



Legal Aid  
Agency

# **Costs Assessment Guidance 2013: for use with the 2010 Standard Civil Contract**

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## Version History

Version:	Date	Reason
1	1 April 2013	
2	30 April 2013	Minor amendments to Section 4
3	November 2013	Amendments following changes to the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 SI No 2877 and other minor amendments.
4	April 2014	Amendments following changes to the LAA Contracts and following the Civil Legal Aid (Remuneration) (Amendment) Regulations 2014 SI No 586 and other minor amendments
5	May 2015	Amendments to paragraphs 11 and 12 to clarify claims for enhancement by providers and counsel and added references for the 2014 Standard Civil Contract
6	May 2020	Amendments to s.13 and s.14 to reflect changes to the LAA's assessment limits
7	January 2021	Amendments as a result of the UK exiting the EU

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## Part A: All Contract Work

### 1. General Principles

This version of the Costs Assessment Guidance is for use in conjunction with the 2010 Standard Civil Contract.

In this section, the following expressions have the following meanings:

***“the Contract”*** means the 2010 Standard Civil Contract

***“the Specification”*** means the 2010 Standard Civil Contract Specification

***“The Act”*** or ***“LASPO”*** means the Legal Aid Sentencing and Punishment of Offenders Act 2012

***“Costs Regulations”*** means the Civil Legal Aid (Costs) Regulations 2013

***“Procedure Regulations”*** means the Civil Legal Aid (Procedure) Regulations 2012

***“Merits Regulations”*** means the Civil Legal Aid (Merits Criteria) Regulations 2013

***“Remuneration Regulations”*** means the Civil Legal Aid (Remuneration) Regulations.

***“Financial Regulations”*** means the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013

***“Statutory Charge Regulations”*** means the Civil Legal Aid (Statutory Charge) Regulations 2013

***“the Director”*** means the Director of Legal Aid Casework as designated by the Lord Chancellor under Section 4 of LASPO.

***“Standard Fee”*** and ***“Graduated Fee”*** have the definitions as set out in the Specification.

#### Introduction

This guidance applies from 1 April 2013 to civil matters and cases governed by the 2010 Standard Civil Contract. It is also relevant to any cases run under an Individual Case Contract.

However, please note that this guidance does not include any family work. All family work is subject to the 2013 Standard Civil Contract and the relevant guidance for this is contained within the 2013 Standard Civil Contract Costs Assessment Guidance.

This guidance relates primarily to services payable at hourly rates under the terms of the Specification, including any notional assessment of the costs of a case or matter paid as a Standard or Graduated Fee, and is the Contract Guide referred to in Paragraph 6.9 of the Specification. The rules concerning Standard and Graduated Fees under controlled work are set out in Section 4 of the Specification. The guidance does not apply to work carried out under previous Contract Specifications. Previous guidance continues to apply to such cases.

Prior authorities have an important role in cost assessment. Our guidance on authorities can be found in the “Narrative and guidance: public funding” document at:

<http://www.justice.gov.uk/legal-aid/funding>

## Basic Framework

- 1.1. The Lord Chancellor through the Legal Aid Agency (“the Agency”) is obliged to pay remuneration for civil cases properly due in accordance with the Remuneration Regulations 2013 and his/her contracted obligations.
- 1.2. Work is remunerated according to time spent by a fee earner at the relevant hourly rate. The rates are set by the Lord Chancellor in the Remuneration Regulations. The rates in the Remuneration Regulations cover all civil matters or cases commenced under the Contract save for those that become subject to an Individual Case Contract with the Lord Chancellor.

## The approach to assessment

- 1.3. Many of the basic principles governing assessments are contained in the Civil Procedure Rules introduced in April 1999 and the Civil Procedure (Amendment) Rules 2013 which provide the general framework for dealing with costs, including the courts’ discretion in the making of costs orders, the form and process of detailed assessment, and the basis, and criteria for quantification of costs. In particular, all assessments of Contract Work as payable by the Agency are to be carried out on the standard basis subject to the provisions of the Specification, the Regulations and this Guidance (see Paragraph 6.9 of the Specification).

CPR 44.3(2) states that:

*“Where the amount of costs is to be assessed on the standard basis, the court will—*

- (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and*
- (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.”*

Under CPR 44.4:

*“(1) The court will have regard to all the circumstances in deciding whether costs were—*

- (a) if it is assessing costs on the standard basis—*
  - (i) proportionately and reasonably incurred; or*
  - (ii) proportionate and reasonable in amount, or*
- (b) if it is assessing costs on the indemnity basis—*
  - (i) unreasonably incurred; or*

- (ii) *unreasonable in amount.*
- (2) *In particular, the court will give effect to any orders which have already been made.*
- (3) *The court will also have regard to—*
  - (a) *the conduct of all the parties, including in particular—*
    - (i) *conduct before, as well as during, the proceedings; and*
    - (ii) *the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;*
  - (b) *the amount or value of any money or property involved;*
  - (c) *the importance of the matter to all the parties;*
  - (d) *the particular complexity of the matter or the difficulty or novelty of the questions raised;*
  - (e) *the skill, effort, specialised knowledge and responsibility involved;*
  - (f) *the time spent on the case;*
  - (g) *the place where and the circumstances in which work or any part of it was done; and*
  - (h) *the receiving party’s last approved or agreed budget.”*

1.4 The assessment of costs payable under legal aid should operate on the same principles whether the assessment is carried out by a costs officer of the court or by an assessor of the Agency, the object in all cases should be to achieve a fair assessment of the costs due to the provider under the Contract. The question of whether costs are reasonable and/or proportionate is to be resolved on an objective basis having regard to all relevant circumstances, and particularly the matters listed in CPR 44.4(3). It should not be influenced by the Lord Chancellor also being the paying party, beyond the fact that resolution of genuine doubts are to be resolved in the Lord Chancellor’s favour under CPR 44 .3 (2)(b).

1.5 The primary document in assessing costs is the bill of costs or the claim form submitted, which sets out the items and amounts being claimed. Items not appearing in the bill or claim form will not be paid.

