

Rule 2 – Client relations

Introduction

Rule 2 is designed to help both you and your clients understand each other's expectations and responsibilities. In particular, the purpose of 2.02 (Client care) and 2.03 (Information about the cost) is to ensure that clients are given the information necessary to enable them to make appropriate decisions about if and how their matter should proceed. Under rule 5 (Business management) a principal in a firm, a director of a recognised body which is a company and a member of a recognised body which is an LLP, must effect supervision and put in place management arrangements to provide for compliance with rule 2. The rule does not apply to your overseas practice but you must comply with 15.02.

Rule 2 – Client relations

2.01 Taking on clients

- (1) You are generally free to decide whether or not to take on a particular client. However, you must refuse to act or cease acting for a client in the following circumstances:
 - (a) when to act would involve you in a breach of the law or a breach of the rules of professional conduct;
 - (b) where you have insufficient resources or lack the competence to deal with the matter;
 - (c) where instructions are given by someone other than the client, or by only one client on behalf of others in a joint matter, you must not proceed without checking that all clients agree with the instructions given; or
 - (d) where you know or have reasonable grounds for believing that the instructions are affected by duress or undue influence, you must not act on those instructions until you have satisfied yourself that they represent the client's wishes.
- (2) You must not cease acting for a client except for good reason and on reasonable notice.

2.02 Client care

- (1) You must:
 - (a) identify clearly the client's objectives in relation to the work to be done for the client;

- (b) give the client a clear explanation of the issues involved and the options available to the client;
 - (c) agree with the client the next steps to be taken; and
 - (d) keep the client informed of progress, unless otherwise agreed.
- (2) You must, both at the outset and, as necessary, during the course of the matter:
- (a) agree an appropriate level of service;
 - (b) explain your responsibilities;
 - (c) explain the client's responsibilities;
 - (d) ensure that the client is given, in writing, the name and status of the person dealing with the matter and the name of the person responsible for its overall supervision; and
 - (e) explain any limitations or conditions resulting from your relationship with a third party (for example a funder, fee sharer or introducer) which affect the steps you can take on the client's behalf.
- (3) If you can demonstrate that it was inappropriate in the circumstances to meet some or all of these requirements, you will not breach 2.02.

2.03 Information about the cost

- (1) You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses. In particular you must:
- (a) advise the client of the basis and terms of your charges;
 - (b) advise the client if charging rates are to be increased;
 - (c) advise the client of likely payments which you or your client may need to make to others;
 - (d) discuss with the client how the client will pay, in particular:
 - (i) whether the client may be eligible and should apply for public funding; and
 - (ii) whether the client's own costs are covered by insurance or may be paid by someone else such as an employer or trade union;
 - (e) advise the client that there are circumstances where you may be entitled to exercise a lien for unpaid costs;
 - (f) advise the client of their potential liability for any other party's costs; and
 - (g) discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained.

- (2) Where you are acting for the client under a conditional fee agreement, (including a collective conditional fee agreement) in addition to complying with 2.03(1) above and 2.03(5) and (6) below, you must explain the following, both at the outset and, when appropriate, as the matter progresses:
 - (a) the circumstances in which your client may be liable for your costs and whether you will seek payment of these from the client, if entitled to do so;
 - (b) if you intend to seek payment of any or all of your costs from your client, you must advise your client of their right to an assessment of those costs; and
 - (c) where applicable, the fact that you are obliged under a fee sharing agreement to pay to a charity any fees which you receive by way of costs from the client's opponent or other third party.
- (3) Where you are acting for a publicly funded client, in addition to complying with 2.03(1) above and 2.03(5) and (6) below, you must explain the following at the outset:
 - (a) the circumstances in which they may be liable for your costs;
 - (b) the effect of the statutory charge;
 - (c) the client's duty to pay any fixed or periodic contribution assessed and the consequence of failing to do so; and
 - (d) that even if your client is successful, the other party may not be ordered to pay costs or may not be in a position to pay them.
- (4) Where you agree to share your fees with a charity in accordance with 8.01(k) you must disclose to the client at the outset the name of the charity.
- (5) Any information about the cost must be clear and confirmed in writing.
- (6) You must discuss with your client whether the potential outcomes of any legal case will justify the expense or risk involved including, if relevant, the risk of having to pay an opponent's costs.
- (7) If you can demonstrate that it was inappropriate in the circumstances to meet some or all of the requirements in 2.03(1) and (5) above, you will not breach 2.03.

