

# In our estimation

Mark Solon reviews the new costs regime for expert witnesses



**B**uilders do it. Car mechanics do it. And now expert witnesses have to provide costs estimates, under the revised Civil Procedure Rules which came into effect in April following Lord Justice Jackson's report into civil litigation costs.

Experts comfortable with the old regime may be perplexed by the demands of estimating how much to budget for assessment, research, report-writing, travel, meetings, questions and court appearances. Meanwhile the court enjoys new powers to reduce fees deemed to be disproportionate. Is it worth being an expert witness?

## Business time

Some committed experts are upbeat: they can run their operations more like a business—offering fixed and capped fees, for example—and cherry-pick the most profitable work. If they can help solicitors give a costs estimate and identify the key issues, they won't be pricing themselves out of the market—they are more likely to be employed. Those appointed as a single joint expert, working on behalf of both sides, will be able to earn higher rates

Experts baulking at being asked for a ballpark figure should itemise every category of work; then they will be in a better position to ask for more money if something takes longer than expected. It will help if they can check their breakdown of previous assignments (yes, accurate record-keeping is essential).

An engagement letter may insist that fees be paid in full, "irrespective of the court's interpretation of proportionality". Flexibility and negotiating skills will help: solicitors will seek to pass on any court-imposed costs reduction, even if a specific fee is agreed in the contract. If the judge makes a costs management order, the expert is entitled to see it, and may appeal to the Solicitors Regulatory Authority if he thinks that the solicitors are not meeting their responsibilities. Timing is another factor: the solicitor or agency will not want to pay the expert until paid by the client (clients sometimes allow the expert to report directly to them, but that is rare).

Paul Rex, managing director of GBRW Expert Witness, points out that cost estimates have already been required for some time, for example by firms on large insurers' panels or working under a contingency agreement or after-the-event cover. "However, in complex financial disputes, the expert may need to plough through several bundles of documents to establish which are or are not relevant and it's very difficult to estimate how much time this might require. I have more than once found a single document which was critical to the case buried in several hundred pages of disclosure."

## Hot-tubbing time

As an economy measure, Mr Justice Ramsey (who is responsible for implementing the Jackson civil litigation reforms) has called

for more "hot-tubbing"—experts for both parties giving evidence at the same time before the judge, rather than being cross-examined separately. Ramsey also wants written evidence and disclosure kept to a minimum, saying that "not more than three facts are required to decide any case" as a rule.

A further issue making experts feel vulnerable is the Supreme Court judgment in *Jones v Kaney*, in 2011. This removed expert witnesses' immunity from civil action for professional negligence and breach of contract. Experts now have to be even more alert to acting reasonably and professionally. They should also check that they have professional indemnity insurance and keep it current as a claim may occur years afterwards.

## Problems ahead?

Despite the moves towards streamlining, Richard Emery, a retail theft and fraud expert, is not alone in foreseeing problems with costs. "With a simple case I can give an estimate, but for more complex cases it's just not possible to prepare a full budget for two reasons: instructions and disclosure.

"Solicitors have a broad idea of their instructions but until I understand the case and discuss the expert issues with them they can't confirm them—so how can I prepare a budget?"

"In a recent case, for example, first disclosure, as filtered by the solicitors, was seven lever arch files. Three months later we got another lot—18 bundles. When I asked a question to clarify the claimant's expert report I got 80 Excel files with half a million lines of data to analyse. How do I budget for that?"

Richard is fearful that experts may end up wasting precious time appearing before judges to explain costs estimates, or asking for more money to deal with subsequent disclosure.

Like many experts, Richard seeks processes to deal with additional events. In major criminal cases he has worked with the Legal Aid Agency to prepare an interim report, with an agreement to produce a full budget after that. His more radical idea is phased trials. He asks: "Why does my report need to cover every argument when just one of them could resolve the whole case?"

In general, however, experts aren't going to see all possible material evidence, just narrowed-down versions which fulfil court requirements. It is up to lawyers to get better at filtering material and addressing the issues—but what happens when they need an expert to explain the issues first? **NLJ**

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