1.6 Assessment of fee-earner’s costs involves making a judgment, having regard both to the bill and to supporting documents provided and all relevant circumstances, as to whether, in respect of individual items of work and the case/matter as a whole:

- (a) the work done;
- (b) the time taken;
- (c) the remuneration rates applied;

- (d) any enhancement claimed;

is in accordance with the provisions of the Contract and Regulations reasonable and proportionate. Assessment of disbursements is considered further at section 3 below.

### Work done

1.7 Allowance is only made for work claimed where it is supported by appropriate evidence on the file. The onus is on the provider to supply evidence on the file that the work was done.

1.8 The assessor is not to take into account hindsight but is to try to view the question of what is reasonable from the perspective of the average competent fee-earner doing his or her best for his client at the particular time when the work was done.

“When considering whether or not an item in a bill is “proper” the correct viewpoint to be adopted is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interest of his lay client”: per *Sachs J, Francis v. Francis & Dickerson*.

Thus the fact that he or she instructed an expert to prepare a report which in the end did not help his or her client’s case, or interviewed a witness whom he later decided not to call to give evidence should never be determinative of whether the action was at that time reasonable.

1.9 However, the fact that an expert report was not used may justify a careful examination of the situation to decide whether it was reasonable to instruct the expert. The fact that a provider made an application to the court which was unsuccessful may lead the assessor to ask whether it was reasonable to have made the application.

1.10 Note that the provisions of CPR 46.9, concerning solicitor and client assessments, expressly do not apply to assessments of legally aided work. In particular, the fact that the Client has requested that or approved work being carried out (CPR 46.9(3) (a)) does not mean that this work can be claimed under legal aid. Further, the assessment of legal aid costs is on a standard rather than indemnity basis (see 1.3)

1.11 Accordingly, the question of whether an item is allowed on an assessment of costs payable under legal aid should in principle be determined in the same way as whether it is allowable against another party on an inter partes detailed assessment, subject to the following specific exceptions falling within the definition of “legal aid only costs” in Paragraph 6.52 of the Specification:

- (i) Work (including counsel’s fees, experts’ reports or other disbursements) that the Agency has specifically requested or authorised to assist in decision making regarding the grant, continuation or amendment of the terms of legal aid;
- (ii) Completion of the Lord Chancellor’s forms and other communications with the Agency
- (iii) Work for which the Agency has granted prior authority (Paragraph 5.25 of the Specification)
- (iv) Costs of reasonable adjustments to comply with the provider’s duty under the Equality Act 2010

- (v) Travel expenses of a legally aided client other than to attend court as a witness of fact

Work falling under categories (i), (ii), (iv) and (v) will still be assessed as to the reasonableness of the time or amount claimed

### **Time Spent**

- 1.12 The assessor must then assess whether the time spent was reasonable, in particular whether the work has been performed with reasonable competence and whether a reasonably competent fee-earner (in relation to the work being undertaken) would have taken that time to perform the work. Again, there should be no difference in time allowable whether an item is being assessed on an inter partes detailed assessment or for payment under legal aid. Where, in licensed work cases, the skill or experience of the fee earner leads to work being undertaken with greater speed than would be expected from a reasonably competent fee-earner a claim for enhancement may be considered (see section 11 of this guidance).

### **Proportionality**

- 1.13 Previously the rules on proportionality in costs orders had been set out in a point of principle determined by the Court of Appeal in *Secretary of State for the Home Department v Lownds*, however, with the introduction of the CPR (Amendment) Rules 2013, this point of principle is now obsolete. The relevant provision is now CPR 44.3(5) which states:

- “(5) *Costs incurred are proportionate if they bear a reasonable relationship to –*
  - a) *the sums in issue in the proceedings;*
  - b) *the value of any non-monetary relief in issue in the proceedings;*
  - c) *the complexity of the litigation;*
  - d) *any additional work generated by the conduct of the paying party; and*
  - e) *any wider factors involved in the proceedings, such as reputation or public importance.”*

### **Contract Requirements**

- 1.14 Work is only payable in accordance with the terms of the Contract and the Remuneration Regulations. Certain rules within the Specification, at Paragraph 6.61, apply to all forms of service of Contract work.

### **Compliance with the Civil Legal Aid Regulations**

- 1.15 All Contract work must be carried out in accordance with the Merits Regulations and the Procedure Regulations. The criteria appropriate to the forms of service and type of case set out in the Merits Regulations must be satisfied at all times that work is carried out and this work must be done in accordance with the criteria under which legal aid was granted.

- 1.16 In relation to controlled work providers must not continue to act where the relevant criteria are no longer satisfied. In licensed work solicitors and other legal representatives are subject to a duty to report to the Agency in a number of circumstances set out in Regulation 40 of the Procedure Regulations.

**Point of Principle CLA 3** states:

*“If a solicitor fails to report a significant change, which is known to him, in either the circumstances of the funded client or the case, costs subsequently incurred may be considered not to have been reasonably incurred and may be disallowed”.*

- 1.17 Costs should only be disallowed on reliance on this Point of Principle in cases where it is clear that the provider has failed to report a change of circumstances that has meant that the Merits Regulations Criteria for the work authorised by the certificate are clearly not satisfied. Notification of the new circumstances may legitimately be made with an application for amendment of the certificate, provided such an application is made soon after the change. In the absence of misleading or withheld information in the application, providers are entitled to rely on any amendment to the certificate granted by the Director.

#### **Recorded and Unrecorded Time**

- 1.18 In Contract work, routine letters and telephone calls are remunerated on fee per item basis. Other preparation and attendances are generally recorded in units of 6 minutes per time spent, payable according to the appropriate hourly rate.

- 1.19 Primarily, information from the files will consist of:

- (a) letters;
- (b) “notes” of work done, attendances on the client and others and telephone attendances;
- (c) documents prepared and considered.

