

GUIDANCE NOTES ON THE SOLICITORS (SCOTLAND) (CLIENT COMMUNICATION) PRACTICE RULES 2005

The above Practice Rules will come into force on 1st August 2005. They have been made under Section 34 of the Solicitors (Scotland) Act 1980. The Rules have been approved by the Lord President. They require solicitors to provide information in writing to clients about certain specific matters namely

- (a) Details of the work to be done;
- (b) An estimate of the total fee including VAT and outlays or the basis upon which the fee will be charged, including VAT and outlays;
- (c) Details of any contribution towards Legal Advice & Assistance or Legal Aid and details of the effect of preservation or recovery of any property if relevant;
- (d) Who will do the work;
- (e) Who the client(s) should contact if they wish to express concern about the manner in which the work is being carried out.

With certain exceptions (see below) this information must be provided at the earliest practicable opportunity upon receiving instructions. It does not have to be contained in a single letter to comply with the Rule, but unless there is a particular reason why it cannot be done in a single letter, there is a risk of omitting certain of the information if it is done in different stages.

If a firm is tendering for new business, either from an established client or a new client, the information can be given when tendering. If it is, and the tender is accepted, there is no need to repeat the information subsequently.

It is quite in order to give the client more information than is necessary to comply with the Rule, but the Rule sets out the minimum requirement.

Exceptions

There are only 3 automatic exceptions to the Rule:

First where a client regularly instructs a solicitor in the same type of work, the information does not have to be provided repeatedly but it will have to be provided on at least the first occasion, and it will have to be updated if there is a change in the information previously provided. Client means any person who instructs a solicitor, which includes lenders as well as individual purchasers or borrowers. If the fee for the lenders work is included in the fee to be charged to the individual purchaser or borrower, that is all that need be said about fees in the information given to the lender.

The second exception is where there is no practical opportunity for the information to be provided before the conclusion of the work. That means where the work is completed at a single meeting. For example a client who may be about to go on holiday and wishes to make a will may have instructions implemented immediately and sign the will at the first meeting. It will not be necessary for solicitors receiving instructions on an agency basis to provide information to the principle solicitor acting, although it is prudent to have an agreed basis of charging for agency work.

The third exception is children under the age of 12. If the client is the child's parent or guardian (for example in a personal injury case) the information will still need to be provided.

Fees

With the withdrawal of the Society's Table of Fees, it will not be appropriate to refer to fees recommended by the Society. If, for example in executries, the file is to be feed by an external fee charger such as an Auditor or Law Accountant, the basis on which the external fee charger will be asked to fee up the file needs to be stated to the client needs to be included. If hourly rates are reviewed during the course of the work, the clients will need to be told about any increase or there is a risk that firms will be unable to charge the higher rate.

As well as the hourly rate any commission which will be charged on capital transactions or on the sale of a house would need to be included. In any matter where the account is being rendered on a detailed basis, the charges for letters, drafting papers, etc will need to be expressed as well as the hourly rate. They can be in a separate schedule referred to in the basic letter.

In terms of Section 61A of the Solicitors (Scotland) Act 1980, where a solicitor and client enter into a written fee charging agreement it is not competent for the Court to refer any dispute in the matter to the Auditor for taxation. Where an hourly rate is specified, and that is accepted in writing, the client would still be entitled to seek a taxation, but would not be able to challenge the agreed hourly rate at such a taxation.

It should be made clear at the outset whether the fee quoted is the fee to be charged or only an estimate. If it is not stated as an estimate and the client accepts it in writing, that could be regarded as a written fee charging agreement under Section 61A of the 1980 Act. If a client has been given an estimate, they should be advised in writing when it becomes known that the cost of work will materially exceed such an estimate. It is good practice to advise the client when the limit of the original estimate is being approached.

Information should be clear, and terms with which the client may not be familiar such as “outlays” may need to be briefly explained. If a payment to account is required, that should be clearly stated, as well as the consequences of failing to pay it on time. For example in a Court matter if the client is advised that failure to make a payment to account will lead to the solicitor withdrawing from acting, there is unlikely to be a professional difficulty about withdrawing from acting in compliance with that. However if the consequence is not stated, and the proof is approaching, solicitors could be vulnerable to a complaint if they withdraw at a late stage to the potential prejudice of the client.

If the clients costs are to be paid by a third party such as a Trade Union or Legal Expenses Insurer, specific details of the basis of charging do not need to be set out when writing to the individual client but any part of the fee which that client may be asked to pay should be included—such as a success fee in a speculative action.

While it is not strictly necessary to comply with the Practice Rule, it is also strongly recommended that any potential liability for other people’s costs should be explained. This would include a tenant’s liability to meet a landlord’s fees as well as the potential liability for expenses in a Court action.

Executries and Trusts

In executries where the only executors are solicitors in the firm, the information should be provided to the residuary beneficiaries, as they will be meeting the fees out of their shares of the residue. In other executries the information should be provided to the non solicitor executors.

Legal Aid

It is not necessary to comply with the Rule for solicitors to explain the Statutory payment Scheme to Legal Aid clients in relation to Legal Advice & Assistance or Legal Aid. Solicitors may wish to forward copies of leaflets provided by SLAB to clients in receipt of Advice & Assistance or Legal Aid. If solicitors do wish to communicate detailed advice to clients about Advice & Assistance or Legal Aid, including for example the clients requirement to report changes in circumstances, that is optional and may be done in a separate letter.

Waivers

The Rules give the Council power to grant a waiver which may be subject to conditions. In practice this power will be delegated to the Professional Practice Committee, which meets monthly except in August. A specific reason should be given for seeking the waiver, and the request is likely to be continued for such information if it is not provided initially.

Failing to Comply with the Rules

The Rules state in terms that a breach may be treated as professional misconduct. For the avoidance of doubt, an occasional failure to send the information required, or sending information which does not fully comply with the Rule, is likely to be dealt with in the first instance as a matter for professional practice guidance. However regular failure to provide the information required may lead to a formal complaint about the solicitor’s conduct, which may be categorised as professional misconduct.