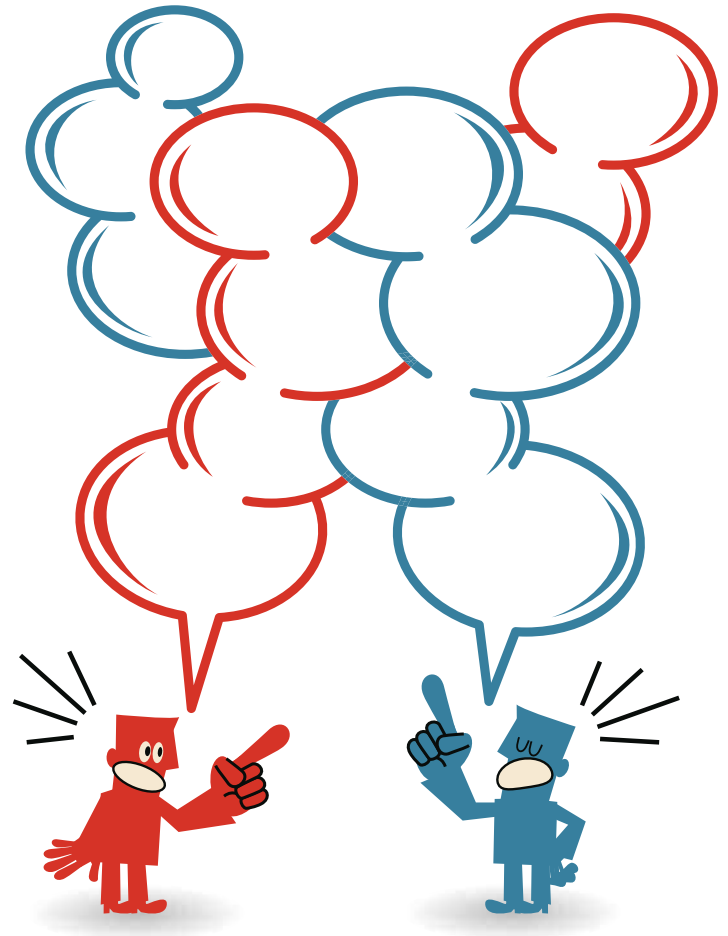


Communication is a two-way street



How lawyers can help clients become better communicators – and vice-versa

Some solicitors may think that the responsibility for maintaining appropriate solicitor/client communications lies solely with them. It is true that solicitors who fail to

adequately communicate with their clients risk losing those clients – or even facing a malpractice claim.

But it is also true that clients have reciprocal obligations to disclose relevant facts, to communicate their need for additional explanation, and in certain cases, to review legal documents sent by the solicitor and communicate their concerns and instructions with respect to them.

Clients' communication obligations

Can you coach your clients so they can better help you to help them? Setting out your expectations in terms of client communication at the start of the retainer can be a powerful tool in achieving a successful outcome for the client. Consider the following case law in deciding how to frame your client communication requirements.

Clients should disclose relevant facts, ask for further explanation

Justice Denis Power's decision in *Michiels v. Kinneer and Vadala*¹ holds that clients must disclose relevant facts to their solicitors and ask for additional explanation if there is something that the client does not understand.

The lawyer acted for the plaintiff and her late husband in making a gift of their home to the husband's niece. The plaintiff later regretted making the gift and sued the solicitor as well as the niece and the niece's husband.

The court held that the solicitor did not cause the plaintiff's loss, because she and her late husband were determined to make the gift. There was no advice that any solicitor could have given which would have dissuaded them from doing so.²

The following year, the plaintiff released the life interest which she had retained at the time of the conveyance to her niece, so that the niece could obtain a mortgage to renovate the property.

The plaintiff claimed that she was functionally illiterate and did not understand what she was signing on either occasion.

Power, J. held that if the plaintiff was functionally illiterate, she clearly had an obligation to point this out to both lawyers who had advised her. Most people assume that, unless there is some indication to the contrary, the person with whom they are dealing is literate. Both lawyers explained the documents to the plaintiff. They reasonably assumed that if she had any difficulty understanding them, she would have said so.

Power, J. referred to *Dawe (c.o.b. Dawe and Dawe Fisheries) v. Brown*,³ where Schwartz J., at para. 44, stated:

44... It is incumbent on the client to explain the problem fully, provide all facts pertaining to the matter including anything which might be detrimental to the possibility of a successful claim, and to give the lawyer instructions on proceeding after being fully advised. It is only then that a solicitor can act properly on behalf of the client.