2.04 Contingency fees

- (1) You must not enter into an arrangement to receive a contingency fee for work done in prosecuting or defending any contentious proceedings before a court of England and Wales, a British court martial or an arbitrator where the seat of the arbitration is in England and Wales, except as permitted by statute or the common law.
- (2) You must not enter into an arrangement to receive a contingency fee for work done in prosecuting or defending any contentious proceedings before a court of an

overseas jurisdiction or an arbitrator where the seat of the arbitration is overseas except to the extent that a lawyer of that jurisdiction would be permitted to do so.

2.05 Complaints handling

- (1) If you are a principal in a firm you must ensure:
 - (a) that the firm has a written complaints procedure and that complaints are handled promptly, fairly and effectively in accordance with it;
 - (b) that the client is told, in writing, at the outset:
 - (i) that, in the event of a problem, the client is entitled to complain; and
 - (ii) to whom the client should complain;
 - (c) that the client is given a copy of the complaints procedure on request; and
 - (d) that once a complaint has been made, the person complaining is told in writing:
 - (i) how the complaint will be handled; and
 - (ii) within what timescales they will be given an initial and/or substantive response.
- (2) If you can demonstrate that it was inappropriate in the circumstances to meet some or all of these requirements, you will not breach 2.05.
- (3) You must not charge your client for the cost of handling a complaint.

2.06 Commissions

If you are a principal in a firm you must ensure that your firm pays to your client commission received over £20 unless the client, having been told the amount, or if the precise amount is not known, an approximate amount or how the amount is to be calculated, has agreed that your firm may keep it.

2.07 Limitation of civil liability by contract

If you are a principal in a firm you must not exclude or attempt to exclude by contract all liability to your clients. However, you may limit your liability, provided that such limitation:

- (a) is not below the minimum level of cover required by the Solicitors' Indemnity Insurance Rules for a policy of qualifying insurance;
- (b) is brought to the client's attention; and
- (c) is in writing.

Guidance to rule 2 – Client relations

General

1. The requirements of rule 2 do not exhaust your obligations to clients. As your client's trusted adviser, you must act in the client's best interests (see 1.04) and you must not abuse or exploit the relationship by taking advantage of a client's age, inexperience, ill health, lack of education or business experience, or emotional or other vulnerability.
2. It is not envisaged or intended that a breach of 2.02, 2.03 or 2.05 should invariably render a retainer unenforceable. As noted in the introduction to this rule, the purpose of 2.02 and 2.03 is to ensure that clients are given the information necessary to enable them to make appropriate decisions about if and how their matter should proceed. These parts of the rule together with 2.05 require you to provide certain information to your client. Subrules 2.02(3), 2.03(7) and 2.05(2) recognise that it is not always necessary to provide all this information to comply with the underlying purpose of the rule. Similarly, the information you are required to give to your client varies in importance both inherently and in relation to the individual client and the retainer. Consequently, the rule will be enforced in a manner which is proportionate to the seriousness of the breach. For example, if you were to fail to tell your client that they would be liable to pay another party's costs in breach of 2.03(1)(f), this is likely to be treated as a more serious breach than your failure to advise your client about your right to exercise a lien for unpaid costs in breach of 2.03(1)(e).

You should note that a breach of rule 2 may provide evidence against a solicitor, an REL or a recognised body of inadequate professional services under section 37A of the Solicitors Act 1974. The powers of the Legal Complaints Service on a finding of an inadequate professional service include disallowing all or part of the solicitor's or REL's costs and directing the solicitor or REL to pay compensation to the client. Section 37A does not apply to you if you are an RFL. Solicitor and REL partners in a multi-national partnership (MNP) are subject to section 37A in respect of services provided by the MNP.

