Engagement Letters

Members of the legal profession have expressed some frustration as regards some of the new Rules of Conduct and Client Care. The rules which have come in for most criticism (unsurprisingly) appear to be those which require the greatest changes to the way lawyers conduct their practice. While new obligations are imposed on lawyers by the Rules it may be that the obligations are not as onerous as some would think. Most importantly lawyers are free to determine for themselves how to comply with the obligations. There is no compulsory letter of engagement or mandatory standard clauses.

The rules require lawyers to provide "client care" information to their clients at both the commencement and conclusion of undertaking legal work. The genesis of these obligations is found in s 94(j) of the Lawyers and Conveyancers Act which requires the Law Society to make rules requiring lawyers to "provide clients in advance with information on the principal aspects of client service". The section then proceeds to set out the four key areas in which information must be provided: fees, insurance, fidelity fund coverage and complaints mechanisms.

Rule 3.4 of the Rules of Conduct and Client Care is the response to this statutory prescription and the words of the rule track the words of the Act closely. However it should also be noted that there are a number of other obligations of disclosure imposed by the r 3.5 which go beyond the minimum required in the Act. These include: providing clients with a copy of the "Client Care and Service Information" principles found in the preface to the rules, informing the client of the identity of the people who will have overall responsibility for the work, and letting the client know of any limitation or exclusion of liability terms.

It is important to note that the form which this information takes and how it is presented to the client is very much up to the lawyer in question. In some cases it will be useful and important to explain to a client what they can expect from the lawyer-client relationship. For example where the client has never used a lawyer before. In cases where the client is sophisticated it will often be sufficient to simply provide the client with the written information and leave it to them to digest at their leisure. What is reasonable will of course depend on the nature of the client and the circumstances surrounding the instructions.

The rules also require lawyers to provide information to clients as the matter progresses. In addition to the familiar rule that a lawyer must disclose relevant information to his or her client, r 7.1 requires a lawyer to take reasonable steps to ensure that the client understands the nature of the retainer and is kept informed of the progress of the work. Rule 9.6 also requires the final bill to be rendered within a reasonable time and with enough detail to enable the client to identify the work to which it relates.

Mode of provision

Some consternation in the profession appears to be caused by the suggestion that the requirements to provide information at the outset are onerous and will lumber the client with volumes of information. This need not be the case. While the rules do require certain information to be provided the manner in which this is done is left largely up to the lawyer concerned.

While some firms choose to provide clients with lengthy terms of engagement, this need not be the case. Compliance with the disclosure obligations at the outset of the retainer can be effected in around 200 words in most cases, along with the provision of the Client

Care and Service Information. If it is thought that comprehensive terms of engagement are useful (and there are obvious reasons for this) they can of course be incorporated by reference to another document which need not necessarily be provided at the same time.

The modesty of the obligations imposed by rules 3.4 and 3.5 is further emphasised by the fact that by r 1.7 information may be provided electronically. This could include not only provision of information by email sent directly to a client but also reference to a web-site. Thus should the lawyer also wish to refer the client to more detailed contractual terms of engagement this may be done by reference to a web-site.

It should however be noted that however a lawyer provides the required information it must be provided in a manner which is clear and not misleading given the identity and capabilities of the client and the nature of the information. While it is too much to ask to insist that a lawyer ensure that a client understands all aspects of the retainer, the lawyer must present the information in an appropriate manner and take such steps as are reasonable to ensure the client understands the basic nature of the retainer.

Exceptions

There will of course be situations where to provide the information set out is either impossible or inappropriate. Although the Act itself does not seem to contemplate the existence of exceptions, r 3.7 sets out a number of cases where a lawyer need not provide client care information. One such case is where the client will not be able to understand the information because they are mentally incapable or of a young age. Thus counsel for the child, when the child is too young to understand the nature of the lawyer-client relationship, need not burden the child with information which is meaningless to them.

Two other more or less routine exceptions are where the lawyer is an in-house lawyer, and where the lawyer is providing services to another lawyer (for example a barrister, or acting for an overseas lawyer).

More problematic perhaps is the vagueness in the exception found in r 3.7(b) which provides that the information need not be provided if it is in the circumstances “impracticable” for the lawyer to provide the information. In some cases this will undoubtedly be the case – as where telephone instructions are received requiring the lawyer to urgently seek injunctive relief or other ex parte orders. In such a case delay might severely prejudice the client. To require the provision of information prior to undertaking the work would simply obstruct the protection of the interests of the client and would clearly be impracticable.

Similarly, lawyers undertaking duty-solicitor work often have only fleeting contact with a client who is then refereed to another lawyer who will act for the client in a more substantive way. While disclosure of the information would be possible in such cases, it would be largely meaningless and would arguably impede the provision of effective assistance. It may be that in such a case it is impracticable to provide the information in that circumstance as well.

It should, however, be noted that “impracticable” is a high threshold and should probably be narrowly interpreted given the purposes of the Act. Certainly it does not equate to “inconvenient” or “administratively burdensome”. The obligations might be criticised in that they do not distinguish between consumer type clients and business and corporate clients. While the case for providing clear information to consumer clients is clear, there is an argument that business clients (many of whom are repeat users of legal services) are less

in need of information and protection. However, simply because a practitioner (and their client) does not consider the provision of the information to be particularly useful does not mean that compliance with the rule is not practicable.

Lawyers are not obliged to provide the same information to the same clients in respect of different retainers. Provided the information remains accurate the fact that the information has already been provided will be sufficient where the lawyer undertakes a new matter for an existing client.

It might also be noted that r 3.5 is also less stringent that r 3.4 in that the former requires only that the information be provided prior to undertaking “significant” work under a retainer whereas the latter requires information to be provided “in advance”. The rationale behind the requirement that information need be provided only before significant work is undertaken appears to be that it is sufficient if the lawyer provides the relevant information as soon as is possible. The rule recognises that it may be the case that some minor steps will have already been taken in respect of the retainer. It is however expected that in most cases information in respect of both rules will be provided together.

Any rules requiring change to the way we behave are likely to receive opposition. There are certainly aspects of the legislation requiring these rules which would benefit from improvement. The Rules themselves will also undoubtedly be refined over time. However, underlying message is that there has been a significant shift in what is expected of lawyers. It is no longer acceptable (if it ever was) for a lawyer to place him or her self above the client. Lawyers must now engage with clients, explain how the relationship will work and what the client can reasonably expect from the lawyer.

December 2008
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