- 1.20 The letters and notes of telephone calls on file will generally be sufficient to justify the unit charge for those items. For other preparation and attendance, including longer letters and telephone calls being claimed on a time basis, all time spent by a fee earner should be recorded on the file. Estimated time may be disallowed, particularly for substantial amounts of time. In *Brush v Bower Cotton and Bower* [1993] All E.R. 741, having considered *Re Frascati* (2 December 1981, unreported) and *Johnson v. Reed* [1992] All ER 169, the court stated:

*“Claims for unrecorded time are likely to be viewed with very considerable care on taxation and it would only be in an unusual case that any substantial allowance be made...”*

- 1.21 Such time should only be allowed where clearly supported by the evidence from the file. This may include the length and complexity of letters or other documents prepared or considered and the hand written notes of attendances.

- 1.22 Even where preparation has been fully recorded with many entries with exact timings on precise dates, this does not mean that all the recorded time must be allowed. It must

still have been reasonable to undertake the item of work claimed and the amount of time spent must be reasonable and proportionate.

- 1.23 The assessor must consider whether the attendance note contains sufficient information to justify the time spent or whether there is other supporting evidence on file of the work done. Where the file note/computer record does not justify the time spent the claim must be reduced to the amount of time, if any, justified by the evidence on the file (e.g. a statement of the client's instructions).
- 1.24 As well as looking carefully at individual attendance notes/computer records it is important to look at the total time claimed for advising on particular issues or considering or preparing particular documents in order that any duplication of work can be identified and an assessment made of the overall time spent. Further, the contents of the letters/documents and file notes are of general importance in allowing the assessor to make a judgment as to the weight and complexity of the case and the particular problems with which the provider had to deal.
- 1.25 Standardised file notes, without any confirmation or reference to specific instructions obtained from or advice given to the client are not satisfactory evidence of the reasonableness of the work done for any but the briefest of attendances.
- 1.26 In particular, any individual attendance note for providing advice or taking instruction over four units (24 minutes) should contain some detail showing the instructions taken or the advice given or how the case was progressed. This does not mean that every word of the advice given as to the law and procedure needs to be recorded - often advice on a particular procedure will be relatively standard, but one would expect to see some reflection in the attendance note of the personal circumstances of the client and the advice given on the case. The longer the attendance claimed, the more detail would be expected. In the absence of either such detail or of other appropriate supporting evidence it would normally be appropriate to reduce the attendance allowed to four units (24 minutes).
- 1.27 Appropriate supporting evidence could include:
  - (a) handwritten notes of the interview with the client;
  - (b) documentation prepared in the course of or as a result of the interview. For example, an attendance on a witness to take a statement could be evidenced by the presence of the statement on a file;
  - (c) letter confirming the advice given to the client on an attendance.
- 1.28 There is no requirement that file notes should be typed up. If they are, then a reasonable time (see 2.16) may be allowed for time spent dictating a file note where it is reasonably lengthy and detailed, and relates to an attendance or notes used in preparation of the case. Costs will not be allowed for preparation of file notes solely to record time expended.
- 1.29 Note that there is a restriction on a fee-earner's attendance with counsel or other advocate at the trial of a fast track matter under CPR 45. The costs of such attendance are only claimable, as allowed under CPR 45.39, where the court considers it necessary for the fee-earner to attend to assist the advocate (see further Part C, section 12.14).

## Appeals and Reviews

- 1.30 The procedures for appealing assessments of Contract Work are set out at Paragraphs 4.35 and 6.74 – 6.93 of the Contract Specification.

## 2. Chargeable work

### Overheads and administrative work:

- 2.1 Subject to any express exceptions, payment will not be made for time spent on purely administrative matters. This will include the costs of opening and setting up files, maintaining time costing records and other time spent in complying with the requirements of the Contract other than the direct provision of legal services to a client.
- 2.2 Expenses which may be classed as overheads of the contracting provider are generally not payable under the Contract. Photocopying in-house is generally an overhead expense as are the costs of postage, stationery, faxes, scanning, typing and the actual cost of telephone calls. However, see section 3.37 in relation to photocopying charges. Whilst courier fees are listed in Paragraph 6.61 of the Specification as overheads, in some circumstances these will be claimable as disbursements, where they are incurred in relation to a particular case or matter and it was reasonable to do so.
- 2.3 Other examples of overheads include staffing expenses (including training), the cost of maintaining premises, taxes (other than VAT properly charged in relation to an individual case or matter) and administrative expenses.

### Legal Research

- 2.4 Legal research is not usually allowable on assessment because:
- (a) fee earners carrying out work under the Contract are assumed to have sufficient expertise in the relevant areas of law; and
  - (b) researching the law is not specific to the immediate matter or case but may be considered part of the overheads of the provider in developing the fee-earner's knowledge of that area.
- 2.5 However, time spent in researching a novel, developing or unusual point of law or the impact of new legislation to the particular case may be allowed (*Perry and Another v The Lord Chancellor* Times Law Reports 26.5.1994). Where a claim for substantial research is made, the assessor would expect to see evidence of the research on file, e.g. copies of case reports etc. Fee earners will usually already have at least a general knowledge or understanding of the point being researched and should record their reasons for undertaking the research in addition to their assessment of the effect of the law on the individual circumstances of their case. A generalised attendance note not backed up by this evidence will be disallowed.
- 2.6 However, practitioners cannot be expected to be 'walking law libraries' (*Johnson v Walks*. Court of Appeal 15 March 2000) and it may still be reasonable for time for checking on the application of established law or procedural rules to individual circumstances to be claimed, provided the reasons are evidenced on the preparation note.

## Preparation

- 2.7 Preparation (sometimes, misleadingly, referred to as “documents”) will include all drafting of documents, consideration of documents and evidence provided by the client or other parties, and general consideration of strategy, evidence needed and evidence to be put forward and whether to make or accept offers to settle a case, and will include the thinking time of the provider. Regardless of the benchmarks below in respect of what time may be allowed in respect of preparation, providers must not claim time in excess of that actually spent.

