

Consultation Paper
Costs Lawyer Standards Board

Subject matter: Revised Costs Lawyer Practising Rule 10.1 (insurance)
Date issued: Tuesday 10 December 2013
Consultation closing date: Tuesday 4 March 2014 (midnight)
Consultation period: 12 weeks

Definitions herein

ABS	Alternative Business Structure
CLSB	Costs Lawyer Standards Board
CPR	Civil Procedure Rules
Costs Lawyer	A Costs Lawyer with a current practising certificate issued by CLSB and regulated by CLSB (Authorised Costs Lawyer)
LSA	Legal Services Act 2007
LSB	Legal Services Board

Introduction

Following significant CPR changes on 1 April 2013, CLSB formed the view that financial risk has increased for those Costs Lawyers undertaking costs budgeting and costs management work. Subsequent case law clearly demonstrates the courts are adopting a strict application of costs budgeting and costs management rules.

Murray & Anor v Neil Dowlman Architecture Ltd [2013] EWHC 872 (TCC)
Andrew Mitchell MP v News Group Newspapers Ltd [2013] EWCA Civ 1537
Henry-v-News Group Newspapers Ltd [2013] EWCA Civ 19

On 16 October 2013, the CLSB sought an exemption direction from the LSB under the provisions of Schedule 4, Part 3, Para 19 (2) (c) & (3) of the LSA to allow CLSB to revise its insurance rules to address this financial risk with immediate effect.

On 4 November 2013, the LSB advised “*the exemption notice is not appropriate it does not mean that we would reject a full application should you chose to submit it.*”

Accordingly, CLSB is now proceeding with a “*full application*” for LSB approval under Schedule 4, Part 3, Para 19 (2) (b) & (20) of the LSA, a process that requires us to undertake full consultation and will take some months to conclude.

On 17 November 2013, CLSB issued a Guidance Note by way of an interim holding position under which we requested Costs Lawyers operate voluntarily in accordance with the proposed revised insurance rule, pending the outcome of the full application to the LSB.

Regulatory objectives

Part 1, S1(1) of the LSA sets out eight regulatory objectives with which, the CLSB as an Approved Regulator, must comply. The proposed rule revision complies with the following three:

- (i) Protecting & promoting the public interest
Adequate insurance expectations is essential to ensure the continued professional standing of the Costs Lawyer profession as well as public confidence and protection.
- (ii) Protecting & promoting the interests of consumers
It ensures adequate insurance is in place to avoid the consumer being financially exposed.
- (iii) Promoting and maintaining adherence to professional principles
It ensures practising rules and regulations are appropriate to current circumstances.

The proposed rule revision does not impact on the remaining five regulatory objectives:

- Improving access to justice.
- Supporting the constitutional principle of the rule of law.
- Promoting competition in the provision of services.
- Encouraging an independent, strong, diverse and effective legal profession.
- Increasing public understanding of the citizen's legal rights and duties.

Part 1, S1 (3) of the LSA sets out the professional principles with which a Costs Lawyer must comply. This includes the requirement to act with "*integrity maintain proper standards of work and act in the best interests of their client*". Ensuring adequate insurance provision is in place complies with these three professional principles.

Part 2, S3(2) of the LSA requires the LSB, so far as is reasonably practicable, to act in a way which is compatible with regulatory objectives defined in the LSA.

Description of proposed rule revision

Costs Lawyer Practising Rule 10.1 currently reads/requires:

RULE 10.1: Indemnity insurance

10.1 With the exception of those who are employees of a Solicitors firm, Costs Lawyer firm, Insurance firm or other alternative business structure on a PAYE basis, a Costs Lawyer shall ensure that:

- a) professional indemnity insurance is in place at all times with minimum cover of £100,000 together with loss of documents cover;
- b) there are no gaps between policies;
- c) policy fees are paid in accordance with payment terms set out by the insurer to ensure cover is in place.

