



**Law Society of Scotland
Money Laundering Regulations 2007
Anti Money Laundering Guidance**

Anti Money Laundering Guidance

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Introduction

New Regulations

The [Money Laundering Regulations 2007](#) will come into force on 15th December 2007. (SI 2007 / 2157)

The Money Laundering Regulations 2003 (SI 2003/3075) will be revoked.

Where can I find the new Regulations?

The Treasury website, use the link provided above.

You must read the Regulations before reading or referring to the guidance. The guidance does not stand alone and is not a substitute for the Regulations.

New Rules

The Solicitors (Scotland) Accounts etc Rules 2001 are amended as follows:

Rule 2, interpretation, to replace reference to the 2003 Regulations with the 2007 Regulations.

Rule 24, to update the wording to apply the provisions of the 2007 Regulations to all business carried out by a Scottish solicitor, in appropriate terms.

These amendments are incorporated into the **Solicitors (Scotland) Accounts etc Rules 2001** available on the Society's web site.

Other legislation

All firms should be aware that, in addition to the Money Laundering Regulations, the requirements of the Terrorism Act 2000 and the Proceeds of Crime Act 2002 must also be taken into account. The guidance includes reference to both of these Acts.

Role of the Society

In terms of the Regulations, the Law Society of Scotland, as the professional body for Scottish Solicitors, is the supervisory authority for relevant persons who are regulated by the Society. While the Society is committed to the education and support of our members in preventing the Scottish Legal system being used to launder criminal or terrorist funds, it also has a duty under the Regulations to take appropriate action where members do not comply with the requirements of the Regulations. This is covered further in Part 2 guidance.

Relevant Person

The type of work typically carried out by a Scottish Solicitor can be wide ranging. 8 categories of relevant persons are given in Regulation 3(1) and expanded on in subsequent sections. Regulation 3 (9) “independent legal professional” may be the most obvious application of the Regulations to the work of solicitors but be aware that 3(6), 3(8), 3(10) and 3(11) and possibly others are also areas where the Regulations could apply. You should refer to the Regulations but, in summary, these sections relate to Insolvency practitioners, tax advisers, trust or company service providers and estate agents.

In addition, the Accounts Rules will extend the scope to treat all business undertaken as if it were undertaken by a relevant person. In doing so the Society is mindful of the risk based and proportionate basis on which the Regulations are founded and will expect solicitors to apply the same considerations whether business is caught under the Regulations and by Rule 24 or by Rule 24 alone.

What are the changes in the Regulations?

The Treasury has issued an [information sheet](#) for firms, which includes the following section.

In Summary the new Regulations

- provide more detailed obligations regarding customer due diligence, for example, explicit requirements for firms to undertake ongoing monitoring of business relationships and for firms to identify not just the customer but the beneficial owner of the customer;

- require firms to vary customer due diligence and monitoring according to the risk of money laundering or terrorist financing;

- require firms to take enhanced customer due diligence measures in higher risk situations, while allowing firms to take reduced identification measures for specific situations with a lower risk of money laundering;

- allow firms to rely on certain other firms for undertaking customer identification; and

- clarify the arrangements for the supervision of firms, including those that will be supervised for the first time.

The guidance previously provided by the Society is altered in both detail and in terms of the risk based and proportionate approach, however, the basic requirements remain:

- Verify the identity of the client to reliable documentation to satisfy yourself that the client is who they claim to be.
- Verify the identity of anyone else who appears to be either the underlying client or involved in the transaction – often parties providing funds towards a transaction, directors of a company etc. The new requirements are extended to some extent with a definition of beneficial owner, but it has always been necessary to “look behind a transaction” to determine who the client is.
- Know your client’s business – if you don’t know what’s normal, how do you recognise what is unusual or what may give rise to a reportable suspicion
- Monitor the transaction, in relation to what you know and expect of the client and also issues such as the source of funds, a change of funding arrangements at the last minute or withdrawing from a transaction for no obvious reason and requesting repayment of funds.
- Don’t act until you have satisfied yourself as to verification of identity
- If you cannot satisfy your self regarding identity do not act at all
- Make a disclosure to SOCA if you have a suspicion of money laundering
- Don’t tip off clients
- Keep full, detailed records – If it isn’t written down, it didn’t happen
- Ensure staff are trained and understand what is required of them
- Appoint a MLRO

Firms with good anti money laundering procedures will have to be familiar with the requirements of the 2007 Regulations and will have to review the current systems and procedures and revise them to ensure they meet the requirements of the new Regulations but much of what is in place already will be easily transferable to the “new regime”.