## Documentary evidence

- 2.8 On receipt of disclosure of documents from another party it will generally be reasonable for all such documents to be considered in detail. On receiving documents from the client an initial brief perusal of all the documents will be reasonable in order to identify which documents are relevant. Having done that, the fee earner may identify that only certain documents are relevant to the case. However, the benefit of any doubt as to whether detailed consideration of a document was justified should always go to the fee-earner, who could face an action for negligence for being unaware of information contained in documents in his or her possession.
- 2.9 In any but the simplest cases there will be the need from time to time to re-examine the core documents to consider their effect on the case. The degree to which this will be justified depends entirely on the complexity of the issues. In small to medium cases re-examination of the papers should be necessary primarily on reviewing the case prior to a hearing or key meeting and prior to instructing or briefing counsel and again when trial bundles have to be prepared. The time spent on both of these will inevitably be considerably less if the fee-earner has at an earlier stage separated the most relevant documents that are likely to be of use in court. Where this has not been done time spent in reading through all the documents may not be reasonably spent.
- 2.10 Where documents are scanned into a computer, the work of scanning is, of course, not claimable as legal work, the selection of which documents are to be scanned is.
- 2.11 In assessing the time spent for perusal and consideration of documents, if in doubt the assessor must have sight of and will have regard to attendance notes and copies of the documents concerned or at the very least full details of the type of documents concerned and the number of pages involved. This is likely to be essential in larger, more complex claims.

### **Point of principle CLA6 states:**

*“Where claims for costs are made for perusal of unusual or substantial papers and the assessor/area committee is minded to disallow those costs in whole or in part it will normally be necessary for the papers in question to be considered”.*

- 2.12 As a very rough guide it takes approximately 2 minutes per A4 page to read the most simple prepared document in order to consider its contents and significance. Time taken will depend on the quality and layout of the document e.g. whether handwritten or typed, single or double spaced, large or small font etc. Documents of greater complexity may, of course, take a longer time either to read or compare with other documents.

- 2.13 **Point of Principle CLA7** deals with documents in medical negligence cases but may also be relevant to other cases where a large number of documents are involved.

**Point of Principle CLA 7** states:

*“It is reasonable in medical negligence cases for the funded client’s solicitors to consider in detail copies of the medical records relevant to the issues in the case.”*

- 2.14 This is subject to the qualification that, although the fee-earner must have a general knowledge of what is in the medical records it is not uncommon for the records to be supplied to the Claimant’s medical expert who then takes on the responsibility of examining and often indexing the records. It would not be reasonable for both the fee-earner and the expert to be paid for detailed examination of the notes. Care must be exercised, however, in extending this qualification to other areas of law. For instance, in mental capacity cases it may be necessary for fee-earners to be familiar with social services records in their entirety, since they may cover wider issues than the expert has been asked to advise on.

- 2.15 **Point of Principle CLA 12** states:

*“Work carried out by an in-house medico-legal assistant will generally be fee earning work. The hourly rate and mark-up applicable will be what is appropriate in all the circumstances having regard to the nature of the work carried out and the special skills and qualifications possessed by the person concerned”*

In cases carried out under the Contract work is generally charged at a prescribed hourly flat rate, but the factors referred to in CLA 12 may be relevant to any claim for enhancement.

- 2.16 The time allowed for drafting documents has traditionally been based on the time reasonably spent by a fee-earner dictating that document. Increasingly, however, as fee earners are likely to type their own documents, the reference to dictation time becomes less relevant. As a guideline, 6–12 minutes preparation time would be expected per page of a straightforward document, but more complex documents will take longer.
- 2.17 Fee earners must prepare master bundles for the court and often for counsel. Fee earners should identify the documents for the master bundle and draft the index to the bundle. This is fee earner work and should be allowed: *B v. B [1994] 1 FLR 323*. It is the making up or copying of any additional bundles that is not considered fee earner work. Where the bundles are above average size it will be reasonable for fee earners, to check that the copies have been properly collated and reproduced.

## **Letters, Calls and emails**

### **Letters**

- 2.18 In respect of claims for letters out appearing on the file there are in principle three possibilities on assessment:
- (a) that no payment is allowed;
  - (b) the item fee from the Remuneration Regulations is allowed (routine letters out);

- (c) preparation time is allowed at the appropriate hourly rate from the schedules (non-routine letters).

Subject to the following paragraphs, the default position would be the item fee (b).

- 2.19 A letter may be disallowed where as an item of costs it was unreasonably incurred. The most likely examples of this are:
- (a) Letters that duplicate information already provided or communication that has already occurred. However, unless overall costs have been held to be disproportionate, the test is one of whether it was reasonable in all the circumstances to send the letter, not whether the letter was strictly necessary to progress the case. For example, a letter simply confirming an appointment that has already been made may be disallowed if it is sent on a routine administrative basis by a non fee earner, but it may be accepted as reasonable where the fee earner has considered the letter appropriate in the circumstances of a particular client.
  - (b) Multiple letters sent unreasonably. A letter should generally be disallowed if its content could reasonably have been included in another letter that was sent on the same day. Clearly, that will not be the case if a second letter is drafted following a significant change of circumstance on that day (or otherwise after dictation of the first letter), or where an open and a without prejudice letter are sent at the same time to another party. It may in any event be reasonable to have separate letters to deal with different matters for the sake of clarity.
  - (c) Letters arising from the oversight of the fee-earner. That would include a letter enclosing a document that the fee-earner had previously forgotten to send or otherwise to address a matter that should have been dealt with previously. Otherwise, however, covering letters enclosing documents are allowable.
- 2.20 For a claim for a non-routine letter to be allowed the time spent must be justified by the substance of the letter. The length of the letter will not itself be determinative of this. A letter of more than one page may be allowed at only the standard rate where, having regard to all the circumstances, including the substantive content of the letter, it was not reasonable for more than 6 minutes to be spent on its preparation. That may particularly be the case where the substance of the letter consists mostly of quotation from another document. Conversely, it may be reasonable to claim more than one unit for a single page letter or less; a concise letter may well take longer to prepare than a verbose letter with the same substantive content, and is likely to be more effective for the client. The letter must not be charged both as a routine letter and also as a time charge.
- 2.21 Where details are inserted into a standard format letter, the letter will be payable as a routine or non-routine letter rate on the same principles as detailed in paragraph 2.20 above, having regard to the contents inserted into the standard template.
- 2.22 When considering the claim as a whole, the assessor should look at the nature of the proceedings and time spent with the client and/or witness(es) to see if the numbers of letters claimed are reasonable. If a large number of letters have been written, but there

is no information on the face of the claim to justify the number claimed, the assessor should look at the file.

