

Guidance related to Rule B4: Client Communication

Background

With effect from 1 August 2005 the Solicitors (Scotland) (Client Communication) Practice Rules 2005 made it mandatory for all solicitors to issue terms of business letters to clients in all transactions subject to certain limited exceptions (see below). The 2005 Rules were consolidated in 2011 as part of the Society's Practice Rules 2011. The current rule can be found in **Rule B4: Client Communication** <http://www.lawscot.org.uk/rules-and-guidance/section-b/rule-b4-client-communication/rules/b4-client-communication/>

Terminology

Terminology such as letters of engagement, terms of engagement, terms of business letters and terms and conditions is often used interchangeably to describe the document setting out the terms governing the solicitor/client relationship. This document forms the contract between the client and the solicitor and accordingly its terms are very important. It is good practice to use the same terminology in correspondence to ensure that the client understands which document the solicitor is referring to. In this guidance reference is made throughout to the term "terms of business letter".

Mandatory Rule

Compliance with Rule B4 is mandatory. The rule requires solicitors to provide certain information to clients in writing, at the earliest practicable opportunity upon receiving instructions, or when tendering for business.

The information does not have to be contained in a single letter, but it is good practice to do so, otherwise there is a risk of certain vital information being omitted if it is provided at various different stages. It is quite reasonable to email the information to clients, which may be followed up in writing, depending on the agreement reached with the client. If the information is provided when tendering for new business, either from an established client or a new client, there is no need to send the information again if the tender is accepted, unless any of the terms have changed during the tendering process.

Rule B4 requires solicitors to provide the following information in writing to clients:

1. An outline of the work to be done;
2. An estimate of the total fee or the basis upon which the fee will be charged including VAT and outlays;
3. 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;
4. Who will do the work; and

5. Who the client should contact if they have any concerns or complaints.

Exceptions to Rule B4:

There are 3 exceptions:

1. Existing clients – the information does not need to be provided repeatedly to regular clients who instruct the same type of work, but it should be provided on at least the first occasion and will need to be updated if there is a change in the information provided.

2. Lack of opportunity - where there is no practical opportunity for the information to be provided before the work has been done, i.e. where the work is completed at a single meeting.

3. Children under 12 - special considerations may apply which may require an alternative method of communication, other than correspondence. Exercising professional judgement is important in each particular case, to ensure that this information is provided in the most appropriate way. This exception does not diminish the solicitor's obligation to communicate effectively with his/her client in terms of Rule B1.9. 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.

Outline of work & who will do the work

It is important that the outline of the work to be carried out contains enough information so that the scope and the significant elements of the work can be clearly identified. However it need not rehearse in detail every step to be taken in progressing and completing the work where that information is not required to enable the client to check that the solicitor's description of work to be done meets with the client's intentions. It is wise for both the solicitor and the client to be clear about what work is being taken on and what the solicitor will not be responsible for. It is important to be clear about when the service will end, i.e. at completion of a transaction or at some later date.

The terms of business letter should specify who is primarily responsible for doing the work. If the solicitor intends to delegate work to unqualified member/s of staff, such as paralegals, this should be explained in the letter. It might not always be possible for such persons to be named, but where it is possible, it is good practice to make reference to fee earners involved in the transaction.

If the nature of the instruction changes, which alters the scope of the work to be carried out, the terms of business letter should be reviewed and if necessary amended or a fresh terms of business letter should be issued, highlighting the changes that have been made.

Fees & Outlays

In terms of the duty to communicate effectively with clients and the terms of Rule B1.11, solicitors are required to provide details of the fees and outlays which will be charged during a transaction following receipt of instructions or when tendering for new business. This can either be an estimate of the total fee or the basis upon which the fee will be charged, i.e. the hourly rate, and the VAT amount and details of any foreseeable outlays.

It may be difficult at the outset of a transaction to quantify the level of fees and outlays which may be incurred (particularly in litigation) but costs which are likely to be significant require to be brought to the client's attention as soon as possible.

If the fees are to be charged on an hourly rate, where more than one fee earner is to be involved in the case and their hourly rates are different, all of the charge out rates should be listed in the terms of business letter. If any of the rates change during the course of the transaction, an update should be provided. If any fee earners not previously notified conduct material chargeable work in the transaction, their charge out rate should also be advised.

Reference should not be made to additional fees being charged to reflect elements of complexity, responsibility or novelty. The basis of the calculation of the fee should be clear, accurate and measurable. If commission is to be charged in addition to an hourly rate, this needs to be specifically referred to in the terms of business letter otherwise it cannot be charged for.

