bowen [2005] 2 IR 528

- “..there has been an increasing tendency...to use affidavits as a means of putting forward argument rather than evidence, I am particularly concerned that that practice should not be allowed extend to permitting highly contentious argumentative material to appear in a document which should only include evidence. In his replying affidavit the defendant describes the plaintiff’s claims as “*wholly unsustainable*” and “*outrageous*”, he suggests that it is “*remarkable*” that the plaintiff could swear an affidavit making certain of the allegations...Similarly in his supplemental affidavit the plaintiff describes the defendant’s claim that he has no responsibility in respect of the money as “*outrageous*” and goes on...to describe explanations as “*preposterous*” and “*an extravagant ruse*”.”

# The view of Chief Justice Clarke

- *“It is appropriate to reiterate that the primary purpose of an affidavit is to place evidence before the court. While it may be permissible and indeed in certain cases useful if the affidavit makes brief reference to the principal contentions which the party concerned seeks to make (in that it thereby puts the other side upon notice of the principal contentions that would be made) any such contentions should be expressed in unemotive terms...If it is desired to reduce argument by way of advocacy to writing then same should be done by means of a written submission to the court rather than contained in*

# Independent Expert Evidence

- The expert must be sent a briefing letter that is factual and neutral in tone
- Every contact with the expert should be on the basis that it will be disclosed at trial
- Contact should only be made by a solicitor and it should be formal
- Any comments on an expert's draft report / witness statement must be very measured and must not seek to apply pressure to alter a view expressed in the existing draft

# Where are the dangers ?

- Entitlement to cross-examine as of right on a Motion for Summary Judgment (Order 37, Rule 2) or claim for possession (Order 38, Rule 2)
- Liberty to apply to cross-examine in other cases, or deponent may be cross-examined at trial
- Witnesses will unravel at a trial if they are coached or ignorant and the Judge may not spare the lawyers involved from criticism
- Trial of Sean Fitzpatrick collapsed in May because the ODCE took witness statements that were contaminated and coached

