Client Retainer Update

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Confusion often arises as to the various consumer provisions that affect law firms and which need to be addressed in any standard terms of business documentation.

Following on from the *EU Consumer Rights Directive*, the various provisions that currently apply to law firms will be overhauled later this year when the *Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013* take effect in June.

Just by way of reminder of the existing position, the *Consumer Protection (Distance Selling) Regulations 2000* apply in relation to work to be done for most private clients where the contract is concluded with the client not being *"physically present"*. This would arise where the client sends in written instructions by letter or e-mail. The consumer information required under these provisions, such as the identity of the provider and its complaints handling processes, will be addressed by most firms through their terms of business documentation. The most important feature is the client's entitlement to a seven day cooling-off period. If the client is not advised of this, they are then entitled to a period of three months to opt out of the services provided, meaning that they could refuse to pay for the substantial amounts of work that might be done for them over this period.

Unfortunately the situation where the private client instructs a firm in person but other than at the firm's offices (i.e. they are physically present but not in the firm's offices) is more complex and brings greater risk to the firm. Remarkably, non-compliance is stated to be a criminal offence, but the greater practical risk is non-payment of any fees due for the matter concerned. Here the *Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008*, apply. Unlike the distance selling provisions it is not possible to comply by notice in any written terms of business and a form needs to be completed at the first meeting. Whether it was ever really the intention to include solicitors in these provisions is unclear, but where the regulations apply compliance should, of course, be regarded as essential.

The EU Consumer Rights Directive has resulted in various statutory changes, including a *Consumer Rights Bill*, but it is the *Information, Cancellation and Additional Payments Regulations* that will have the greatest impact on law firms. The main changes will be an extension to fourteen days from the current seven for cancellation rights and re-definitions of the information to be supplied for relevant *"on-premises"* and *"off-premises"* contracts. The complexity of the new provisions makes the best advice to ensure compliance with the current regime until the change-over date in June and then to adopt the new terms and paperwork on that date.

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The importance of paying close attention to the terms of the solicitor/client retainer has also been demonstrated in two unusual High Court decisions during the last month.

In *Blankley v Manchester NHS Trust [2014] EWHC 168 (QB)* where a party to a legal action lost her mental capacity in the course of the proceedings, her loss of capacity did not have the automatic and immediate effect of frustrating or terminating her solicitor's retainer. Whilst the incapacity removed the solicitor's authority to act on her behalf, that authority could be restored when she regained capacity or when a deputy was appointed and gave instructions to the solicitor. Whilst a significant decision for solicitors conducting pre-April 2103 personal injury claims under CFAs, it may not always be in the best interests of the firm for such a retainer to continue unbroken. The ability to reserve the right to terminate in such circumstances may be an option worth considering.

In *Kingstons (Solicitors) v Reiss Solicitors 4 Feb 2014* a bill of costs provided by solicitors acting as agent for another firm was not regarded as a bill of costs for the purposes of the Solicitors Act 1974 s 69 where a covering email had indicated that the document had been drafted to facilitate costs negotiation rather than to represent an actual invoice to the principal firm. The solicitor agent not only failed to recover the higher "inflated" figure for costs but also now faces a possible SRA investigation as the court ordered that the judgment should be sent to the Law Society President. This judgment emphasises that there should always be complete transparency regarding costs whether between solicitor and client or solicitor and third party

The rather familiar theme of the contents of this month's column is the need to ensure that terms of business are complete, appropriate for the firm and are in use by all fee earners – a message that does stand repetition. ■

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