By Jayne Willetts
Solicitor Advocate
Jayne Willetts & Co -
Specialists in Professional
Regulation

MUST THE CLIENT SIGN THE RETAINER LETTER?

The retainer process is, of course, critical to the whole process of engaging with clients in relation to the services to be provided. More than just a regulatory requirement, it is also key to being able to recover your firm's fees in those unfortunate circumstances when it is necessary to take legal action in relation to any fees that remain unpaid.

The standard advice for many years has been to ensure that the client signs and returns a copy of the retainer letter (and/or a duplicate set of Terms of Business) in order to ensure that there is a clear agreement as to both the scope of the work to be done and the terms and conditions that will apply. The problem for most firms is what to do if, as is commonly the case, the client fails or refuses to do so – is the firm safe to continue to act or does the failure to have a signed retainer on file amount, in effect, to a failure of contract?

There is encouraging news on this issue to be found in the recently reported case of *Fladgate LLP v Lee Harrison [2012] EWHC 67*. The case concerned some complex work arising from the restructuring of a property development company. The instructions were initially to act for the defendant in person which, following a change to the law on the extent of permitted financial assistance by a company in 2008, was part funded by the company. The fees in dispute amounted to just over £60,000.

The firm had been commendably thorough in establishing a retainer with the client. Following an initial meeting the partner involved had sent a draft engagement letter asking the client to comment if he did not agree with its provisions in any way. Having had no response to this communication the firm sent a final version of the letter, along with its standard terms of business, to the client with the standard request that a duplicate copy should be signed and returned to the firm. The firm did not receive any response from the client, but continued to act on the basis of the letter that had been sent.

The client subsequently claimed that there was no valid retainer in place with the firm and that the invoices were therefore invalid. The court did services in this case for the acceptance slip to be signed. They took the view instead that the retainer had been agreed orally and could be *"implied by the conduct of the Defendant in employing the Claimant to carry out the work requested by him"*.

Although it did not specifically arise in this case this might suggest that the wording adopted by many firms to cover this eventuality – to the effect that if the signed acceptance is not received *"your continued instructions will amount to an agreement"* of the contents of the documents supplied may well be more effective than some had thought.

So far, so good, but two major caveats do need to be stated. First, as always, this judgment is based just as much on the particular facts of the case as on any immutable principles of law, and the judge's views on the reliability of both parties was clearly relevant to the outcome of the case. Secondly, and perhaps more importantly, the combined effect of Rule 48.8 of the Civil Procedure Rules, taken with section 74(3) of the Solicitors Act 1974, is that the firm may be at risk of being limited to party and party costs in County Court proceedings unless they have a written agreement as to the terms of business that has been signed by the client.

All in all, *Fladgate v Lee Harrison* should provide re-assurance for firms but should not justify any relaxation of your current stance if it is to insist upon, or to use your best endeavours to, obtain a signed agreement from your client at the outset of each engagement. Doing anything less should still be seen to be a risk, though it is clear that a well maintained file, with good and detailed communication to the client recorded within it, is capable of amounting to a valid agreement. This is not the case where the amount of costs at risk does directly depend on having a signed retainer, however, and in these areas of the practice at least the rule should be that you will not act if the signed acceptance has not been received. ■

STOP PRESS – the Legal Ombudsman has changed postal address to Legal Ombudsman, PO Box 6806, Wolverhampton WV1 9WJ. You will need to amend your client care letters and