Taking on clients – 2.01

3. Subrule 2.01 identifies some situations where you must refuse to act for a client or, if already acting, must stop doing so.
4. Your right to decide not to accept instructions is subject to restrictions, including the following:
 - (a) You must not refuse for a reason that would breach rule 6 (Equality and diversity).
 - (b) Rule 11 (Litigation and advocacy), governing a solicitor or REL acting as an advocate, contains restrictions on when the solicitor or REL may refuse instructions.

- (c) Be aware of restrictions on when you can refuse to act or cease acting for a publicly funded client in a criminal matter.
5. If you are an in-house solicitor or in-house REL you are already in a contractual relationship with your employer who is, for the purpose of these rules, your client. You are not therefore necessarily as free as a solicitor or REL in a firm to refuse instructions, and will need to use your professional judgement in applying 2.01.
6. Subrule 2.01 sets out situations in which you must refuse instructions or, where appropriate, cease acting. These might include the following:
- (a) Breach of the law or rules
 - (i) where there is a conflict of interests between you and your client or between two or more clients – see rule 3 (Conflict of interests);
 - (ii) where money laundering is suspected, your freedom to cease acting is curtailed (see the Proceeds of Crime Act 2002, the Money Laundering Regulations 2003 (SI 2003/3075), other relevant law and directives, and guidance issued by the Board of the Solicitors Regulation Authority on this subject); and
 - (iii) where the client is a child or a patient (within the meaning of the Mental Health Act 1983), special circumstances apply. You cannot enter into a contract with such a person and, furthermore, if your client loses mental capacity after you have started to act, the law will automatically end the contractual relationship. However, it is important that the client, who is in a very vulnerable situation, is not left without legal representation. Consequently, you should notify an appropriate person (e.g. the Court of Protection), or you may look for someone legally entitled to provide you with instructions, such as an attorney under an enduring power of attorney, or take the appropriate steps for such a person to be appointed, such as a receiver or a litigation friend. This is a particularly complex legal issue and you should satisfy yourself as to the law before deciding on your course of action.

(b) Insufficient resources

Before taking on a new matter, you must consider whether your firm has the resources – including knowledge, qualifications, expertise, time, sufficient support staff and, where appropriate, access to external expertise such as agents and counsel – to provide the support required to represent the client properly. The obligation is a continuing one, and you must ensure that an appropriate or agreed level of service can be delivered even if circumstances change.

(c) Duress or undue influence

It is important to be satisfied that clients give their instructions freely. Some clients, such as the elderly, those with language or learning difficulties and

those with disabilities are particularly vulnerable to pressure from others. If you suspect that a client's instructions are the result of undue influence you need to exercise your judgement as to whether you can proceed on the client's behalf. For example, if you suspect that a friend or relative who accompanies the client is exerting undue influence, you should arrange to see the client alone or if appropriate with an independent third party or interpreter. Where there is no actual evidence of undue influence but the client appears to want to act against their best interests, it may be sufficient simply to explain the consequences of the instructions the client has given and confirm that the client wishes to proceed. For evidential purposes, it would be sensible to get this confirmation in writing.

7. As a matter of good practice you should not act for a client who has instructed another firm in the same matter unless the other firm agrees. If you are asked to provide a second opinion, you may do so but you should satisfy yourself that you have sufficient information to handle the matter properly.

