



Sophisticated spending

Managing the costs of high stakes litigation

Foreword



‘With so much uncertainty around regulatory reform, we concluded it was high time to ask the people who matter what was most useful to them in maintaining control over litigation costs.’

Andy Ellis, Practico

The rate of change affecting litigation costs is alarming when the rumours and policy proposals are conflated with the concrete developments. If Sir Rupert Jackson had his way, the burden of court-mandated budgeting in cases up to £10m, itself relatively new, would soon be alleviated at the lower end by fixed costs. That lower end could be in cases worth up to £250,000 – which to the wider world is not low at all.

Meanwhile, budgeting is said to be clogging up the court lists; hence only skeletal budget submissions are now needed for cases worth up to £50,000. There is an updated court form for compiling and presenting budgets but it remains user-hostile. The design of this ‘Precedent H’ continues to veer towards data obfuscation and is not easy on the eye.

With so much uncertainty around regulatory reform, we concluded it was high time to ask the people who matter most in our day jobs – senior general counsel and litigation partners – what was most useful to them in maintaining control over litigation costs; hence the research that underpins this report.

We have learned that time-based billing remains the dominant fee arrangement in dispute resolution and that most corporate clients are still comfortable with it in principle – also that budgeting is increasingly important.

But there is room for improvement in billing practices. At Practico we have known for some time that time recording categorised primarily by task enables close to real-time reports when monitoring incurred costs against budget. Those that have taken a good look at the J-code methodology are becoming enthusiastic standard bearers for it. By this time next year, I predict that take-up will be significantly higher and that fixed and hybrid fee arrangements for disputes will start to be informed by data rather than diktat.

Andy Ellis
Managing Director,
Practico

Sophisticated spending

London's status as a pre-eminent disputes hub continues to come under scrutiny over the high cost of conducting litigation. As Practico assesses, the profession is having to face up to initiatives that help to improve costs transparency and which, when allied to technology advances, should promote predictable and ultimately lower costs.

Today's dispute resolution elite continue to enjoy a healthy supply of high value cross-border work where international corporate clients rely on the most brilliant legal minds. Canvas market views, and you'll find the UK's legal profession is well ranked in the 'brilliant mind' stakes but scores poorly on any measure of 'proportionate costs'.

Part of that high cost is embedded in the English legal system and the stringent demands of its civil procedure. Justice Secretary Michael Gove's announcement last summer that he planned to tackle the 'creaking, outdated' court system may turn out to be another false dawn given the permanent squeeze on public funds.

Likewise, if 'Brexit' were to become a reality the consequent upheaval would dominate government resource and is likely to shift focus away from the nascent Briggs review and incomplete Jackson reforms.

Irrespective of political drivers there is significant commercial pressure on law firms to reduce costs. Corporate clients have hardened procurement policy, trimmed panel sizes – or in the recent example of Shell radically cut them – required fixed or capped fee arrangements for litigation and demanded added-value packages that include free secondments and 'off the clock' advice lines.

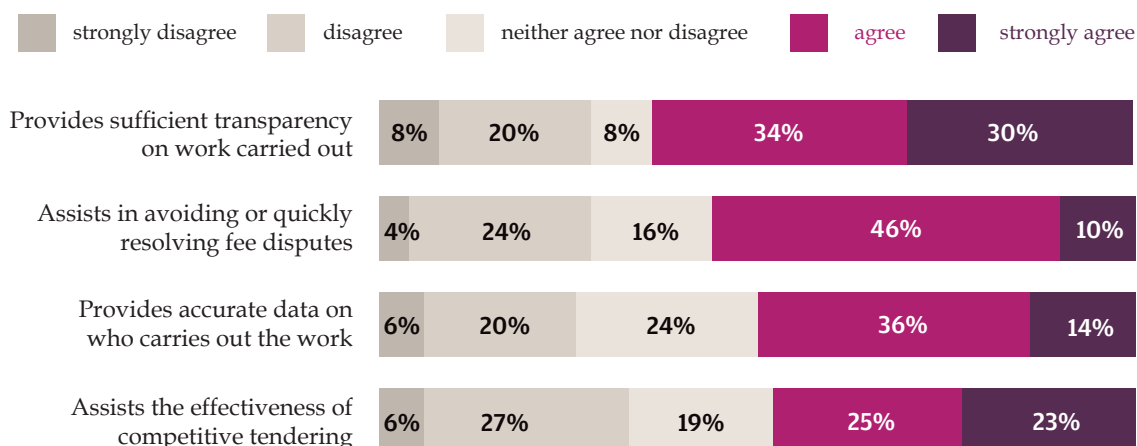


'As institutions learn to use technology more effectively, it will be easier to produce relevant documents and prepare for litigation. But it will never take away the cost of large cases.'

