

Estimating costs: art or science?

Andy Ellis explains the logic and success behind “Feesability”

Over the summer of 2009 we consulted with a number of lawyers on the topic of using technology more effectively within costs assessment. Our purpose was to explore ways in which we might produce bills of costs in a less cumbersome way by accessing directly the data that was held in solicitors’ time records and then presenting that information in a form that practitioners and their clients would find clear—all with far less clerical intervention than current practice tends to follow. We now do just that.

Burning issue

What emerged from these informal focus groups was that civil litigators needed us to address a far more burning issue – that of costs estimates. Put simply, the solicitors we talked to felt under increasing pressure both from their clients and the courts to provide reliable estimates – and the discomfort surrounding that whole process was tangible.

Had it not been for a follow-up meeting with Olswang litigation partner Dan Tench, our efforts to help alleviate this particular headache might have come to nought. But Dan had worked on the estimating issue before, ten years earlier in the wake of the Woolf reforms. Not only that but he had applied his programming skills to the problem by writing an estimating and costs planning application called Feesability.

Refining Feesability

I should declare an interest. Over the past few months we have been working with Dan and a team of developers to redevelop Feesability commercially and enhance it as a web-based costs management application.

What fascinated us as costs specialists was the clinical logic behind Feesability. The process of compiling a litigation estimate had been laid out as a walk-through. The user was prompted to assign a team, build assumptions, attach time and other costs to standard tasks, both sequential, eg pleadings, and thematic, eg negotiations, and then let the application calculate costs.

Of course, the use of the word “standard” in relation to litigation estimates is problematic. I have covered the standards issue in some depth elsewhere (see “Taking Solicitors to Task” at <http://costs2.posterous.com/taking-solicitors-to-task>) and work is planned in the wake of the Jackson Review to foster a measure of agreement over standard descriptions for litigation tasks.

It is apparent that the current guidance given to lawyers about estimates is inadequate and the current Precedent H format for estimates provided to the court is not at all useful. In our experience lawyers do not plan cases or estimate tasks by reference to how many letters they might write or how much time they might allot to generic “dustbin” categories like documents.

The optimal approach

Estimating for litigation is not easy. The awkward analogy I sometimes use is that it is hard enough to estimate the cost of building a house, harder still if someone has commissioned a demolition contractor to work in competition.

But despite all the caveats and imponderables it is clear that lawyers recognise that they must overcome their in-built reluctance to particularising estimates and grasp the nettle.

The optimal approach, daunting though it might first appear, is to break the litigation aspects and tasks down into progressively smaller components until those

activities are capable of being estimated with a greater degree of reliability.

The methodology built into Feesability involves breaking the larger aspects of the case into tasks, to particularise those tasks and then break them down further into discrete activities.

By taking a more granular approach, the easier it is to estimate. It would be fanciful to claim that such estimates will prove unfailingly accurate but we are confident they will end up much closer to reality than any of the luckiest produced by more generalised methods or mere instinct. Laborious though the process is, our experience is that it is easier to answer a long list of direct questions than a short list of open ones.

Over time, of course, the best informant to reliable costs estimating will be the comparison of budgeted against actual costs, which can only occur reliably if lawyers start to record their time against the same criteria employed in compiling the estimate. This presents a challenge both in changing behaviour by the person recording time (“working on case” really won’t rub) and in developing more sophisticated tools to capture time.

My guess (for which I cannot provide a binding estimate) is that software will in time be able to flag up how near to budget the lawyer is at the point when time is recorded to the case. ■

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