Ceasing to act

8. A client can end the retainer with you at any time and for any reason. You may only end the relationship with the client if there is a good reason and after giving reasonable notice. The retainer is a contractual relationship and subject to legal considerations. Examples of good reasons include where there is a breakdown in confidence between you and the client, and where you are unable to obtain proper instructions.
9. If there is good reason to cease acting, you must give reasonable notice to the client. What amounts to reasonable notice will depend on the circumstances. For example, it would normally be unreasonable to stop acting for a client immediately before a court hearing where it is impossible for the client to find alternative representation. In such a case, if there is no alternative but to cease acting immediately, you should attend and explain the circumstances to the court – see rule 11 (Litigation and advocacy). There may be circumstances where it is reasonable to give no notice.
10. The relationship between you and your client can also be ended automatically by law, for example by the client's bankruptcy or mental incapacity (see note 6(a)(iii) above).
11. When you cease acting for a client, you will need to consider what should be done with the paperwork. You must hand over the client's files promptly on request subject to your right to exercise a lien in respect of outstanding costs. You should try to ensure the client's position is not prejudiced, and should also bear in mind his or her rights under the Data Protection Act 1998. Undertakings to secure the costs should be used as an alternative to the exercise of a lien if possible. There may be circumstances where it is unreasonable to exercise a lien, for example, where the amount of the outstanding costs is small and the value or importance of the matter is very great. In any dispute over the ownership of documents you should refer to the

law. Further advice about the law of lien or the ownership of documents can be found in Cordery on Solicitors or other reference books on the subject.

Client care – 2.02

12. The purpose of 2.02 is to set out the type of information that must normally be given to a client. This information must be provided in a clear and readily accessible form.
13. Subrule 2.02 is flexible about the extent of the information to be given in each individual case. Over-complex or lengthy terms of business letters may not be helpful.
14. The “level of service” to be provided should be agreed at the outset. For example, the client may want regular written reports. Alternatively, the client may want to provide initial instructions then to hear no more until an agreed point has been reached. This will affect the projected costs of the matter.
15. When considering the options available to the client (2.02(1)(b)), if the matter relates to a dispute between your client and a third party, you should discuss whether mediation or some other alternative dispute resolution (ADR) procedure may be more appropriate than litigation, arbitration or other formal processes. There may be costs sanctions if a party refuses ADR – see *Halsey v Milton Keynes NHS Trust and Steel and Joy* [2004] EWCA (Civ) 576. More information may be obtained from the Law Society’s Practice Advice Service.
16. Subrule 2.02(2)(e) requires you to explain limitations or conditions on your acting arising from your relationship with a third party. Where such a relationship involves sharing any client information with a third party, you must inform the client and obtain their consent. Failure to do so would be a breach of client confidentiality (see rule 4 (Confidentiality and disclosure)) and possibly also a breach of the Data Protection Act 1998. Some arrangements with third parties, such as introducers under rule 9 (Referrals of business) or fee sharers under rule 8 (Fee sharing), may constrain the way in which you handle clients’ matters.
17. The constraints that such arrangements impose may fall into one of the following categories:
 - (a) Constraints which are proper and do not require disclosure to the client. These normally relate to service standards such as dealing with client enquiries within a specified time, the use of specified computer software, telecommunications systems, a particular advertising medium, or particular training provision.
 - (b) Constraints which are proper but require disclosure to the client. Some third parties may have a legitimate interest in the progress of the client’s matter and the way it is dealt with – for instance, third parties who fund a client’s matter, and insurers. Constraints that they impose, e.g. that you will not issue proceedings without the authority of the funder are proper provided they do

not operate against the client's best interests, but should be disclosed to the client.

- (c) Constraints which are improper cannot be remedied by disclosing them to the client. These are constraints which impair your independence and ability to act in the client's best interests. You cannot accept an arrangement which involves such constraints. They might include, for instance, requirements that you do not disclose information to the client to which the client is entitled, or give advice to the client which you know is contrary to the client's best interests, or with which you disagree, or that you act towards the court in a deceitful manner or lie to a third party.
18. You must give the required information to the client as soon as possible after you have agreed to act. You must then keep the client up to date with the progress of the matter and any changes affecting the original agreement.
 19. The status of the person dealing with your client must be made absolutely clear, for legal and ethical reasons. For example, a person who is not a solicitor must not be described as one, either expressly or by implication. All staff having contact with clients, including reception, switchboard and secretarial staff, should be advised accordingly.
 20. All clients affected by a material alteration to the composition of the firm must be informed personally. Where the person having conduct of a matter leaves a firm, the client in question must be informed, preferably in advance, and told the name and status of the person who is to take over their matter.
 21. Subrule 2.02(2)(d) refers to the person responsible for the overall supervision of a matter. Supervision requirements are dealt with in rule 5 (Business management) and guidance about who can supervise matters may be found there.
 22. There may be circumstances when it would be inappropriate to provide any or all of the information required by 2.02. It will be for you to justify why compliance was not appropriate in an individual matter. For example, where you are asked for "one-off" advice, or where you have a long-standing client who is familiar with your firm's terms of business and knows the status of the person dealing with the matter, this information may not need to be repeated. However, other aspects of 2.02 must be complied with and the client must be kept up to date and informed of changes.
 23. If you are an in-house solicitor or in-house REL much of 2.02 will be inappropriate when you are acting for your employer. However, it may be necessary for you to comply with aspects of 2.02 when you are acting for someone other than your employer in accordance with rule 13 (In-house practice).
 24. If you receive instructions from someone other than your client, you must still give the client the information required under 2.02. There are, however, exceptions to this. For example, where your client is represented by an attorney under a power of attorney or where a receiver has been appointed because the client has lost mental