Joint Money Laundering Steering Group Guidance (JMLSG)

Why is the Society adopting this guidance?

The JMLSG Guidance Part 1 deals with topics relevant to all Regulated Persons. The Guidance is comprehensive, detailed and is widely recognised by the FSA, Treasury and other Regulators. The Society is also mindful of the need to have consistent guidance throughout the regulated sector and in particular to have guidance which is relevant to solicitors firms whether or not they are FSA Authorised.

To avoid matters being taken out of context, no attempt has been made to extract sections. The Society refers members to Part 1 of the guidance in full. This will also allow members to access the most up to date version, as and when revisions are made.

The detailed index to the guidance makes it simple to locate the appropriate section as required, however you must be familiar with the guidance as a whole.

Where additional guidance is required, to either clarify or to address issues specific to Scottish Solicitors, this is included in the Society's Guidance, Part 2.

The Society expresses grateful thanks to the JMLSG for allowing the Society to adopt Part 1 as the basis for guidance to our members.

Where can I find it?

The [JMLSG Guidance](#) is currently with the Treasury for approval. It is anticipated that approval will be given in the near future, without any or any significant alterations being required.

The above link is to the November 2007 board approved version, which should be used, but please refer to their [website](#) for updates.

Other impending changes

The Third Money Laundering Directive has implications for legislation other than the Money Laundering Regulations. Currently the Home Office is consulting on the Terrorism Act 2000 and the Proceeds of Crime Act 2002. The AML Guidance makes reference to the requirements of both of these Acts and will be kept under review in light of possible changes.

Client or Customer?

The term “customer” is used throughout the Regulations and within the JMLSG Guidance. The Treasury did not amend the Regulations to include reference to “client” but has clarified that the term customer includes client and that firms may use either term.

Law Society of Scotland Guidance- Part 1

This section of the Society's Guidance adopts in full Part 1 of the Joint Money Laundering Steering Group Guidance.

The Society expressly acknowledges that this guidance has been formulated and published by the JMLSG and would like to acknowledge the generosity of the JMLSG in allowing the Society to adopt it as part of its own Guidance.

You should refer to the [JMLSG Guidance \(November 2007\)](#) Part 1

Matters in JMLSG Guidance Part 1 which are clarified or covered further in Law Society of Scotland Guidance – Part 2:

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Law Society of Scotland Guidance – Part 2

Matters in Part 1 that require clarification or additional guidance:

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Firms not Regulated by the FSA

Some firms of Scottish Solicitors are authorised by the FSA to carry out investment business and are therefore also regulated by the FSA in relation to financial services work.

Other firms may be licensed by the Society to carry out Incidental Financial Business or may not carry out any such business at all and are not subject to direct FSA Regulation.

The guidance notes deal with either type of firm, giving reference to what requirement the specific guidance relates to, with a detailed glossary of abbreviations provided.

Any firm not subject to FSA Regulation may choose to follow the guidance as if it were, in so far as that is practical. However, firms who are not authorised by the FSA to undertake investment business will not be expected to comply with the FSA requirements and the guidance relating solely to FSA requirements may be disregarded **except** where specified to the contrary in this Guidance.

In sections of the guidance, for example 2.3 - 2.6, FSA requirements are used to clarify and illustrate what may be required by all firms to comply with the Regulations. Care should be taken to read the guidance carefully and not immediately discount any reference to FSA Regulation or guidance.

Nominated Officer / MLRO

- **You must appoint a MLRO**
- **You must comply with JMLSG Guidance 3.4- 3.16 (excluding 3.7)**

The regulations specifically require a nominated officer to be appointed, they make no reference to a money laundering reporting officer (MLRO), that is an FSA requirement.

The Society requires all firms to appoint a MLRO, whether or not they are FSA Regulated. This will not imply that a firm is FSA Regulated and will not require firms that are not FSA Regulated to comply with FSA requirements, unless stated to the contrary in this guidance.

