

Litigation Committee response to the Civil Justice Council's Costs Committee's Call for Evidence regarding solicitors' guideline hourly rates

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee (the "Committee") and addresses the call for evidence by Civil Justice Council's Costs Committee (the "CJC") to assist the CJC in making "evidence-based recommendations" on new guideline hourly rates for solicitors' firms. In particular, this response addresses the CJC's survey of solicitor's firms, which seeks to gather evidence in order to enable the CJC to set those guideline rates.

1. The Committee considers that the CJC's survey reflects a flawed approach to establishing solicitors' reasonable charges and, further, that if this approach is carried through, it may reduce the international attractiveness of litigation in England and Wales.
2. The Committee accepts that it is impracticable for the court to receive evidence of solicitors' reasonable charges on every application for costs and, as a result, that guideline rates should be published in order to offer the judge in any particular case a starting point when assessing costs. The Committee also agrees that new guideline rates are required since it is three years since those rates were last reviewed and solicitors' rates, like other prices, have inevitably changed over that time. If the award of costs to successful litigants is to remain meaningful, the rates used by the court must reflect the true cost of litigation borne by litigants. However, the Committee considers that the CJC's survey will not establish litigants' true costs. The CJC should be seeking to identify market rates for solicitors' services so that guideline rates reflect what litigants actually pay; the CJC should not be setting its own rates

based on its subjective view as to what profit solicitors should make and what successful litigants should recover in costs.

The determination of reasonable costs

3. CPR 44.4 defines the amount of costs that a court should award to a successful litigant by reference to the reasonableness of the litigant's costs (CPR 44.4 also refers to proportionality but that is not relevant to the CJC's work). The question for the court (and, by extension, the question for the CJC when publishing guidelines) is what are solicitors' reasonable costs. More immediately, the question for the CJC is how solicitors' reasonable costs should be determined.
4. When the court is asked to determine a reasonable price or rate in other circumstances, the starting point is the market price or rate. If the market is distorted, that may offer a reason to depart from the market price, but in most instances a determination of the market price suffices to identify a reasonable price because the market price is what a reasonable person would have to pay for the goods or services in question.
5. In the Committee's view, solicitors' reasonable rates should be determined in the same manner. The market for solicitors' services in England and Wales is highly competitive. The reasonable rate for solicitors' services, objectively determined, is the market rate. The principal question for the court under CPR 44.4 is therefore what is the market rate for the solicitors' services in question. What solicitors in fact charge in the legal market place - not what others may think they should charge - is what litigants pay in order to conduct litigation. The costs awarded to a successful litigant should reflect litigants' actual costs.
6. The CJC's survey does not seek to identify the current market rates for solicitors' services. The CJC's survey asks questions about the direct costs incurred by a solicitor's practice. Having decided what it considers to be a proper figure for those direct costs, the CJC will then presumably decide how many hours solicitors should work and how much solicitors should earn, and use those figures to calculate the CJC's hourly rates. The CJC's approach will not lead to its guideline rates reflecting market reality but rather to the CJC's determining what, in its view, successful litigants should recover by way of costs.
7. The Committee considers that the approach taken by the CJC's survey represents an inappropriate basis upon which to establish guideline rates for solicitors' reasonable charges for the purposes of CPR 44.4. This is for the following reasons, amongst others:
 - (a) As mentioned above, it is not the approach the court takes when asked to determine a reasonable cost in other circumstances, and

there are no grounds to justify a different approach where solicitors are concerned. For example, the Committee is not aware of any survey of barristers' costs in order to establish expense rates for barristers or any attempt by the judiciary to determine the profit over those expenses that barristers should make.

- (b) It reflects the old approach to solicitors' costs, which involved adding the so-called A and B factors, the A factor being the expense rate and the B factor being the "care and conduct", or profit, element. That approach was rightly abandoned some years ago in favour of a single rate because that approach did not reflect commercial reality, as well as being cumbersome and inefficient. This outmoded approach should not be reintroduced through the CJC's survey.
 - (c) The CJC is ill-equipped to make an economic and social decision as to what profit solicitors' firms should make, nor is it appropriate for it to do so given the highly competitive nature of the market.
8. The Committee therefore considers that the CJC should conduct research, amongst solicitors and their clients, to establish the current market rates for solicitors' services. The CJC should not investigate the far more complex question of the underlying cost structure of solicitors' firms as a step towards the CJC's fixing its own subjective recovery rates.

The effect of the CJC's approach on international litigation

9. The Committee is also concerned about the effect that the CJC's approach may have on international litigation in England and Wales if, as is increasingly the case, recoverable rates depart from market rates.
10. One of the attractive features of litigating in England and Wales is the prospect that a successful party in litigation will recover a high proportion of its actual costs. If the CJC determines those costs not by reference to market rates but to the CJC's own view as to what the appropriate level of recovery is, that is likely in reality to depress costs recoveries and, as a result, leave a successful party bearing an ever higher proportion of its actual costs. This would discourage international litigants and, as a result, run directly counter to the Lord Chancellor's policy of promoting England and Wales as an international centre for the resolution of disputes.

The practicality and implementation of the CJC's survey

11. As a matter of practicality, the Committee is concerned that the CJC's survey will not produce meaningful data. The CJC has demanded from solicitors' firms a mass of detailed and sensitive management information that few firms will have readily available, especially in the form requested. The Committee is concerned that many firms will not reply (particularly, perhaps, larger firms),

which will result in distorted or unrepresentative figures. By contrast determining the market rate should be significantly easier through consultation with solicitors' firms and their clients.

12. The Committee is also concerned whether the potential significance of the CJC's survey will have been appreciated by those to whom notification of the survey was, the Committee understands, sent, reducing still further the number of responses. The Committee understands that the survey was sent to firms' compliance officers rather than to the litigators within firms. Even if a wide-spread mailing penetrated a firm's spam filters, a compliance officer may not have understood the purpose of the survey or the need to pass the mailing to the litigation department,
13. Even within survey's own terms, the Committee is sceptical of the utility of a number of the questions included in the survey. For example, questions 13 to 16 ask respondents to calculate the proportion of costs claimed that were recovered in up to four individual cases. However, the proportion of costs claimed that is recovered can vary enormously from case to case, and so is unlikely in itself to be meaningful (as well as potentially being subject to careful selection according to what the respondent wishes to prove). Calculating an average recovery rate across all relevant areas would be a significant undertaking.

Competition law

14. The Committee does not specialise in competition law. The Committee assumes that the CJC and its individual members have considered whether the CJC's current approach, as evidenced by its survey, is consistent with the requirements of competition law. For example, the Committee assumes that the CJC has considered whether its decision as to what rates solicitors' clients should recover will have the effect of distorting competition in solicitors' services or indirectly fixing prices contrary to the Competition Act 1998.

Conclusion

15. For the reasons set out above, the Committee considers that new guideline rates are required but that the survey launched by the CJC is not the appropriate way to establish those rates. The CJC should conduct research into the market rate for solicitors' services, not determine what it considers successful parties should recover.

5 December 2013

THE CITY OF LONDON LAW SOCIETY
Litigation Committee

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