In Justice Power's opinion, it is incumbent on clients who do not understand what they are being asked to sign to ask for a better explanation, just as an illiterate client must point out to the lawyer that he or she is illiterate.⁴

If the first lawyer's negligence had caused loss to the plaintiff, Power, J. would have reduced the plaintiff's damages by 50 per cent to account for her contributory negligence in failing to disclose her alleged illiteracy and lack of understanding of the documents she signed.⁵

Clients should review legal documents sent by the lawyer

The courts have long accepted that clients, especially experienced business clients, should read the legal documents sent to them by their solicitors for review and comment.

In *Duncan v. Cuelenaere, Beaubier, Walters, Kendall & Fisher*,⁶ the plaintiff's crops were damaged by hail. The plaintiff gave his lawyer the wrong date of loss, which caused the statement of claim to be issued outside the limitation period. The plaintiff had the opportunity to read the statement of claim before the limitation period expired.

The court stated:

... (the lawyer) was entitled to assume that an experienced business person would take care in giving instructions to his counsel and that the dates and descriptions of the lands affected would be accurate. He was also entitled to

assume that a client would care enough to review important legal documents sent to him. The plaintiff failed to take the most basic steps to ensure that his instructions were being discharged. He knew better than anyone the facts prevailing and could be expected to detect any errors immediately.⁷

Duncan v. Cuelenaere was followed in *Hallmark Financial v. Fraser & Beatty*.⁸ In *Hallmark*, the court held that the solicitors were entitled to assume that their clients, experienced business people, would review the purchase agreement to ensure that its business provisions reflected their understanding of the letter of intent. The clients reviewed the agreement and made no changes.

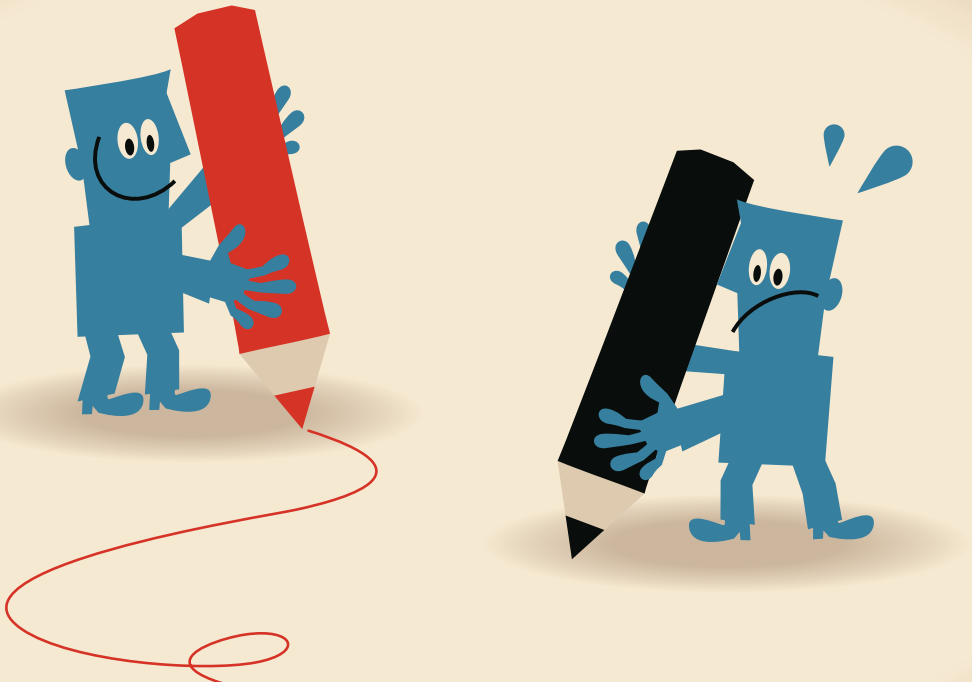
The approach taken in these cases was recently confirmed in *3557537 Canada Inc. v. Howard*,⁹ an action by a sophisticated businessman against his solicitor. The lawyer and client had frequent conversations concerning the transaction and the documentation as the transaction evolved.

The court held that the client recognized the need to review and understand the documentation which was sent to him. He knew that if he did not understand a provision in the documentation he should say so. He knew that it was important to ensure that the documentation correctly reflected the business deal he had made. He knew that if he was uncertain whether or not it did so, he should say so. The solicitor was not responsible for the client's failure to do so.¹⁰

Lawyers' communication obligations

Articles published elsewhere in this magazine discuss the very real client dissatisfaction caused by solicitors' failure to discuss what the solicitor can reasonably accomplish on the client's behalf, failure to keep clients informed of the progress of their cases, failure to adequately discuss fees, and so forth. Below we discuss miscommunication which gives rise to malpractice claims.

