Q & A notes SPG forum

Fees, SIP 9 and Reporting

Pre-administration and pre-appointment costs

What can I charge for?

All pre-administration and pre- appointment costs that can statutorily be paid post-appointment and that remain outstanding at the date of appointment, require approval. Dear IP September 2014 advises that where pre-appointment/pre-administration costs are to be approved at the same time as approval of the proposals, the two must be distnguished.

ADM (IR 16 3.36, 3.52): pre-administration costs

The key point is that to be allowable as an administration expense, the costs must be incurred with a view to the company entering administration.

Commonly this could include

- formalities required to be completed by the proposed administrator, such as considering and completing documentation and, in court appointments, preparing a witness statement in support of the application; and
- considering and arranging a pre-pack.

However it would exclude any insolvency or other advice that may or may not lead directly to the administration appointment.

CVL (IR16 6.7): pre-appointment costs

- Any reasonable and necessary expenses of preparing the Statement of Affairs
- Any reasonable and necessary expenses of the decision procedure or deemed consent procedures to seek a decision on the nomination of the liquidator

Pre-appointment advice and costs for convening a general meeting of the company cannot be drawn from estate funds after the date of appointment, even if you have sought approval for them.

I have included full detail of my pre-administration costs in my proposals which have been approved. Why am I told they are unauthorised?

R3.35 (10) expressly states that a statement that pre-administration costs are to be paid as an expense of the administration are not part of the proposals and are subject to separate approval under r 3.52. Simply including details in the proposals is not enough. A separate resolution is required to authorise payment as an expense in the administration.

I included details of my pre-appointment costs in my estimated outcome statement. Why isn't this enough?

The principles of SIP 9 apply equally to pre-appointment/administration costs. If you are seeking approval of these costs we could expect to see creditors advised of the following:

- Details of the agreement, parties to the agreement and date of agreement, under which the costs were incurred
- Details of work to be done
- Explanation of why it had to be done pre-appointment
- Statement of the amount

- Statementof any amount already paid and who made the payment
- Statement of the amount that remains outstanding

What is the difference between expenses, costs and disbursements?

Expenses, or costs, are amounts properly payable by the office holder from the estate which are not otherwise categorised as the office holder's remuneration or as a distribution to a creditor or creditors. These may include, but are not limited to, legal and agents' fees, trading expenses and tax liabilities. When providing details of the expenses an office holder anticipates will, or are likely to be, incurred it is acceptable to provide a range, or repeat a range quoted by a third party (for instance for legal costs in litigation).

Expenses should be disclosed.

Disbursements
Disbursements are expenses met by and reimbursed to an office holder in connection with an insolvency appointment and will fall into two categories; Category 1 and Category 2.

Category 1 disbursements: These are payments to independent third parties where there is specific expenditure directly referable to the appointment in question. Category 1 disbursements can be drawn without prior approval, although an office holder should be prepared to disclose information about them in the same way as any other expenses.

Category 2 disbursements: These are expenses that are directly referable to the appointment in question but not a payment to an independent third party. They may include shared or allocated costs that may be incurred by the office holder or their firm, and that can be allocated to the appointment on a proper and reasonable basis. Category 2 disbursements require approval in the same manner as an office holder's remuneration.

I have made a payment to an associate firm in respect of legal fees? Is this a category 2 disbursement?

It isn't necessarily. If it is a necessary expense of the case and paid directly to the service provider from the estate, in the same way as you might pay a third party provider, it is a cost (or expense) of the estate. However payments to associates, where services are provided from within the practice or by a party with whom the practice, or an individual within the practice, has a business or personal relationship, could reasonably be perceived as presenting a threat to the office holder's objectivity. Such payments should be disclosed and approved in the same manner as an office holder's remuneration or category 2 disbursements (SIP 9). The payment only becomes a disbursement if the expense is met by and reimbursed to the officeholder.

What is a fee estimate?

Following the introduction of the Insolvency Amendment Rules 2015 in October 2015 (now incorporated into Part 18, chapter 4 Insolvency (England and Wales) Rules 2016) IPs are required to provide a fee estimate in respect of any fees sought on a time cost basis. This applies to administration, winding up and bankruptcy.

What information do I need to provide in my fee estimate?

The principle here is that you should provide sufficient information for a creditor to assess the reasonableness of the fee for the work to be undertaken. That information should be provided in sufficient time for the authorising body to make that judgement.

SIP 9 was revised in December 2015 to clarify the information that IPs are expected to provide. The information given should be proportionate to the circustances of the case and there is no fixed template.

