

# Costs Law Update

## Spring 2025 – Retainer Special



Our previous Costs Law Updates, including the Fixed Recoverable Costs special editions, are available [here](#).

### In this issue ...

- Law Society Model Conditional Fee Agreement – [Pages 1-2](#)
  - Notice of Right to Cancel – [Pages 2-3](#)
- Retainers and Fixed Recoverable Costs – [Pages 3-4](#)
  - Contact Us – [Page 4](#)

### ***Law Society Model Conditional Fee Agreement***

For many years the Law Society provided a model conditional fee agreement for use in personal injury and clinical negligence cases. This was updated from time to time.

The last version was updated in 2014 and, even then, appears to have been a temporary job as the header to the document stated:

“This model agreement is in the process of being amended to take [sic] make it fully compliant with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. You should refer to those regulations before using this model.”

This version was removed from the Law Society website in July 2021 with a message stating:

“The Law Society’s model conditional fee agreement (CFA) is in the process of being reviewed, and so is not currently published.

Solicitors using an old version should be aware that it does not reflect all of the recent changes to legislation, or case law, that may affect the viability of CFAs.

The model CFA and guidance were last updated in 2014. The model is intended for use in personal injury and clinical negligence claims.

We will issue a revised version in due course, taking into account ongoing judgments from 2021.

Thank you for your patience in the meantime.”

Solicitors waiting for the revised version will therefore be delighted with the latest update on the [Law Society website](#) (updated in December 2023), which now advises:

“The Law Society’s model conditional fee agreement (CFA) is in the process of being reviewed, and so is not currently published.

Solicitors using an old version should be aware that it does not reflect all of the recent changes to legislation, or case law, that may affect the viability of CFAs.

The model CFA and guidance were last updated in 2014. The model is intended

for use in personal injury and clinical negligence claims.

The CFA will be reviewed in light of the court's decision in *Belsner v CAM Legal Services* in October 2022.

We will issue a revised version in due course.

Thank you for your patience in the meantime."

You couldn't make it up.

How well does this reflect on the Law Society, that the representative body for solicitors is unable to keep up to date with developments in the law or publish a model agreement years after promising to do so?

It is hardly surprising that an increasing part of our work involves advising on and drafting CFAs for solicitors.

## **Notice of Right to Cancel**

---

Solicitors will all be aware of the importance of including a right to cancel notice with their retainers, right? Not necessarily.

The *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* require certain information to be provided to consumers (defined as "an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession") when contracts are entered into. The nature of this information varies depending on how and where the contract is "concluded". Importantly, unless the contract is an "on-premises contract", the information that must be included is the right of the consumer to cancel the contract without liability. The usual cancellation period is 14 days. The consequence of a failure to provide this information is that the cancellation period is extended for 12 months, and the consumer is then free to cancel the agreement at any time up to 12 months after the 14-day period and **with no liability to pay for any services received** during the extended cancellation period.

There is no doubt that these Regulations apply with equal force to solicitors' retainers. A failure to provide the correct cancellation notice, when required, potentially means receiving no payment for a year's worth of work.

Problems have been created by the less than helpful drafting of the wording of the Regulations, meaning it is not always obvious as to where the contract is "concluded".

In simple terms (although the devil is in the detail), an "on-premises contract" is one entered into at the solicitor's office (with no prior visit to the client's home). No notice of a right to cancel is required in this situation.

The main difficulty arises in terms of a "distance contract", where a notice of a right to cancel is required. The Regulations define this as "a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded".

What is "an organised distance sales or service-provision scheme"? The Law Society's Practice Note on the issue stated:

"Examples of distance contracts include mail order, online sales and telesales contracts. This will not apply to most solicitors. However, contracts under which you agree to provide

services to a consumer, and which have been concluded wholly online, would be distance contacts.”

Unfortunately, this interpretation of the Regulations appears to be wrong (or, at least, is not the generally accepted interpretation).

A much broader interpretation can be found in the Competition and Markets Authority’s *Legal Services Market Study: Final Report*, at paragraph 36 of Appendix E:

“Distance contracts are contracts concluded under an organised distance sales or service-provision scheme where legal services providers and consumers are not both physically present at the time the contract is made. Additionally, the agreement must be made by exclusive use of one or more means of distance communication (for example, by phone, post or the internet) up to and including the time at which the contract is concluded. The requirements relating to distance contracts are likely to apply where, for instance, legal services providers send contractual documents to consumers by post and consumers return signed copies using the same means. This is likely to be common practice amongst legal services such as conveyance contracts, contracts for Wills and probate.”