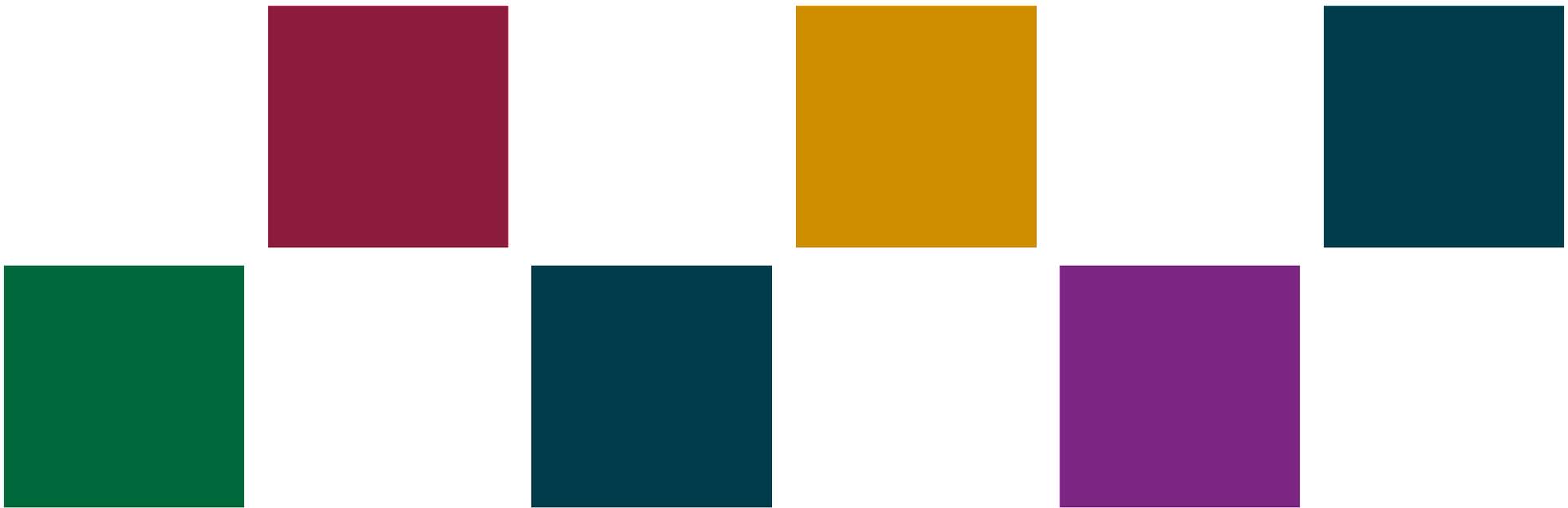


# Final thought

- There is a tendency amongst non-lawyers in a business to see litigation as just another cost-centre that needs to be pruned
- This attitude overlooks the fact that there are no good short-cuts to take when your company is litigating in the High Court and participating in the administration of justice
- We can all be in favour of mediation and alternatives to costly litigation, but if there is no alternative, it has to be done properly
- You are ideally placed to educate your company about the seriousness of these matters and to promote higher standards in the presentation of evidence to the High Court

# S150 Legal Services Regulation Act 2015

Nina Hourigan Smith, Director of Client Service



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New York

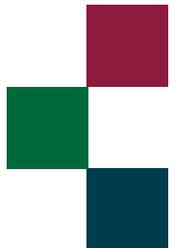
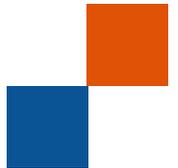
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# Common frustrations with legal costs

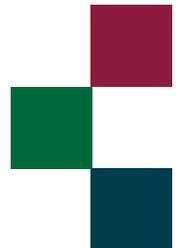
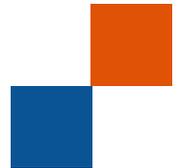
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- Estimates
- Scope of work
- Calculation of fee is not clearly explained
- Surprises



# Lack of communication between solicitors and their clients

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# S150 Framework

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**S150 Notice required at the outset of the matter if costs are fixed. If this is not reasonably practicable, the basis of costs must be provided**

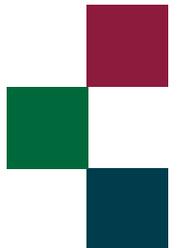
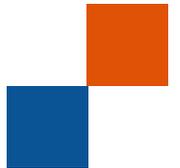
**S150 Notice required when the costs are known**

**S150 notice(s) required when the solicitor becomes aware of any factor that would significantly increase costs**

# S150 Notice

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- Clear language
- Certification of costs
- Basis of costs
- Standstill period
- Solicitors' obligation to issue a new notice
- Litigation considerations



# S150 Notice

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## Litigation considerations

- Identify each stage, outline the work involved, the requirement for third party involvement, the basis of cost and the likely costs in each stage
- Statement that the services of a barrister, expert witness or any other service provider will not be engaged without first:
  - ascertaining the likely cost or basis of cost of engaging the person or service
  - advising the client of such cost or basis
  - obtaining the client's approval
- A statement on the legal and financial consequences of discontinuing an action

# S150 Notice

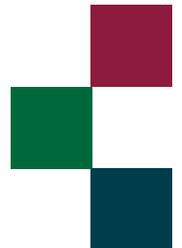
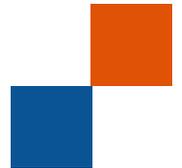
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## Litigation considerations contd...