John Collins,
Santander UK

It is notable also that the pace of technology and its potential for efficiency savings are accelerating in areas like disclosure. Despite its relatively recent introduction in England, the use of predictive coding was given the green light by Master Matthews in February in the widely discussed case of *Pyrrho Investments v MWB Property*.

Benefits of time-based billing



‘The more standardisation you can achieve in the costs process the better and so the use of the J-code initiative is a positive step.’

Richard Vary, Nokia



Although the master was careful to emphasise that his decision was case-specific on its facts, the direction of travel has now been set.

Traditional litigators will need to grasp the technology nettle more firmly, from the deployment of predictive coding in e-disclosure through to electronic billing and on to targeted R&D around artificial intelligence.

At the dry end of the mechanics of costs control there is, after a slow start, the prospect of material improvement in the clarity and efficiency of conventional billing. This should aid budget-monitoring and then provide the ability to nip potential overspending in the bud.

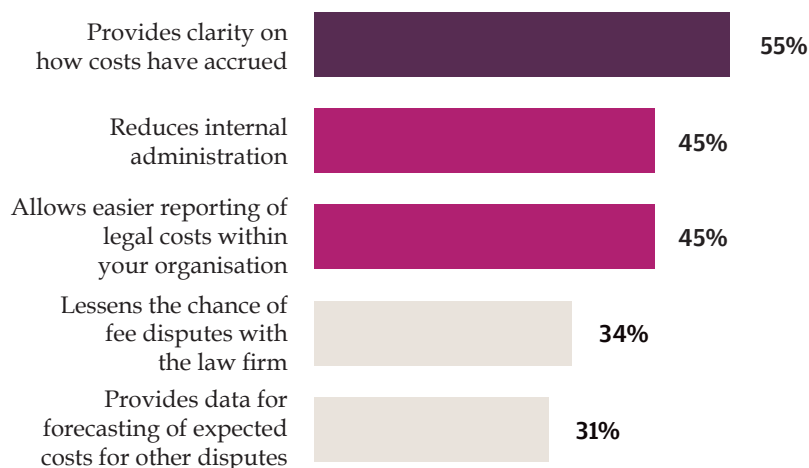
This report builds on an initial survey of 50 in-house counsel about their preferred methods of costs management in

dispute resolution, in which we found a significant proportion of respondents are aware and accepting of alternative, smarter and transparent forms of costs management and billing.

More than half of our survey respondents agree that the increasingly complex nature of litigation, alongside game-changing legislation such as the Consumer Rights Act, will make control of costs more important over the next two years.

The Royal Bank of Scotland general counsel (GC) John Collins, who is soon to join Santander UK as director of legal, compliance, regulatory affairs and anti-money laundering, points out that where cost is driven by the way the court system requires the case to be managed, there is a growing acceptance of technology-based processes. ‘Clearly we’re in a contentious environment in the post-financial crisis era. As institutions learn to use

Anticipated benefits of J-codes



‘The move towards transparency and analysis will help forge agreements, and ultimately create a move away from time-based billing.’

Jeremy Barton, KPMG



technology more effectively, it will be easier to produce relevant documents and prepare for litigation. But it will never take away the cost of large cases and the amount of witnesses and preparation that is required.’

Many corporate clients will agree with Lord Justice Jackson when he says that there are only two viable options for managing litigation costs – either fixed or budgeted – and that means costs being dealt with at the front end to reduce scope for nasty surprises. Everyone in the business world hates ‘step provisioning’. The courts are now becoming more closely aligned with client objectives.

As Deutsche Bank global head of strategy for legal Emma Slatter says: ‘Budgeting in litigation is of critical importance to managing client expectations, particularly in the current cost-conscious climate.’