- 2.23 A claim for routine letters received can be made in family cases/matters but not in other civil proceedings. In both civil family and non-family proceedings a claim may be made for consideration of non-routine letters received at the hourly rate for the time reasonably expended, but not in addition to a claim for a routine letter in.

### ***Telephone calls***

- 2.24 Telephone calls may again be claimed as routine (with the item fee in the schedule) or non-routine, or may be not allowable at all.

- 2.25 Calls may be disallowed in a similar way to routine letters because, for example:

- (a) they are administrative non fee earner work, such as a routine reminder of an appointment that has already been made or confirmation of receipt of correspondence;
- (b) they arise from the previous oversight of the fee earner, for example the client's justifiable complaint about lack of contact or progress; or forgetting to take instructions or provide an advice on a short point that should have been included in the time for an earlier attendance or call. However, in either situation, where the updating on the case, further instructions or advice are such as to require a non-routine call, this time should be allowed as it would be additional to the time spent in any earlier attendance in any event;
- (c) they are abortive. However:
  - (i) It would be reasonable for an initial unsuccessful attempt to make a telephone call to be charged as a routine call. Repeated attempts to call the same number, however, will require justification regarding the urgency and importance of the call;
  - (ii) where justifiable, preparation time may be claimed for preparing for the call;
  - (iii) time may, in principle, be charged for an attendance note recording repeated attempts to make a call and the reasons for these repeated attempts;
  - (iv) where the fee earner actually gets through to the number but the person is unavailable, or where a message is left on an answerphone, these may reasonably be allowed as routine calls.

- 2.26 In relation to long calls any call of six minutes or more in length may be claimed as a timed attendance, but not also as a telephone call.

- 2.27 Short periods of time 'on hold' of up to 6 minutes may be incorporated as part of a non-routine call. For longer periods, it is not justifiable for the full attendance rate to be claimed, but it will not necessarily be reasonable to expect a fee earner to attempt to carry out other work. Accordingly, subject to the reasonableness of making the call, it will be appropriate to claim such time at the waiting rate.

- 2.28 Reading of the correspondence and records of telephone attendances is essential to enable the assessor to gain a view of the reasonableness of the work done both narrowly in terms of the letters or telephone calls themselves and also generally in considering the overall work done.

***Faxes, e-mails and texts***

- 2.29 Where an e-mail or fax is sent instead of a letter then it can be allowed as a letter on normal principles. A printout of the e-mail or fax must be kept on file. No separate claim can be made for sending, for example, a hard copy of a letter sent by e-mail or fax because no extra preparation time is involved. The assessor may in his or her discretion allow an actual time charge for preparation which properly amount to attendances provided that the time taken has been recorded.
- 2.30 Routine e-mails or faxes received are not claimable as separate items, except in family cases where a charge may be made for a letter received. The same principle applies where the same e-mail or fax is copied to more than one recipient, i.e. only one item may be claimed for.
- 2.31 Text messages may be claimed as short telephone calls or attendances paid at the hourly rate for the time reasonably incurred, under the same principles applying to telephone calls above.

**Attendances on the client and others**

- 2.32 Attendance records should show not only the time spent but also what was done and in the case of an actual attendance, what was discussed.
- 2.33 The first question must be: was it reasonable to do the work recorded in the attendance note? To make this judgment it is necessary to have a clear view of the nature and complexities of the case and the client. It is clearly reasonable to interview a witness once. It might be possible to obtain a statement merely by writing to the potential witness, but the fee-earner will usually wish to probe the information given and to get some view of the likely impression that witness might make on the court. Sometimes it may be reasonable to see the witness a second time to go through the statement prepared by the provider and get it signed though this should be less common. Further attendances to ask additional questions should only be allowed if there is good reason for them not being asked at the earlier interview(s). Such a reason might be the need to comment on a witness statement produced by the other party or as a result of a new issue arising.
- 2.34 It is the fee earner's responsibility to ensure that attendances on the client are not excessive. Where such excessive attendances do occur they should not be allowed on assessment under legal aid any more than they would be on an inter partes detailed assessment (see paragraph 1.6) Further, it should be remembered that, in licensed work, if the legally aided client requires the proceedings to be conducted unreasonably or in such a way as to incur unjustifiable expense under legal aid, the fee-earner is under a duty to report this to the Director and the Director may choose to withdraw the determination of legal aid (Regulation 42, the Procedure Regulations). Where a fee-earner fails to report that the client is requiring the proceedings to be conducted unreasonably or at an unjustifiable expense when it was reasonable to have expected

it, subsequent costs may in any event have been unreasonably incurred. Only a proper study of the file will reveal this.

- 2.35 As with preparation time, attendance notes/computer records or other relevant documents should justify the time claimed. If the documentation does not provide adequate information or does not exist at all then the costs should be reduced or disallowed.
- 2.36 In some cases, it may be appropriate to allow for the attendance of more than one fee earner on a client e.g. where preparation work has been divided between more than one fee earner owing to the volume of papers and/or the involvement of more than one specialised area of law and/or complexity of the case. However, the file must provide justification as to why the attendance of more than one fee earner was reasonable at the particular meeting.
- 2.37 It will be unusual that a fee earner will be able to claim for attendance (or other communications) with other fee earners in the same organisation working in the same category of law. The attendance note will need to justify why it was necessary for the fee earner with conduct to seek advice from a colleague, given that fee earners should be given cases that are within their competence. Examples of where such time may be reasonable could include:
- where the case or matter has reasonably been shared between more than one fee earner (as in paragraph 2.36 above);
  - where a novel or developing point of law arises which it is reasonable to discuss with a colleague in conjunction with or in place of research;
  - where a difficult or unusual point from a different area of that category of law arises unexpectedly and it is reasonable to discuss with someone more specialist in that area;
  - where it is reasonable and cost effective to instruct a more experienced advocate within the organisation to attend a hearing (Point of Principle CLA53);

However, time spent in routine supervision of one fee earner by another should generally be considered part of the provider's overheads.