- Information as the circumstances in which a client would be likely to pay costs for any of the other parties to the case
- Information on the circumstances where the costs of their own legal practitioners (solicitor and/or barrister) would not be recovered from other parties

# The Alternative – S151 Agreement

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# Bill of Costs - S152

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- A summary of the services provided and the charges incurred
- Details of any money which has been recovered (eg damages)
- Amounts recovered or payable to the solicitor from a third party on behalf of the client (eg insurance company)
- Signed by the solicitor
- Procedure to be followed if a client is not satisfied to be attached
- S151 alternative

# Non Compliance with S150

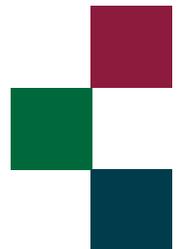
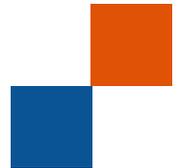
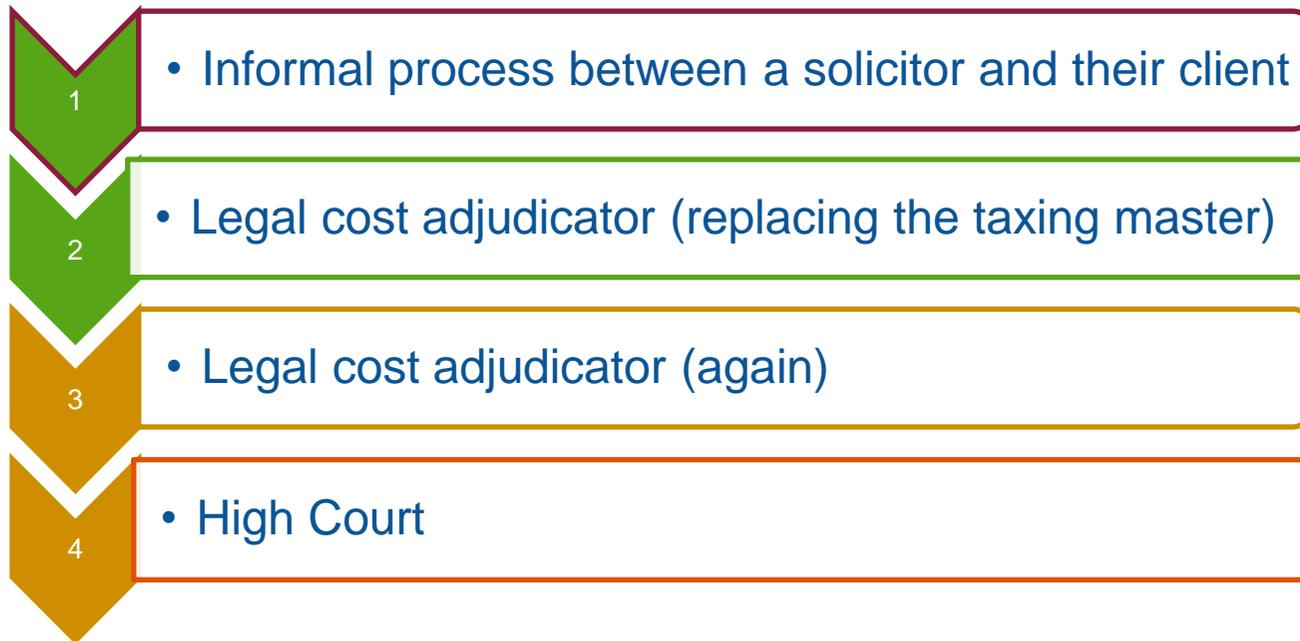
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## Non Compliance with S150

- Solicitor may be found guilty of misconduct and sanctioned
- Solicitor may not get paid

