



The Costs Lawyer Standards Board, setting and maintaining standards in the profession

Newsletter 13: 25 July 2018

2019 practising certificate fee

On 19 July 2018, we issued a consultation paper under which we are proposing the fee for a 2019 Costs Lawyer practising certificate remains the same at £250.00 for the eighth consecutive year. This has been achieved by continued sound financial management at the CLSB. Please note that consultation responses have to be in by midnight on Monday 10 September 2018.

Cold calling

We will shortly be consulting on a proposed change to the Costs Lawyer Code of Conduct to introduce a specific code to protect the private individual (lay person) against cold calling by a Costs Lawyer. This is not accepted practice in the legal professions; the SRA, IpReg and CLC all have a specific rule banning the practice by Solicitors, Patent Attorneys, Trade Mark Attorneys and Licensed Conveyancers respectively. There has never been a specific code or rule on such a practice as it was never foreseen happening in the profession. We consider such a practice to be a breach of principle 1 (to act with integrity and professionalism). To ensure lay persons are adequately protected, it is proposed the new code will read:

You must not make an unsolicited approach (cold call) by any means to a private individual (lay person) or to domestic premises (unless a business is being conducted from there) in order to publicise your service as a Costs Lawyer or your business.

Outcome of snapshot survey

Many thanks to all those who responded to the one week snapshot survey on advocacy/drafting. 1/6th of the profession inputted, and the outcome identified a surprisingly low level of advocacy being undertaken by the profession. The question asked was "what % of your work time (on average per calendar month) involves drafting and what % advocacy?" In response, 19.09% advised they undertook no advocacy. The survey identified that 86.55% of a Costs Lawyer's work was made up of drafting pleadings and process documents with only 8.7% being advocacy.

Outcome of the Costs Lawyer competence test consultation

This proposal has been re-branded as being the CLCA (Costs Lawyer Competence Assessment). Following consideration of all representations for and against (in full or part) and the outcome of the snapshot survey referred to above, the proposal has been revised. We now propose a five part qualifying process on legal knowledge and skills:

Part 1:	MCT	Core legal principles
Part 2:	MCT	Costs law & practice
Part 3:	Practical test	Drafting pleadings & process documents
Part 4:	Training	Legal knowledge One day training on advocacy skills
Part 5:	Experience	Minimum 2 years qualifying work experience

We continue to work on this proposal and a fully comprehensive handbook. More detail around the proposal will follow in due course.

Anyone interested in qualifying as a Costs Lawyer

If you know of anyone interested in qualifying as a Costs Lawyer, please ask them to register their interest with us so we can keep them informed on developments with the CLCA.

Why Costs Lawyers leave the regulated community

We undertook an analysis of information gathered on leavers since 2012. Approximately 50% would not indicate their reasons for not re-applying. From those who did indicate a reason, it was noted that reasons were mixed e.g. maternity leave, career change, career break, illness, unemployment, personal/family reasons and death.

The analysis identified that there has only been one Costs Lawyer that did not renew back in 2013 due to the cost of regulation. It was noted that unemployment was stated as a reason for not renewing in 2017 (4 Costs Lawyers) and 2018 (5 Costs Lawyers). This did not appear as a reason in 2016, 2015, 2014, 2013 or 2012 and it is likely that this reflects a competitive market for the profession.

New guidance note on reserved legal activity rights

Under the Legal Services Act 2007, the three reserved legal activity rights (right to conduct litigation, right of audience, right to administer oaths) afforded a Costs Lawyer authorised by the CLSB are personal to that Costs Lawyer and cannot be delegated.

Delegation of authorised rights by an authorised entity or licenced alternative business structure may occur under supervision, however the CLSB does not authorise entities or licence alternative business structures.

A new guidance note, confined to the personal authorised rights of an individual Costs Lawyer endorsed by Gregory Treverton-Jones QC, was approved by the CLSB board on 18 July 2018. The guidance note can be accessed under the Costs Lawyer Handbook section of the CLSB website, it reads as follows:

Guidance Note
Reserved Legal Activity Rights

Effective: 18 July 2018

Introduction

This guidance has been written to clarify the authorised rights of a Costs Lawyer (as defined). It has been approved by specialist regulatory counsel, Gregory Treverton-Jones QC.

Definitions and references

Reference to the law herein is a reference to the Legal Services Act 2007, unless stated otherwise.