Herbert Smith Freehills (HSF) disputes partner Damien Byrne Hill adds there is momentum within the market for lawyers to be more sophisticated about budgeting. ‘People are trying to find better ways to assess the situation. That’s the area of greatest change – the move to be much more sophisticated about budgeting, allocation, measurement and testing of actual costs against budget. It reflects the client’s real concern to understand what’s going on.’

ON THE CLOCK

So is hourly billing already becoming a thing of the past? Perhaps surprisingly, Practico’s survey found that its demise has been announced prematurely. A total of 78% of survey respondents said time-based billing was used for their disputes more than 50% of the time, with 64% either agreeing or strongly agreeing that the method provides sufficient transparency on work carried out for a dispute.

That the market still adheres to this traditional method is less surprising once the enduring benefits of time-based billing are taken into account. Taken across the board just over half the respondents agree it continues to fulfil the needs of clients for transparency and visibility on who carries out the work, assistance with evaluating competitive tendering, and a useful information source for resolving fee disputes.

Collins says: ‘Litigation doesn’t lend itself to fixed fees the way transactional work does because you just don’t know how long it’s going to go on for, how deep the work is, and what twists and turns it’s going to take. Firms generally don’t have an appetite for fixed fees – usually you agree an appropriate discount to hourly rates.’

HSF’s Byrne Hill says that clients are ‘very keen to explore different, alternative, innovative ways of addressing legal costs. They want the costs to go down but they’re also interested in different ways to present them. For litigation, there’s lots of scope to be innovative and come to arrangements but they tend to be tied to hourly rates. Simply because in the largest pieces of litigation there will always be an element you can ultimately measure by the time the task took’.

If hourly billing is still going to be with us it is useful to drill down and see if its effectiveness and value could be enhanced.

One billing initiative that has slipped under the radar is the J-code model for categorising the way litigation costs are recorded and presented. Adapted from the American e-billing standard UTBMS and endorsed in 2014 both by senior judiciary and the international e-billing body LEDES, J-codes are tailored to English civil procedure and help provide a more purposeful breakdown of the work lawyers undertake in litigation. The reporting emphasis switches to what lawyers are working on (phase and task – which is

ripe for measurement and analysis) instead of the much less valuable and old-fashioned billing description of how that work is carried out.

54%

of GCs believe the increasingly complex nature of litigation and new law will make reliable costs budgeting and control more important in the next 24 months

In our survey, a total of 58% of respondents were not aware of the use of J-codes to categorise costs and feed electronic bills. But those that have looked at them are quick to see the upside. An extract from the code set setting out the generic phases and tasks is appended to this report and more information is available at utbms.com.

KPMG GC Jeremy Barton agrees: 'There isn't a huge amount of awareness in-house or in private practice.' But he goes on to say: 'The value of services you're paying for is critical. The context of e-billing between clients and law firms is gathering momentum. Having that platform with the codes established, the concept of getting that standardisation in place with J-codes seems to have been a useful step because the courts are looking to leverage technology.'

Practico additionally asked the views of senior in-house counsel across sectors where high-value disputes – and the need to monitor cost – are high on the business agenda. Nokia head of litigation Richard Vary is a keen advocate of J-codes and believes their adoption will increase. 'This is a good thing. The more standardisation you can achieve in the costs process the better and so the use of the J-code initiative is a positive step. If we can find some way of making it simpler and easier to figure out what these incredibly complicated bills of costs deal with and what each fee-earner was doing at each time, that can only be an advantage.'

J-codes help to achieve a closer correlation between e-bills to clients and bills used in the assessment of the costs that are recoverable by the successful party when costs-shifting applies.

Vary further points out that the current system of court budgeting and assessment relies on what are often opaque bills, partly down to the haphazard way in which the work has conventionally been recorded. 'There you have some poor cost judge in the middle trying to decipher all of this and quite often ends up sticking a finger up in the air and taking a guess. The more you can categorise the spending in different common categories, the easier it is to compare with each side and see to what extent that spending is reasonable.'