A common issue is a failure to provide sufficient information and a lack of narrative to support any numerical information supplied.

More specifically we see:

- A lack of detail of the work the office holder anticipates will be done and why that work is necessary.Tell the creditors what do you need to do and how you are you going to do it.

- No statement about whether the anticipated work will provide a financial benefit to creditors. Tell the creditors why the anticipated work is needed and what the anticipated benefit is to them, if there is a financial benefit to them.

- No indication of the likely return to creditors (where possible), or how much are the creditors likely to get.

- The use of a generic listing to describe tasks undertaken. Due to error or oversight these are often not correctly tailored to the case and the estimate includes tasks, and a fee for the time, for aspects not included ie property realisation, employee claims, SIP 16 reporting in a CVL etc. Any narrative of work to be undertaken should be bespoke to the case.

- Information not provided in sufficient time to facilitate that body making an informed judgement about the reasonableness of the office holder's requests. Particularly an issue where seeking approval at the virtual/physical meeting for a CVL appointment under s100. Presenting the fee estimate to the meeting is not considered to be giving creditors as a body sufficient time to make a reasoned judgement.

- Fee estimates should be based on the information available to the office holder at the time that the estimate is provided and may not be presented on the basis of alternative scenarios and/or provide a range of estimated charges. You cannot estimate the time it will take to realise an asset you might not yet be aware of!

- No disclosure of the expenses, (even Category 1 expenses for which approval isn't required), the office-holder considers will be, or are likely to be, incurred. This MUST be provided prior to agreeing the basis for remuneration and if not is technically a breach of statute. Providing the disclosure with the fee estimate is acceptable.

I am seeking a fixed fee. Do I have to provide the same information?

No. Where the fee basis is a fixed fee or % then SIP 9 requires the IP to explain why the basis requested is expected to produce a fair and reasonable reflection of the work that the office holder anticipates will be undertaken.

We generally see a lack of narrative to explain why the work is fair and reasonable, explain what work you need to do and why the fee is appropriate.

I want to ask for a 20% realisation fee on asset realisations. There is only cash at bank. Is that reasonable?

There is particular concern over % fees and in particular in relation to assets such as cash at bank. The % requested is the basis for a fee not necessarily just for the work done in relation to that asset. You need to be clear on what the fee is for, and what work are you undertaking. If the fee is to cover all aspects of the case, not just the realisation of the specific asset, then say so.

Why can't I ask for a % fee for any assets realised as a result of my investigations?

When determining the basis of remuneration you must have regard for the nature and value of the property, amongst other things (R18.16(9)). If the assets are unknown, the value is unknown or the extent of any work to be undertaken is unknown, so creditors may not be able to assess the reasonableness of any fee to be sought. The time to agree fees for previously unknown assets arising from investigations, is once you have determined that there are assets there, their potential value and

therefore are able to provide an estimate of what work may be entailed in their recovery and what that cost might be, so that you can explain why the percentage sought is fair and reasonable.

I want to use a mixed basis for my fee. What do I need to be aware of?

Where remuneration is sought on more than one basis, it should be clearly stated to which part of the office holder's activities the particular basis relates.

If one of the bases is time costs you need to be sure that your time recording system is sufficiently robust to ensure the correct time is accurately recorded against the appropriate tasks. Errors in coding may inadvertently result in remuneration for time spent on a task subject to a fixed or % fee being reclaimed. This may result in it being double counted and could result in unauthorised remuneration.

I now realise that I haven't provided enough information when I got my fee estimate approved. What should I do?

Where a resolution for fees has been passed and insufficient information is provided we would recommend that the correct information is provided to creditors at the next available opportunity and ratification of the fee sought.

How much narrative do I have to put in my progress report?

The progress report is a report on the work undertaken under the period of review. You should be providing enough information to allow creditors to understand what you have been doing, why you have done it and what is still to be done. The amount of narrative depends on the complexity of the case. If there is a complex issue, or realisation of an asset or agreement of a liability with a high value, then write sufficient to enable creditors to understand what you are doing without them having to ask further questions of you, and how and why this is a benefit for the estate.

You need to report on the time incurred in the period and expenses incurred, even if not paid. This allows creditors to understand how costs might be adding up. While the focus is on the period under review you should provide an indication of the cumulative costs and expenses.

A good report is one where someone, who is unfamiliar with the case, can read it and understand what you have done. It may benefit from a peer review within the office prior to sending it out, where possible.

Don't forget to include a means to access details of statutory rights under legislation. If you use a link to the creditors' guides check it periodically to ensure it hasn't been moved on the website.