- 2.38 Where an issue arises in a different category of law, attendances and written communications with a fee earner in that category will be allowable, subject to reasonableness in the usual way.

### **Reviewing files**

- 2.39 Files will sometimes exhibit general claims for attendance of the following nature e.g. "reviewing file" or "perusing and considering file" or "considering next steps". Subject to the specific provisions for file review, as a general principle providers would be expected to be reasonably familiar with their files and should not be allowed to claim for general re-reading and consideration of the file every time an action is taken. In order for such claims to be reasonable there must be some specific circumstances justifying the time in the particular case e.g. reviewing the file prior to an attendance on

the client. This should be noted on the file. Such claims should generally be linked to a specific action. Where a fee-earner undertakes his or her own advocacy it will be generally reasonable to claim time in preparing a brief to him or herself.

- 2.40 Equally, if it has been some considerable time (usually at least a month) since any action has been taken on the file due to no fault of the fee earner then again it may be reasonable for that fee earner to claim for some time refreshing his or her mind as to the salient points. It should be borne in mind that the time allowed would generally be limited, in that re-reading a file with which one is already familiar even after an absence of several months-will only involve picking out the key areas and will not involve having to read every letter and document on the file. Equally, such file notes should be linked to some particular development or need to take further action on the file. Even within a period of one month, it may be justifiable to claim a short period (e.g. one to two units) reviewing the file before taking a particular action.
- 2.41 Extra time incurred that arises from conduct of the file changing from one fee earner to another within the provider's organisation is not allowable. Such changes occur through the firm's own administrative arrangements and a private client would, for example, be unwilling to pay for the cost of a new fee earner familiarising him or herself with the file because the firm had chosen to transfer the matter or the previous fee-earner had left the provider, other than as allowable under paragraph 2.37, above. However, where work is required while the fee-earner with conduct of the matter is unavailable in circumstances beyond that fee-earner's control, and it is reasonable not to wait for that fee-earner to become available, reasonable time should be allowed for the a new fee-earner to review the file. Examples of this would be a hearing, such as for an injunction, listed while the usual fee-earner was unavailable (but not where this was because the fee-earner had failed properly to supply dates to avoid) or other urgent instructions from the client.

### **Travel time by the fee earner**

#### ***Generally***

- 2.42 Where there is doubt as to the reasonableness of the amount of time claimed for travel the assessor should usually allow the amount of time that it would be reasonable to expect the fee-earner to take to travel between the two places concerned. If the travelling time is longer than usual fee earners are expected to record in the file note the reasons for this. Travel times (and expenses) will be based on the journey from the fee-earner's office rather than home, unless the journey was actually made from the fee-earner's home and the travel was shorter/less expensive than it would have been from the office.
- 2.43 Where travelling time is incurred a decision will need to be made whether it was reasonable for the fee earner to travel or whether the work could be done in some less expensive way, for example by instructing a local lawyer agent or by attending on the client by telephone or by using methods of remote communication where appropriate.
- 2.44 Normally, where a five hour round trip is required it may be difficult to justify the fee-earner's travelling time and expenses, and it would be more appropriate to instruct an agent who is able to attend within a one hour round journey. However, in some cases it may be reasonable for the fee earner to travel and the reason for making the journey

should be recorded on the file. Examples of when it may be reasonable for the fee earner to travel for a longer time are as follows:

- (a) court applications, other than those that are straightforward;
- (b) conferences with counsel;
- (c) interviewing a witness where the fee earner will wish to test the witness's credibility for him or herself;
- (d) because of the specialised nature of the case, the fee earner's close personal understanding of the matter or the nature of the client;
- (e) where there is a lack of suitably qualified agents in the area concerned;

2.45 Where any claim for travel time is reduced because it is considered that a local agent should have been instructed, a notional allowance should be made for time that would have been spent briefing the agents and considering any reports or correspondence.

2.46 Under Paragraph 6.61(c) of the Specification, in respect of all travel time and expenses or agent fees, no extra costs are payable that arise from the fee earner being based in a location distant from the client where it would have been reasonable for the client to have instructed a nearer provider. This will need to be determined on the facts of any particular claim. However, vulnerable clients in particular should not be expected to have to carry out extensive research or make repeated attempts to find a provider with capacity to take on their case where they are aware of a particular, more distant, provider able to do so. No disallowance should be made where the client confirms that they have made attempts to instruct local providers. Further, no reduction in respect of time or expenses will be made where a distant provider is instructed because the proceedings are taking place within that provider's locality (e.g. the office is based within 10 miles of the relevant court or tribunal).

#### ***Travel to the legally aided client***

2.47 Usually, the legally aided client will be expected to attend the provider's offices (see *Various Lewward Claimants v Kent and Medway Health Authority and Another* [2003] EWHC 2551 (QB)). However, there may be circumstances where the fee-earner has to travel to the client, for instance, because the client is house bound or may be detained in prison or in hospital. Reasonable travelling time and disbursements may be reimbursed in these circumstances, subject to the above Contract provisions. This will include travel to a client before a legal help form is signed, where justified under the Specification, provided the client subsequently signs the legal help form and is confirmed as eligible for legal aid. Where travelling costs to the client are claimed, fee-earners should always record the reason for the travel.

#### **The Use of Solicitor/Legal Advisor Agents**

2.48 Use of agents is subject to the requirements of Paragraphs 2.7 to 2.11 of the Specification. In particular the provider conducting the case or matter is responsible for supervision of the agent and ensuring that the agent carries out the work in accordance with the Contract.

