**How well do solicitors engage?**

This report looks at firms’ Terms of Business letters and asks:

* To what extent do they comply with the requirements of Law Society of Scotland Rule B4: Client Communication, and
* Would an average client be likely to read and understand them?

# Executive summary

Overall, we saw generally good compliance with the basic requirements of Rule B4. However our sample showed a real variation in the extent to which firms made their Terms of Business clear, accessible, accurate, and a useful tool for effective communication with the client.

## Importance and relevance

* Not all firms had done enough to emphasise the importance of the terms and why clients should pay attention to them.
* Only a handful of firms issued terms that were truly personalised to the transaction. Even if details were given in covering letters many of the terms were still over-expanded and complicated by irrelevant and often confusing information that firms would have done better to exclude. In attempting to standardise many firms lost the opportunity to focus on the key risk factors for each transaction.

## Clarity and accessibility

* In some cases, firms had worked hard to make their terms clear and accessible, but we felt only about a third of our sample were likely to be easily read and understood by clients.
* The longer and more complex your Terms of Business, the less likely that the client will read them. The clearest terms that we saw used good layout and spacing, and grouped relevant information under clear headings, using plain language. Most importantly, they were short and easy to read!
* Even where firms had attempted to write their terms in plainer language and had improved the formatting, we noticed paragraphs that contained inconsistent statements, outdated contact details, or legalistic language.
* In many cases, information on fees and charging was likely to be confusing for clients. This includes unfamiliar (to clients) unit pricing calculations, risk factor increases and payment models, and an unreasonable assumption that clients would understand what takes a transaction from “simple” or “routine” to “extraordinary”.

## Accuracy

* Firms need to do more to ensure their terms are up-to-date, relevant to the instructions and correct in detail.
* Less than 15% of our sample correctly cited the SLCC and its contact details despite the changes to Rule B4.2 making this compulsory from February 2020, and two thirds cited time limits that have not applied since 2017.
* We also felt several firms used wording that may not comply with Money Laundering Regulations or that might be inconsistent with current Law Society of Scotland Guidance.

## Recommendations

* Ensure that your terms and the standard of work that you do both match up to your marketing. Your marketing, policies and terms should all be treated as living documents, reviewed and revised regularly to ensure they are still relevant to your clients and your current way of working.
* Treat your terms as your first and an ongoing opportunity to communicate well with your client. Use them to set out how you’ll work together, and refer back to them when you need to throughout the transaction. Even if something is mentioned in the Terms of Business, you’d be well advised to explain the full implications at the time it becomes relevant during the transaction, to ensure that you’re communicating as well as you could with the client.
* As far as possible, try to make your terms clear, concise and easy to read. Try to imagine a friend or family member without any legal knowledge receiving them and read them as if through their eyes. Pay attention to wording, spacing, sentence length and logical grouping of information. Personalising your terms to the transaction will help with this.
* Take extra care in explaining fees and charging – many of the complaints we see stem from misunderstandings and miscommunication here. Don’t assume your client will understand or be familiar with a charging method not used in many other types of transaction, or know how routine or otherwise their case might be.
* Check the accuracy of references to the right to complain to your firm and to the SLCC. Use our suggested wording to make that straightforward. You should never attempt to restrict the right to complain, to restrict or place conditions on the posting of online reviews, or impose unduly onerous processes. A complaints process that is fully accessible is more likely to lead to amicable resolution of any concerns.

# Background to this project

Many complaints arise from a mismatch of expectations, so it makes sense to take every opportunity to manage expectations more effectively, right from the start of your engagement, and to make it easy for clients to access the information they need.

Properly crafted terms of business play a vital part in risk management. They help to manage client expectations and provide an opportunity for firms to clarify the work they will - and will not - do for their clients. There are also specific regulatory requirements on client communication set out in the Law Society of Scotland’s (LSS) Rules and Guidance.