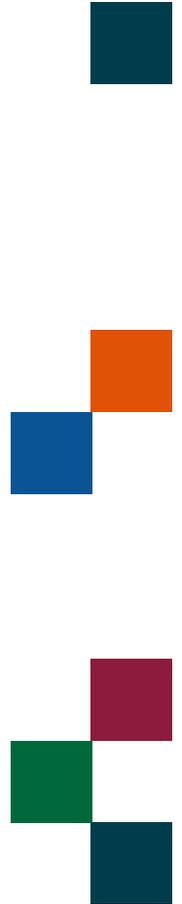
# Dispute over bills

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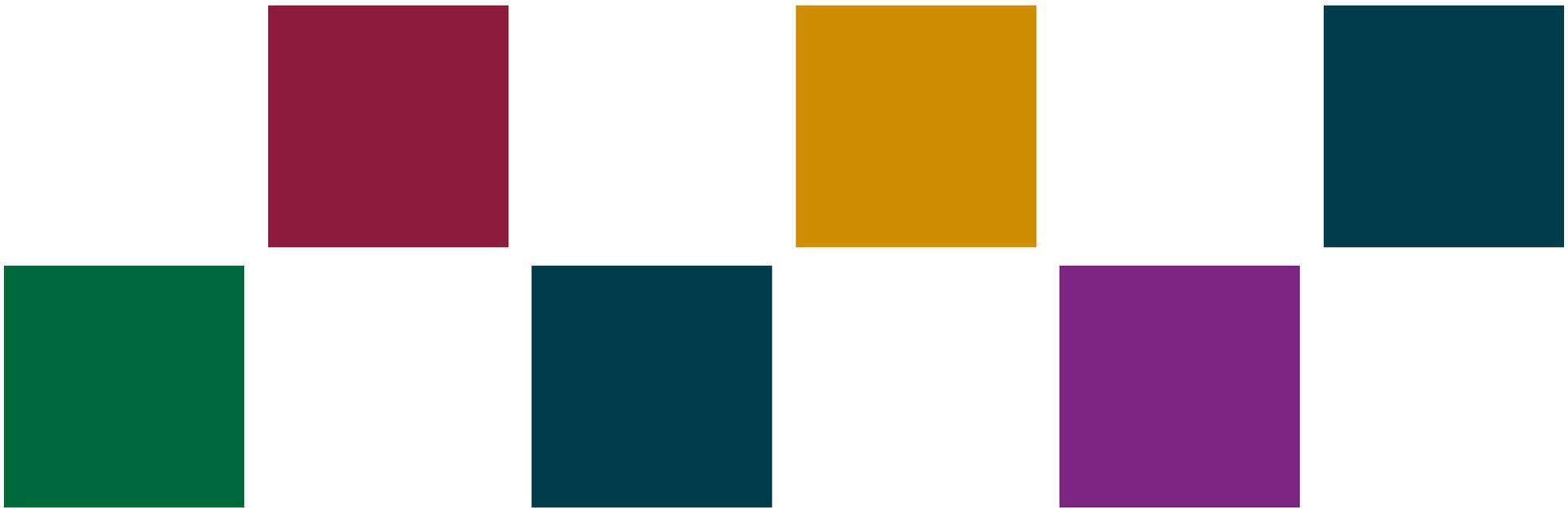
# What changes for the client?

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# The Solicitors Duty in Discovery & Disclosures

Gerard Kelly, Partner



Dublin

London

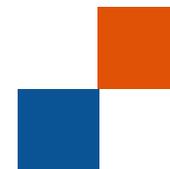
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# Discovery

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# The Discovery Duty

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Duty to disclose to the other party on sworn affidavit the **existence of all documents** and electronically stored information in or previously in a party's "**power, possession or procurement**" which are of **relevance** to the categories agreed/ordered.

# The smoking gun?



# The Madoff Litigation

*“The Fraud risk to us is huge”*

*“Too good to be true”*

*“Possible Ponzi scheme”*



# The Solicitor's Duty

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The duty towards parties making discovery and the duty towards parties receiving discovery:

- (1) Reluctance to disclose a relevant document
- (2) Inadvertent disclosure of privileged document
- (3) Confidentiality clubs

# Failure to comply fully with discovery obligations

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## Implications

- Applications for further and better discovery
- Application to dismiss action or to strike out defence
- Order for attachment
- Adverse inferences
- Cross examination on oath about the contents, the steps taken and searches made
- Costs

# The First Issue

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A reluctance to disclose a document?

The solicitor's duty is to the Court to ensure that proper discovery is made.

