Cause for complaint

Dominic Regan offers tips on avoiding arguments with clients over legal bills

Dealings with a client ought to be remunerative. Dealing with an aggrieved client, regardless of who is in the right, will cost you time, money and perhaps your professional reputation.

Whatever the category of work undertaken, it is crucial to get off on the right foot with a clear retainer. Thereafter, there is a rolling obligation to communicate with your client, making them aware of material developments. This article, written in the light of wisdom shared by Simon Williams, senior Legal Ombudsman, is intended to highlight the ever recurring problems that could so easily be avoided with a little thought.

AT THE OUTSET

First things first. At the point of potentially taking on a client, it is your duty to make them aware of reasonable funding options. This is so even if you may not be prepared to act under one or more of those arrangements, with the result that the client to be walks away to find a competitor willing to act.

Let us assume that the client is agreeable to your terms of business. It is now imperative to produce a decent client care letter. Getting this wrong could lead to the involvement of the Legal Ombudsman and / or a solicitor - client assessment under the Solicitors Act 1974.

Core guidance from the Legal Ombudsman, who has sadly seen it all before, tells us what is expected:

1. An explanation of why the client has elected to engage the lawyer.

2. What work is to be undertaken? Define the precise parameters so that the client knows what work is excluded from the contract. One legitimate device for curbing costs is to act on a limited retainer. In *Minkin v Landsberg* (2015) EWCA Civ 1152, Jackson LJ delivered the substantive judgment of the court. C had instructed D, a solicitor, to draw up an agreement embodying the terms on which she had agreed to divorce her husband. The solicitor did precisely that and charged just for that discrete task. She was later sued in negligence. The client asserted that the deal was a bad one and she ought to have been warned off settling on unfavourable terms. Held - the retainer was specific and the solicitor had done all that was required of her.

3. The likely costs of the case based on the information set out in the letter.

4. The course of action agreed with the client.

5. The anticipated timescale and standards for the project.

6. If the retainer terms are inconsistent with earlier suggestions or advertised terms, then this should be signposted and explained.

A client care letter should be expressed in clear English. Avoid jargon and technical terms that are well understood by lawyers but not a person in the street. Simon Williams told me that 'disbursements' can baffle. Far better to specify what they are, for example court fees, Land Registry charges et al.

Another expensive howler is the failure to deal with VAT. A client who is told that the fee will be £2,000 is justified in challenging a bill

of £2,400. Be explicit: in this example, I suggest the shared view of a costs judge and the Legal Ombudsman is that the figure cited is VAT inclusive, so one will only be entitled to £1,666 (plus VAT).

Rash promises as to standards of service are just asking for trouble. 'We will always return calls within 24 hours' is an unnecessary guarantee.

ESTIMATES

The next minefield is the production of estimates. One recently reported authority is chilling. In *Kenton v Slee Blackwell* (2023) EWHC 2613 (SCCO), Senior Costs Judge Gordon-Saker concluded that a final bill seeking costs well over a quarter of a million pounds was utterly unsustainable, for it was miles away from an opening estimate.

'In circumstances where the client was given a hopelessly inaccurate estimate, relied on the estimate by entering into a conditional fee agreement, lost the opportunity of doing something different, was not given proper costs information, was billed a sum several times the amount of the estimate, and where the solicitor failed properly to explain the difference between the estimate and the costs incurred, the amount that the client should reasonably be expected to pay must be a figure close to the estimate upon which she relied. The claim settled before issue and following mediation. The estimate given for that outcome was £5,000 to £20,000 plus "additional costs for mediation". Taking the top end of that bracket and adding £20,000 for mediation would give £40,000. That is just under half of the figure which Ms Slade referred to as the most she had ever charged for a case which went to trial. It is also not far off the amount that I would expect to have seen estimated and incurred. £40,000 seems to me to be the reasonable sum which the claimant should be expected to pay.'

There is much to be said for incorporating a worst case scenario into the spectrum of estimated costs. It is glib to say that most cases settle, but of course some do not. The demeanour and attitude of a belligerent opponent (they do exist) could mean that dispute resolution might only be secured after an arduous trial.

FUNDAMENTAL PRINCIPLES

The 3rd edition of the Legal Ombudsman Costs guidance published in November 2023 says it all. There are just three fundamental principles:

1. A client should never be surprised by the bill they receive from their lawyer.

2. If ever you intend to charge your client for something, now or later, you should tell them of this clearly and at the earliest opportunity.

3. Keep clear and accurate records of all the costs information you provide, along with confirmation from the client that they understand what they will be charged.

The best evidence to satisfy the third requirement is something in writing! The problem with an oral exchange is, as the late Queen Elizabeth so smartly observed, 'recollections may vary'. The gold standard here is a written exchange with the client writing to confirm their understanding and agreement.

Intriguingly, I sense that some firms are challenging the concept of taking a cut of damages at all. Richard Clark, the chief executive officer of the law firm CFG, told me recently that in all matters taken on since 2016 they have not taken anything from damages. Unsurprisingly, they have received zero complaints! This is all the more intriguing because the firm majors on serious high-value personal injury and clinical negligence claims. Those are the actions where the maximum recoverable success fee element could be in six figures. He is adamant that a full client service can be delivered without recourse to damages. This is an area to watch closely.

On 30 September 2024, the ombudsman published supplemental guidance, 'Complaints about legal costs'. Succinct as ever, the view from the office is crystal clear. While 10% of complaints are explicitly about costs, a much larger percentage is about poor communication, and inept guidance about costs looms large.

The dramatic extension of fixed recoverable costs implemented on 1 October 2023 will inevitably lead to solicitors looking to their client to make a meaningful contribution to foot their own bill of costs. The disgruntled have nothing to lose by turning to the Office of the Legal Ombudsman (LeO). I hasten to add that the Office is not some soft touch, but it will at the outset have to scrutinise a complaint.

The new guidance addresses a common problem – the client in a settled matter who does not possess a copy of their bill. If no bill has been delivered and the solicitor refuses to produce one, they would have grounds for complaint. As an aside, always render a final bill even if you are not asking for a penny. That statement of account will get the limitation period for seeking a Section 70 Assessment under the 1974 Act running.

What, though, if they were sent a bill but have binned or lost it? The view is that a copy should be supplied. 'However, it isn't necessarily unfair for the solicitor to ask the consumer to pay some money towards this'. Consequently, reasonable expenses incurred in satisfying the request, such as retrieval from off-site storage, copying and postage can properly be charged.

A novel point not addressed until now is what happens if a client complains that they were not party to discussions about the extent of a paying party's costs liability? Maximising the recovery from the other side should mean that the liability of the client is commensurately diminished. The sensible view of LeO is that it is neither unfair or unreasonable to exclude the client. This accords with established legal practice, and so such a complaint in all likelihood would be dismissed under Scheme Rule 5.7 a.

On the other hand, complaints about deductions from damages will be carefully scrutinised. Some firms charge the maximum success fee, regardless of risk, so as to take the maximum 25% cut of relevant damages. There is nothing improper in this on condition that the client is made aware of it, and also of the fact that other solicitors would seek a much reduced fee which in turn would minimise the deduction from damages.

In *Herbert v HH Law* (2019) EWCA Civ 527 a fee of 100% in a case that was unloseable was slashed to 15%. Miss Herbert's purported consent was negated by the failure of her solicitors to spell out the fact that they were setting the fee so high, contrary to the obvious absence of any real litigation risk. Had they levelled with her, she would either have gone elsewhere or negotiated a realistic rate.

Any firm adhering to the *Herbert* model must be able to comfortably demonstrate that they had secured the fully informed consent of their client.

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