For this project we looked at over 80 initial contact or engagement letters or terms of business that were provided to us in relation to complaints we received over a six-month period. The documents we saw were from a broad range of firms of different sizes, structures and geographical locations, and there was no particular trend that we saw in their approach.

Firms are of course free to choose exactly how they convey the information, and what they choose to call their documents. In this report, for convenience, we’ll just refer to the documents as “terms of business”. Our sample showed some firms using a single document, others combining more personalised letters with standard terms that are either issued separately or accessed from the firm’s website, and a few that set out only the most basic information and invited clients to contact the firm if they wanted more detail.

Most of the initial correspondence contained some wording that explained briefly why firms issued the document; some tied it into their marketing, using words like “the firm’s commitment to you” or “a sound basis for our relationship”. Others had no introduction, and although there might have been wording saying clients may raise queries, this was usually in the context of the work being done, rather than the preliminary steps.

We know most complainers do not read or retain the information in their terms of business because they find the documents too lengthy and complex, but we also felt that most of our sample could have done better to encourage clients to read and raise queries on the initial engagement.

# The basics – Rule B4 requirements

Rule B4 says that a firm must provide “information in writing” on the following:

1. an outline of the work to be done
2. An estimate of the total fee, VAT and outlays; or details of the basis on which the work will be charged, including VAT and outlays
3. If advice and assistance or legal aid is provided, details of the level of contribution, or factors that might affect it
4. The name of the person who will do the work for the client
5. Who the client should contact, in the firm, to express any concerns about the work done
6. Signposting to the SLCC, with its current contact details, if concerns have not been resolved between the firm and client.

# How well did firms meet the Rule B4 requirements?

As a general observation, firms were attempting to provide most of the information set out in rule B4, although we felt that the way they do so could be improved. In terms of the format, some firms prioritised the information that Rule B4 prescribes, either by focusing on these points in a covering letter - which could be helpful to clients but also ran the risk that clients might not refer to other documents - or by including them in the opening paragraphs of their terms of business. However, many terms of business that included the basic Rule B4 requirements early in the document still contained other random references to various points (particularly fees and payments and client responsibility) in less-obvious clauses, sometimes with unrelated headings.

## (a) An outline of the work to be done

The LSS Guidance says the outline “should contain enough information to allow the scope and significant elements to be clearly identified”. About 25% of our sample had very brief headings - such as “You vs XYZ” or “Conveyancing”, and a significant percentage of those without a clear heading then went on to include lengthy, detailed and irrelevant information that we felt could be even more confusing to clients. For instance, we saw documents simply headed “Conveyancing” (with no further details) that included information on applications for legal aid, how the firm would deal with executries, the costs of medical reports, and unit charges for litigation.

We felt that only about 12% of our sample stood out as a comprehensive, well-worded and personalised indication both of the scope of instructions and what was not included. One firm opted to use a generic terms of business but a covering letter specified which of the clauses (that were clearly numbered) would apply to this instruction. Another included a single-page “supplement” setting out each expected stage, how long it would take, and what the client would be asked to do. We appreciate that not all areas of work lend themselves to these exact approaches, but we thought they were helpful examples that achieved clarity for the clients.

In addition to listing the work that will be done, the LSS Guidance suggests that clients should be made aware of what the firm will not attend to. Most of the terms of business in our sample said that the firm would not offer financial, investment or tax advice. The clearest examples that we saw listed firstly “what our instructions cover” and then “what is not included”. Some firms also used similar headings to emphasise that they would only act on instructions from a particular named person, or to define what was covered by the fee quoted and what would be charged separately in an executry.   
  
Many terms of business, either in the sections dealing with scope or fees, referred to work that was “normal” or “standard”; and also to “additional”, “extraordinary”, “post-settlement” or “complex” work. In most cases these were not defined, so we felt that clients would not understand what this meant, or be aware of the point at which work might change from “normal” to “extraordinary”. Some firms listed examples of work that fell outside the “normal” scope, but we often felt that the wording would still not be clear to most clients. Examples included references to “inhibition”, “heritable creditor in possession”, “joint and severable liability” and “requirement to obtain sanction”.

