

## Managing Litigation Retainers

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### How we transact business today

The relationship between solicitor and client is highly regulated and the detail may be found in Rule 15 of the Solicitors' Practice Rules and The Solicitors' Costs Information and Client Care Code 1999. The code is important because failure to follow the requirements could lead to a:

1. Finding of a breach of the Rules leading to a fine, reprimand, suspension or striking off;
2. Finding of inadequate professional service (IPS) and a fine of up to £15,000; and,
3. A reduction in your firm's fees.

*The key terms which one should include in any terms of business to ensure they are compliant are:*

- Which fee earner is undertaking the work and their status
- Money laundering requirements
- How fees are calculated and the hourly charge out rate
- A cost benefit analysis
- Fee estimate
- Disbursements
- Funding options such as legal aid, before or after the event insurance options
- Payments on account
- Billing and payment terms
- How the adverse cost rule works
- The difference between the level of solicitor and own client charges and between the parties cost recoveries
- Complaints handling

The most important word in this resume is "should" for, as we learned from Edwards v Garbutt [2005] EWCA Civ 1206, "should" is a word which connotes an exhortation not a mandatory requirement. Consequently failing to comply with those provisions will not lead to any serious sanction save in extreme cases. This is fortunate for most solicitors because the requirement to provide fee estimates and the requirement to provide a cost benefit analysis is more honoured in the breach.

The Practice Advice Service of the Law Society has prepared 2 new guidance booklets which provide a useful starting point for refreshing your understanding of this important area or revisiting

the rules to ensure your firm is compliant.

“Contentious costs” reviews issues which frequently cause difficulty in costs related matters. It covers issues such as: methods of charging, billing your client, recovering costs from your client and detailed assessments. It is available now on the Law Society website: [www.lawsociety.org.uk](http://www.lawsociety.org.uk) under the link: Services for solicitors and their clients go to Practice Advice.

The other, “Payment by Results”, provides invaluable advice about working under conditional fee agreements both before and after 1 November 2005 when the new regulations came into force. It should be available on the site by September.

Both booklets have appendices containing the relevant rules and a precedent CFA agreement as at 1 November 2005.

## The future for solicitors’ costs

The regime is expected to change when the new Code of Conduct is finally introduced later this year. Although the Code as a whole is being reviewed by the relevant committee within the DCA Rule 2, which deals with client relations, is not expected to alter from the draft. The Code may be found on [www.lawsociety.org.uk](http://www.lawsociety.org.uk) under Pending Rules and Consultations.

On the face of it Rule 2 looks similar to Rule 15 and the Code. It draws together in one rule a number of provisions which are spread amongst different rules in the present regulatory regime. However the devil is in the detail and the key changes to the way in which solicitors set out their terms of business under the new Rule are:

- Level of service commitment (important when considering how costs may be charged). This requires firms to confirm the level of service expected by the client. In other words how often will you inform the client of developments? At every stage or just quarterly? Such an agreement will avoid any difficulties with the Law Society or with the client because you will then be charging him or her in accordance with an agreed level of service. (2.02(2)(a))
- The likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses (2.03(1))
- The circumstances when you may be entitled to exercise a lien (2.03(1)(e))

The most important change in the rules lies in the word “must” which appears where the word “should” formerly appeared. Must has a very different legal interpretation to should. Must is a mandatory word which has the effect of making these requirements obligatory.

This will, I predict, come as a very rude awakening to the profession and one which calls for wide publicity. Just how rude an awakening will of course depend on the regulator but with a new Chief Executive heading the regulatory arm of the Law Society and keen to promote transparent regulation (see article in the Law Society’s Gazette 27.07.06) one may be confident these new rules about estimates will be enforced with perhaps greater attention to detail than the profession

has hitherto been accustomed.

The format of the new rules is also different to the present regime. Guidance is provided and this is worth reading; in particular guidance notes 11 (when a lien may properly be exercised – not always!) and 14 as to the importance of agreeing a level of service and how this affects the way in which costs may be charged.

Paragraph 36 reminds the profession that in some cases it is impossible to tell what the overall cost will be. Nevertheless a ceiling figure or review date should be specified.

Finally, it is encouraging to note that despite all of the new requirements the guidance says (para 13) that over-complex or lengthy terms of business letters may not be helpful!

## The future for funding litigation

I, together with about 100 others, attended the Civil Justice Council's Costs Forum which took place from 28 February to 2 March 2006 in a little known part of Buckinghamshire. There was much debate about the different issues in costs today and I refer to a couple which are of particular interest to litigators interested in how the future of litigation may develop.

### 1. Costs estimates/budgets as tools in the Court's arsenal

After a very lengthy debate on the first day of the 2 day event the Master of the Rolls concluded that it was unnecessary for the Court to prescribe a budget as an aid to determining case management. The Court already had estimate under the CPR and these should be adequate to provide the Court with sufficient information to effectively case manage cases.

### 2. Funding of cases by professional funders

The funding of cases by commercial, professional funders established for that purpose moved another step forward during the Forum when the meeting acknowledged that in the light of the Court of Appeal decision in *Arkin v Borchard* [2005] EWCA Civ 655 the way was now clear for professional funding companies to develop the market in a structured and coherent fashion. *Arkin*, it will be remembered, holds, amongst other things, that professional funders are a legitimate source of funding for litigation. The English and Welsh market is under-developed at present with a small number of providers however I expect this will change before too long.

Interviewed by the Law Society's Gazette (21.04.06) the Master of the Rolls commented that he was remaining "open-minded" about costs problems which many interpret as offering the prospect of radical solutions to current dilemmas in costs we may therefore be able to look forward to yet more change emanating from the CJC in the near future.

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