Guidance in 3.4 -3.16 , but excluding 3.7, is to be followed by all firms as if they were FSA regulated.

In short this requires:

- **The firm to appoint a MLRO, who is responsible for the oversight of the firm's compliance with the regulations.**
- **They must be suitably senior within the firm to be able to properly discharge their responsibilities.**
- **They must be supported by senior management.**
- **It is envisaged that the same individual will undertake the duties of the nominated officer and MLRO.**

Senior Management responsibility and Annual Reports

Regardless of whether a firm is subject to FSA regulation or not, the Society requires all firms to comply with guidance in sections 1.27 to 1.33, 1.41 to 1.44 and 3.28 to 3.36, inclusive, as if they were FSA Regulated.

For the avoidance of doubt, the responsibility for establishing and maintaining appropriate risk-sensitive policies and procedures, as required by Regulation 20, is not a nominated officer or MLRO responsibility specifically. It is the responsibility of senior management and requires senior management input and support. Senior management must support the MLRO and the MLRO must provide reports to senior management at least annually.

JMLSG provide a suggested framework for a [MLRO annual report](#).

The complexity of the report will depend on the size and nature of your business.

It is suggested that this requirement is kept in mind when setting up, revising and documenting systems to ensure the information needed for the report is easily accessed.

Consider the most appropriate timing for the report and diary time now for both the preparation of the report by the MLRO and consideration of the report by senior management.

- **Senior Management is responsible for establishing and maintaining the policies and procedures required by Regulation 20**
- **Document the policies and procedures**
- **MLRO must report to senior management at least annually**

Risk Based Approach

The regulations are founded on a risk based and proportionate approach. There are clear benefits in that you do not need to apply the same anti – money laundering (AML) checks to every client or every piece of business so that you can “tick the box” for compliance. The other side of that coin however is that you must develop and document policies and procedures which allow the risk to be assessed in categories of client and types of business generally but also on a case by case basis. Firms and staff must be more alive to: the requirements of the Regulations; the firm’s procedures and policies; and clearly understand: what they are trying to achieve; what their duties and responsibilities are and what the actual and potential risks are. The policies and procedures must be proactive and dynamic to anticipate and /or address new risk profiles as they arise. This could be, for example, engaging in a new type of work; opening an office abroad; recognising new ways in which criminals target and use solicitors to launder money; a change in personnel or office structure or a change in computer systems.

It should be simple to identify the different types of business that you carry out but it may be that you find it necessary or useful to sub divide that list once you gain experience of applying the risk based approach.

Client profile will also have an impact on risk assessment. For example, a new client will generally be a higher risk category than an existing one. This depends of course on the level of checking and knowledge of existing clients as well as on going monitoring of the type of business you are instructed to carry out and how that fits with what you know about the client and their circumstances. This highlights that, within general risk groups, there may be indicators that require individual transactions or clients to be reassessed and treated differently.

Two examples highlighted by the regulations as high risk are non face to face customers, that is, where you do not meet the client, and politically exposed persons (PEPs). While many firms will require specific procedures to deal with non face to face customers, many will never act for a PEP. The issue however is that you must consider whether, if you were acting for a PEP, your procedures would highlight a level of risk that would require further due diligence than if the client were not a PEP. That does not require all firms to run checks on all clients to determine whether they are PEPs. For example, basic client due diligence will provide information about the client. If that, or the nature of the work you are instructed to undertake indicates a possibility of the client being a PEP then further checks must be undertaken. The same is true of any client, if normal procedures indicate that further checking is required then that must be acted on. A typical example might be a client where the funding for a transaction comes from a third party. It may be that the person providing the funds is the beneficial owner and further checks will be required on them. The initial client and transaction profile may not have indicated a particularly high risk profile but subsequent actions or information require additional checking to be carried out.

While all firms are alert to the high risk of accepting anything other than a very small level of cash from a client, it is an obvious example of a trigger that would immediately escalate the level of risk associated with a client transaction. The policy or procedure most firms have adopted to address this potential risk is to include within their terms of business that they will not accept cash above a certain level, normally £500.