The LSS Guidance says that if the nature of the instruction changes “to alter the scope of work”, firms may need to issue amended or new terms of business to highlight the changes. Several firms used wording indicating that the terms of business as issued would be regarded as the entire contract with the client, and would not change. One used a blanket statement that the terms of business would apply to any work, even if unrelated to the current instruction. Only a few firms indicated that if circumstances changed, the firm may discuss new options, including different fee arrangements, with the client before proceeding, and only one said changes to scope would be givenin a separate letter.

Although we appreciate that firms have probably tried to standardise their terms of business as far as possible over the years, we are concerned that in doing so, they may have lost the opportunity to be as clear as possible about the scope of work being done for the particular client.

## (b) Fee estimates or basis of charging

All firms in our sample included fee information. All firms included a reference also to VAT and the fact that clients would be expected to pay for outlays. Some terms of business cited examples of outlays. The clearest listed that outlays x, y and z would definitely apply, and others would be discussed and clarified if they became necessary.

We felt the most effective fee information was either found prominently, with a clear heading and easy-to-read format, in the main terms of business, or the firm gave a summary of how it would generally deal with fees, but also indicated that relevant details for this transaction would be found in a particular letter that was clearly referenced by date. Only one firm took the bold step of saying “We guarantee that our fees will always be clear….We’ll not expect you to pay any fees which we didn’t make clear to you” (and we felt that their terms of business did achieve this objective).   
  
Most terms of business said it would be difficult to predict the final time and cost of legal work. Even with this rider, we felt that many could have benefitted from including even a ballpark range. Most conveyancing and criminal matters were quoted as a fixed fee - but we saw one conveyancing matter that had a fixed fee but also spoke of “units” without setting any figure for these. The firms in our sample who had provided letters to individuals, to explain that they were primarily acting on instructions of insurers, unions or lenders, had also explained clearly that fees had been quoted to their instructing client, but that the firm’s instructions lasted only up to a certain level or defined event. Hourly rates were the most commonly applied, but in executries many firms said that in addition, commission (ranging between 5% and 25% of the value of the estate) “may” or “would”be charged.   
  
Where firms have quoted a fixed fee, a clear description of the scope of work obviously makes for more certainty on the fee. In relation to time-based charges, we felt that most firms could have been clearer in their explanations. We know that many clients do not appreciate the meaning of “time and line” or “sheetage”, or why a description of a fee per page needs to go on to talk about unit charges. One firm said it would charge “fees based on the current schedule published by the Association of Independent Law Accountants” - but we didn’t see that attached. Even where hourly rates were specified, many firms then qualified the hourly rates as “a minimum”; or said they “may elect to charge on a different basis”; “or on some particular scale” (which was not defined further) or “by a combination of charging methods” (without clarifying which would apply).   
  
Most firms described different rates based on the seniority of the solicitors, but it wasn’t always apparent from the terms of business which rate applied to this particular instruction. The unit charges quoted varied between 6 and 15 minutes. The effect of some of the wording used meant that the client must firstly know what hourly rate applied to their solicitor, then work out a unit charge, then calculate, for different attendances, what 0.5, 1.25 or even 0.05 of the unit would be.   
  
Most clients would probably appreciate what fixed fees or simply-stated hourly rates mean, we often felt that the detail of the breakdown into further sub-categories would not be clear, particularly as very few firms made a commitment up front to give more detailed breakdowns along with their fee notes. We do understand that there are historical reasons behind the way in which fees are charged, and that firms have potentially drafted their terms of business to match the way their accounting software has been set up. However, looking more broadly at clauses dealing with fees, we felt that it was worth mentioning some examples that we saw where we felt that improvements could have been made to improve clients’ understanding, without affecting the way the rates are applied:

* A firm said it *might* charge in various ways - but it was left to the client to request details.
* Several firms include references to peripheral information about fees - such as outlays, terms, charges for credit card payments, bank clearances - in many different paragraphs, without cross-referencing or logical order. One firm spread this information across three entirely separate documents. Another included detailed descriptions of terms of payment, cancellation charges, recovery charges and file storage charges, but did not clearly indicate how the main fee would be calculated. Logical groupings of all fee and costs information under one heading, or in a series of consecutive paragraphs, is likely to be clearer to clients, therefore more likely to be read and appreciated from the outset.
* It was not always made clear to clients that every attendance would incur a charge. We know that many clients do not understand that they will be billed for the first consultation, requests for a progress report and telephone messages.
* Clients are asked to pay monthly or periodic payments to account, but the terms of business nowhere mentions that these are unlikely to cover all the work done in that month, or to date over several months, and that the clients will be presented with a much larger bill than the monthly payments, at the end of the transaction.
* Firms quote fixed fees but did not specify what would happen if the transaction did not complete.
* One terms of business attempted to list, with a fee, every possible attendance that it could undertake, taking up about 70% of the document. However, the fee was still quoted as “a minimum” and the client never received a ballpark quotation.
* A firm included references to “negotiable” agency commission. When viewed in isolation, it could have been readily understood. However, when included in a paragraph that detailed legal fees, there was room for confusion as to which methods and comments applied to which part of the transaction.
* A firm quoted how it would charge, and how payments to account were to be made. However, over the next few months, it used four distinctly different methods to bill and recover fees. Finally, when it came to a particular piece of work, the client was unaware of when, how and what they were expected to pay.

### **Risk and responsibility surcharge**

About 50% of the terms of business in our sample reserved the right to elevate the quoted rates by a percentage variously described as a “risk and responsibility factor”, “surcharge” or “additional sum that may be applicable”, in the case of “urgent or complex work”, “or “uplifted” matters. Some indicated a flat percentage increase, others said that the decision and the figure would be fixed by the Law Accountant or Cost Accountant who drew the account at the end of the instruction. It was most often unclear whether the elevated fees would be applied only to certain attendances, work from a certain date, or to the entire bill. Only a handful of terms of business said that this would be discussed with the client in advance of the rate being applied. Firms including this type of wording might wish to consider whether it is fully in line with the LSS guidelines on price transparency.

### **Assessments and taxation**

About half our sample coupled their fee information with references to assessment of fees; many executries specified that fees either would be drawn initially by a Law Accountant or would automatically be submitted for assessment. Firms variously referred to assessments done by “our” Law Accountant, a named Law Accountant of their local Faculty, the Auditor of Court or “taxation at the Sheriff Court”. Only a few distinguished clearly between requesting a detailed breakdown of fees, an assessment and taxation, and it wasn’t always specified how an assessment would be triggered. One firm mentioned assessments as part of the complaints process, and one said they would only agree to arbitration in respect of fees. About 30% did not mention that an additional charge could apply for assessed fees.

The clearest explanations on fees that we saw were also the simplest: “For this transaction we will charge £x per hour” or “For emails, correspondence and documents, we charge for each 100 words”. We also saw clear examples such as “The firm applies a z% increase to all fees on 1 January each year” or “We will immediately notify all clients when our rates change” or “We undertake to discuss any change to these fees before we implement them”.

## (c) Information about Advice and Assistance, or Legal Aid

In the few cases in our sample where the work was to be done with legal aid assistance, this was well explained. However, we saw several instances where information on legal aid was included, often in great detail, where it was not relevant to the transaction. We felt that this could have been confusing to clients and added unnecessarily to the length of the document, which could have put clients off reading the important and relevant parts.

## (d) Name of the practitioner

Virtually all terms of business included either the name of the practitioner or indicated that a solicitor who had already been in contact with the client would take joint or sole or supervisory responsibility for the work. Some named a Head of Department, some listed all partners with their specialities. One named both the solicitor and the Law Accountant who would be assessing the final executry fee.