- 2.49 Where another provider is instructed as an agent they stand in the shoes of the conducting provider and their costs form part of the conducting provider's profit costs. They are not claimable as disbursements nor can any claim be made on account of providers' agents' fees. In particular, (and as confirmed in the judgment of R(SP) v the Lord Chancellor [2013] EWHC4011 (Admin)), under Clause 3 of the Contract Standard Terms another provider cannot be instructed as a legal expert (i.e. an Approved Third Party). If agents are instructed, London rates are payable where the agent is based within the Agency's London region.
- 2.50 Counsel in independent practice cannot be a provider's agent. Providers may indicate that the reason they manage their work this way is because prior commitments or the distance of the court make instruction of counsel desirable where there are insufficient numbers of local providers to use as agents. Providers may of course continue to instruct counsel where necessary in the course of litigation but they must do so in accordance with the Contract and Regulations. Counsel's fees must be charged as such under a fee note delivered by counsel.
- 2.51 However, barristers who are employees of a solicitor's firm or other providers may be instructed as an agent in the same way as any other fee earner of that firm or provider.

### **Waiting**

- 2.52 Most waiting will occur on attendances at court, and the fee earner will have very little control over the length of time involved.
- 2.53 Few fee earners will wish to spend time in waiting. However, fee earners should not be unreasonably cautious in assessing the time that he or she needs to arrive at court. As a guideline, the earliest should generally be half an hour before a case is timed to start or before any pre hearing conference or attendance. However, for longer journeys in particular, it may not be practicable to ensure arrival even within that period.
- 2.54 Where time is claimed at court as attendance or conference, rather than waiting, rates for taking further instructions from the client, conferences with counsel or negotiations with other parties, the important question is whether there is evidence on the file of attendances that were reasonably undertaken. Fee earners and/or counsel may generally be expected to be fully prepared before the hearing, but sometimes, it may be more convenient for the fee earner or counsel to arrange a conference at court prior to a hearing than at their offices or chambers at a different time. Where further documents or evidence are served at the last minute it may also be a legitimate use of the time available to take further instructions. In some cases, such as possession proceedings brought by social landlords, the initial hearing may represent the first opportunity to address the case with the opponent.
- 2.55 In most cases it will be more difficult to justify claiming time for attendance or conference beyond the time that the matter was due to go into court, unless the Judge directs that the parties spend time considering settlement or other issues. However, if the parties are still in discussion at the time of the hearing it may be reasonable for the discussions or negotiations to continue if the case is not immediately called on. A lunchtime adjournment is not included in waiting time, but claims may be made for any attendance or conference that takes place during that adjournment.

- 2.56 It is, of course, essential that no time is claimed both as attendance/conference and waiting.
- 2.57 Waiting time must be charged at the rates appropriate to waiting and not at rates appropriate to advocacy.

### **Form completion**

- 2.58 Time may not be claimed for the completion of forms that are not specific to a case or matter. No time can be claimed for completion of forms that are required purely to meet providers' contracting obligations towards the Lord Chancellor (see further Paragraph 6.61 (a) of the Specification).
- 2.59 Under Paragraph 3.12 of the Specification, where the legal help form is signed in the course of an interview, and it is confirmed that the client is eligible for services, a claim for time from the beginning of the interview may be made. Under Paragraph 3.29 of the Specification, telephone advice given before the application form is signed is also claimable, provided the client does subsequently sign the application form and is confirmed as eligible for legal aid. Accordingly, where the client is confirmed as eligible for legal aid, time spent in completing the legal help form should be allowed.
- 2.60 A claim may be made for completion of application forms for Controlled Legal Representation in Immigration cases and for licensed work certificates (in the latter case, time will be claimed under the certificate itself following a delegated, telephone or faxed application grant of legal aid, otherwise under legal help; see further Part C, section 9.15). The basic time standard for such forms is 30 minutes, but more may be payable in complex cases, particularly if a substantial statement of case is required and where the application is for emergency legal aid or is to report a grant of emergency legal aid by delegated functions. Reasonable time may also be claimed for completion of forms to seek amendments to licensed work certificates, for payments of account under certificates and for increases to upper financial limits in controlled work cases.
- 2.61 Time may also be claimed for completion of forms Claim1, Claim 1A, Claim2 and POA1. For forms Claim1, Claim 1A and Claim2 this will normally be 12 to 18 minutes; for a POA1, 6 minutes should usually be sufficient. This includes cases where a Claim1 or Claim 1A is submitted following detailed assessment of the costs by the court. Where the bill of costs is prepared with the Claim1 or Claim 1A for assessment by the Agency, further allowance is likely to be appropriate. Point of Principle CLA52 confirms that work done in preparing and submitting the CIV Claim2 form, together with the covering letter, is remunerable as contract work even if the costs of the substantive work are met in full by the other side on an inter partes basis. The time spent in completing a Claim 1 and Claim 1A in family proceedings can only be claimed separately where the claim is accepted as an exceptional case or is not subject to a Standard/Graduated Fee; otherwise it is covered by the Standard/Graduated Fee. Where allowable, the time standards for the Claim1, Claim 1A and POA 1 will apply.
- 2.62 Otherwise, completion or assistance with completion of eligibility forms is not normally claimable. This is not legal work, but compliance with the requirements of the Contract and Regulations in respect of provision of services only to clients who are financially eligible. In exceptional circumstances, where the client does not have relatives, friends or other support to provide assistance, it may be permissible to claim for time in relation to eligibility forms. This would be in circumstances analogous to those of *Ecclestone*,

above, where without such assistance the client's case or matter would not be viable because they would be unable to obtain legal aid. Care must be taken to ensure that the fee earner does not assume responsibility for the statement of the client's eligibility.

- 2.63 More generally, under the Specification and under usual principles, completion of forms on behalf of the client will usually not be claimable unless their content is such that legal assistance is justified.

