FireWire from Prime Legal Costs introduces the new legal costs clinic, your questions answered together with news and commentary from guest editors.

FireWire News

A very warm welcome to our October 2011 Firewire update.

Prime Legal Costs provides you with a full legal costs drafting and negotiation service designed around you the client. We aim to address the key issues you want answered. Our articles are topical; practice area related and sometimes light hearted in these testing times. A special thank you for our guest editorial from Neil Rose of Legal Futures on the much vaunted issue of Referral fees. PLC Editor.

The Dangerous Fees Act 2011

By Neil Rose Editor, Legal Futures

A senior figure in the world of legal regulation has described to me the impending effort to ban referral fees as the Dangerous Fees Act, recalling the infamously half-baked and kneejerk Dangerous Dogs Act 1991. It had become increasingly clear, since Jack Straw's intervention in June, that government support for a ban had warmed up significantly. Saying that, justice minister Jonathan Djanogly appeared on the Today programme the day after Mr Straw began his campaign, and observed that "banning anything is not necessarily going to solve the problem. It will find another route".

Privately, the Ministry of Justice (MoJ) knows this. Announcing a ban is for show and for headlines. It is politics, not policy. If ministers really want rid of claims management companies, then ban them, not referral fees. But they know they can't do that, because these businesses will just become alternative business structures and do the whole case themselves, a move that was likely anyway but that this announcement will surely speed up. Ministers clearly don't have a philosophical problem with referral fees or they would stop them in conveyancing as well. The Legal Services Board, after all, found no regulatory case for banning them (it explicitly did not consider the public policy arguments). Short of scrapping claims farmers, restricting advertising would be a more effective way of clamping down on the industry. It is accepted that defining referral fees in such a way as to catch every arrangement an imaginative solicitor or claims manager can dream up is nigh-on impossible. It will stop the upfront referral fee, but there are many ways to skin this particular cat. Indeed, the notes to editors in the MoJ press release begins by saying: "Please note there is no universally recognised definition of 'referral fees'." Good luck with trying to find one.

Is a solicitor who outsources to another company all of his personal injury marketing, as well as preliminary work like accident investigation and witness statements, caught by the ban when he pays for those services? Why should a solicitor not be able to do that? Is the government going to ban outsourcing? These questions become sharper given that justice secretary Ken Clarke has indicated the ban is likely to take the form of a criminal, rather than regulatory, offence. The MoJ also recognises that the ban is no silver bullet; it remains focused on reducing the amount of money in the system that allows fat referral fees to be paid, and the announcement frankly offers little hope to campaigners that the Jackson reforms can be derailed. The full article can be accessed through news **www.primelegalcosts.co.uk** and thanks for Neil's contribution. PLC Editor.

Defendants refuse to pay for medical report

Our Costs Lawyer addresses a common issue on low value personal injury claims, in response to your questions:-
"I have accepted a Part 36 offer for £500.00 and the defendants refuse to pay for two medical reports I needed, stating inter alia CPR 27.14(f) a sum not exceeding the amount specified…for an expert's fees" The Small Claims Track costs do not apply.

- **1.** The provisions for acceptance of a Part 36 offer are found in 36.10(3) CPR. Costs follow on the "standard basis if the amount of costs is not agreed"
- **2.** Further according to 27.2(1) (g) CPR, Part 36 offers do not apply to small claims in any event.
- **3.** Finally under 27.14(1) CPR costs on the Small Claims Track only apply when the "case …has been allocated to the small claims track" see also 44.9 CPR for confirmation as to when costs regimes effectively "bite". Therefore in this scenario, costs are not just limited to a sole expert's fee, or fixed fees for costs and witnesses. The usual tests of reasonableness of disbursements will apply and recourse to the Courts via a Part 8 application (under 44.12A CPR) should be sought (as a last resort) to resolve the matter.

Wicked webs…. from Grade D to A

You are filling in an N260 for the latest application in protracted litigation. A partner at the firm of 15 years standing wants to make sure that his time has been recorded correctly on it. In fact, he proposes penalising the other side by asking you to "bump up" his actual contribution to the work done. Please consider carefully the result in Booth v Oldham MBC from the Watford County Court in 2009 which has recently re-surfaced. In this matter the N260 stated that all the work done, in what was ostensibly a simple application; (save for the attendance at the hearing) was done by a Grade A fee earner, a grade D fee earner in attendance.