It is acceptable to state in the terms of business letter that the firm reserves the right to increase an estimated fee, if the matter becomes protracted or complicated due to unforeseen events. Clients should be advised of this at the initial meeting and this should be reiterated at the time that the increase becomes foreseeable, i.e. when the limit of the original estimate is being approached and not at the time that the fee note is issued in accordance with the terms of Rule B1.9.2

Any interim fee or payment to account arrangement should be set out clearly in the terms of business letter. It is also recommended that the client's liability for a third party's costs be included, e.g. if the client is the tenant under a lease and has agreed to pay the landlord's solicitors' fees and outlays.

It is competent for solicitors to charge a fee (but not a contingency fee) which is calculated as a percentage of the value of the matter in hand e.g. the estate agency work incurred in the sale of a property. The basis of the fee must be specific enough to give the client an indication of the eventual cost.

Since April 2012, the amount of fees or extra-judicial taxations can no longer be assessed by local Sheriff Court Auditors. Such work can only be carried out by Sheriff Court Auditors who are not employed by the Scottish Court Service or by the Auditor of the Court of Session.

Legal Aid

Solicitors who undertake either civil or criminal legal aid work are not exempt from the terms of Rule B4. Terms of business letters must be issued to clients at the outset of new instructions. It will also be necessary to issue a revised terms of business letter where a case changes from being funded by legal aid to being funded by private fee arrangement and, similarly, should a case that has started as a private fee case be one going on to legal aid funding.

Terms of business letters should advise a legally aided client about any contribution to be paid either to the solicitor for advice and assistance or to the Scottish Legal Aid Board towards legal aid and the potential operation of the statutory charge or “claw back” which covers the cost of the client’s legal expenses if the client wins his/her case and recovers money or property, and of their potential liability (and right to seek modification of that liability) to pay the opponent’s expenses if they lose their case. Failure to advise clients of claw back and their potential liability for the other party’s expenses has been held to be an inadequate professional service. The letter should also advise that in circumstances of unusual complexity the solicitor may apply for an uplift in fees to be paid by the Scottish Legal Aid Board at the end of the case and this may affect the amount the client receives if claw back applies and the solicitor may wish to say that the solicitor will say more about that as the case develops and if this additional fee element may become a real prospect, or if the client asks for more information about that as the case progresses.

Note: Solicitors should be aware that a failure to advise an eligible client as to the possibility of being funded by legal aid may be deemed to be unsatisfactory professional conduct and/or an inadequate professional service.

Complaints

Client Relations Manager

The terms of business letter must specify that there is a person in the firm who deals with concerns and complaints. In some cases, it might be appropriate to name the supervising solicitor as the first point of contact. However, as Rule B5 requires every firm to designate a person within the firm as a Client Relations Manager, it is important that the terms of business letter explains that the firm has a Client Relations Manager and if possible, should state who that person is.

As Rule B5 also makes it essential for firms to have:

- (a) a written procedure for dealing with complaints, which must be provided to a client or former client who requests a copy, and
- (b) a central record of complaints.

it is good practice if the terms of business letter refers to the fact that the firm has a written complaints process in place and that the client has the right to request a copy

of it or direct the client to where it can be found, for example on the firm's website if it has one.

Scottish Legal Complaints Commission (SLCC)

In addition to advising clients about the existence of the Client Relations Manager in the firm, the terms of business letter should signpost clients to the SLCC, as the single gateway for receipt of all legal complaints, if they remain dissatisfied with how their complaint has been dealt with by the firm. The letter should set out contact details for the SLCC, including the telephone number, address and email address. A link to the SLCC's website which contains information about how to make a complaint, including an online complaint form would also be helpful.

Terms of business letters should not refer clients to the Scottish Legal Services Ombudsman, which was abolished when the SLCC came into existence. Neither should reference be made to complaints being made to the Society, as any complaints received by the Society will simply be passed on to the SLCC.

Additional matters

In addition to the information which is mandatory under Rule B4, solicitors should think about the following when drafting terms of business letters:

Communication

Terms of business letters should set out the agreement about how the solicitor will communicate with his/her client and in what form instructions should be given. Confirmation should also be provided about who has authority to give instructions on behalf of a client, e.g. who is the authorised person if the client is a limited company or a partnership.

Timescales

Terms of business letters should provide an estimate of how long it will take to carry out the work. It may not be possible to put an exact timescale on a piece of work, but it is wise to give an indication of timescales and to err on the side of caution, as timescales may need to be extended to allow for matters which are beyond the solicitor's control. If a solicitor can flag potential issues to the client in advance, it may prevent dissatisfaction in the future and avoid a complaint about unreasonable delay. Clients should be advised, in advance, if timescales cannot be met and a new timescale should be provided.