# Irish Nationwide BS v Charlton

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## Supreme Court, Murphy J., (1997)

The solicitor owes a duty to the court to carefully go through documents and ensure that no relevant documents have been withheld from disclosure...

...Client cannot abdicate this duty to legal advisers nor could lawyers accept the responsibility of inspecting all of the documents in the possession of the client....

Careful consultation between solicitor and client is required.

# W v W

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## Supreme Court, Judge Baron (1999)

“When the failure to make discovery is deliberate this is perjury....

.....Court should not be slow to make a solicitor personally liable for costs thrown away by unnecessary and unreasonable recalcitrant behaviour.”

# Dunnes Stores v Irish Life Assurance

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## High Court, Judge Clarke, (2008)

“It is, of course, the case that individuals themselves may not fully understand either their ..obligations.. may not be able to...address questions of relevance ...and most certainly may not be able to deal with legal issues, such as privilege, which may arise. However, the obligation on such parties, in those circumstances, is to take proper legal advice and to act upon it.”

# Hansfield Developments v Irish Asphalt

**Gilligan J (2010)**

Held that there was a onus on the parties to engage regarding discovery

*“There was in the Court’s view a serious breakdown in communication between the plaintiff’s solicitors, the plaintiffs, the relevant members of the management who were involved in the discovery process and the employees of the Plaintiffs companies also involved.”*

*“Many of the difficulties raised in the present motion could therefore have been avoided if the plaintiffs had properly engaged with these queries rather than asserting that they had, in effect, gone above and beyond the call of duty in relation to discovery, when in fact they had not done so.”*

Plaintiffs’ legal advisers to set out a programme to meet the various concerns expressed which was to be endorsed by PWC

# IBRC v Quinn

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## Court of Appeal, Judget Mahon , (2015)

The solicitors duty in respect of privilege claims ?

In addition to requiring the defendants to describe the documents in greater detail, the Court of Appeal directed their solicitor to swear an affidavit verifying the assertions of privilege.

# Other Solicitor Duties

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(a) What if a document comes to light after the Affidavit of Discovery is sworn?

The Solicitor owes a duty to the court and the other side in the litigation to inform the other side of the omitted documents and if not assented to must cease to act - **Myers v Elman (1940)**

(b) What about document preservation?

The duty of the Solicitor also extends to taking positive steps so as to ensure that clients appreciate at an early stage to preserve and not destroy documents - **Rockwell Machine Tool Co. v EP Barrus (Concessionaires) Ltd (1968)**

# The Second Issue

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Unintentional disclosure of a privileged document?

Clear?

The solicitor's duty is to the client to litigate its interests?

# Waiver of Privilege?

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**England / Wales** - privilege is not necessarily waived or lost by reason of inadvertent disclosure and that a party can restrain the use of a privileged document provided:

- (i) prior to trial; and
- (ii) obtained by improper means or it would have been obvious to the opposing party that it had been disclosed by reason of mistake.

**Canada and Australia** - more protective whereby a court will restrain use of a privileged document that was disclosed by inadvertence even if it would not have been obvious to the opposing party that the mistake had been made.

# Australia

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## Expense Reduction Analysts v Armstrong Strategic Management and Marketing.(2013) High Court

60,000 documents provided by ediscovery

Oops moment: Norton Rose sent CDs to Marque's containing 13 documents which had "inadvertently" provided some documents, which included communications with their clients.

Marques wrote to Norton Rose seeking other such communications to be provided.

Marques told Norton Rose they were under no obligation to return the documents because privilege had been waived.

Documents ultimately ordered to be handed back – correction of mistake.

# Irish Approach?

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## Shell E. & P. Ireland Ltd v McGrath (2006)

High Court, Smyth J:

Solicitor's attendance dockets inadvertently included in a booklet of inter partes correspondence.

Must have been obvious to the defendants' solicitor that the attendance dockets were privileged and disclosed by mistake.

"... must adopt the mantle of the reasonable solicitor".

Entitled to assert privilege.