The level of risk of money laundering, or terrorist financing, depends on a combination of factors. While certain high risk categories may be definable, there is and can be no prescriptive list of what represents a high risk of money laundering. Each firm will have a different profile in terms of location, organisation, types of work undertaken, client profile and so on. The following are therefore suggestions of some aspects to take into account in assessing risk both in terms of categories and individual cases. You must ensure that in assessing your risk and formulating necessary systems, procedures and

action to deter and detect money laundering on a risk sensitive basis, that you document the processes.

Further reading: Financial Action Task Force – [Guidance on the risk based approach](#) to combating money laundering and terrorist financing. June 2007

- **Consider the nature of the work your firm engages in**
- **Identify areas where there is a higher risk of money laundering**
- **Determine what policies and procedures you need to adopt to manage or mitigate the risk**
- **On a case by case basis be alert to the risk of money laundering and take appropriate steps to manage or mitigate the risk**

Some suggested risk profile categories or considerations**Client**

- One off transaction or business relationship
- New or existing client
- Non face to face clients
- Private individual or trust / corporate
- Resident in UK or not
- Client is acting as an agent for another party

Business

- Division of work by category, for example:
 - Conveyancing
 - Trust work
 - Portfolio and investment work
- Instructed to carry out work where there is no obvious legitimate purpose
- Instructed in work you don't normally carry out
- Instructed in work where the timescales are tight / too tight and client is forcing the pace or there are penalties
- Location of client / assets / transaction
- Instructed where a solicitor would not be required and would not normally be involved in such a transaction.
- The value of the transaction

Funding

- Cash
- Funds from abroad
- Funds provided by someone other than the client
- Funds not handled by the firm
- Change of agreed arrangement at last minute
- Instructions to make payment of funds /free proceeds to someone other than the client
- Receiving or holding funds when there is no transaction or requirement to do so
- Client claims not to have a bank account but transaction / circumstances indicate they should / could have

Current or known ways in which criminals use solicitors for money laundering purposes.

- Traditionally organised crime use cash businesses as a means of laundering money.
- Mortgage Fraud

Other

- Local information
 - Client – for example: runs a local business, has convictions or connection to drugs, fraud etc
 - Transaction – for example knowledge of property values in an area versus purchase price/valuation

Regulation

The Society is a supervisory authority and as such has obligations, some of which are noted below as an extract from the Money Laundering regulations 2007:

24 (1) A supervisory authority must effectively monitor the relevant persons for whom it is the supervisory authority and take necessary measures for the purpose of securing compliance by such persons with the requirements of these Regulations.

(2) A supervisory authority which, in the course of carrying out any of its functions under these Regulations, knows or suspects that a person is or has engaged in money laundering or terrorist financing must promptly inform the Serious Organised Crime Agency.

(3) A disclosure made under paragraph (2) is not to be taken to breach any restriction, however imposed, on the disclosure of information.

The Society will monitor compliance with the Regulations and Rule 24 of the Solicitors (Scotland) Accounts etc Rules 2001 primarily through self certification by the profession through Accounts Certificates and on site monitoring at Guarantee Fund compliance monitoring visits.

Regulation by the Society requires to be and will be risked based and proportionate.

In so saying, the Society clearly recognises that firms that have no procedures, inadequate procedures or procedures which are adequate but are not complied with in practice, offer significant opportunities to clients who would attempt to launder money. Failings in procedural areas, whether or not there is any indication that money laundering has been attempted or has taken place, is a direct breach of Regulation 20 and will be dealt with accordingly.

A firm must be able to demonstrate the policies and procedures it has in place to comply with the Regulations and also compliance with those procedures.

Failure to document procedures will be taken as *prima facie* evidence that there are no procedures. The onus will be on a firm to demonstrate that this is not the case.

The Society is committed to education and training and seeks to assist members by providing this guidance. In addition the Society's website will be used to highlight topical issues, including the inclusion of frequently asked questions (FAQ).

The Society invites dialog and constructive feedback on AML issues in general to ensure the support and guidance provided to the profession is as relevant and as helpful as possible.

The Society will seek Government approval of its guidance. You must be aware that this is of particular relevance in terms of Regulation 42(3), dealing with civil penalties and 45(2) dealing with criminal penalties for failure to comply with the regulations:

42(3) In deciding whether a person has failed to comply with a requirement of these Regulations,

the designated authority must consider whether he followed any relevant guidance which was at the time—

(a) issued by a supervisory authority or any other appropriate body;

(b) approved by the Treasury; and

(c) published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it.