Returning to budgetary control, Mark Garnish, development director at legal technology solution provider Tikit, says: 'You can monitor costs without them. But honestly, they just make life easier. A law firm is expected to budget for litigation and, for argument's sake, they have budgeted 100 hours to spend on witness statements. They have to check to see how they're faring against that budget. The idea is if you use J-codes, it's easy for you to monitor how you're doing against your original budget. Why not use a system which has been largely designed to achieve that?'

The key benefit it provides, says Garnish, is transparency. 'Why wouldn't a client want to be able to check their lawyer's budget? If I'm about to spend £100,000, I want to know where my money is going. I wouldn't be surprised if in the future businesses demand that lawyers use J-coding.'

KPMG's Barton agrees and makes the link to the provision of data that can better inform fixed costs: 'The move towards transparency and analysis and breakdown will help forge agreements, and ultimately create a move away from time-based billing.'

One Essex Court's Sa'ad Hossain QC concludes: 'It seems the use of J-codes will be widely adopted. It goes to the very heart of costs management and now it seems there is a joined-up approach. A costs budget is not simply something that is looked at during a procedural stage to work out costs. It should run through to the end where the detail of costs is looked at. We're in a new world now.'

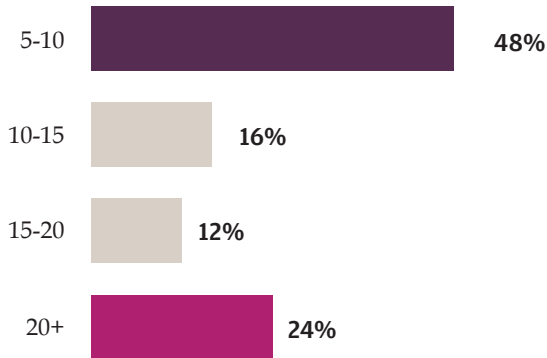
METHODOLOGY

Practico outsourced a survey straddling the fourth quarter of 2015 and the first quarter of 2016, surveying the views of 50 in-house lawyers on a total of 13 questions based around costs management in litigation.

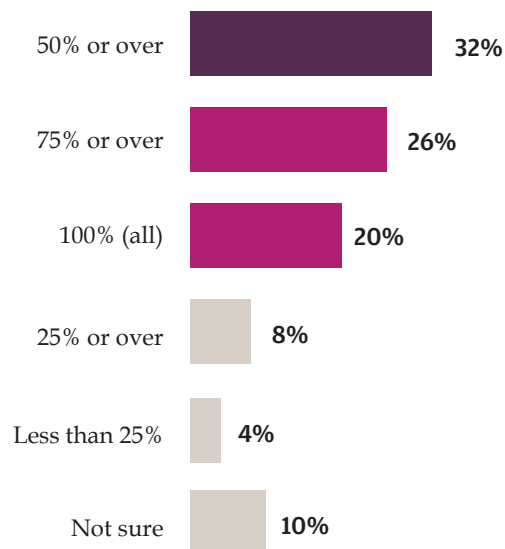
For more information about J-codes, see <http://utbms.com/jackson-ew-utbms>

Appendix Data

How many disputes has your company been involved in, over the last 24 months?



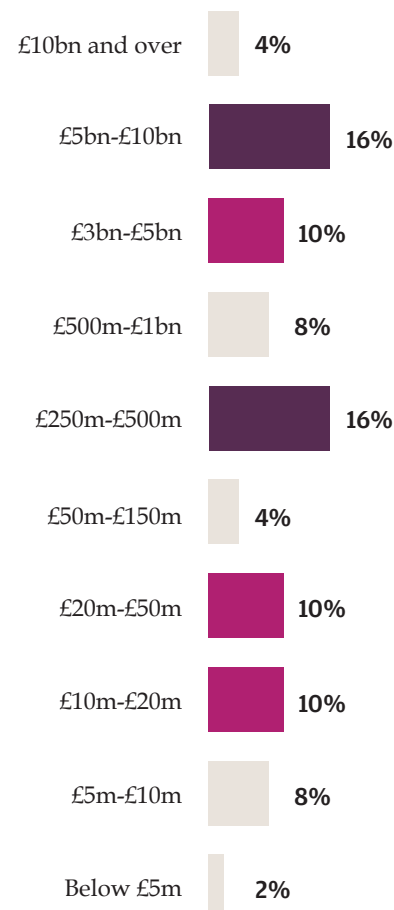
In what percentage of those disputes was time based billing used?