Client's Responsibilities

The terms of business letter should make it clear what the client's responsibilities are in the transaction. It should confirm the following information:

- (a) the need to give instructions and information timeously when requested,

- (b) the manner in which instructions should be given,
- (c) the need for clients to be available to sign documents,
- (d) the need to remain in contact, particularly if critical dates are to be met, and
- (e) the need to keep the solicitor advised of any change of contact details, e.g. address, email address or telephone number.

Plain English

Terms of business letters should be written in plain English and contain no unnecessary jargon or legal terms. This will ensure that the letter is easy for clients to understand and so there is no confusion about the terms used at a later date. All fees and outlays quoted should be set out in numbers and highlighted, to make this as clear as possible.

Housekeeping

As part of good file management and record keeping, a copy of the terms of business letter which has been sent to the client should be kept on the file.

It is recommended that the content of terms of business letters is kept under regular review by the fee earner responsible for the work being carried out. It is also good practice for the Client Relations Manager to ensure that terms of business letters contain the relevant information relating to responsibility for complaints within the firm and the signposting requirements, as the absence of such provisions can lead to complaints of inadequate complaint handling.

Equality & Diversity

In terms of the Equality Act 2010, people with “protected characteristics” are protected from discrimination, e.g. treating someone unfairly because of their characteristics. Firms are under a duty to make “reasonable adjustments” for those clients with a disability. Firms should ensure that terms of business letters are duly adjusted to take into account clients with disabilities. This would include providing information in an accessible format such as braille for a blind client. It is recommended that firms do not use an overly small font size which could be difficult for clients to read. Solicitors should also be aware of Standard of Conduct Rule B1.15 in relation to diversity.

Outsourcing and Agency work

If a firm has decided to outsource or sub-contract some of the legal services being provided to the client, the terms of business letter should state which firm will carry out what work. Whoever carries out the work, the obligation to comply with Rule B4 remains with the instructing firm, not with the agent.

Solicitors who receive instructions from another firm to act on an agency basis may wish to enter into a service level agreement with the instructing firm.

Alternative Dispute Resolution

On 1 October 2015 regulation 19 of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities & Information) Regulations 2015

<http://www.legislation.gov.uk/ukxi/2015/542/contents/made> came into effect. The Regulations require solicitors (as service providers) to give consumer clients (individuals not trading as commercial entities) details of a certified ADR provider, and indicate whether or not they intend to use them to try and settle the dispute.

In the terms of business letter the firm should either:

State that it intends to implement the Regulations and inform clients about any ADR entities and processes which the firm is prepared to use (these should also be referred to on the firm's website if it has one)

or

If the firm chooses not to adopt an ADR process, it still requires to account for and share information about the terms of the Regulations with its clients

Here is some sample text which could be used in the terms of business letter and on the firm's website if it has one:

"We recognise that Alternative Dispute Resolution Regulations have implemented ADR/EDR Directive 2013/11/EU to promote alternative dispute resolution as a means of redress for consumers in relation to unsatisfactory services. We have however chosen not to adopt an ADR process, and if you have any concerns about the services you receive from this firm you should contact the firm's Client Relations Manager."

Consumer Contract (Information, Cancellation & Additional Charges) Regulations 2013 and the Consumer Rights Act 2015

Solicitors need to be aware of the Consumer Contract (Information, Cancellation & Additional Charges) Regulations 2013 and the Consumer Rights Act 2015 and take appropriate steps to ensure compliance therewith.

Risk Management Tool

A well drafted letter of engagement is a useful risk management tool which can have real benefits for solicitors and their firms. Time spent considering and crafting a well tailored terms of business letter at the outset of a transaction will help to minimise the risk of complaints at a future stage.

Sanctions

A breach of Rule B4 may result in a finding of professional misconduct or unsatisfactory professional conduct.

Failing to issue a terms of business letter, or not including adequate provisions in a terms of business letter, could also lead to a finding of inadequate professional service against a firm or an individual solicitor. This is particularly the case where that failure/deficiency has directly contributed to the matter which is the subject of the services complaint.

It is important for terms of business letters to be issued as soon as possible after instructions are received as delaying issuing the letter has been upheld as a complaint of inadequate professional service.

Waivers

Although it is technically possible to apply for a waiver of Rule B4, such waivers are rarely granted. It is difficult to envisage circumstances in which a waiver of Rule B4 would be granted in accordance with the terms of the Society's overarching waiver policy <http://www.lawscot.org.uk/media/623231/OverarchingWaiverPolicy.pdf>