

Benefit of doubt: why you should be serious about note taking

The courts are likely to interpret ambiguities in your communications with clients in their favour, so getting documents properly drafted in the first place is in your interest, says

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Skill and experience are required to produce notes and communications which record advice and instructions to the right level of detail: too little and uncertainty remains, too much and the client may be left with a confusing transcript which takes away the value of concluded advice and creates doubt.

So it is perhaps surprising that a profession which is closely concerned with recording transactions and marshalling evidence should often fail to record its own dealings with clients adequately. Many clients like informality and may associate it with value for money, but a solicitor who fails to document dealings with clients adequately will find that the client is likely to benefit from any doubt.

Describing limits

Leaving aside service and conduct requirements, the issue can arise most acutely when a solicitor is sued for negligence. It will be relevant to know what advice the solicitor was retained to give and what advice was actually given. Letters confirming the terms of engagement will usually have been sent but insufficient care may have been taken in describing the limits of the

advice. The client may not even know that he needs, for example, tax advice while the solicitor may simply take it as obvious that he is not giving it. That would be a mistake.



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The attitude of the courts was expressed by Lightman J in *Hurlingham Estates v Wilde* [1997] 1 Lloyd's Rep 525:

"...the client must be fully informed as to the limited reliance he may place on his solicitor and the reason for it (i.e. the solicitor's lack of any basic knowledge or competence), that this limitation is not a normal term of a solicitor's engagement, and that the client may be better advised to go to another

solicitor who is not so handicapped and can be retained with no such limitation on his duties. Common sense requires that all these matters should also be recorded in an attendance note of the meeting where they are discussed and agreed, and should subsequently be recorded in a letter to the client. The letter is required, not merely to evidence what has been agreed, but to ensure that, after receipt of the letter, the client can consider (and discuss with others) the position and its implications away from, and free from any constraints imposed by, the presence of the solicitor."

Different recollection

In relation to the advice itself, oral communication is obviously technically sufficient but the risks of differing recollections or misunderstanding are much more likely to disadvantage the solicitor than the client.

A competent solicitor will be expected to make a written note of any discussion in which advice is given or instructions obtained. It is the solicitor's duty to take reasonable steps to ensure that the client appears to understand the advice and the substance of the instructions they are giving. It is the

solicitor's duty to ascertain the client's wishes correctly. There will be occasions when a written communication is essential – for example where the risks are high or the advice unpalatable. In the absence of an attendance note, the assertion from an experienced solicitor that particular advice would always have been given in certain circumstances is likely to fail.

The client will not necessarily be expected to express his requirements in correct terminology or even very clearly. If it comes to a dispute about what the client required to have covered or the advice given, the client's evidence is likely to be preferred on the basis that it was the solicitor's duty to establish and record the position, not the client's to make it clear. **SJ**



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