(4) In paragraph (3), an "appropriate body" means any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender.

45 (2) In deciding whether a person has committed an offence under paragraph (1), the court must consider whether he followed any relevant guidance which was at the time—

- (a) issued by a supervisory authority or any other appropriate body;
- (b) approved by the Treasury; and
- (c) published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it.

(3) In paragraph (2), an “appropriate body” means any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender.

Reliance

In terms of Regulation 17 a relevant person may rely on another person, falling within specified categories, to apply client due diligence. One of those categories includes an “independent legal professional”. It is possible that you may choose to rely on another party, with their agreement, or that another party may choose to rely on you, with your agreement. You must refer to the Regulations and Part 1 Guidance for more detail.

The JMLSG guidance includes styles of forms to use in these circumstances. The styles make reference to FSA Regulated / EU Regulated Financial Services Firm/ Non-EU Regulated Financial Services Firm which may not be appropriate to your particular circumstances. It is recommended that you adopt the appropriate style and revise the heading of the form after “Introduction by....” to reflect the correct information in terms of the persons defined in Regulation 17 (2). All reference to “FSA Reference Number”, where that is not applicable, may be replaced by “Name of regulator” and “Regulator reference number”.

Where you are being relied upon, you will disclose your regulator as “The Law Society of Scotland” and your Regulator reference number will be the number quoted on Guarantee Fund Department correspondence. It is a 5 digit number and can be confirmed by the Guarantee Fund Department, if required.

- **Be clear on which third parties you may rely on**
- **Remember you remain responsible for compliance with the regulations**
- **Consider whether you want to be relied upon by others**

Reporting

Regulation 20 (d) refers to reporting, and cross refers to Part 7 of the Proceeds of Crime Act 2002 and Part 3 of the Terrorism Act 2000.

Consent

You can make a report without requesting consent to proceed. If you require consent to proceed with a transaction please ensure you request it when making the report to avoid any undue delay.

Clients under investigation

Subject to Legal Professional Privilege, where you act for a client who you know is under investigation for a reportable matter, never assume you have consent to proceed or to carry out subsequent or unrelated transactions merely because the authorities know that you represent the client. If a client was under investigation for VAT evasion, for example, there may be grounds to suspect that any assets or funds of that client are the proceeds of crime. In accepting funds from the client or carrying out transactions relating to property you may be committing an offence if you have not obtained consent to proceed in each and every case.

Complaints by clients

Where a firm has been unable to proceed with a transaction as a result of having made a disclosure to SOCA and awaiting consent and the client makes a complaint to the Society, the firm may advise the Society of the position, without being guilty of tipping off. In such circumstances firms should contact the director of the Guarantee Fund, whom failing the director of Professional Practice. They will liaise with the client relations office at the appropriate level and with SOCA if necessary.

Retention of information relating to potential or actual suspicious activity reports

Where consideration has been given as to whether a matter requires to be reported or where a report has been subsequently made, the documentation should be retained in a secure file separate from the client's file. In the event that a client were to mandate their file elsewhere there is a risk that the papers would not be identified and extracted which may amount to tipping off.

Legal Professional Privilege

There may be circumstances where a solicitor has legal professional privilege (LPP) and will not require to make information available to the authorities.

The regulations refer to LLP specifically at 37(7)

Power to require information from, and attendance of, relevant and connected persons

37 (7) A person may not be required under this regulation to provide or produce information or to answer questions which he would be entitled to refuse to provide, produce or answer on grounds of legal professional privilege in proceedings in the High Court, except that a lawyer may be required to provide the name and address of his client.

37 (11) In the application of this regulation to Scotland, the reference in paragraph (7) to—

(a) proceedings in the High Court is to be read as a reference to legal proceedings generally;

and

(b) an entitlement on grounds of legal professional privilege is to be read as a reference to an entitlement on the grounds of confidentiality of communications.

Client Confidentiality

Client confidentiality is not a defence against making disclosures and producing documentation to the authorities, unless it amounts to legal professional privilege. However, client information should not be handed over without court authority, which would normally be in the form of a warrant or a production order.

These points are covered further under professional practice advice.