A prime example of such miscommunication is failure to come to an understanding about



what the solicitor will or will not do for the client. The issue is complicated by the fact that, in some cases, the client needs the solicitor's guidance in defining what the solicitor's retainer should be.

Personal injury claims are the most obvious example. In other cases, the client is sophisticated, but something nevertheless "falls between the cracks." A third source of difficulty is the extent to which advice must be put in writing.

Defining the scope of the retainer

Jackson & Powell on Professional Liability – Sixth Edition, the leading British text on professional liability, contains the following warning at p. 659:

The need for writing. Where the retainer is oral, the solicitor ought, for the benefit of both parties, to record the terms in a letter to his client at the outset. At the very least, the nature of the retainer should be recorded in an attendance note. If the solicitor neglects this precaution and later there is a dispute as to what he was instructed to do, the solicitor will begin at a disadvantage.

If a solicitor considers that the services he is performing for a client are only limited, this should be put in writing to avoid misunderstanding. Similarly it is prudent for a solicitor to record in writing the advice that he gives during the retainer.

Limited retainers

Limited retainers have been a fruitful source of malpractice claims. Whether a solicitor can establish that his or her retainer was properly "limited" is extremely fact-driven and unpredictable.

The best known limited retainer case is *ABN Amro Bank Canada v. Gowling, Strathy & Henderson*.¹¹ The law firm acted for the lender client. It was the law firm's responsibility to obtain evidence that business interruption insurance was in place before the loan proceeds were advanced. The firm alleged that the lender had nevertheless agreed to undertake this responsibility. The lender, as plaintiff, denied this. The law firm was held liable. Any attempt to "limit" a solicitor's retainer to exclude a matter otherwise required should be done in simple, clear, concise language, reduced to writing. The law firm did not do so.

The outcome for the solicitor was happier in *Woodglen & Co. v. Owens*.¹² A sophisticated developer's action against the lawyer was dismissed. The developer asked the solicitor to carry out several specific but limited tasks, which he did. The developer retained overall control of the project, and had engaged other planners and solicitors to help with the work. The defendant solicitor did everything he was retained to do. The developer was responsible for the lack of co-ordination between himself, the solicitor and his other legal and planning advisors.

In *Outaouais Synergist Incorporated v. Keenan*,¹³ the court found that responsibility for an important matter "fell between the cracks" as between solicitor and client, and the solicitors were responsible for this. The law firm acted for the plaintiff on the purchase of vacant commercial land near Ottawa. The purchaser and firm agreed that the purchaser would deal with the municipality of Ottawa in relation to zoning and development issues, with the law firm to attend to the legal issues.

After closing, the plaintiff learned that its property was subject to a 0.3 metre reserve around its perimeter in favour of Ottawa. The plaintiff could not get access to the property, unless the reserve was lifted. Ottawa had spent over \$200,000 on road improvements, and the reserve was its way of ensuring repayment. The purchaser unwittingly took the property subject to this obligation, which was not registered.

James J. held that the plaintiff, in taking responsibility for development issues, never appreciated the access implications of the 0.3 metre reserve. The interplay between the development control aspect of the 0.3 metre reserve and its relationship with the legal issue of access was a "question of doubt" in the scope of the lawyer's retainer. The law firm failed to establish a "bright line" between its responsibilities and those of the client. Consequently, the due diligence obligation with respect to the 0.3 metre reserve was not effectively transferred to the client. This judgment is under appeal.

Distinguishing between a limited retainer and an ordinary retainer

Because any attempt to limit a solicitor's retainer must be done in simple, clear language (preferably reduced to writing), it is important to distinguish between what is or is not a limited retainer.

*Broesky v. Lust*¹⁴ is helpful on this issue. The plaintiff client retained the lawyer to pursue her claim for disability benefits, which he did. The plaintiff alleged that she also retained the lawyer to pursue tort and SAB claims. Mackinnon, J. dismissed the plaintiff's action. The court found that the lawyer was retained only for the disability claim, even though the defendant never expressly stated in writing that he would NOT be handling the tort and SAB claims.

This case supports two useful principles:

- a limited retainer, as properly understood, refers to a solicitor undertaking a lesser level of service than a reasonably competent solicitor would provide in the circumstances. Examples of limited retainers include closing a real estate transaction without a title search or advising about a separation agreement without obtaining financial disclosure. Pursuing a disability claim on the client's instructions – but not a tort or SAB claim – is not a limited retainer; and
- it is not negligent for a solicitor to fail to confirm a non-retainer in writing, although it is prudent to do so. Such a letter is for the solicitor's protection. A non-retainer letter should be distinguished from a letter limiting a solicitor's retainer.

