

wkforensic

Experts' Fees and Rates Reduced

On 3rd October this year, the Community Legal Service (Funding) (Amendment No.2) Order 2011 and the Criminal Defence Service (Funding) (Amendment) Order 2011 both came into force, arguably the most contentious elements of which are to be found in the Schedules to the respective documents, outlining Experts' Fees and Rates.

These rates cover over 60 classifications, from A&E consultant to voice recognition expert, and provide two hourly rates (or fixed fees, in a few cases) for each, depending on whether or not the expert is London-based. Only two classes of expert can expect a London increase in rates (bizarrely, many rates are actually reduced, several by as much as a third), and fortunately the (forensic) accountant is one of them. Outside London, the accountant can charge an hourly rate of £50 - £135, and £50 - £144 if based within London.

The range of rates is accounted for by further division into sub-categories, reflecting the varying levels of expertise necessary in accounting work, for which different rates are applicable as follows:

Partner	£144
Manager	£108
Accountant	£80
General Staff	£50

Note that the lowest rate for London and non-London accountants remains the same, at £50, whilst the Partner's rate increases from £135 to £144. It is not stated whether the Manager and

Accountant grades should increase proportionately if London-based, but in the absence of specific guidance, it is probably safer to assume not. There will also be plenty of scope for subjective judgment in allocating staff time to these four categories, and thus for any invoice to be challenged by the Legal Services Commission (LSC), despite the apparent clarity of the codified rates.

If the fee levels are less than inviting, there may be some possibility for improvement, by obtaining a 'prior authority' from the LSC (without which fees exceeding the codified rates will simply be disallowed). Their guidelines state:

The Commission may increase the rates if it considers it reasonable to do so due to exceptional circumstances. These are where expert's evidence is key to the client's case and either:

- i) *the complexity of the material is such that an expert with a high level of seniority is required*
- ii) *the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.*

Given that prior authorities are required also where 'expenditure is unusual in nature or unusually large', the likelihood is that applications for prior authority are going to be numerous, and this in itself may prove to be a significant administrative problem for the Commission.

In addition to the rates restrictions, the Orders also confirmed that administration fees may not be charged by experts, nor may any cancellation

Welcome

Welcome to the Winter 2011 edition of WKforensic. In this issue we first take a hard look at a direct effect of the Chancellor's squeeze on Legal Aid funding, the cuts in Experts' fees. On page 2, having covered mediation in our Spring edition, we take a look at expert determination, another form of dispute resolution that avoids the costs and hassle of litigation.

fee be charged where cancellation was notified more than 72 hours before the relevant hearing or appointment. Travel time will only be reimbursed at £40 per hour, and vehicle mileage at £0.45 per mile. These limitations were set out in the original consultation documents in 2009.

Though there will be many applications to increase rates, a high level of resistance should be anticipated, and whilst this may seem to be a problem only for Legal Aid firms, an inevitable resultant migration to more remunerative sources of work will result in increased competitive pressure in the private arena also.

With these new rates setting a bench mark for the future in terms of funding, an inevitable result will be that experts will be increasingly wanting to discuss with instructing solicitors private funding to run alongside public funding to make appointments commercially viable. The consequence of this move may well be to reduce the number of experts willing to take appointments of this nature thus reducing the pool of expertise available to the legal profession.

To find out more, simply contact your nearest Wilkins Kennedy office, or call Adam Merrett on 020 7403 1877 or email adam.merrett@wilkinskennedy.com

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Expert Determination

Like mediation, Expert Determination is a dispute resolution process that provides a much more timely and cost-effective solution than litigation. In this process, an independent expert in the particular field of the dispute is appointed by the parties to resolve the matter. The expert's decision is - by prior agreement of the parties - legally binding.

Expert Determination is ideally suited to disputes over valuation, or which are primarily dependent on technical issues. Typical examples might include: the valuation of shares; the determination of fault origination (e.g. whether in the design or the manufacturing of a piece of equipment); whether, or the degree to which, a technical specification has been met; rent reviews; boundary disputes. In such cases, there is often little dispute over the fundamental facts of the matter, and therefore little to be gained through protracted and expensive litigation: far better to simply appoint an appropriate expert to determine the amount or extent to be settled.

The Advantages of Expert Determination

- **Cost-effectiveness**
- **Confidentiality and privacy – particularly regarding commercially sensitive information**
- **Maintenance of business relationships, due to the confidential, less adversarial nature of the process**
- **Relative speed of the process - the parties can even agree a timetable**
- **Parties retain control of the procedure, which is less affected by delays and external influences, formalities and rules**

- **Matters are determined by an independent expert in the relevant field, selected by both parties, or according to an agreed procedure**
- **The outcome is final and binding, unless otherwise agreed in advance, avoiding protracted legal appeals and similar actions**
- **The process is well-established and well-supported, with experts available in a wide variety of disciplines who are experienced in the relevant procedures**
- **Expert Determination is also ideally suited to multi-party disputes, due to its flexibility.**

Note that the expert's decision is binding, and can only be challenged if the expert answered the wrong question, or there is evidence of fraud or partiality. Therefore it is critical that proper attention be given to the drafting of the contract for the determination, in particular the scope of the question to be addressed by the expert. For example, in a dispute regarding a debt, the debtor will want to be sure to include any counterclaims or offsets in the determination, because if they are not included, it will not be possible to imply them into the amount at a later stage – the gross amount would be due and enforceable in law, regardless.

If the prospect of such a binding decision is discomfiting, parties can elect instead for an Expert Evaluation, where the expert's decision is advisory rather than binding, but still often forms the basis of a settlement. It carries the significant disadvantage, however, of leaving the doors open for litigious challenge.

The Process

The process is instigated either by the triggering of a contract provision stipulating the means of dispute resolution, or by both parties simply agreeing to adopt the process in preference to litigation. In either case, early involvement of an expert with relevant experience and knowledge of the process is critical in drawing up an effective contract for determination.

There are standard frameworks that can be used as a basis for the agreement, including the terms of the Expert's appointment. The exact wording must be agreed, as well as the provision of such evidence as they, and the Expert, think necessary. The Expert will decide on any procedural matters, such as meetings and hearings, or relating to the provision of evidence. Once the Determination is completed the Expert will issue his decision in writing to all parties, in accordance with the agreed procedures.

Costs will vary with complexity, and the number of parties involved. The appointment fee, and the Expert's charges and costs, will be known in advance, other costs will vary with the extent of the written and other evidence. It is usual for the parties to share the Expert's fees and administrative costs equally. Both parties can at least rely on the fact that the total will certainly be much less than that for arbitration or litigation.

The team of specialist forensic accountants at Wilkins Kennedy have experience in resolving a wide range of serious business and commercial disputes. For further information please contact your local Wilkins Kennedy office.

Offices at:

London, Amersham, Ashford, Egham, Guildford, Hertford, Orpington, Reading, Romsey, Southend-on-Sea, Winchester, Falkland Islands

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