

President's Guidance

May 2012

Prior Authority for Experts

Background

On 11 October 2011, as part of the legal aid reform programme, the Ministry of Justice (MoJ) enacted a new Funding Order that set maximum hourly rates and prescribed fees for certain types of experts. The Order does not prescribe the amount of time that may be spent by an expert on a case. The Order does allow for higher rates to be paid if specific exceptional criteria are met. The LSC is required to make funding decisions in accordance with the Order.

Solicitors may make an application to the LSC for prior authority for expert costs in certain circumstances.

Volumes of applications for prior authorities received by the LSC

| <i>Monthly applications</i> | <i>Nov</i> | <i>Dec</i> | <i>Jan</i> | <i>Feb</i> | <i>Mar</i> | <i>April</i> |
|----------------------------------|------------|------------|------------|------------|------------|--------------|
| Applications for Prior Authority | 216 | 492 | 784 | 1140 | 1840 | 1855 |

The number of prior authority applications received overall in this period is significantly higher than the same period the previous year. It is difficult to predict whether the numbers of applications will continue to increase.

The LSC contract states that prior authority should only be sought where the request is for exceptional rates or where the costs sought are unusual or unusually high. The LSC agreed that as a transitional arrangement it would grant requests for standard expenditure for 3 months after the enactment of the Order to provide certainty for solicitors. The LSC is now working with the Law Society to discourage applications where no unusual costs are sought.

Time taken to process applications

The time taken to process applications as at March 2012 is set out below. The LSC is monitoring the volumes of applications and the time taken to process them.

| <i>Time taken to process</i> | |
|------------------------------|--------|
| Standard applications | 8 days |
| Urgent applications | 3 days |

There are no specific criteria for urgent applications other than that the solicitor has stated that it is urgent, for example a Court hearing is imminent.

The time taken to process the applications is calculated from the date that all of the necessary information has been received from the solicitor and would exclude time taken waiting for additional information if this had been requested.

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The above analysis does not include applications for experts in very high cost cases which are dealt with under individual high cost case contracts. In these cases it may take longer to authorise expert costs as the total costs of the cases need to be agreed. The number of these cases is small (around 1,950 of care certificates which represent 5% of the total number of care certificates granted). However, these cases cost around £60 million taking up 20% of the public law spend.

The LSC is looking at how the system for approving costs in these cases can be made simpler for all parties and is currently piloting a new “events model” with some solicitor firms.

Decisions made

The LSC may grant, refuse or reject an application. The meanings of these decisions are:

- (i) Where applications are granted the prior authority for hourly rates and/or hours is approved as requested;
- (ii) Where the prior authority was refused it may be for a number of reasons e.g. the hours are excessive (following the introduction of the Order there has been a significant increase in the number of hours requested in some cases) or there are issues with apportionment of costs;
- (iii) Where applications are rejected the solicitor has provided insufficient information to enable the LSC to make a determination e.g. requesting a global sum without a breakdown of the work to be done, the number of hours and the requested hourly rate. In these cases the solicitor is asked to re-submit the application with the relevant information.

There was previously a right of appeal against a funding decision by the LSC on a prior authority. Following the introduction of the new family contracts in 2012 there is no longer this right. Solicitors are able to re-submit their application where they have additional information that they wish to have considered.

A refusal of prior authority does not necessarily mean the cost of the expert will not be met. Refusals may take the form of telling the solicitor to “Justify on taxation” i.e. as part of their usual application for payment at the end of the case. This applies in particular to cases where the assessor decides the case does not justify an exceptional rate.

Future data

The LSC is committed, as a member of the Family Justice System, to improve the management information that it collects. One of the areas where more data is being collected is on prior authority requests. This data will be shared once a representative sample has been analysed and should be available by October 2012. It will look at things such as the:

- Types of experts for whom prior authority is sought
- The nature of the authority i.e. in relation to rates or hours
- The number of applications that are refused or rejected.

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