PROFESSIONAL PRACTICE ADVICE

1. FAMILY CASES

The Proceeds of Crime Act and Civil Litigation (Bowman v Fels)

This note looks at the case of *Bowman v Fels* decided by the Court of Appeal in England on 8 March 2005 [2005] EWCA Civ 226. This case overturns the decision of the High Court in *P v P* decided in 2003.

Proceeds of Crime Act

Before looking in detail at the Appeal Court's decision, it is necessary to look at the legislation in some detail to put the decision into context. The Proceeds of Crime Act 2002 (POCA) came fully into force on 1 March 2004. It is in 12 parts but the significant parts for Scottish solicitors are part 7 (Money Laundering) and part 8 (Investigations).

Part 7 creates a number of offences. In particular Section 327 creates the offence of concealing, disguising, converting or transferring criminal property or removing it from the United Kingdom. Section 328 creates the offence of entering into or becoming concerned in an arrangement in respect of criminal property and Section 329 creates the offence of acquiring, using or processing criminal property. Section 328 was the subject of the decisions in both *Bowman v Fels* and *P v P*. It should be noted however that there are other offences in part 7 – particularly the offence of failing to disclose that another person is engaged in money laundering. Under POCA there is a duty to report knowledge or suspicion – referred to in POCA as an authorised or a protected disclosure.

All of these offences clearly have implications for solicitors in general. Conveyancers have been in the front line for some time as one of the most

common ways of converting “dirty” money into “clean” money is to invest it in heritable property.

Arrangements

Section 328(1) of POCA states, “A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.”

Criminal property is property constituting or representing a benefit from criminal conduct which the alleged offender knows or suspects, and criminal conduct is conduct which constitutes an offence in any part of the UK or would constitute an offence in the UK if it occurred here.

The only way to avoid such an offence is to make an authorised disclosure or to have a reasonable excuse for not doing so (not defined). Legal privilege is not specifically stated to be an exception.

P v P

P v P was a divorce action in which the wife’s solicitors obtained a forensic accountants report on the husband’s assets. This made them suspicious that part of his assets – which amounted in total to £19 million – was criminal property arising from tax evasion. The wife’s solicitors were concerned that in acting for her in negotiating a settlement of the matrimonial property this might be regarded as becoming concerned in an arrangement falling foul of Section 328. Dame Butler-Sloss in the High Court held that the act of negotiating an arrangement amounts to being concerned in the arrangement and that the offence is not merely committed at the point of execution of the arrangement. She further held that solicitors have a duty to make a disclosure irrespective of the amount or value of the criminal property involved.

Section 328 provides that the offence of being concerned in an arrangement is not committed if the person makes an authorised disclosure under Section 338 and in the form and manner prescribed in Section 339. The disclosure is authorised only upon satisfaction of one of the two conditions set out in Section 338 – namely that it is made either before the alleged offender does the prohibited act (of being concerned in the arrangement) or after having done it where there is good reason for failure to make the disclosure before doing so and the disclosure is made on the person's own initiative as soon as practicable for him to make it.

It was the subject of agreement in the case that the act of negotiating an arrangement did amount to being concerned in it, so that was not the subject of a contested argument. Dame Butler-Sloss held that there is nothing in Section 328 to prevent a solicitor taking instructions from a client but if having done so the solicitor knows or suspects that the client will become involved in an arrangement that might involve acquisition, retention, use or control of criminal property, an authorised disclosure should be made and the appropriate consent sought in order to proceed with it.

Bowman v Fels

This case was a claim by a cohabitee for a share of the value of the house the parties had lived in for 10 years before splitting up. The claimant's solicitors suspected that the other party had included the cost of work on the property in his business accounts and VAT returns even though the work was unconnected with his business. In the light of *P v P* they made a report to NCIS and obtained an adjournment of the trial without advising the defendant's agents of the reasons. The defendant appealed. Before the appeal was heard NCIS had given consent to proceed. The Appeal Court analysed the history of the European Directives and legislation on proceeds of crime. They observed that the definition of money laundering in POCA goes further than was required to comply with the relevant Directive, and in particular includes suspicion as well as knowledge.