How useful would costs budgeting allied with the use of J-Codes be for controlling your legal budget in disputes?

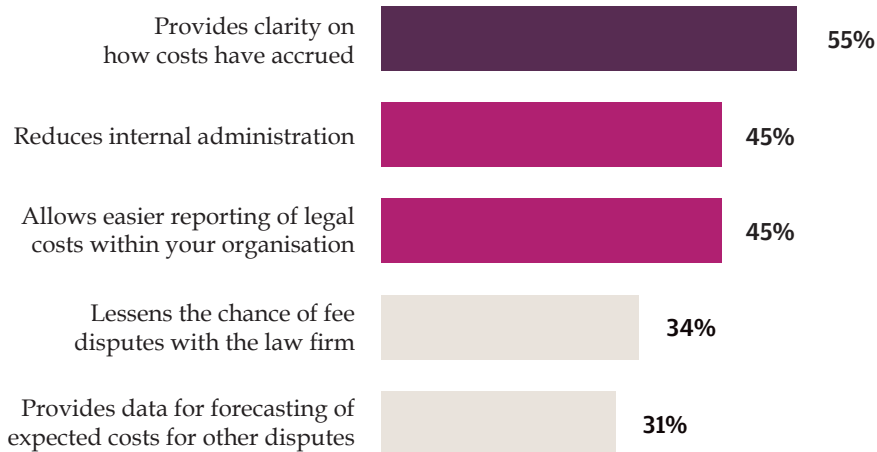


What was your company's annual turnover in the last financial year?

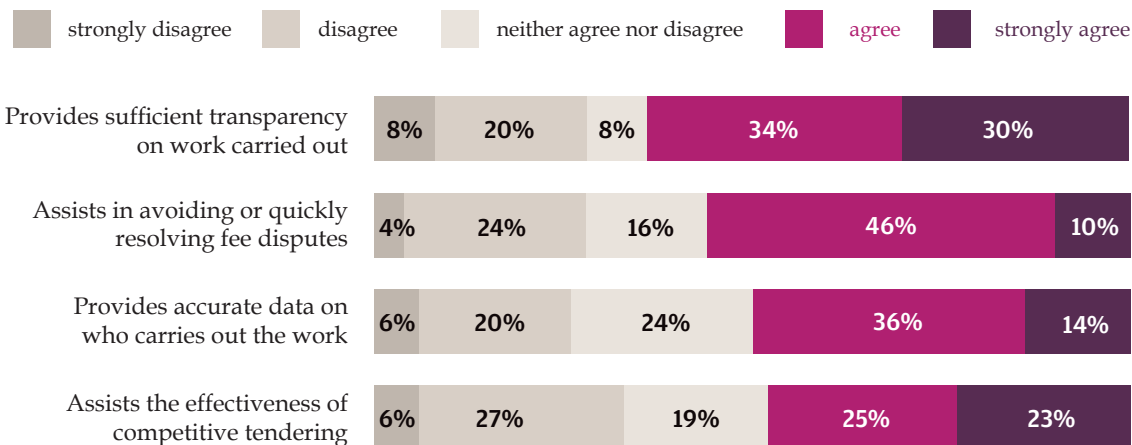


Appendix Data (continued)