The majority of the terms of business noted that the named practitioner might not always be available to take calls or give immediate answers to queries. Some provided alternative contact details; others said that messages and emails would be responded to within the firm’s target timescales. Most terms of business said that at times, it might be necessary for other solicitors or paralegals to deal with the instructions. Where this was included, not all the firms took the opportunity to reassure the client that whoever dealt with the matter would be fully conversant with the file and previous discussions.

## (e) Reference to the Client Relations Manager (CRM) and the right to raise concerns

The majority of the terms of business in our sample made reference to the client’s right to raise queries, concerns or complaints about any aspect of the work. Mostly, this was preceded by a statement of the firm’s commitment to good service. Only one firm mentioned neither a process nor CRM’s name, merely saying that if a client had “any problems” they should contact “the firm, who will have a solution”.

Most firms asked clients to raise any concerns firstly with the practitioner dealing with the matter and named (or said the website would name) the CRM, either as an alternate initial contact, or in order to escalate the complaint. One firm’s wording suggested that if a client needed to be “spoken to” by a more senior person, this might escalate the client’s costs. Even if clients may be challenging, they should never be penalised for requesting to speak to the CRM.

About 40% of firms made specific reference to having a complaints policy or process that they would provide on request. Others did not specify how the firm would deal with a complaint. At the opposite end of the spectrum, one firm, in its extensive terms of business, included details of a multi-tier, lengthy process, which was not easy to find (or understand). It’s worth remembering that even if a firm attempts to prescribe that every stage of a complex or lengthy investigation process must be completed internally, a complainer has the right to approach the SLCC if the complaint remains unresolved 28 days after it was first raised to the firm.

## (f) Signposting the SLCC and its contact details

Firms did not do so well on the requirement to signpost the SLCC and give its correct contact details, since less than 15% of our sample had all information both present and correct.

Two terms of business made no mention of the SLCC or a complaints process, and one of these firms did not even mention the SLCC in their response to the complaint. One firm had not given the SLCC’s details in its terms of business but had included a reference to it in the last clause of another letter.

Our sample included the following errors:

* citing the SLCC as “at the Law Society”, or “c/o Client Relations Law Society”, and/or giving the LSS address and phone numbers
* saying that complaints about conduct must be made either directly to the LSS, or that complaints can be made to either or both of the LSS and SLCC
* specifying that all complaints must first be made to the LSS, but that the SLCC would consider a complaint about the findings of the LSS
* referring to the Scottish Legal Services Ombudsman (which was disbanded in 2008)
* saying “you may complain against any finding of the SLCC to the Scottish Legal Services Ombudsman”
* making reference to the Legal Ombudsman as the body to receive complaints - one firm only mentioned this body, and another named the SLCC a few pages later. These terms of business were issued by firms that are registered in England and Scotland, but both instructions were handled by Scottish solicitors, and one was about a matter unique to Scots law.

Just over 66% made mention of the SLCC but included one or more inaccurate details. The majority of these quoted insufficient or obsolete contact information.

20% of firms incorrectly attempted to explain the time limits for lodging complaints. Most referred to the one-year time limit that has not generally applied since April 2017. One, referred to a six-year limit; the context indicated this was probably a reference to the limit that formerly applied to the Legal Ombudsman in England and Wales.

Our time limits will change again as from 1 April 2023. We suggest that firms might like to include wording along these lines when referring to the SLCC:

*You have the right to make a complaint to the Scottish Legal Complaints Commission, 10-14 Waterloo Place, Edinburgh EH1 3EG,* [*enquiries@scottishlegalcomplaints.org.uk*](mailto:enquiries@scottishlegalcomplaints.org.uk)

*You can find out more details - and access a complaint form and information about the time limits for making a complaint - from the SLCC website* [*www.scottishlegalcomplaints.org.uk*](http://www.scottishlegalcomplaints.org.uk) *or phone them at 0131 201 2130.*

Firms should ensure this information remains correct. We will communicate any changes to firms, and we expect terms of business or other paperwork signposting to the SLCC to be updated in line with any changes to our contact details.

