

KNOW YOUR CLIENT AND THE FEES

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1. Identifying who is your client
 - the creditor?
 - the Collection Agency?
 - the lawyer forwarding the claim?

2. Nature of arrangement between (receiver) lawyer and client
 - who gives instruction?
 - who does the receiver deal with exclusively?
 - who pays whatever monies are required?
 - to whom does the receiver send money?
 - who makes decisions?

3. Contract between receiver and agent
 - Engagement letter and terms
 - from forwarder to receiver
 - from receiver to forwarder
 - Incorporation of Operative Guide of CLLA or the like

4. Authority of forwarder
 - contract between forwarder and creditor
 - terms made known to receiver
 - liability of receiver if forwarder breaches its authority or fails to account

5. Engagement by lawyer when suit is filed
 - dual retainer
6. Counterclaims
 - issue if creditor has credit insurance or has factored the debt (assigned the debt to a lender)
 - fee arrangement to handle the defence to the counterclaim
7. Identification and verification of client by lawyers
- 7.1. United Kingdom

The Money Laundering Regulations 2007

“Customer Due Diligence”

Regulation 5 – “Customer due diligence measures” means:

- (a) identifying the customer and verifying the customer’s identity on the basis of documents, data or information obtained from a reliable and independent source
- (b) identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and
- (c) obtaining information on the purpose and intended nature of the business relationship.

Regulation 7 – (1) Subject to Regulations 9, 10, 12, 13, 14, 16(4) and 17, a relevant person must apply customer due diligence measures when he:

- (a) establishes a business relationship;
 - (b) carries out an occasional transaction;
 - (c) suspects money laundering or terrorist financing;
 - (d) doubts the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification.
- (2) Subject to Regulation 16(4), a relevant person must also apply customer due diligence measures at other appropriate times to existing customers on a risk-sensitive basis.

- (3) A relevant person must:
 - (a) determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and
 - (b) be able to demonstrate to his supervisory authority that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing.
- (4) Where:
 - (a) a relevant person is required to apply customer due diligence measures in the case of a trust, legal entity (other than a body corporate) or a legal arrangement (other than a trust); and
 - (b) the class of persons in whose main interest the trust, entity or arrangement is set up or operates is identified as a beneficial owner,

the relevant person is not required to identify all the members of the class.

Beneficial owner – 25% owner or who exercises control over the management

Identifying

Verifying [Regulation 4.33 etc.]

Simplified due diligence

Regulation 13 – (1) A relevant person is not required to apply customer due diligence measures in the circumstances mentioned in Regulation 7(1)(a), (b) or (d) where he has reasonable grounds for believing that the customer, transaction or produce related to such transaction, falls within any of the following paragraphs:

- (2) The customer is:
 - (a) a credit or financial institution which is subject to the requirements of the money laundering directive; or
 - (b) a credit or financial institution (or equivalent institution) which:
 - (i) is situated in a non-EEA state which imposes requirements equivalent to those laid down in the money laundering directive; and
 - (ii) is supervised for compliance with those requirements.
- (3) The customer is a company whose securities are listed on a regulated market subject to specified disclosure obligations.
- (4) The customer is an independent legal professional and the produce is an account into which monies are pooled, provided that:
 - (a) where the pooled account is held in a non-EEA state:

- (i) that state imposes requirements to combat money laundering and terrorist financing which are consistent with international standards; and
 - (ii) the independent legal professional is supervised in that state for compliance with those requirements; and
- (b) information on the identity of the persons on whose behalf monies are held in the pooled account is available, on request, to the institution which acts as a depository institution for the account.

Enhanced customer due diligence and ongoing monitoring

Regulation 14(1) and (2)

14. (1) A relevant person must apply on a risk sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring:
- (a) in accordance with paragraphs (2) to (4);
 - (b) in any other situation which by its nature can present a higher risk of money laundering or terrorist financing.
- (2) Where the customer has not been physically present for identification purposes, a relevant person must take specific and adequate measures to compensate for the higher risk, for example, by applying one or more of the following measures:
- (a) ensuring that the customer's identity is established by additional documents, data or information;
 - (b) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by a credit or financial institution which is subject to the money laundering directive;
 - (c) ensuring that the first payment is carried out through an account opened in the customer's name with a credit institution.

7.2. Other countries

Malta

Spain

Eire

Canada – do your best!

8. Lawyers' fees

(referred to by lawyers sometimes as costs – to be distinguished from court costs and other expenses)

- contingency fees
- definition of success - judgment or recovery?
 - what about counterclaims?
- hourly rate
- different hourly rates depending on success –

(Conditional Fee Agreements (UK))

- Damages Based Agreements (similar to a contingency fee agreement)

9. Recovery of fees and costs

- “Costs follow the event” – in the UK and many British Commonwealth countries
 - Fees and expenses
- “Reasonable attorney's fees” in contracts
- Fixed cost recovery
 - in Latin countries

10. Contingency and Reasonable fees

- Rates – dependant on amount placed or recovered?
- Circumstances in which reasonable fees are payable
- Regressive scale
- Declining percentage (Op Guide 3.3)
- Aged debt – higher percentage (Op Guide 3.5)

11. Operative Guides

- Operative Guide of the Commercial Law League of America

- League International for Creditors

12. Contingency Fees

- Contingent on recovery (Op Guide 3.1)
- Payment made direct to creditor or forwarder (Op Guide 3.7)
 - before demand
 - after demand
- Withdrawal of claim by forwarder
- After receipt by it of cheque or note (Op Guide 3.8(b))

13. Reasonable fees

- Where notices served or other steps taken in probate or a bankruptcy case (Op Guide 6.1(a)) and the forwarder cannot withdraw the file without paying a reasonable fee (LIC 24)
- Where receiver has to attend trial - (in addition to normal suit fee) (Op Guide 6.1(c))
- After initial demand (if payment of debt not made) receiver is entitled to a “reasonable non-contingent administrative fee” (Op Guide 6.2) but receiver must tell forwarder promptly (Op Guide 6.3)
- Where goods or property taken in settlement (Op Guide 7.1(a)) but LIC 9 – a percentage of the credit given for the property
- Where debtor correctly asserts:
 - set off
 - counterclaim
 - barring by Statute of Limitation (Op Guide 7.1(c))
- Where dispute known to creditor or forwarder but not told to receiver (Op Guide 7.1(d))
- Where creditor or forwarder interferes in the collection process (Op Guide 7.1(e)) but LIC 19 full percentage
- Where the creditor changes its mind re suit (Op Guide 7.1(g))
- Where claim forwarded by mistake and receiver has done work before he is told of it (Op Guide 7.3) but LIC 12a, 14 and 16 – 50% of usual fee if receiver has acknowledged claim, otherwise nothing (LIC 13)

14. Issues peculiar to the UK

- After the event insurance to cover “adverse costs”
- Cost of insurance and the Success Fee not recoverable from debtor
- Costs budgets
- Proportionality
- Offer of settlement in special form can entitle credit to 10% more and enhanced recovery of legal costs (“Part 36 Offer”)

15. Alternative Dispute Resolution

- Should be attempted to avoid costs penalty
- Mediation or arbitration

16. Interaction of contingency fees and hourly rates