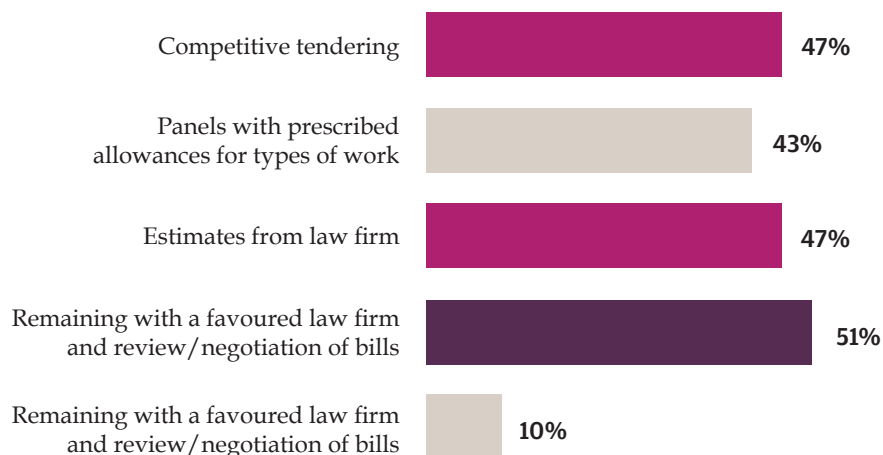
Anticipated benefits of J-codes



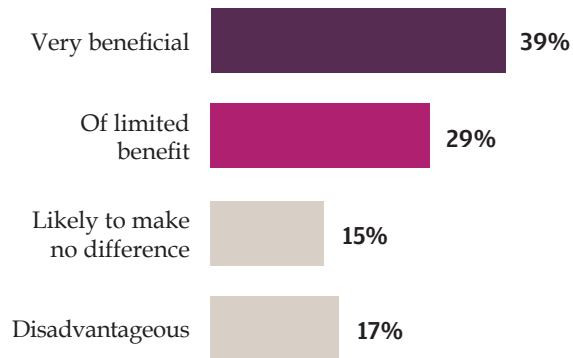
Benefits of time-based billing



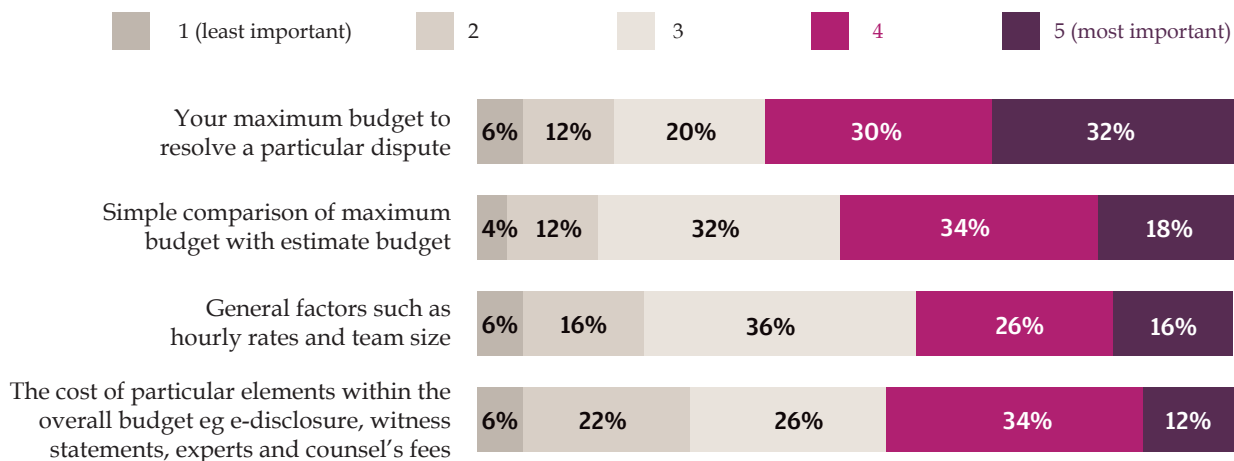
When it comes to setting cost budgets around disputes, what are your methods of achieving control?



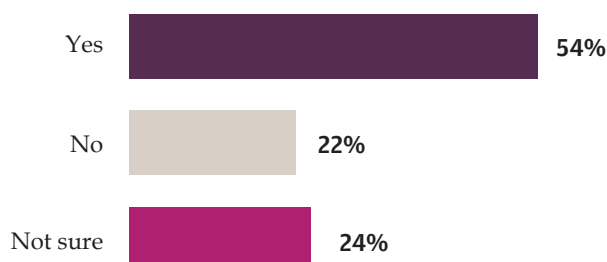
It is likely that J-Code based reporting will ultimately be required in most large claims for costs between the parties in litigation in England and Wales. In your view, is this:



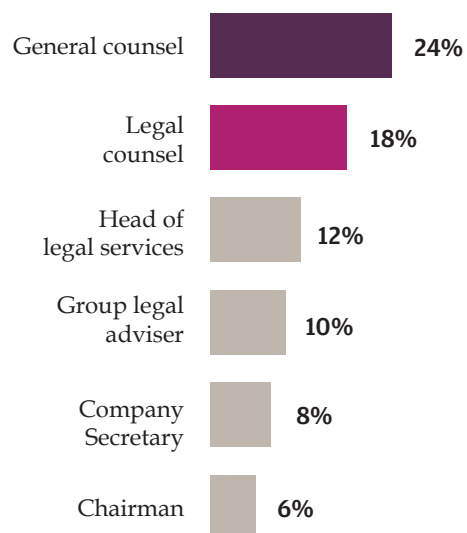
When controlling legal spend how important is...