# Byrne v Shannon Foynes

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## High Court, Clarke J., (2007)

Mistakenly failed to assert privilege in its affidavit of discovery over certain documents and sought to revise its affidavit .

Clarke J: “... *the court should ordinarily permit the party whose document it is to amend the schedule at any time before inspection has taken place*” but that, after inspection has taken place, “... *the general rule is that the privilege has gone*”.

Two step test applied.

Privilege waived.

# Conflict in duty?

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## Byrne v. Shannon Foynes Port Company, High Court, Clarke J. (2007)

Two step test:

(1) Was it evident to the solicitor seeing privileged documents that a mistake had been made?

(2) If not, would it have been obvious to the hypothetical reasonable solicitor that disclosure had occurred as a result of a mistake? ...

[I]f the answer to either question is "yes", then, [under the CPR], the court would normally restrain the solicitor if he did not give the documents back, and might restrain him from acting further if he had read the documents and it was impossible for the advantage to be removed in any other way."

# Guide to Good Professional Conduct (Law Society)

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## Duties

A solicitor should promote and protect fearlessly by all proper and lawful means, the client's best interests and do so without regard to his own interest or to any consequences to himself or to any person.

A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and in general is entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.

A solicitor owes a duty to a client to disclose all relevant information to him.

# Guide to Good Professional Conduct (Law Society)

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## Material disclosed by mistake

If a solicitor mistakenly acquires material which should not have been acquired by him, and that solicitor realises, or ought to realise, that an obvious mistake has been made, then privilege is retained by the sender. If the contents of documents come to his knowledge in any other way, he is not as a general rule entitled to use the information obtained for the benefit of his client.

This would not apply in circumstances where the material comes into the solicitor's possession at a later date or where privilege does not apply, such as on discovery.

# CLAI - Good Practice Discovery Guide

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The absence of a claw back agreement [in respect of inadvertent disclosure of privileged and/or other documents] does not dilute the obligation on a solicitor not knowingly to read or deploy an obviously privileged document belonging to another party and to notify the other solicitor of the receipt of the document promptly.

A solicitor in receipt of a document which appears to be privileged should immediately contact the solicitor for the party whose document has been disclosed to confirm the status of the document and should not read or deploy the document until its status has been confirmed, unless a large volume of such documents has been discovered to the receiving party such that it appears that a conscious decision was taken to waive privilege.

# The case law

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## Cat out of the bag!

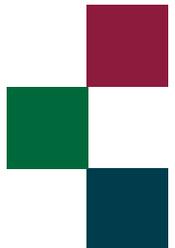
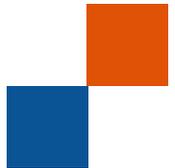
A recipient party will only be prevented from making use of a document where its disclosure was an "obvious mistake".



# The Third Issue

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## Confidentiality Clubs



# Koger v O'Donnell (2009) Kelly J.

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*“...the restriction which the defendants seek to place on disclosure of the material namely, only to be seen by the experts or alternatively only by the experts and the legal advisors but to **deny it to even a limited number of persons in the plaintiffs’ organisation is exceptional**. Such restriction can be ordered but it is unusual. If such a restriction is to apply, there must be exceptional circumstances which would justify it.”*

# Boehringer v The Patent Acts (2015)

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## Hedigan J:

- 1 vs. 3 in-house counsel
  - *“impractical and too restrictive”*
- Involvement in further litigation i.e. same subject matter in any jurisdiction
  - *“an unacceptable restriction and an unnecessary one”*
- Detailed record of disclosures
  - i.e. identity of recipient, date of disclosure, details of document disclosed but only after the hearing

# Thank you

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Nina Hourigan-Smith

t: +353 1 614 7745

e: [nhourigansmith@mhc.ie](mailto:nhourigansmith@mhc.ie)



Gerard Kelly

t: +353 1 614 5093

e: [gkelly@MHC.ie](mailto:gkelly@MHC.ie)