

**CIVIL JUSTICE COUNCIL CALL FOR EVIDENCE:
GUIDELINE HOURLY RATES**



A response by the Association of Personal Injury Lawyers

11 December 2013

1. The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have over 4,000 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.
2. APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:
 - To promote full and just compensation for all types of personal injury;
 - To promote and develop expertise in the practice of personal injury law;
 - To promote wider redress for personal injury in the legal system;
 - To campaign for improvements in personal injury law;
 - To promote safety and alert the public to hazards wherever they arise;
 - To provide a communication network for members.
3. Any enquiries in respect of this response should be addressed, in the first instance, to:

Helen Blundell

Legal Services Manager

APIL

Unit 3, Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: mail@apil.org.uk

4. The Civil Justice Council has issued a call for evidence to assist with its calculation of guideline hourly rates for solicitors' firms in England and Wales. It has posed the following three questions:
 - a) The extent to which the current (2010) guideline hourly rates continue to represent a reasonable hourly rate for the work of different level fee earners in different parts of England and Wales – and if not, why not.
 - b) What is to be regarded as a fair profit margin for a firm of solicitors in relation to work on various types of civil litigation on top of expenditure on salaries and overheads and the extent to which this profit margin might be compared with other similar professions.
 - c) The effect that the 'Jackson' reforms that came into effect earlier this year, including the abolition of the recoverability of success fees, 'After the event' (ATE) premiums and referral fees, and the introduction of alternative business structures and damages-based agreements, are likely to have, or ought to have, on the way in which the GHR are calculated.
5. APIL's response to the CJC's call for evidence is based on discussions with a working group comprising members of its executive committee – all of whom are practising lawyers. The response is predicated upon the basis that there should not be a separate set of guideline hourly rates for personal injury work: our comments are not industry specific: instead they are based upon the experience of our group's work as litigators.

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6. Guideline hourly rates for solicitor's firms have remained substantially unchanged since 1 January 2009 when guideline hourly rates (GHR) recommended by the Advisory Committee on Civil costs were increased by just 1.7 per cent as an interim measure while the Committee continued its analysis of the issues raised in its paper "*The Derivation of New Guideline Hourly Rates.*"¹ On 1 April 2010 the Master of the Rolls accepted the recommendation of the Advisory Committee on

¹ "Why We Recommend Uprating the 2009 GHR," Note from the Advisory Committee on Civil costs, March 2010:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/recommendation-advisory-committee-rates-mar-2010.pdf>

Civil Costs that those interim GHR should be accepted as the final hourly rates². No further increases have been made.

7. During that same period, the Retail Price Index has increased by 19.8 per cent³ and the Consumer Prices Index has increased by 16.7 per cent.⁴
8. In our view, the GHR no longer represent a reasonable hourly rate for the work of fee earners and should be increased in line with an average of these two indices to reflect the true cost of goods and services in 2013: 18.25 per cent.

What is to be regarded as a fair profit margin for a firm of solicitors in relation to work on various types of civil litigation on top of expenditure on salaries and overheads and the extent to which this profit margin might be compared with other similar professions.

9. It is exceedingly difficult to ascertain profit margins for firms of different shapes, sizes or specialisation. For example, the legal periodical 'The Lawyer' produces an annual report which ranks the top 200 law firms in the UK, with profit margins in the top 20 in 2010/11 ranging from 53 per cent to 18 per cent⁵. This illustrates the difficulty in determining what a "*fair profit margin for a firm of solicitors*" should be, even where firms undertake the similar sort of work. We take the view that the Civil Justice Council should determine the answer to this question from its own survey of law firms, and commission research from an organisation such as Otterburn Legal Consulting who will have a clearer idea as to the appropriate profit margins for various types of law firm.

² Judicial Communications Office statement 1910/2010, 25 June 2010:
<http://www.judiciary.gov.uk/media/media-releases/2010/media-release-1910>

³ RPI: October 2013: 251.9 - January 2009: 210.1 / January 2009: 210.1 x 100 = 19.8%

⁴ CPI: October 2013: 126.9 - January 2009: 108.7 / January 2009: 108.7 x 100 = 16.7%

⁵ "The Lawyer UK 200 preview: Profit margin: Profitability still a key indicator of success" *The Lawyer*, 15 August 2011 (<http://www.thelawyer.com/the-lawyer-uk-200-preview-profit-margin-profitability-still-a-key-indicator-of-success/1008941.article>)

The effect that the ‘Jackson’ reforms that came into effect earlier this year, including the abolition of the recoverability of success fees, ‘After the event’ (ATE) premiums and referral fees, and the introduction of alternative business structures and damages-based agreements, are likely to have, or ought to have, on the way in which the GHR are calculated.