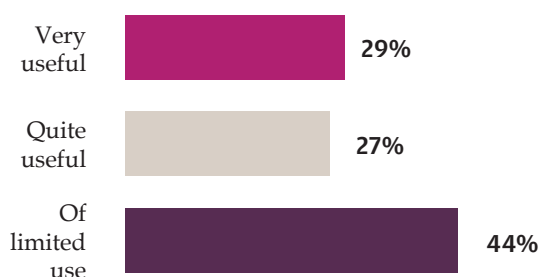
Do you think the increasingly complex nature of litigation, as well as new legislation such as the Consumer Rights Act will make reliable costs budgeting and control more important in the next 24 months?



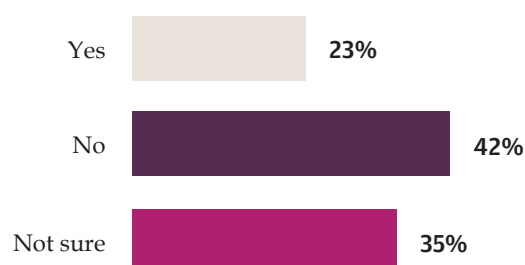
What is your role or job title?



How useful would costs budgeting allied with the use of J-Codes be for controlling your legal budget in disputes?



Have you required the use of J-Codes or another form of phase and task recording in the disputes your company has been involved in, over the last 24 months?



Are you aware of the use of J-Codes to categorise costs and the new electronic Bill of Costs proposed?



Appendix J Code phases and tasks

JA00	Funding
JA10	Funding
JB00	Budgeting incl. costs estimates
JB10	Budgeting - own side's costs
JB20	Budgeting - Precedent H
JB30	Budgeting - between the parties
JC00	Initial and Pre-action protocol work
JC10	Factual investigation
JC20	Legal investigation
JC30	Pre-action protocol (or similar) work
JD00	ADR / Settlement
JD10	Mediation
JD20	Other Settlement Matters
JE00	Issue / Statements of Case
JE10	Issue and Serve Proceedings and Preparation of Statement(s) of Case
JE20	Review of Other Party(s)' Statements of Case
JE30	Requests for Further Information
JE40	Amendment of Statements of Case
JF00	Disclosure
JF10	Preparation of the disclosure report and the disclosure proposal
JF20	Obtaining and reviewing documents
JF30	Preparing and serving disclosure lists
JF40	Inspection and review of the other side's disclosure for work undertaken after exchange of disclosure lists
JG00	Witness statements
JG10	Taking, preparing and finalising witness statements
JG20	Reviewing other parties' witness statements
JH00	Expert reports
JH10	Own expert evidence
JH20	Other Party(s)' expert evidence
JH30	Joint expert evidence
JI00	Case and Costs Management Hearings
JI10	Case Management Conference
JI20	Pre Trial Review
JI30	Costs Management Conference
JJ00	Interim Applications and Hearings (Interlocutory Applications)
JJ10	Applications relating to originating process or Statement of Case or for default or summary judgment
JJ20	Applications for an injunction or committal
JJ30	Applications for disclosure or Further Information
JJ40	Applications concerning evidence
JJ50	Applications relating to Costs alone
JJ60	Permission applications
JJ70	All other types of application not covered by the categories above
JK00	Trial preparation
JK10	Preparation of trial bundles
JK20	General work regarding preparation for trial
JL00	Trial
JL10	Advocacy
JL20	Support of advocates
JL30	Judgment and post-trial activity
JM00	Costs Assessment
JM10	Preparing costs claim
JM20	Points of dispute, Replies and Negotiations
JM30	Hearings
JM40	Post Assessment Work (excluding Hearings)

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