The judge found that not only was the application poorly brought, and in breach of the protocols but was poorly billed. He awarded no costs for the successful Claimants and wished that the Grade A fee earner was personally notified of his wrath at the abuse of process. Next time your supervisor wants to make sure that their time has been recorded correctly on it ensure that he has actually done the work and you can reasonably justify it to the judge. Always seek detailed instructions and check your indemnity insurance and/or CV just in case!

Having issues recovering costs in Infant matters

In settlements involving infants less than £1,000.00 the defendants argue entitlement is only Small Claims Costs. Clear disparity in recoverable costs of the costs regimes – just a few pounds either way can affect costs substantially. In an infant case that settles below £1,000.00 it is not a small claims matter. Even if the Small claims track would be the normal track for the value of the claim, the Small claims costs do not apply. Refer Rule 21.10(2)(b) CPR which states that Infant matters must follow the Part 8 procedure. Part 8, Rule 8.9(c) CPR states that the matter shall be allocated to the multi-track and Part 26 (allocation) does not apply. Furthermore, rule 8.9 describes itself as a modification of the general rule, which is taken to mean that it over-rides other rules. It follows then that Multi-track costs apply and not Small Claims Costs (or even Part 45 predictive costs for that matter) Counsel should be instructed to ask for costs to be assessed on the standard basis to be dealt with by detailed assessment if not agreed.

Counsel can recover his opinion fee as being necessarily and reasonably incurred and counsel should look to Thaxton v Goodman (2010) for the recovery of his attendance fee, approved in the sum of £150.00. This being said, however, there are rumours circulating that Thaxton is to be appealed. A number of low level judgments, e.g DJ Platts decision in GW -v- BW & TA -v- RP [2011] EW Misc 10 (CC) are becoming cited more often in support of no counsel's fees and indeed no actual need for an Infant Approval hearing in any event. There is some hope though, if the matter has not been settled by the Judge at Approval hearing, it is still "live." (see Drinkall -v- Whitwood [2003] ADR LR 11/06) Negotiate a-plenty for the correct decision as to liability for costs before the hearing and send it to costs draftsman with counsel's carefully phrased Order after the Hearing.

Recovery of ATE Premium et al...

Now this is one issue we all come across from time to time and for many firms handling particularly personal injury work must cause major issues when it comes down to cash flow. You settle the case in the portal and costs are paid except for the ATE premium; arguments range from too expensive should have used a cheaper alternative, not making appropriate BTE checks and then there are the attacks on the validity of the policy. These are all well used, tried and tested tactics used by the defendant cost lawyers, the net result being slowing down the payment cycle, starving cash flow.

So what can you do? Well the answer is don't push the file to one side, act now, if you are satisfied reasonable checks have been carried out then don't succumb to the defendants lure of entering in to correspondence as before you know it 3 months have passed and you are still no further forward. Positive action involves having confidence in your procedure, knowing you have made the appropriate checks at the time and making sure that the insurers have been put on notice of every relevant issue during the initial stages. It seems obvious, but with the modern pace of litigation having the initial BTE checks and report to the third party insurers as part of your workflow keeps risk under control. We advocate resolution by way of Part 8 proceedings and have a number of successful pilots in place, **please contact us for further information on how we can help 0844 887 1214.**

Your Feedback is always appreciated

Including the good, bad and the ugly...we want to make this newsletter an altogether better read and relevant to you and your work types. That is why we will be soon publishing several different versions of Firewire which will be sent to our subscriber sub groups. It is a trial which will run for the next three issues so if you receive Firewire and it is not relevant to your practice area please tell us and we can fix it! We know you like guest editorials and will continue to seek out the 'legal influencers' if you think of someone who should be considered, again just let us know. Many thanks PLC ED.

WIN!!! £25 Marks & Spencers vouchers

We will be providing one lucky individual subscribing to Prime Legal Costs FireWire vouchers to the value of £25 from Marks & Spencers (or equivalent retailer/ donation upon request). The winner will be selected at random from our list of subscribers.

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