CLSB	The Costs Lawyer Standards Board, acting as approved regulator under Schedule 4, Part 1 of the Legal Services Act 2007 following delegated authority by The Association of Law Costs Draftsmen on 31 October 2011
Costs Lawyer	A Costs Lawyer entitled (authorised) and regulated by the CLSB under the Legal Services Act 2007
LSA	The Legal Services Act 2007

1. BACKGROUND

(i) Reserved legal activity

A Costs Lawyer is entitled (authorised) to conduct the following three reserved legal activities (Schedule 4, Part 1):

- The exercise of a right of audience
- The conduct of litigation
- The administration of oaths

A statement of right, which clarified those rights was approved by the Lord Chancellor in July 2007. That statement of rights was subsequently reviewed and a revised version was approved by the Legal Services Board and implemented on the 26 March 2014. That statement appears under the Costs Lawyer code of conduct and reads:

Provided that you are instructed to deal only with matters that relate to costs, you may conduct proceedings and represent clients in any court or tribunal, including any criminal court or courts martial, the Supreme Court or the Privy Council where:

- *the proceedings are at first instance; or*
- *the proceedings include an appeal below the level of the Court of Appeal or Upper Tribunal, are on a first appeal (other than in the Court of Appeal) and the appeal itself relates to costs; or*
- *the proceedings do not fall within either of the categories above, but your instructions are limited to dealing with the costs of the proceedings; or*
- *the court or tribunal grants permission for you to conduct proceedings or to represent a client (or both).*

Where proceedings relate to other matters, in addition to costs, the rights referred to above apply only to those parts of the proceedings (if any) that:

- *relate solely to costs; or*
- *when they relate to other issues, solely those issues that are not in dispute.*

A matter 'relates to costs' if it relates to payments for legal representation, including payments in respect of pro bono representation under s194 of the LSA and/or to payments made for bringing or defending any proceedings, but only if and to the extent that those monies are not damages. For the avoidance of doubt, this includes:

- *Costs between opposing parties including costs management and budgeting.*
- *Solicitor and client costs but not if and to the extent that issues of negligence arise when a Lawyer competent to deal with allegations of negligence ought to be instructed instead.*
- *Legal aid, criminal costs, wasted costs or costs against third parties.*

Further, you may administer any oath.

(ii) Authority of the LSA in relation to entitlement (authorisation)

S13(1) states that the question of whether a person is entitled (authorised) to carry on a reserved legal activity *“is to be determined solely in accordance with the provisions of the Act”*

(iii) Where are the authorised rights of an individual Costs Lawyer derived from?

13(2): *A person is entitled to carry on an activity (“the relevant activity”) which is a reserved legal activity where-*

(a) the person is an authorised person in relation to the relevant activity.

(iv) Who is an “authorised person”?

S.18(1): *A person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity.*

(v) Is an authorised person an individual only?

No, the definition of a person under Part 9, s.207 includes a body of persons (corporate or incorporate, commonly referred to as an entity. However, the CLSB does not authorise and regulate entities, only individuals.

(vi) Entitlement (authorisation) to carry out a reserved legal activity

A person is either entitled (authorised) or exempt under the LSA.

Entitled (authorised) under S.13(2):

A person is entitled to carry on an activity (“the relevant activity”) which is a reserved legal activity where-

*the person is an authorised person in relation to the relevant activity, or
the person is an exempt person in relation to that activity.*

Exempt under s.19:

In this Act, “exempt person”, in relation to an activity (“the relevant activity”) which is a reserved legal activity, means a person who, for the purposes of carrying on the relevant activity, is an exempt person by virtue of-

*(a) Schedule 3 (exempt persons), or
(b) paragraph 13 or 18 of Schedule 5 (additional categories) of exempt persons during transitional period.*

(vii) What are the duties of an authorised and regulated Costs Lawyer?

Part 8, s.176:

(1) A person who is a regulated person in relation to an approved regulator has a duty to comply with the regulatory arrangements of the approved regulator as they apply to that person.

(2) A person is a regulated person in relation to an approved regulator if the person:

*(a) is authorised by the approved regulator to carry on an activity which is a reserved legal activity; or
(b) is not so authorised, but is a manager or employee of a person who is so authorised.*

The “regulatory arrangements” of the CLSB include the Code of Conduct, with which an authorised and regulated Costs Lawyer must comply.

2. OFFENCES UNDER THE LSA

(i) Undertaking a reserved legal activity when not entitled (authorised) under the LSA

Under s.14 it is an offence for a person to carry on a reserved legal activity unless entitled (authorised) to do so. The offence is punishable by imprisonment and/or fine.

(ii) Pretending to be entitled (authorised) under the LSA

Under s.17 it is an offence if a person wilfully pretends to be entitled (authorised) to carry on a reserved legal activity when they are not entitled (authorised) to do so. The offence is punishable by imprisonment and/or fine.