It is proposed Rule 10.1 be revised to read/require:

RULE 10.1: Indemnity insurance

10.1 All Costs Lawyers, save for those exclusively employed on a PAYE basis by a firm of Solicitors regulated by the SRA, insurance company, bank or other such financial institution, shall ensure that they/their employer has professional indemnity insurance in place at all times with minimum cover of £100,000 together with loss of documents cover. Costs Lawyers are required to assess the risks associated with the work being undertaken by them and ensure that professional indemnity insurance is put in place, in excess of the minimum set out herein, at a level commensurate with that work.

Three reasons for the proposed rule revision

(i) CPR Changes

As set out above in the introduction section.

(ii) Rule to cover ABSs

On reviewing Rule 10.1 it was noted it exempted Costs Lawyers working for an ABS from ensuring they have required levels of professional indemnity cover in place. Following an analysis of the profession undertaken at the beginning of 2013 it was established that there are some sole practitioner Costs Lawyers who practice through an ABS. The proposed revision seeks to ensure Rule 10.1 captures those working under an ABS structure.

(iii) Rule to cover employees of Costs Lawyer firms

As CLSB currently regulates the individual Costs Lawyer and not the firm, CLSB seeks to make it a requirement that a Costs Lawyer ensures their employer has adequate insurance cover in place.

Proportionality

The proposed rule revision retains the current minimum level of insurance cover but seeks to make it a requirement Costs Lawyers assess the financial risks of their own instructions and put adequate insurance in place as deemed appropriate. The revision also seeks to correct the fact the rule on insurance, as currently drafted, does not apply to Costs Lawyers working for Costs Lawyer firms or under an ABS.

Accountability

The proposed rule revision is now being subject to full public consultation as an exemption direction was not approved by the LSB.

Consistency

CLSB subjects all its rules and regulations to regular review to ensure they are fit for purpose. The proposed rule revision has come about as a result of those effective processes and procedures. This evidences a consistent management/risk management approach by CLSB.

Transparency

By revising the rule, which appears in the public domain for public and consumer reference, transparency is maintained. The consumer is clear on the rules and regulations under which a Costs Lawyer operates.

Targeted

The increased financial risk relates only to those Costs Lawyers undertaking costs budgeting and costs management activity. It was considered unfair to increase minimum insurance requirements and costs to practitioners across the whole of the profession which would inevitably and unnecessarily filter through to the consumer. The proposed revision therefore retains the current minimum level of cover but also now requires that a Costs Lawyer assesses financial risk based on their instruction and ensures they put in place an appropriate level of professional indemnity insurance attributable to those identified risks.

Any increase in costs is therefore only applicable on a “needs be” basis as opposed to across the whole of the profession.

Consumer protection

Whilst the LSB requires supporting data on the risk before considering the proposed rule revision, CLSB is of the view that even if one consumer is financially exposed, no matter the amount of exposure, that there is a requirement insurance rules be revised to ensure this risk is adequately addressed. CLSB believes the consumer, the judiciary and the profession would expect no less.

Professional standing of the profession

CLSB is of the view the proposed rule revision is necessary to ensure the continued professional standing of the Costs Lawyer profession.

Costs Lawyer impact

CLSB is of the view this proposed rule revision will not affect a Costs Lawyers ability to operate, make a profit and earn a livelihood, nor will it affect competition or entry into the profession.

In conclusion

CLSB is of the view this rule revision is both required and essential to ensure consumer protection and continued confidence in the Costs Lawyer profession.

Question for consideration under this consultation

Do you agree with the proposed revision to Costs Lawyer Practising Rule 10.1?

In responding, if you have any evidence in support of your submission either way then CLSB would be pleased if you would provide this.

How to respond to this consultation paper

Please note your responses should be submitted by email or post and must be received by midnight on Tuesday 4 March 2014.

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In the event of any questions arising from this consultation paper and attached documents please contact Lynn Plumbley at ceo@clsb.info or on 0161 214 7904.