Less is more

Andrew Hogan on how behavioural science reveals the need to simplify retainers

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One of the interesting developments of the last decade or so has been the rise of behavioural science, its acceptance by the political establishment and its deployment into mainstream policy-making by politicians. In 2008, Richard Thaler and Cass Sunstein's book *Nudge: Improving Decisions About Health, Wealth, and Happiness* gained a following among politicians in the UK. The authors refer to influencing behaviour without coercion as 'libertarian paternalism', and the influencers as choice architects. Thaler and Sunstein defined their concept as: 'A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not.'

This in turn led to the establishment as part of the Cabinet Office in 2010, of the Behavioural Insights Team. The team ran a series of trials with HMRC that sought to improve tax collection rates by making it easier for individuals to pay. One of the simplest interventions involved testing the impact of directing letter recipients straight to the specific form they were required to complete, as opposed to the web page that included the form. This increased response rates by 19-23%.

The team also worked with the Ministry of Justice, devising a policy that prompted those owing the UK Courts Service fines with a text message 10 days before the bailiffs were to be sent to a person, which doubled payments made without the need for further intervention. This innovation has reportedly saved the Courts Service £30m a year.

At its heart, behavioural science rejects the notion that people are calm, rational decision makers, capable of infinite patience and weighing of evidence; and accepts that they are rather creatures driven by instinct, much of whose decision making is subconscious and capable of being 'nudged'. They are human beings and not an alien species, known as the 'econ'.

For many years I have had an interest in behavioural psychology. The field is closely related to a quality that all lawyers should possess, namely empathy. That is the ability to share and understand the feelings of another.

I would emphasise the word 'feelings': because although we may kid ourselves that we are creatures of logic, moving smoothly from rational decision to rational decision, much decision making is unconscious, or instinctive and not based on objective evaluation of the circumstances we find ourselves in.

An example will suffice: do you buy goods or services online? Do you always read the terms and conditions, scrolling carefully through them? Or do you just click 'accept', not knowing that in so doing, you have agreed to give your children into slavery, by carefully drafted small print?

This is irrational behaviour, which is the normal reaction of most human beings. It follows that as a measure of consumer protection,

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requiring terms and conditions to be placed on a screen, where a consumer is free to scroll down them and read them at leisure, is utterly useless, as it does not achieve the objective of creating informed choice. A similar point can be made against the provision of documents with lengthy terms and conditions: people continue to sign them, without reading them, so what good is providing the terms and conditions?

It also raises the larger question, which is whether our current legal system, predicated on alleged rational decision making, is actually no such thing: and there are fascinating studies that have taken place, which reveal that, for example, in relation to sentencing in the criminal courts, the severity of the sentence that you might get can be affected by the time of day when sentence is handed down - and whether the judge is hungry or has been fed (see tinyurl.com/qjtpgxv).

CLIENTS

If such considerations apply to purchasing goods or services online, or to the decision making process of the courts, how much more do they apply to clients: and it follows that when taking instructions from a client or litigating their case, it is extremely dangerous to assume that they will behave rationally, by, for example, always reading letters that you send them, or that they will assiduously check the truth of what they tell you, against available contemporaneous documents – or more prosaically, that they will actually correct witness statements, prior to reading them. Yet they are litigating in a court system designed for 'econs' and predicated that decisions made by courts are rational and based on the evidence.

Stepping back, this problem is evident at the earliest stage, when a client retains a solicitor, and is provided with copious written material, which is meant to govern the relationship between client and solicitor, and fulfil the purpose of providing consumer protection for the client. It will not work if the client does not read it, or if they do read it, does not understand it.

I would therefore suggest that the current system of client care and provision of client care letters, retainer provisions and terms and conditions of business is not fit for the purpose of providing real consumer protection to clients, both in terms of the basis upon which solicitors charge, and the way that charging methodology is then recorded and explained. It needs to be fundamentally reshaped to deal with the real needs of the clients who are represented by solicitors.

CHARGING BASIS

I deal with the charging basis first. Let me take as an example personal injury claims, as a type of consumer claim. I would hazard that most clients will not understand the conditional fee agreement they are provided with. They will not understand the subtle difference between a 100% success fee on costs and a 25% deduction from their damages; they will not understand that if they agree to a conditional fee agreement without a success fee, they are still at risk of unrecovered base charges eating into their damages. They will probably make their

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retainer remotely, with a firm located in another part of the country, and simply sign whatever is provided to them by email or in the post; and what is provided to them will cover many pages of impenetrable retainer documentation.

