

## The sanctions applied to late claims are changing

The Lord Chancellor's Department and the Commission have been working together to find a simpler and fairer approach to late claims for civil certificated work. Draft amendments to The Civil Legal Aid (General) (Amendment No. 2) Regulations 2002 are published in this edition of Focus and will be posted to the Commission's website.

The Lord Chancellor's Department has consulted with The Law Society, The Bar Council, and other representative bodies. The consultation concluded on 27 Nov 2002.

The changes will be effective on 31<sup>st</sup> December 2002 and will be applied to **all costs claims** for civil certificated work that are submitted to the Commission for assessment **on or after 1 January 2003**.

### *What are the amendments?*

The amendments are being made to the Civil Legal Aid (General) Regulations 1989 (as amended see page 1B-83 of Volume 1 of the LSC manual. Rule 6.5 of the General Civil Contract Specification incorporates the regulations into the contract – see page 2 A-108 of Volume 2 of the LSC manual. The proposed amendments will apply to costs claims under both the 1988 Act and the 1999 Act.

New Regulations 104(4) & (5) are inserted.

Regulation 105(9) is deleted.

Regulation 105(10) is substituted by:

*“Where a solicitor or counsel has failed to comply with the time limit in paragraph (3A), the costs shall be assessed and the Area Director shall consider what, if any, reduction is reasonable and proportionate in all the circumstances; provided that the costs shall not be reduced unless the solicitor or counsel has been allowed an opportunity to show cause in writing why the costs should not be reduced”.*

### *What does this mean?*

Currently if there is no extension to the time limit for good reason (where the solicitor can justify the delay) a nil assessment of the costs is made unless there are exceptional circumstances. If no good reason exists, but the solicitor can show exceptional circumstances, the reasonable costs are assessed and deductions imposed for lateness. This structure, whilst it follows the previous approach to criminal costs claims has, in some cases, produced harsh results. The courts' approach in the case of *Home Assured v Dobson & Others*, whilst not directly on point, was considered when determining how sanctions should be applied.

Hopefully, the changes will produce a fair balance between the interests of the Community Legal Service, in obtaining prompt submission of costs claims, and those of solicitors who should not be deprived, merely by late submission, of all the costs of work properly carried out. The amended regulations allow the Commission to assess costs and to apply a level of reduction that is reasonable and proportionate in each case.

Amendments are made to regulation 104 to place it beyond doubt that the late claims sanctions apply to proceedings conducted in the Magistrates' court and to set out the relevant time limits.

The remainder of this article sets out the Commission's interim guidance. The guidance is subject to consultation until 15 January 2003. Following consultation the final version of the guidance will be posted to the Commission's website and published in later edition of Focus and the LSC Manual.

### *Guidance*

There is no longer a requirement for the time limit to be extended. Where costs are submitted outside of the time limit, deductions will be immediately considered. The Commission's existing guidance on time limits can be found at page 1D-22/11-13 Volume 1 of the LSC manual.

The guideline deductions are:

- 5% for bills submitted up to 3 months out of time;
- 10% for bills submitted up to 6 months out of time;
- 15% for bills submitted up to 9 months out of time;
- 20% for bills submitted up to 12 months [1 year] out of time;
- 25% for bills submitted up to 15 months out of time;
- 30% for bills submitted up to 18 months [1½ years] out of time;
- 40% for bills submitted up to 21 months out of time;
- 50% for bills submitted up to 24 months [2 years] out of time.

Generally, it should be possible for late claims to be submitted within 27 months of the conclusion of the matter (i.e. up to 2 years out of time) but if the claim is submitted later, higher deductions may be applied.

The percentage reductions are a guide, so if the solicitor provides an explanation that justifies the delay, the regional office will consider what is the appropriate reduction in the circumstances. There may, for example, be circumstances where a bill submitted up to 3 months out of time has been delayed through no fault of the solicitor and thus no deduction should be applied. Where circumstances are outside the firm's control it is less likely that a penalty will be imposed.

Regard will be had to what reasonable steps could have been taken to minimise delay. The factors below are indicators that it may be reasonable for some delay to have occurred. The regional office will evaluate what period of delay is reasonable and make a reduction in accordance with that decision. For example, a fee-earner has a serious illness and is away from the office for three months but it is 12 months before the cost claim is submitted. When it was known the fee earner would be away for a considerable period, the firm should have taken steps to ensure their costs claims were assessed promptly. In the circumstances, it may be reasonable for a delay of up to six months to be incurred. If so, a deduction of 10% would be made on the basis that the costs claim should have been submitted only six months out of time.

### *What is reasonable and proportionate in the circumstances?*

This is a question of fact in every case. Regard will be had to the particular firm's history of late claiming.

## *Reasonableness*

Common examples of where it may be reasonable for some delay to have been incurred are:

- linked or related actions awaiting final disposal;
- where conveyancing work by the conducting solicitor is necessary to implement an ancillary relief order;
- the court has delayed in sending the final order;
- counsel has failed to submit a fee note, despite reasonable steps by the solicitor to obtain the same (or where the solicitor has failed to provide information or documentation - for counsel's claims);
- delays in drafting the bill by a Law Costs Draftsman, despite reasonable steps by the solicitor to ensure the bill is submitted within time;
- if the solicitor chooses to await the conclusion of a case transferred from the Magistrates' to the County Court before assessment;
- intervention or insolvency (however it remains the solicitor's duty to collate and prepare bills), illness or injury to the conducting solicitor;
- damage to files through office fire or flood.

## *Proportionality*

In considering the deduction to be applied the size of the claim may be a relevant factor. If the costs claim is above average, i.e. over £2,500, it may be appropriate for a lesser deduction to be applied than that in the guidelines. In claims under £2500 the guideline deductions are considered to be proportionate and therefore it will be a case of considering the reasonableness of the reason for late submission when applying them.

Deductions are based on the solicitor's profit costs. The deductions will have to be made from the solicitor unless counsel has been responsible for the delay. Counsel's fees are preserved provided he or she has not caused or contributed to the delay. In any case where the maximum fee principle applies, the late claim deduction is applied after assessment of the reasonable costs and counsel's fees are paid from the balance then due.

Where profit costs are disallowed in full, the solicitor is still bound to discharge any expert's fees that had been incurred.

Under the Family Graduated Fee Scheme counsel must submit costs claims within three months of revocation or discharge of the certificate. These sanctions will be applied whenever a late claim reduction is appropriate under that scheme.

Comments on the interim guidance may be sent to Ruth Symons, Policy & Legal Department, 85 Gray's Inn Road, London WC 1X 8TX (DX 328 London/Chancery Lane) or e-mailed to [ruth.symons@legalservices.gov.uk](mailto:ruth.symons@legalservices.gov.uk).