They then considered whether Section 328 above applies to the conduct of legal proceedings, including settlement negotiations. The Court unanimously held that it does not, for both linguistic and policy reasons. On language they said “whatever Parliament may have had in mind by the phrase ‘entering into or becomes concerned in an arrangement which...facilitates...’ it is most unlikely that it was thinking of legal proceedings... to describe a judgement or an order as an ‘arrangement’ is a most unnatural view of language... we see equally little basis in ordinary language for treating any step taken to issue or pursue legal proceedings... as ‘an arrangement’”.

On policy they said “access to legal advice on a private and confidential basis is also a fundamental principle not lightly to be interfered with”. In their conclusion they said “Parliament cannot have intended that proceedings or steps taken by lawyers in order to determine or secure legal rights and remedies for their clients should involve them in ‘becoming concerned in an arrangement which.... facilitates the acquisition, retention, use or control of criminal property’”. They also held that as there was nothing express in the language of Section 328 which overturns legal professional privilege it could not be implied. They quoted Lord Hoffman in *R v Secretary of State for Home Department Exp Simms* [2000] 2AC115 “Fundamental rights can not be overridden by general....words”.

Finally the Appeal Court considered negotiated settlements of legal proceedings and held that such negotiations are not an “arrangement” in terms of Section 328 either. They drew a distinction between negotiations in existing or contemplated legal proceedings and arrangements independent of litigation, which they felt did fall within the Directive and POCA.

Existing or Contemplated Legal Proceedings

It is clear that there is a distinction under POCA between matters where there are existing or contemplated legal proceedings and other matters where there are no proceedings either in existence or in contemplation. Whether litigation is in existence is a matter of fact and should not give rise to a difficulty. That

is not necessarily the case for contemplated proceedings. It would therefore be prudent to note in the file whether proceedings are in contemplation if that is not express in correspondence. Mere intimation of an accident claim for example may not amount to contemplated proceedings. The issue of a letter advising that if payment is not made within a time limit an action will be raised without further intimation would clearly demonstrate that proceedings are contemplated.

Confidentiality and Professional Privilege

Unlike Section 328, there is a specific exception in Section 330 of POCA and the Money Laundering Regulations where the information is privileged. It is now necessary to look at the related questions of confidentiality and privilege.

The Code of Conduct for Scottish solicitors describes confidentiality as a fundamental duty of solicitors. This has had to be amended to take the legislation to account. The traditional view is that solicitors should not disclose to any third party any matter connected with a client's affairs which is not already in the public domain unless required to do so by law or authorised to do so by the client. Professional privilege is a narrower definition. In both POCA and the Money Laundering Regulations it is information communicated by a client or his representative in connection with the giving of legal advice or in connection with legal proceedings or contemplated legal proceedings, but does not apply to information communicated with the intention of furthering a criminal purpose (including laundering money). In other words, if the client is using the solicitor unwittingly to assist the client in committing a crime, that is not subject to legal privilege. This is not new. The law was clearly stated by the late Lord President Emslie in Micosta v. Shetland Islands Council 1983 SLT 483, "The only circumstances in which the general Rule [of total confidentiality] will be superseded is where fraud or some other illegal act is alleged against a party and where his law agent has been directly concerned in the carrying out of the very transaction which is the subject matter of enquiry."

Tipping Off

Section 333 creates the offence of tipping off where a person knows or suspects that a protected or authorised disclosure has been made and that person makes a different disclosure likely to prejudice any investigation which might be conducted.

In addition, Section 342 makes it an offence for a person to make a disclosure likely to prejudice an investigation (a confiscation investigation, civil recovery investigation or a money laundering investigation).

No offence is committed by a solicitor in either case if it is a disclosure “(a) to a client or to a representative of a client in connection with the giving..... of legal advice to the client, or (b) to any person in connection with legal proceedings or contemplated legal proceedings” but that does not include disclosures made “with the intention of further a criminal purpose” (see above).

This issue was also considered by the High Court in *P v. P* who held that unless the requisite improper intention is there (i.e. to further a criminal purpose) the solicitor should be free to communicate such information to his/her client or opponent as is necessary or appropriate in connection with the giving of legal advice or acting in connection with actual or contemplated legal proceedings. This can only be done after having made the authorised or protected disclosure. The High Court thought that it was appropriate for seven working days to pass before informing a client but that where appropriate consent is refused by NCIS and a 31 day moratorium is in place the solicitor and NCIS try and agree on the degree of information which can be disclosed during the moratorium period without harming the investigation.