capacity, the information required by 2.02 should be given to the attorney or receiver.

25. In order to provide evidence of compliance with 2.02, you should consider giving the information in writing even though this is not a requirement.
26. Where you are, in effect, your firm's client – for example, as an executor administering a deceased's estate or a trustee of a trust – you should consider what information, if any, should be given to interested parties. There is no requirement, for example, that beneficiaries under a will or trust should be treated as though they were clients. It may, however, be good practice to provide some information – for example, about the type of work to be carried out and approximate timescales.

Information about the cost – 2.03

27. The purpose of 2.03 is to ensure that the client is given relevant costs information and that this is clearly expressed. Information about costs must be worded in a way that is appropriate for the client. All costs information must be given in writing and regularly updated.
28. Subrule 2.03 recognises that there may be circumstances where it would be inappropriate to provide any or all of the information required. It will be for you to justify why compliance was not appropriate in an individual matter. For example, your firm may regularly do repeat work for the client on agreed terms and the client might not need the costs information repeated. However, the client should be informed, for example, of any changes in a firm's charging rates.
29. If you are an in-house solicitor or REL, much of 2.03 will be inappropriate if you are acting for your employer.
30. This guidance does not deal with the form a bill can take, final and interim bills, when they can be delivered and when and how a firm can sue on a bill. All these matters are governed by complex legal provisions, and there are many publications that provide help to firms and clients. Advice on some aspects of costs is available from the Law Society's Practice Advice Service.
31. You will usually be free to negotiate the cost and the method of payment with your clients. It will not normally be necessary for the client to be separately advised on the cost agreement. Different cost options may have different implications for the client – for example, where the choice is between a conditional fee agreement and an application for public funding. In those circumstances clients should be made aware of the implications of each option.

32. The rule requires you to advise the client of the circumstances in which you may be entitled to exercise a lien for unpaid costs. For more information see note 11 above.
33. Clients may be referred to you at a stage when they have already signed a contract for a funding arrangement – see also rule 9 (Referrals of business). You should explain the implications of any such arrangement fully including the extent to which the charges associated with such an arrangement may be recovered from another party to the proceedings.
34. There may be some unusual arrangements, however, where it should be suggested that the client considers separate advice on what is being proposed – for example, where you are to receive shares in a new company instead of costs. See also rule 3 (Conflict of interests) and 9.02(g) for details about your obligations to clients who have been referred to you.
35. Subrule 2.03 does not cover all the different charging arrangements possible or the law governing them. However, it does require that the chosen option is explained as fully as possible to the client. It also requires that if you have agreed to pay all, or part, of your fees to a charity in accordance with rule 8 (Fee sharing) the client must be informed at the outset of the name of that charity.
36. It is often impossible to tell at the outset what the overall cost will be. Subrule 2.03 allows for this and requires that you provide the client with as much information as possible at the start and that you keep the client updated. If a precise figure cannot be given at the outset, you should explain the reason to the client and agree a ceiling figure or review dates.
37. Particular information will be of relevance at particular stages of a client's matter. You should, for example, ensure that clients understand the costs implications of any offers of settlement. Where offers of settlement are made, clients must be fully informed of the amount to be deducted in respect of costs and how this figure is calculated. You should advise clients of their rights to assessment of your costs in such circumstances.
38. When a potential client contacts you with a view to giving you instructions you should always, when asked, try to be helpful in providing information on the likely costs of their matter.