3. RIGHT OF AUDIENCE

(i) Definition under the LSA

Schedule 2, paragraph 3(1):

A “right of audience” means a right to appear before and address a court, including the right to call and examine witnesses.

(ii) Can a Costs Lawyer delegate this right?

No. The CLSB authorises and regulates individual Costs Lawyers, and under s.18 it is the Costs Lawyer who is authorised in relation to this reserved legal activity. Under s.13 only an entitled (authorised) person may undertake a reserved legal activity, and the LSA makes no provision for the delegation of this specific right by an entitled (authorised) person.

Therefore, subject to paragraph 1(7) of Schedule 3 (set out below), if a Costs Lawyer sends a colleague to a Court hearing, that individual will not be entitled (authorised) to address the Court unless they are entitled (authorised) as a Costs Lawyer, or they are permitted to address the Court by the Court itself in the exercise of its discretion.

(iii) Exemptions to an offence under s.14

Schedule 3, paragraph 1:

(2) The person is exempt if the person-

(a) is not an authorised person in relation to that activity, but

(b) has a right of audience granted by the court in relation to those proceedings.

(3) The person is exempt if the person-

(a) is not an authorised person in relation to that activity, but

(b) has a right of audience before the court in relation to those proceedings granted by or under any enactment.

(7) The person is exempt if-

(a) the person is an individual whose work includes assisting in the conduct of litigation,

(b) the person is assisting in the conduct of litigation-

(i) under instructions given (either generally or in relation to the proceedings) by an individual to whom sub-paragraph (8) applies, and

(ii) under the supervision of that individual, and

(c) the proceedings are being heard in chambers in the High Court or a county court and are not reserved family proceedings.

(8) *This sub-paragraph applies to-*

- (a) *any authorised person in relation to an activity which constitutes the conduct of litigation;*
- (b) *any authorised person who by virtue of section 193 is not required to be entitled to carry on such an activity.*

4. RIGHT TO CONDUCT LITIGATION

(i) Definition under the LSA

Schedule 2, paragraph 4(1):

The “conduct of litigation” means-

- (a) *the issuing of proceedings before any court in England and Wales,*
- (b) *the commencement, prosecution and defence of such proceedings, and*
- (c) *the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)*

(ii) Can a Costs Lawyer delegate this right?

No. The CLSB authorises and regulates individual Costs Lawyers, and under s.18 it is the Costs Lawyer who is authorised in relation to this reserved legal activity. Under s.13 only an entitled (authorised) person may undertake a reserved legal activity, and the LSA makes no provision for the delegation of this specific right by an entitled (authorised) person.

The precise ambit of the phrase “the conduct of litigation” is unclear, and is discussed by the Court of Appeal in *Agassi v Robinson* [2006] 1 WLR 2126.

(iii) Exemptions to an offence under s.14

Schedule 3, paragraph 2:

The person is exempt if the person-

- (a) *is not an authorised person in relation to that activity, but*
- (b) *has a right to conduct litigation granted by a court in relation to those proceedings.*

Schedule 3, paragraph 3:

The person is exempt if the person-

- (a) *is not an authorised person in relation to that activity, but*
- (b) *has a right to conduct litigation in relation to those proceedings granted by or under any enactment.*

Schedule 3, paragraph 4:

The person is exempt if the person-

- (a) *is a party to those proceedings, and*
- (b) *would have a right to conduct litigation, in the person’s capacity as such a party, if this Act had not been passed.*

5. RIGHT TO ADMINISTER OATHS

(i) Definition under the LSA

Schedule 2, paragraph 8: *The “administration of oaths” means an exercise of the powers conferred on a commissioner for oaths by:*

- (a) *the Commissioner for Oaths Act 1889 (c.10);*
- (b) *the Commissioner for Oaths Act 1891 (c.50);*
- (c) *section 24 of the Stamp Duties Management Act 1891 (c.38).*

(ii) Can a Costs Lawyer delegate this right?

No, this authorised right is personal to the Costs Lawyer. Under s.13 only an entitled (authorised) person may undertake a reserved legal activity, and the LSA makes no provision for the delegation of this specific right by an entitled (authorised) person.

(iii) Exemptions to an offence under s.14

Schedule 3, paragraph 6 (2): *The person is exempt if the person is not an authorised person in relation to that activity under the Act, but is authorised to carry on that activity by or by virtue of any other enactment.*

Schedule 3, paragraph 6(3): *The person is exempt if that person has a commission under section 1(1) of the Commissioners for Oaths Act 1889 (c.10).*

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