This retainer documentation will have been created using a model conditional fee agreement and a client care letter written with an eye to the *Law Society Practice Note June 2018 Law Society Guidance on retainers*. This document notes without any irony 'There are relatively few outcomes that require you to provide information in writing. These relate to complaints.'.

But reading into the document, that is not quite right. Clients must be made aware in writing of their right to make a complaint, and details of how to do so. They must also be advised of their right to complain to the Legal Ombudsman. They must further be aware of their right to challenge or complain about a bill, including their rights to an assessment of costs under part III of the Solicitors Act 1974. Moreover, as the document unfolds, it makes it plain that clients must be informed of the solicitor's regulatory status, provided with cost information and fee arrangements, told about any separate businesses, and there must be an agreement about service levels – including, for example, the type and frequency of communications.

Although this information need not be provided in writing, it would be a bold or incautious solicitor who does not record it in writing. Nor is this a new problem, or one that goes unrecognised. Section 4.12 of the Guidance notes this: 'Many clients comment about being given large documents containing lots of legal language in small print by their solicitors. Often these documents are not read or understood.'

The advice given by the Law Society is to alter the style used to write these documents, in an attempt to make them more user friendly:'You may wish to consider adopting the following style for your written client information to help clients understand the contents:

- ensure the key information is highlighted early on. If the document exceeds three pages, you may wish to move detailed information into annexes. This will help ensure important information is not overlooked
- use a clear font, in no smaller than 11 point
- make use of headings and bullet points to break up blocks of text and highlight points
- use plain language
- only include terms and conditions which actually apply to the specific retainer
- where a document is long, include a table of contents.'

However, the Guidance also goes on to heap yet more written requirements on the solicitor's head, promising that on the one hand there is no regulatory requirement to set out terms of business, while on the other noting ominously that it is good business practice to do so. These terms of business are stated to include the following matters: 'Terms of business will normally set out details of:

- standards of service clients can expect
- information on professional indemnity insurance (also see requirements under Provision of Services Regulations 2009)

The system of client care, retainer provisions and terms and conditions is not fit for the purpose of providing real consumer protection to clients

- verifying bank account details in order to protect against fraud
- data protection issues
- storage of documents and any related costs
- confidentiality and disclosure
- outsourcing of work
- auditing and vetting of files
- any clauses limiting liability
- processes for terminating the retainer
- client due diligence…'

But what is the point of all these provisions, if the client is not actually going to read them, and if they do, is not going to understand them?

I frequently am asked to draft retainer agreements, conditional fee agreements, and client care letters. When I ask to see the documents currently in use, they always resemble a 'coral reef' of provisions, where they have been added to over the years, with fresh terms and conditions, but nothing is ever taken away: the result being that the documents get longer and longer, and are often contradictory in part. This is most unsatisfactory, and my task is usually to simplify and reduce, rather than to expand upon what has been done in the past.

I would suggest that a radical new approach could usefully be taken, to the practice both of charging and consumer protection; and reform of the second practice is easier to achieve than the first.

In respect of reforms to the practice of charging, there would have to be the repeal and replacement of the Solicitors Act 1974, with amendments to the Courts and Legal Services Act 1990 to sweep away the nonsense of damages-based agreements which do not work, and conditional fee agreements which do not reflect the realities of the agreements that solicitors and clients want to make. Obtaining primary legislation seems most unlikely in the current climate.

In respect of consumer protection, a lot could be done to simplify retainers and make them easier for clients to understand. Most retainers could be reduced to 2,000 words in my view, and most client care protections made standard to all clients and set out in the Solicitors Handbook. There is no need to duplicate them in a client care letter.

Moreover, it could be made a regulatory requirement that a solicitor or their representative must give an oral explanation to the client of key provisions, and keep a record of it. Since the advent of email, people do not talk to each other as they used to, but a conversation is a much better way of ensuring the most important information is conveyed in a way that means there is a reasonable chance that the client will actually understand what their rights and obligations are - with a better prospect of achieving the objective of consumer protection.

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