
On one condition

*Responsibility for client care, contractual and guidance matters now
fall under a Law Society code*

BY GEANEEN HAYES

The new regime for Conditional Fee Agreements (CFAs) and Collective Conditional Fee Agreements (CCFAs) began on 1 November 2005. As many solicitors will be aware, on this date the current Conditional Fee Agreements Regulations 2000 and the Collective Conditional Fee Agreements Regulations 2000 were revoked and primary responsibility for client care, contractual and guidance matters now fall under the Law Society's Solicitors' Costs Information and Client Care Code 1999.

The purpose of the change is to simplify how CFAs and CCFAs are governed. The Law Society has pressed for this for some years. Following consultation undertaken by the Department for Constitutional Affairs in 2004, there was consensus that the current regulations were unnecessarily complex and had led to significant problems.

The mandatory requirements in section 58 of the Courts and Legal Services Act 1990 (as amended by section 27 of the Access to Justice Act 1999) remain. Agreements still have to be in writing, not relate to criminal or family proceedings, and in the case of a success fee must specify the percentage increase, which must not exceed that specified by the Lord Chancellor (currently set at 100 per cent). If section 58 requirements are not met then the agreement is unenforceable and, by virtue of the indemnity principle, the losing party is not liable for the winning party's costs.

Before 1 November, the regulations sat under section 58 and, if these were breached in a material way, the agreement was unenforceable in accordance with section 58(1). What has changed? For the most part, the Law Society requirements in the code simply repeat the existing regulations as to the information about costs which must be given to clients. There is one amendment, which came into force at the same time and provides that where clients are represented under a CFA or CCFA the solicitor should explain:

- the circumstances in which the client may be liable for their own costs and for the other party's costs;
- the client's right to assessment of costs, wherever the solicitor intends to seek payment of any or all of their costs from the client; and
- any interest a solicitor may have in recommending a particular policy or other funding.

Moving the detailed requirements of the regulations to the Law Society code is intended, in part, to make it less likely that a minor failure fully to comply results in a disproportionate sanc-

tion. The consequences of failing to provide a costs estimate were clarified by the Court of Appeal's recent decision in the case of *Garbutt v Edwards* (see article, page 16). The Law Society intervened in the case, submitting that the agreement should not be void, but subject to sanction by the Law Society. Another recent case of note is *Deborah Garrett v Halton Borough Council* regarding the declaration of an interest in recommending a particular After-The-Event (ATE) insurance policy. The judge held that being on a panel for claims farmers meant that the solicitor had an interest in recommending the policy, because if the solicitors did not recommend the linked policy they would lose work by being removed from the panel. This decision is relevant under the new regime as the amended code provides that the solicitor should explain any interest they may have in recommending a particular policy or other funding when their client is using a CFA.

The requirements issued in January 2005 by the Financial Services Authority (FSA) also address the question of "interest", including where a solicitor's recommendation is influenced by their link to particular insurers. The Law Society has provided guidance on how to comply with FSA requirements.

Transitional provisions are provided in the revoking regulations. The revocation only applies in respect of CFAs or CCFAs entered into from 1 November 2005. Any agreements that are entered into before 1 November 2005 will be subject to the existing regulations. There is no statutory restriction on terminating an existing agreement and entering into a new one to take advantage of the new regime.

The Law Society has prepared a new model CFA. The one page agreement contains the statutory and basic requirements, as well as the leaflet *What you need to know about a CFA*. The client care letter should provide further information that is required by the Law Society's code. When using a CFA it is important that solicitors have regard to their client's individual circumstances and refer to the Law Society's Solicitors' Costs Information and Client Care Code 1999 and FSA requirements.

Further information on the code and the amended rule, FSA requirements and the CFA model can be found on the Law Society's website at www.lawsociety.org.uk. Alternatively, telephone the Law Society's Practice Advice Service, which is staffed by solicitors, on 0870 606 2522.

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