# Defensive Advising Strategies 2: Know Your Client

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With a history in the world of financial services regulation, *"know your customer/client"* or *"KYC"* is a cornerstone of professional practice. What does it mean for legal professionals? In this instalment of my series on defensive advising strategies, I consider three aspects of KYC which are particularly relevant to lawyers, with an emphasis on the interface between solicitors and other professionals and the barristers they instruct. This perspective is based on my own experience as a practitioner and raises issues which crop up relatively frequently.

Identifying and managing conflicts of interest

Firms of solicitors and accountants can develop long-standing relationships with particular families or groups of companies in a way that barristers do not. It can therefore be difficult for, say, a firm of private client solicitors to identify at any particular time which individuals the firm is acting for. It is accordingly not always easy to ensure that conflicts of interest are properly identified and managed, sending off a client to obtain independent legal advice where appropriate.

The situation is brought into sharp focus when Counsel is instructed. For some reason, at least a third of the instructions I receive from private client solicitors outside of the context of litigation do not in the Instructions expressly identify on whose behalf they are given. I then have to follow this up politely (because asking directly who the client is can sound like a stupid question!) through the clerks. Money Laundering documents, if supplied, might implicitly answer the question, but why play *"guess the client"*? Once, my clerk came back to me after a conversation with a solicitor about some new instructions, in which he had asked for clarification on who I was acting for, and he relayed to me what the solicitor has said to him: *"Why does she need to know?"*

Sometimes, a barrister may be told simply that they are instructed on behalf of the *"current trustees"*, without it being clarified who these are. It is important to know the identity of the exact individuals, so that it can be seen whether they may also be beneficiaries who are proposing to take action in relation to which they have a conflict of interest and where there may be problems with the equitable rules – a point which is often overlooked.

The worrying thing is that if those instructing are not clear about who they are acting for, they may not be clear in their own minds and the critical point of monitoring for potential conflicts of interest will not have been addressed. I would add that focus on the identity of trustees may help to identify circumstances where those trustees have not been validly appointed.

Money Laundering

Large firms of city solicitors usually have entire compliance departments, who are able to develop and implement money laundering checks as required by law as well as identifying and managing conflicts of interest. For smaller legal practices, including barristers' Chambers, attending to money laundering can be a struggle. It has recently been reported that the SRA has begun a money laundering clampdown, with several firms being fined[1]. So, it is clear that KYC failures can have serious professional consequences.

Barristers in the tax and private client field often perform work within the scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. Specifically, barristers can fall within the definition of *"independent legal professional"* within Regulation 12(1) when they are involved in transactional advice, such as preparing trust documents. The words in Regulation 12(1): *"a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction"* are wide. Alternatively, barristers can fall within the definition of *"tax adviser"* in Regulation 11(d). It is understood that the Bar Council's Money Laundering Working Group continues to work with other professional bodies to seek to improve the way anti-money laundering legislation applies to barristers, and as such the experience of

[1] Law Society Gazette, 23 June 2021.

the Revenue Bar Association (whose members are frequently subject to the legislation because they are within the definition of "tax adviser") is of considerable use to them.

The inclusion of this section is really a plea to those instructing barristers, whether they are solicitors or other professionals such as accountants, to have greater awareness of the obligations which fall on barristers under current legislation. Many firms permit Counsel to rely on that firm's own certificate that it has met its obligations. Whether that will be sufficient going forward cannot be assumed, particularly where enhanced customer due diligence is appropriate. In any event, it is notable that some firms have in recent months ceased to provide such certificates, but in circumstances where they have no formal alternative arrangements in place to administer client due diligence for the purposes of instructing Counsel. Barristers, of course, ordinarily have no direct contact with the lay client, other than through the instructing firm. How this unsatisfactory state of affairs has come about, I do not know, but I have a suspicion that it is aided and abetted by wide-spread non-compliance by some barristers. It is invidious for a barrister, who is only trying to do the right thing, to be seen to be throwing up unexpected obstacles when accepting instructions, when what the barrister really wants to do is to appear helpful and welcoming to the instructing party and their clients. Money laundering compliance is a reality of professional life and it benefits all involved to ensure that the rules are satisfied in full and without too much trouble.

Assessing the client's attitude to risk

Good knowledge of the identity of the client and their circumstances is critical to assessing their attitude to risk and therefore giving best advice. This is especially so in the risky area of litigation. A commercial client may be prepared to litigate on the basis of a pure cost-benefit analysis. But a private client in a probate action, by contrast, may not be able to afford to lose. It interests me how risk is presented to clients and how different ways of presenting essentially the same advice can have a very different impact on different types of client.

Consider the following ways of presenting advice to a client who is considering challenging the validity of a parent's Will under which they take no benefit, in all cases where the client has been made aware (at least in the small print) that the loser usually pays the winner's costs:-

**Approach 1**: You have a 60% chance of winning;

**Approach 2**: You have a 40% chance of losing;

**Approach 3**: You have a 70% chance of winning, provided your lead witness performs well; and

**Approach 4**: In litigation like this, before even looking at any weaknesses in your particular case, you have at least a 30% chance of losing, bearing your own costs (at least £50k) and paying the other side's costs (also at least £50k – i.e. at total costs bill of £100k).

Approaches 1 to 2 are materially identical, but different personality types may react differently to the presentation – a scientific study of this phenomenon would be very interesting! It would also be interesting to know how independent lawyers really are when presenting their advice, given that certain presentations are – as they must at least subconsciously know - more likely to generate further professional fees than others.

Approach 3 is common in barristers' opinions, but is not very satisfactory. You should not give a percentage chance at a midpoint during the analysis, with further caveats unaccounted for in the figure: it gives undue prominence to the 70% figure. I have used Approach 4 where I suspect that a client cannot afford to litigate. It can get through to a client when they are their most receptive to rational arguments, i.e. before the emotional interference which an analysis of the strengths and weaknesses of their particular case in a family dispute sets in.

Conclusion

So, KYC is key to the process of advising clients effectively. It helps ensure compliance, the identification and management of conflicts of interest and suitable advice in relation to risk. It is not always given the prominence it deserves, although it is to be noted that paragraph 8.1 of the 2018 SRA Code of Conduct for Solicitors, RELs and RFLs in terms requires that when solicitors are providing services to the public or a section of the public they identify who they are acting for in relation to any matter. On the subject of risk, the next part in this series will focus on a phenomenon which I term "risk bargaining", so watch this space!

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