Other useful limited retainer cases include *Coughlin v. Comery*¹⁵ and *Holomeg v. Brady*.¹⁶

Failure to confirm with client that the retainer is spent

In *120 Adelaide Leaseholds Inc. v. Thomson, Rogers*,¹⁷ the law firm acted on the purchase of a leasehold interest in a Toronto

commercial building. It was instructed to exercise all options to renew immediately after closing. It proved impossible to do so. The solicitors considered that their instructions were "spent." This was not confirmed with the client. The solicitors were held liable when the option to renew was not exercised in a timely fashion.

A client is not obliged to follow up with his solicitor to inquire whether the solicitor has followed the client's instructions. A client is entitled to rely upon the solicitor to follow its instructions, in the absence of clear advice to the contrary.

Must oral advice be confirmed in writing?

In most cases, failing to put advice in writing is not negligence, so long as the advice was given clearly and the client understood it. It is a sensible precaution for solicitors to either give their advice in writing or to make an attendance note of all oral advice, but that is principally for their own protection.¹⁸

There are exceptions to every rule. *Turi v. Swanick*¹⁹ illustrates that confirming advice in writing may be necessary to ensure that the client understands and remembers the advice.

The plaintiff client retained the solicitor to incorporate a company to operate his new store, in order to avoid personal liability for the store's debts. Nevertheless, the plaintiff was found liable to one of the store's creditors because he signed an account application and a purchase order in his personal capacity.

The plaintiff sued his lawyer to recover this amount. Spiegel, J. found that the plaintiff was an unsophisticated businessman, and that the lawyer's advice about the proper use of the corporate name must have "gone in one ear and out the other." The lawyer should have sent his client a short written memorandum setting out the advice concerning the proper use of the corporate name; his failure to do so, in this case, fell below the appropriate standard of care.

Conclusion

Communication is indeed a two-way street. A solicitor must clearly establish, from the beginning, the scope of his or her retainer. Any limits on the retainer should be confirmed in writing. Although clear oral advice is generally acceptable, some clients may require that the advice be confirmed in writing.

Clients, on the other hand, must make their solicitors aware of all relevant facts. If the client does not understand the solicitor's advice, the client should say so. Clients, especially business clients, should carefully read documents sent by the solicitor for their review and comment. Letting the clients know their role in good communication may help them avoid problems for themselves in the long term. ■

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¹ 2011 ONSC 3826 (S.C.J.)

² *Ibid.*, at para. 20

³ (1995), 130 Nfld. & P.E.I.R. 281 (S.C.)

⁴ *Michiels v. Kinnear*, *supra*, paras. 157, 158

⁵ *Ibid.*, para. 174

⁶ [1987] 2 W.W.R. 379 (Sask.Q.B.)

⁷ *Ibid.*, at p. 383

⁸ (1991), 1 O.R. (3d) 641 (Ont. Ct. Gen. Div.)

⁹ 2011 ABQB 212. (Alta. Q.B.); pdf copy available from debra.rolph@lawpro.ca

¹⁰ *Ibid.*, at para. 318

¹¹ (1995), 20 O.R. (3D) 779 (Ont. Ct. Gen. Div.)

¹² (1999), 27 R.P.R. (3d) 237 (Ont. C.A.), affirming (1997), 6 R.P.R. (3d) 259 (Ont. Ct. Gen. Div.)

¹³ 2011 ONSC 637 (S.C.J.)

¹⁴ 2011 ONSC 167 (S.C.J.)

¹⁵ [1998] O.J. No. 4066 (Ont. C.A.), dismissing appeal from [1996] O.J. No. 822 (Ont. Ct. Gen. Div.)

¹⁶ [2004] O.J. No. 5283 (S.C.J.)

¹⁷ (1995), 43 R.P.R. (2d) 68 (Ont. Ct. Gen. Div.)

¹⁸ *Harwood v. Taylor Vinters (A Firm)*, [2003] E.W.J. No. 3352; [2003] EWCA Civ. 907; see also *Kumar v. Atkinson*, [2004] O.J. No. 3151; *Accurate Fasteners v. Gray*, [2005] O.J. No. 4175; *Dinevski v. Snowdon*, 2010 ONSC 2715 (S.C.J.)

¹⁹ (2003), 61 O.R. (3d) 368 (S.C.J.)