

'The Costs Column'



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Readers of our costs publication **Costs Recovery News** will already be aware that we often feature contributions to our publication from other costs experts. One such expert is my colleague and fellow Costs Lawyer, Victoria Hopkins. As well as being a costs draftsman, Victoria is also a remuneration certificate assessor for the Legal Complaints Service.

Victoria wrote an article on the new Code of Conduct for the December edition of **Costs Recovery News** and it has been so well received that I thought it was worth reproducing part of it here.

Costs Information & Client Care Code 1999	Code of Conduct 2007 (nb: clauses are shown out of order to show equivalence with the old Code)
Costs Information	
"Costs information must not be inaccurate or misleading"	
"Any terms with which the client may be unfamiliar should be explained"	"Any information about the cost must be clear"
"The information ... should be given to the client at the outset of, and at appropriate stages throughout the matter"	"You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses"
"All information given orally should be confirmed in writing to the client as soon as possible"	"Any information about the cost must be clear and confirmed in writing"
"The solicitor should give the best information possible"	"You must give your client the best information possible ..."
"The solicitor should explain clearly to the client the time likely to be spent in dealing with a matter" <i>[if time is a factor in billing]</i>	
"The solicitor should make it clear at the outset if an estimate, quotation or other indication of cost is not intended to be fixed"	
"The solicitor should explain to the client how the firm's fees are calculated ... if the basis of charging is an hourly charging rate, that must be made clear"	"You must: a) advise the client of the basis and terms of your charges; b) advise the client if charging rates are to be increased..."
"The solicitor should explain what reasonably foreseeable payments a client may have to make either to the solicitor or to a third party and when those payments are likely to be needed"	You must ... advise the client of likely payments which you and your client may need to make to others"
"The solicitor should explain to the client the arrangements for updating the costs information ..."	
Eligibility for Public Funding	
"The solicitor should discuss with the client ... whether the client may be eligible and should apply for legal aid ..."	"You must ... discuss with the client ... whether the client may be eligible and should apply for public funding"
"The solicitor should discuss with the client ... whether the client's liability for their own costs may be covered by insurance"	"You must ... discuss with the client ... whether the client's own costs are covered by insurance"
"The solicitor should discuss with the client how and when any costs are to be met"	"You must ... discuss with the client how the client will pay"
Insurance or Third Party Cover	
"The solicitor should discuss with the client ... whether the client's liability for another party's costs may be covered by pre-purchased insurance and, if not, whether it would be advisable for ... costs to be covered by after the event insurance ...[or] may be paid by another person eg. an employer or trade union.	"You must ... discuss with the client ... whether the client's own costs are covered by insurance or may be paid by someone else such as employer or trade union" "You must ... discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained"

Cost/benefit	
“The solicitor should discuss with the client whether the likely outcome in a matter will justify the expense or risk involved”	You must discuss with your client whether the potential outcomes of any legal case will justify the expense or risk involved including, if relevant, the risk of having to pay an opponent’s costs”
“The solicitor should discuss with the client ... the risk of having to bear an opponent’s costs”	“You must ... advise the client of their potential liability for any other party’s costs”
Publicly-funded clients	
“The solicitor should explain to a legally aided client the client’s potential liability for the client’s own expenses and those of any other party”	<p>“Where you are acting for a publicly funded client ... you must explain the following at the outset:</p> <ul style="list-style-type: none"> a) the circumstances in which they may be liable for your costs; b) the effect of the statutory charge; c) the client’s duty to pay any ... contribution ... d) that even if your client is successful, the other party may not be ordered to pay costs ...
CFA clients	
<p>“When a client is represented under a CFA, the solicitor should explain:</p> <ul style="list-style-type: none"> i) the circumstances in which the client may be liable for their own costs and for the other party’s costs; ii) the client’s right to assessment of costs; iii) any interest the solicitor may have in recommending a particular policy or other funding” 	<p>“Where you are acting for the client under a CFA ... you must explain the following, both at the outset and, when appropriate, as the matter progresses:</p> <ul style="list-style-type: none"> a) the circumstances in which your client may be liable for your costs and whether you will seek payment of these from the client, if entitled to do so; b) if you intend to seek payment of any or all of your costs from your client, you must advise your client of their right to an assessment of those costs; and c) where applicable, the fact that you are obliged under a fee sharing agreement to pay a charity any fees which you receive by way of costs from the client’s opponent or other third party.
Updating information	
<p>“The solicitor should keep the client properly informed about costs as a matter progresses. In particular, the solicitor should:</p> <ul style="list-style-type: none"> a) tell the client, unless otherwise agreed, how much the costs are at regular intervals (at least every six months) ... b) explain to the client (and confirm in writing) any changed circumstances ... c) inform the client in writing as soon as it appears that a costs estimate ... may or will be exceeded” 	<p>“You must give your client the best information possible about the likely overall cost ... as the matter progresses”</p>
	<p>If you can demonstrate that it was inappropriate in the circumstances to meet some or all of the requirements in 2.03 (1) [best information possible] and (5) [clear and confirmed in writing] above, you will not breach 2.03</p>

As you can see, the differences between the old and new code are often subtle. Only when the wording comes to be tested by a higher court will we know how significant the changes are (you may recall the debate in *Garbutt v Edwards* [2005] EWCA Civ 1206 about whether the word “shall” in the old Code was mandatory or directory).

Note the number of times “shoulds” have become “musts”. Also note the important “get-out clause” which allows solicitors to exercise some discretion about whether all the provisions of Rule 2.03 need to be adhered to, for example, in relation to a sophisticated commercial client giving repeat business.

Some of the provisions in the old Code have not been transferred specifically, but are clearly inherent in the overall intention of the new Code, for example the prohibition on “inaccurate or misleading” information. Clearly, any such information would not be the “best information possible”.

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