## Additional clauses

Every firm probably has a different view on whether to use standardised or personalised terms of business; to cover every eventuality at the start; to deal with matters as they arise; to specify that terms of business represent the entire contract; or to keep it more open. Most firms include more than the information set out in Rule B4.

Most firms included other information relating to GDPR, AML and Data Protection, and the Law Society’s guidance on these and other aspects. Many made reference to EU directives (Right to Arbitration) and Consumer Contract Regulations, as more fully detailed in Lockton’s [Letters of Engagement Guide](https://www.locktonlaw.scot/news/letters-of-engagement-guide.html). Some firms include details of the PI insurance; one named the incorrect broker.

## Restrictive terms

Our previous [blog](https://www.scottishlegalcomplaints.org.uk/for-lawyers/guidance-advice-and-tips/best-practice-blog/charging-for-complaints-why-you-shouldnt-do-it/) post highlighted a few attempts by solicitors to restrict the right to complain, to restrict or place conditions on the posting of online reviews, to threaten to or actually charge for complaints, or to dissuade complainers by threatening to release information. Unduly onerous processes were also mentioned. We emphasised that a complaints process needs to be fully accessible, both in name and in fact, to be effective. Only one terms of business in our sample contained restrictive provisions, notwithstanding our specific advice to the firm, and this is now being dealt with as part of an ongoing complaint.

## Client roles and responsibilities

Most firms included some description of the client role. Most often, the client’s responsibility to pay fees is listed prominently. Some terms of business included headings like “Our Role / Your Role” or described that the client would be expected, at various stages of the transaction, to give timeous responses and instructions, keep the firm advised of changes to personal details, availability or circumstances, and notify the firm of any conflicts of interest.

Some firms asked clients to refrain from repeatedly contacting the firm. Some were more explicit in setting out expectations for reasonable and respectful engagement by clients. This approach could help to manage challenging situations (see our recent [blog post on managing the personal impact of complaints](https://www.scottishlegalcomplaints.org.uk/for-lawyers/guidance-advice-and-tips/best-practice-blog/managing-the-personal-impact-of-complaints/)), but firms should avoid any suggestion that penalties, additional charges or withdrawal will be an automatic response because clients, however they express themselves, may still be expressing genuine complaints that need to be addressed.

# Useful or overkill?

One question we’ve asked during our outreach work with the profession is - *How easy would it be for you to read your Terms out loud to a client? At what point would you and/or the client start to flag?”*

An anxious client is looking for reassurance that solicitors really are “on my side” and would hope that the terms of business would reinforce that. A document that is full of jargon and small print can create the impression that the firm is rather more concerned with reserving their rights against the client than achieving the client’s objectives. Many of the terms of business in our sample didn’t explain the purpose of the document clearly, nor indicate why it is equally important to both parties.

Our sample led us to suspect that many firms aren’t treating their terms of business as living documents, but have gradually added additional information over the years, without taking a closer look at the relevance and inter-dependency of the clauses as a whole. Only three terms of business in our sample were under five pages. Most were between 10 and 15, and the longest exceeded 25 pages. We felt that about 30% were likely to be read - and easily understood - by most clients.

Language and layout are as important as content. The best examples grouped the most relevant information logically at the start, using good spacing, short sentences and, above all, plain language. Naturally firms should try to ensure that all communication is accessible, so you might want to tell your clients (if you haven’t already asked them) that alternative formats can be made available.

Your terms of business are more than just a regulatory requirement. They should be a reinforcement of everything you’ve said in your marketing about your values and your high standards. We understand that firms are often attempting to cover every eventuality that can lead to a claim or complaint. Yet it’s impossible to do that. Individuals have the right to *make* a complaint, even if it’s not upheld, and open discussions at an early stage solve more problems than pointing to exclusions. And it’s not enough to tell your client to read your terms of business. It’s up to you to make them readable, otherwise this important document will be little more than waste paper that fails to meet its objective.

Is it time to review yours now?