Cases subject to GHR

10. It should be borne in mind that one of the main effects of the Jackson reforms has been to reduce the number of claims which are still subject to GHRs. Based on an analysis conducted by Professor Paul Fenn on nearly 64,000 claims, only 11.65 per cent of employment liability (EL) claims⁶, 3.64 per cent of motor claims and 5.21 per cent of public liability (PL) claims have a damages value above £25,000 and therefore fall outside any type of fixed costs regime (whether it be in the RTA and EL/PL protocols or in the fixed recoverable costs scheme). In our view, the remaining cases are indistinguishable from other types of litigation: they are by their nature of relatively greater complexity than those cases which remain in the pre-action protocol regimes, and therefore deserving of an appropriate enhanced rate in accordance with the balance of general litigation cases.
11. Never the less, it is important to recall that the fixed costs within these various schemes were, according to the Government response, fixed with reference to the GHRs. In our view, this link should be maintained⁷.

Referral fee ban / costs of acquiring work

12. Lawyers have a route to market which will cost money, regardless of the referral fee ban. Since the relaxation of advertising rules, all firms undertake marketing activities in order to acquire new business and in all sectors the nature of that marketing has changed radically in recent years. It will not relate solely to referral fees or advertising, corporate events and seminars for example.

⁶ Professor Fenn analysed a sample of 63,998 personal injury cases for Lord Justice Jackson's response to the Ministry of Justice's (MoJ) consultation paper CP13/10 (<http://www.judiciary.gov.uk/NR/rdonlyres/FFE965E-2A7F-4A1E-881E-3FC58483EA99/0/jacksonjicivillitresponse.pdf>). It is possible that the data source did not include information on all of the very high value claims – they may have been treated separately. This is, however, only speculative.

⁷ See paragraph 40: *Extension of the Road Traffic Accident Personal Injury Scheme: proposals on fixed recoverable costs*. Ministry of Justice consultation response 27 February 2013.

13. In paragraphs 14 - 17 below, we quote from and refer to research conducted on behalf of APIL by Otterburn Consulting in 2012⁸, prepared in response to Helen Grant MP's letter calling for evidence on the new portal fees (Jan 2013).
14. Twenty years ago, most firms of solicitors did very little marketing with most of their work coming from existing clients or client recommendation. For some areas, such as family work, this continues to be the case, but most other areas have seen radical change in the marketing techniques used to obtain new clients. Solicitors still receive some work from existing clients, or passing trade, however for most, this work source is minimal. Most business today comes through television advertising, web site optimisation, pay per click or direct marketing.
15. Many firms of solicitors lack in-depth experience of these forms of advertising and will often rely upon a marketing consortium. For many firms fees paid to these consortia are simply another form of marketing, in much the same way as today most (but not all) insurance companies buy work from price comparison websites. They are simply different ways of generating work. The "cost of acquisition" of new business and the length of time for a new customer to become profitable, has become a huge issue in many sectors.
16. Otterburn's report sampled eight law firms to examine their acquisition of work costs. The sums varied from £535 to £880 per case.
17. His report noted that interestingly, other sectors experience similar high new business acquisition costs. The key is often the relationship between that cost and the income it generates and how long it takes to move into profit. For example:
 - Research in the US suggests the cost of a new cell phone customer is \$350, comprising commissions, phone subsidies and marketing. A customer paying \$59.99 a month becomes profitable after month eight and a \$39.99 a month customer after month eleven (www.myrateplan.com);
 - A regional UK accountancy practice estimates their marketing budget at £68,000, being £18,000 on a limited amount of advertising, their seminar programme, and a client newsletter, and a further £50,000 on sponsorship, a total of £68,000. Each year they might acquire 15 new clients, so the average acquisition cost per client is £4,500. Average fees for these new clients are £13,000, so the acquisition cost represents just over 33 per cent of the first year's fees. The £18,000 direct marketing expenditure represents one per cent of their fees.

⁸ Personal injury marketing and "referral fees" December 2012, *Otterburn Legal Consulting*.

Alternative business structures / LASPO

18. As to the final effect that the 'Jackson' reforms and the advent of ABSs are likely to have on GHRs, it is probably still too early to tell. Yet early signs suggest the need for caution when setting new GHRs as uncertainty in the marketplace, reduction in fixed fees and the introduction of new fixed costs schemes has led many practices to become less financially viable. For example, leading Leeds law firm Walker Morris recently announced the closure of its personal injury practice stating "[a]s a result of the LASPO changes and the continuing turmoil in the personal injury market place Walker Morris has taken the decision to withdraw from this market." In addition, Co-Op Legal Services has restructured its personal injury division, with expected redundancies⁹.
19. With the current GHRs failing to take account of over four years of real-world inflation, keeping them at the same level or even reducing them would ultimately have access to justice implications as it will become increasingly difficult for consumers to find independent solicitors to take on their cases. In addition, the practices which continue to survive may well be concentrated within large metropolitan areas leaving large advice deserts in rural areas and for those unable to travel.

Association of Personal Injury Lawyers

- ▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX ● T: 0115 958 0585
- E: mail@apil.org.uk ● W: www.apil.org.uk

⁹ "Walker Morris joins Co-op in personal injury cull" Leeds firm to shed 48 staff, blaming LASPO and 'continuing turmoil,' Solicitors Journal 21 November 2013: <http://www.solicitorsjournal.com/news/legal-profession/legal-services/walker-morris-joins-co-op-personal-injury-cull>