Work under a conditional fee agreement or for a publicly funded client

39. Subrule 2.03(2) and (3) set out additional information which must be explained to the client when work is done under a conditional fee agreement or on a publicly funded basis. Conditional fee agreements are subject to statutory requirements and all agreements must conform to these. Where you are acting under a conditional fee agreement and you are obliged under a fee sharing agreement to pay to a charity any fees which you receive by way of costs from the client's opponent or other third party, the client must be informed at the outset of the name of that charity.

Payments to others

40. You must explain at the outset to your client any likely payments they will have to make. These could include court fees, search fees, experts' fees and counsels' fees. Where possible, you should give details of the probable cost and if this is not possible you should agree with the client to review these expenses and the need for them nearer the time they are likely to be incurred.

Contingency fees – 2.04

41. A “contingency fee” is defined in rule 24 (Interpretation) as any sum (whether fixed, or calculated either as a percentage of the proceeds or otherwise) payable only in the event of success.
42. If you enter into an arrangement for a lawful contingency fee with a client, what amounts to “success” should be agreed between you and your client prior to entering into the arrangement.
43. Under rule 24 (Interpretation), “contentious proceedings” is to be construed in accordance with the definition of “contentious business” in section 87 of the Solicitors Act 1974.
44. Conditional fees are a form of contingency fees. In England and Wales a conditional fee agreement for certain types of litigation is permitted by statute. See section 58 of the Courts and Legal Services Act 1990 (as amended by section 27 of the Access to Justice Act 1999) and 2.03(2) above for more information.
45. It is acceptable to enter into a contingency fee arrangement for non-contentious matters (see section 87 of the Solicitors Act 1974 for the definition of “non-contentious business”) but you should note that to be enforceable the arrangement must be contained in a non-contentious business agreement.
46. An otherwise contentious matter remains non-contentious up to the commencement of proceedings. Consequently, you may enter into a contingency fee arrangement for, for example, the receipt of commission for the successful collection of debts owed to a client, provided legal proceedings are not started.

Complaints handling – 2.05

47. The purpose of 2.05 is to encourage complaints to be properly and openly dealt with. There are huge benefits in terms of time, money and client satisfaction if complaints can be dealt with effectively at firm level.
48. The content of your firm's complaints handling procedure is a matter for the firm, but the procedure must be in writing, clear and unambiguous. If a complaint is made to the Legal Complaints Service (LCS) or the Solicitors Regulation Authority the firm will need to be able to demonstrate compliance. Everyone in the firm will need to know about this obligation to ensure that clients know who to contact if they have

a problem, the information to give the client when a complaint is made, and the importance of recording the stages of the complaint and the final outcome. When you acknowledge the complaint, your letter should contain details of the Legal Complaints Service, with the post and web addresses of that organisation. You should also explain that the client(s) can ask the LCS to become involved at the end of the firm's own complaints procedure if they are unhappy with the outcome. It is important to advise of the time limit, which is generally 6 months from the end of the firm's procedure, and can be checked by looking at the LCS website or by telephoning the LCS.⁴⁹ Your firm's arrangements for dealing with complaints must be fair and effective. Any investigation must be handled within an agreed timescale. Any arrangements must also comply with rule 6 (Equality and diversity).

50. Subrule 2.05(3) prevents you charging your client for the cost of handling a complaint. Dealing properly with complaints is an integral part of any professional business. The associated costs are part of the firm's overheads, and complainants must not be charged separately.
51. Subrule 2.05 allows for situations where it may be inappropriate to give all the information required.