This is therefore likely to catch any retainer which is sent out by post or email for the client to sign and return.

The Law Society does appear to have recognised that its guidance may have been wrong and the previous Practice Note has since been “archived” on their website. Visitors are currently met with a message stating: “This practice note has been temporarily archived while the content is reviewed”. This appears to have been archived in September 2023 and the review is presumably still ongoing. So far as the Law Society’s ability to keep up to date with the law is concerned, readers may have spotted a trend emerging.

Problems are not helped by the fact that many solicitors are still using conditional fee agreements based on the old Law Society Model Conditional Fee Agreement. Later versions of that did include a notice of a right to cancel but it will not come as a surprise by this stage to discover that the wording of the notice was, itself, defective. The notice stated:

“This only applies if you sign the Conditional Fee Agreement:

- (i) At your home, workplace or at someone else’s home; or
- (ii) At our offices but following a visit by us (or by someone acting on our behalf) to your home, workplace or someone else’s home; or
- (iii) At our offices but following a meeting between us away from our offices.”

For the reasons given above, this is almost certainly incorrect. Solicitors must ensure their retainer documents fully comply with the right to cancel Regulations.

### ***Retainers and Fixed Recoverable Costs***

---

The 1<sup>st</sup> of October 2023 saw a major expansion of Fixed Recoverable Costs (FRC) in civil litigation. The majority of civil claims valued at £100,000 or less are now subject to FRC for both claimants and defendants.

Do your firm’s retainer documents make proper provision for FRC?

The most important drafting consideration is what costs will the client be liable for if there is

a shortfall or excess between costs calculated on an hourly rate basis (if that is how the retainer is structured) and any FRC recovered from the other side.

The simplest option is to have a retainer that fixes the charges to the client at the amount of FRC recovered from the other side, although this requires careful drafting.

Many firms will consider the FRC to be, for many cases, too low to be profitable and will want to be able to recover any shortfall from the client. Section 74(3) of the Solicitors Act 1974 states that, on assessment, a solicitor may only recover from their client the costs which would be recoverable on a between the parties' assessment. This limitation only applies to contentious business in the County Court. This limitation can be disapplied by rules of court, and CPR 46.9(2) does disapply s74(3) if there is a written agreement between the solicitor and the client that allows this. The crucial point is that the retainer must be drafted so as to permit a shortfall to be charged.

The second important consideration is that costs belong to the client. This applies equally to FRC. Unless the terms of the retainer provide otherwise, if the FRC are greater than the solicitors' costs calculated on an hourly rate basis (or otherwise), any excess will belong to the client and not the solicitors. This

issue goes further than the obvious situation where the charges based on an hourly rate are lower than the applicable FRC at the point of settlement. The FRC figure can be increased in a number of situations:

- Where the other party to the litigation has behaved unreasonably, the Court may order that the costs payable to the successful party are increased by an amount equivalent to 50% of the FRC which would otherwise be payable (CPR 45.13(2)).
- Where a claimant succeeds at trial on a Part 36 offer, they are entitled to a 35% uplift on the FRC for the relevant stage(s).

Again, these uplifts will belong to the client, not the solicitor, unless the retainer documents make appropriate provision.

Obviously, any retainer where the amount of costs is, at least in part, subject to the outcome of the case (here, the FRC recovered from the other side) will be a form of conditional fee agreement, but the other terms of the retainer can be entirely conventional. For example, the retainer could allow for work to be charged on an hourly rate basis, win or lose, but in the event the FRC are higher than the fees on an hourly rate basis, the total fees will be increased to the amount of the recovered FRC.

*Please contact Simon Gibbs if you would like us to undertake a review of your existing retainers.*

## Contact Us ...

If you wish to discuss the contents of this update in more detail, please contact:

**Simon Gibbs**

Tel: 020 7096 0937

Email: [simon.gibbs@gwslaw.co.uk](mailto:simon.gibbs@gwslaw.co.uk)

Address: 68 Clarendon Drive, London, SW15 1AH

Website: [www.gwslaw.co.uk](http://www.gwslaw.co.uk)

Legal Costs Blog: [www.gwslaw.co.uk/blog](http://www.gwslaw.co.uk/blog)