Crown Court Costs

Making The Most of Your Graduated Fee

Graduated Fees have ***NO*** escape threshold – does not matter how much time you have spent on a case

Graduated Fee Scheme has ***NO*** concept of equity – fee does not have to be fair or reasonable – it is what it is – works on a 'swings and roundabouts' basis

- Make sure you claim all the Graduated Fees to which you are entitled
- 1 fee = 1 case = 1 Indictment
- Multiple Indictments which are not formally joined = multiple fees (even if the same are case managed side-by-side and no Trial ever takes place)
- Also, if summary offences are committed for sentence along with offences on Indictment – a 'committal for sentence' fee is claimable in addition to the Graduated Fee for the case on Indictment

Graduated Fee comprises three elements –

1. Basic Fee
2. Length of Trial Proxy
3. Pages of Prosecution Evidence Uplift

Basic Fee

Basic Fee is predicated on (1) category of offence and (2) how case concludes (whether by way of guilty plea, Trial or crack)

Category of Offence

Categories of Offences (to be found in Table at Part 7 of Schedule 2 to the Criminal Legal Aid Remuneration Regulations 2013 as amended)

Class A: Homicide and related grave offences

Class B: Offences involving serious violence or damage, and serious drug offences

Class C: Lesser offences involving violence or damage and less serious drugs offences

Class D: Sexual offences and offences against children

Class E: Burglary etc.

Classes F G and K: Other offences of dishonesty (*Certain offences are in Class G if the value involved exceeds £30,000, Class K if the value exceeds £100,000 and in Class F otherwise)*

Class H: Miscellaneous other offences

Class J: Serious sexual offences

- If more than one offence on Indictment make sure you may elect which offence to claim under – make sure you claim the highest paying (can be counterintuitive so don't just go by which provides for the higher Basic Fee – do the calculation)
- Any offence not in the Table of Offences automatically falls as Class H **BUT** there is express entitlement in the Regs that 'the litigator may apply to the appropriate officer, when lodging the claim for fees, to reclassify the offence' (an example would be offences under the Mental Capacity Act 2005)

- Any case where there is a hearing to determine whether the Defendant is fit to plead or stand Trial, you may elect to claim the same either in line with the category of offence or as Class D
- Any case where a restriction order is made can be claimed automatically under Class A

<u>How Case Concludes</u>

Guilty Plea = plea of guilty at first effective PCMH

Cracked Trial = a plea of guilty any time from immediately after the PCMH to immediately prior to the Trial – even if client elects to plead immediately after having entered a 'not guilty' plea

Trial – Has a Trial commenced if Defendant elects to plead at a very early juncture?

Lord Chancellor v Ian Henery Solicitors Ltd [2011] EWHC 3246 (QB)

> *(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.*
>
> *(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).*
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> *(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).*
>
> *(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).*
>
> *(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the*

jury, the opening of the case, and the leading of evidence (R v Dean Smith, R v Bullingham, R v Wembo).

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment.

Length of Trial Proxy

First two days of Trial are included in Basic Fee

Thereafter a length of Trial proxy claimable for the number of days which the Trial actually lasts

Table at para 7 of Schedule 2 to the Criminal Legal Aid Remuneration Regulations 2013

Argument which forms part of the Trial but takes place prior to empanelling of jury would count as Trial days:

R v Wembo (SCCO, 21/12/10) – Two days of argument as to whether anonymity orders should be made in respect of certain witnesses (for which no separate fee under the Advocate's Graduated Fee Scheme)

Master Gordon-Saker (Senior Costs Judge):

> *It seems to me that if that process involves a preliminary argument which would previously have been heard after the jury was empanelled but is now heard as a matter of "modern…and economical practice" before the jury is empanelled the argument nevertheless forms part of the trial.*

Pages of Prosecution Evidence (PPE) Uplift

NOT intended as a payment for *reading* the pages in question – solely a parameter on which the fee is calculated

There is a cut-off figure below which no uplift is claimable. This is based on the category of offence being claimed and how the case concludes

For example:

Class A Cracked Trial – No uplift claimable on the first 79 pages

5 day Class A Trial – No uplift claimable on the first 156 pages

Table of cut-off points at para 5 of Schedule 2 to Criminal Legal Aid Remuneration Regulations 2013

Rate per page tapers on a sliding scale

For example:

Class A Cracked Trial

1-79 – nil

80-249 - £10.70 per page

250-999 - £6.71 per page

1000-2799 - £3.92

Etc

Generally, PPE is that served by way of the committal bundle and any Notices of Additional Evidence

But the question is whether the same has been 'served'

Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB)

> *i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.*
>
> *ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.*
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> *iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But para 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.*
>
> *iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispensed with the need for service of a notice of additional evidence before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.*
>
> *v) The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary precondition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages would be excluded from the count of PPE merely because the notice had for some reason not reached the court.*

vi) In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.

vii) Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore serve an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues will depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

viii) If – regrettably – the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Officer (or, on appeal, the costs judge) will have to determine it in the light of all the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or costs judge) would be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or costs judge) would be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the

Determining Officer (or costs judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.

ix) If an exhibit is served, but in electronic form and in circumstances which come within para 1(5) of Schedule 2 , the Determining Officer (or, on appeal, the costs judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.

x) If an exhibit is served in electronic form but the Determining Officer or costs judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by para 20 of Schedule 2 .

xi) If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under para 1(5) does not apply.

Special Preparation

Special Preparation is claimable **at hourly rates** either where

(a) number of pages of prosecution evidence exceeds 6,000; or
(b) where same served electronically and
    i. same has never existed in paper form; and
    ii. the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence

Important to ensure time recording. Where PPE exceeds 6,000 pages, one can only claim the time to read the excess pages. So, if 6,001 pages served you can claim the time for reading the last page only.

Unused Materials

Newly introduced fee for consideration of unused materials. Para 20A of Schedule 2 to the Criminal Legal Aid Remuneration Regulations 2013

Fee of £64.68 claimable 'whether or not such consideration has actually occurred'

But where

(a) you *have* undertaken consideration of unused materials; and
(b) you have spent in excess of three hours on the same

Then you can claim at hourly rates!

Important to record time both to ensure whether you have exceeded the three hour threshold and to thereafter claim your time

Confiscation Proceedings

Always claimable at hourly rates and with a potential enhancement.

Important both to time record this work and to seek such enhancement as might legitimately be claimed.

How to approach your practice in light of the fixity of the fees

Rigidity of fees means you are able to calculate an anticipated fee after the first PCMH and budget resources accordingly (although the possibility of a crack does mean the fee is not set in stone)

Ensure that the appropriate level of fee earner is running the Crown Court caseload

In general, this means Paralegals – do not waste senior fee earners on Crown Court work (exception to this is senior fee earner with Higher Court Rights of Audience who acts as Litigator and Advocate so can take both fees)

So far as possible act as a 'postbox' for Counsel

There is no requirement to attend Court to sit behind Counsel