Commissions – 2.06

52. Subrule 2.06 reflects the legal position, preventing a solicitor making a secret profit arising from the solicitor–client relationship.
53. A commission is:
 - (a) a financial benefit you receive by reason of and in the course of the relationship of solicitor and client; and
 - (b) arises in the context that you have put a third party and the client in touch with one another. (See *The Law Society v Mark Hedley Adcock and Neil Kenneth Mcroft* [2006] EWHC 3212 (Admin)).
54. Examples of what amounts to a commission include payments received from a stockbroker on the purchase of stocks and shares, from an insurance company or intermediary on the purchase or renewal of an insurance policy and from a bank or building society on the opening of a bank account. Also, a payment made to you for introducing a client to a third party (unless the introduction was unconnected with any particular matter which you were currently or had been handling for the client) amounts to a commission.
55. On the other hand, a discount on a product or a rebate on, for example, a search fee would not amount to a commission because it does not arise in the context of referring your client to a third party. Such payments are disbursements and the client must get the benefit of any discount or rebate.
56. A client can give informed consent only if you:

- (a) provide details concerning the amount; and
 - (b) make it clear that they can withhold their consent and, if so, the commission will belong to them when it is received by you.
59. Commission received may be retained only if the conditions within 2.06 are complied with and the arrangement is in your client's best interests – either:
- (a) it is used to offset a bill of costs; or
 - (b) you must be able to justify its retention – for example, the commission is retained in lieu of costs which you could have billed for work done in placing the business, but was not so billed.
57. It cannot be in the best interests of the client for you to receive the commission as a gift. There must be proper and fair legal consideration, such as your agreement to undertake legal work. In consequence, except where the commission is to be offset against a bill of costs:
- (a) it is important that consent is obtained prior to the receipt of the commission (and preferably before you undertake the work leading to the paying of the commission);
 - (b) for the purposes of complying with 2.06 you may not obtain your client's consent to retain the commission after you have received it. If consent is not given beforehand, there can be no legal consideration and so the money belongs to the client; and
 - (c) if you have obtained consent but the amount actually received is materially in excess of the estimate given to your client, you cannot retrospectively obtain consent to retain the excess. The excess belongs to your client and should be handled accordingly.
58. In order to minimise possible confusion and misunderstanding, and to protect both you and your client, it is recommended that the agreement containing the details about the commission be in writing.
60. If it is your intention from the outset to use the commission to offset a bill of costs, it should be (subject to there being no specific instructions concerning the use of the commission):
- (a) paid into client account as money on account of costs, if received before the bill has been submitted; or
 - (b) paid straight into office account if the bill has already been submitted.
61. Where you intend to retain the commission in lieu of costs and your client has provided their consent in accordance with 2.06, the money may be paid into office account as soon as it is received. Where you have requested your client's consent and it has been refused, the commission will belong to the client on receipt and must be paid into client account. It may then be paid to the client or used to offset a bill

subject to note 60 above. See the Solicitors' Accounts Rules 1998 for more information.

62. Where you are a sole trustee or attorney or a joint trustee or attorney only with other solicitors, you cannot give proper consent to your retaining commission by purporting to switch capacities. Furthermore, you are very likely to be acting contrary to your fiduciary obligations at law.
63. For further information about dealing with commission see Solicitors Financial Services (Scope) Rules 2001.

Limitation of civil liability by contract – 2.07

64. For the qualifying insurance cover currently required see the Solicitors' Indemnity Insurance Rules.
65. The details of any limitation must be in writing and brought to the attention of the client. Because such a limitation goes to the heart of the agreement between you and your client, you should ensure that your client knows about the limitation and, in your opinion, understands its effect. Consequently, it would not be appropriate to include the limitation

within a "terms of business" letter without specifically drawing your client's attention to it.

66. Where you are preparing a trust instrument for a client and that instrument includes a term or terms which has or have the effect of excluding or limiting liability in negligence for a prospective trustee, you should take reasonable steps before the trust is created to ensure that your client is aware of the meaning and effect of the clause. Extra care will be needed if you are, or anyone in or associated with, your firm is, or is likely later to become, a paid trustee of the trust.
67. Where you or another person in, or associated with, your firm is considering acting as a paid trustee you should not cause to be included a clause in a trust instrument which has the effect of excluding or limiting liability for negligence without taking reasonable steps before the trust is created to ensure that the settlor is aware of the meaning and effect of the clause.

It would be prudent to ensure both that:

- (a) there is evidence that you have taken the appropriate steps; and
 - (b) that evidence is retained for as long as the trust exists and for a suitable period afterwards.
68. Subrule 2.07 is subject to the position in law. The points which follow should be noted. The Solicitors Regulation Authority is entitled to expect you to undertake your own research and/or take appropriate advice as to the general law in this area.

Relying upon this guidance alone may not be sufficient to ensure compliance with the law.

- (a) Liability for fraud or reckless disregard of professional obligations cannot be limited.
 - (b) Existing legal restraints cannot be overridden. In particular, the courts will not enforce in your favour an unfair agreement with your client.
 - (c) Under section 60(5) of the Solicitors Act 1974 and paragraph 24 of Schedule 2 to the Administration of Justice Act 1985, a provision in a contentious business agreement that a firm shall not be liable for negligence, or shall be relieved from any responsibility which would otherwise apply is void.
 - (d) By section 2(2) of the Unfair Contract Terms Act 1977, a contract term which seeks to exclude liability for negligence is of no effect except in so far as it satisfies the requirement of reasonableness set out in section 11 of that Act. Section 11 specifies that the contract term must be fair and reasonable having regard to the circumstances which were or ought reasonably to have been known to, or in the contemplation of, the parties when the contract was made. Schedule 2 to the Act sets out guidelines as to the factors to be taken into account in considering whether the contract term meets the test of reasonableness.
 - (e) Section 11(4) of the Unfair Contract Terms Act 1977 provides that where a contractual term seeks to restrict liability to a specified sum of money, the question of whether the requirement of reasonableness has been satisfied must also take into account the resources available to you for the purpose of meeting the liability, and the extent to which insurance is available.
 - (f) The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) have a comparable effect to the Unfair Contract Terms Act 1977 as to limitation or exclusion of liability, where your client is a consumer and the term in question has not been individually negotiated. Regulation 3(1) defines a consumer as any natural person who, in contracts covered by those Regulations, is acting for purposes which are outside their trade, business or profession. Regulation 5(2) states that a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term. Regulation 5(1) provides that a term is unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations. Schedule 2 to the Regulations contains an indicative, non-exhaustive list of contract terms which may be regarded as unfair. The test of fairness under these Regulations is not identical to the test of reasonableness under the Unfair Contract Terms Act 1977.
 - (g) When the retainer may be affected by foreign law, such matters may need to be considered according to the law applicable to the contract.
69. You should also note that if you want to limit your firm's liability to a figure above the minimum level for qualifying insurance but within your firm's top-up insurance

cover, you will need to consider whether the top-up insurance will adequately cover a claim arising from the matter in question. For example:

- (a) If your firm agrees with a client that its liability will not exceed £4 million, and the top-up insurance is calculated on an aggregate yearly basis, there is no guarantee that the amount of the top-up cover would be sufficient where there have been multiple claims already.
- (b) Because insurance cover available to meet any particular claim is usually ascertained by reference to the year in which the claim itself is first made, or notice of circumstances which may give rise to a claim is first brought to the attention of insurers, the top-up cover when the claim is brought (or notice of circumstances given) may not be the same as it was when the contract was made.

- 70. You will not breach 2.07 by agreeing with your client that liability will rest with your firm and not with any employee, director, member or shareowner who might otherwise be liable. However, any such agreement is subject to section 60(5) of the Solicitors Act 1974, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.
- 71. Subrule 2.07 does not apply in relation to your overseas practice. However, if you are a principal or a recognised body 15.02(3) prohibits you from seeking to limit your civil liability below the minimum level of cover you would need in order to comply with 15.26 (Professional indemnity).
- 72. You will not breach 2.07 by a term limiting or excluding any liability to persons who are not your client under the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. However, any such term will be subject to section 60(5) of the Solicitors Act 1974, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, where appropriate.