### **3: Disbursements**

#### **General**

- 3.1 "Disbursements" means counsel's fees, experts' fees, court fees, travelling and witness expenses and other out of pocket expenses properly incurred by a fee earner which would be properly chargeable to a client. Counsel's fees are also treated as disbursements for most purposes but are considered separately at section 12 of the Guidance. Disbursements are assessed on the basis of determining whether they were reasonably and proportionately incurred and are reasonable in amount subject to any prior authority granted. Invoices or receipts should be provided in respect of any disbursement of £20 (including VAT) or more. However, where the nature of the disbursement, such as court fees and mileage, means that no invoice or receipt is available, a note should be left on file to this effect.
- 3.2 The Lord Chancellor can specify what disbursements can be charged under any form of service. See Paragraph 4.21 of the Specification in relation to controlled work and Paragraph 6.62 of the Specification in relation to licensed work. For residential assessments and other disbursements specifically excluded from legal aid, see the guidance on prior authorities in the "Narrative and guidance: public funding" document on the Ministry of Justice website at <http://www.justice.gov.uk/legal-aid/funding>
- 3.3 "Reasonable" means what is reasonable for the proper conduct of the case in all the circumstances. The test is based on the view/knowledge of the reasonably competent fee earner at the time the disbursement was incurred. Hindsight should not be used.
- 3.4 Regard must be had to the purpose and importance of the disbursements to the case, the particular service involved and the extent to which there is a choice of alternative service providers and whether all elements of the service are justified in the particular case and at the particular time.
- 3.5 Paragraph 6.61(c) of the Specification applies to disbursements as it does to travelling time. Where it would have been reasonable for the client to instruct a more local provider, payment for disbursements that are more expensive by reason of the distance of the client from the provider's office will be limited accordingly.

#### **Mediation Costs**

- 3.6 A fee-earner or counsel acting under a certificate for full representation cannot themselves provide mediation or arbitration services in the same case, but the fees of a mediator or arbitrator can be claimed under such a certificate as a disbursement, except in family cases.

#### **Costs of Communication Support Professionals**

- 3.7 A disbursement does not include costs which are overheads of the provider or to be borne by them by way of some professional obligation. The Equality Act 2010 places an obligation on service providers to make reasonable adjustments so that they can assist clients with disabilities. The provider as service provider is therefore obliged to make adjustments, where it would be reasonable to do so. The adjustment is not a disbursement as it is to be borne by the provider. Where it would not be reasonable to make the adjustment, the client can be charged and so the costs may be a disbursement and reimbursed by the Lord Chancellor. In recognition of the level of these costs and to prevent any gap in provision, the costs of sign language interpretation have been deemed unreasonable for providers to bear on an ongoing basis. These costs will be reimbursed by the Lord Chancellor. It is important, however, for the costs of the interpretation, and any additional preparation time incurred by the interpretation, to be calculated and notified to the Agency separately, so that the cost does not get passed onto the BSL client via the statutory charge. These costs should therefore be reported as part of the costs of assessment.

### **Agents' fees**

- 3.8 Where an agent undertakes work that is otherwise fee earner work, it must be claimed as part of the conducting provider's costs and not as a disbursement. i.e. attending on witnesses to take statements or, because of the distance involved, attending on hearings. If an agent is instructed outside of England and Wales, details of the instruction should be set out in the claim but the charge will be a disbursement. The costs will be assessed on the basis of the costs allowable in that jurisdiction (*McCullie v Butler* [1962] 2 Q.B. 313)
- 3.9 Non-fee earner enquiry agent work should be claimed as a disbursement. Such work will include the service of process, including a subpoena or witness summons, tracing witnesses, taking statements, surveillance work etc. The relevant questions will be:
- (a) was the work done by the agent reasonable in the light of the fee-earner's knowledge at the time of instruction? and
  - (b) is the charge a reasonable one?
- 3.10 One particular amount to consider is the charge for the enquiry agent's travelling time and expenses. It will seldom be reasonable to instruct an enquiry agent except in the locality where the work is being done. An exception might be where a number of witnesses are to be interviewed in different towns. It may then be more efficient for one enquiry agent to interview all the witnesses rather than divide the work among separate agents.

### **Fee earner's travelling expenses**

- 3.11 Generally, the questions that will arise are:
- (a) was there a reasonable need for the journey?
  - (b) was the appropriate form of transport used?
- 3.12 Most travel will be to court, to chambers for a conference, to take statements from witnesses, to inspect the scene of the incident or to see the client. All these have been dealt with elsewhere when considering the time spent.

- 3.13 These expenses are generally to be allowed at the actual expense incurred or at a specified mileage rate (45 pence per mile). Whether it was reasonable to travel by car rather than public transport should be considered in the context of reasonable convenience and the saving of the claim for travelling time that may have resulted. The question of mode of travel depends on comparative costs, taking into account the fares incurred and the time saved by use of the more expensive mode of transport.
- 3.14 The use of taxi travel may well be reasonable in that although the disbursement claim will be higher, the travelling time would be substantially less than that incurred as a result of travelling by public transport or it is reasonable in the circumstances, for example where heavy bundles have to be transported. However, if there is no saving in travelling time and no evidence of special circumstances then the disbursement should be reduced to the equivalent of that which would have been incurred using public transport.
- 3.15 Paragraph 5.22(3) of the Practice Direction to Rule 47.6 CPR (Civil Procedure (Amendment) Rules 2013) states that local travelling expenses incurred by providers will not be allowed on assessment. What is 'local' will be a matter in the discretion of the court dealing with the case at the relevant time, but as a general rule, will be taken to mean within a radius of 10 miles from that court. However, courts will generally take a flexible approach and may allow travel expenses where local public transport is known to be poor. Any claim for travel expenses within this 10 miles radius should be supported by a file note giving the particular reasons for the claim. Where justifiable under paragraph 3.14 above, the costs of taxi travel are claimable within the 10 mile radius.
- 3.16 The cost of travel by air may only be allowed if there is no reasonable alternative and the class of fare is reasonable in all the circumstances, or if the air travel is more economical taking into account the time saved. Cheap air fare offers should be used where possible. It would be usual to expect alternative quotes to be sought to identify the most competitive route. If the assessor determines that it was unreasonable to use air travel, the appropriate rate for travel by an alternative means of public transport should be allowed.
- 3.17 Invoices/receipts should always be produced in support of claims for travel expenses. Claims for up to £20 will not normally require substantiation by provision of a receipt or disbursement voucher, but should be justified on file. If prior authority has been obtained to cover the expense, then any voucher and a copy of the authority must be available but there is no need to justify why the expense was incurred, unless the amount exceeds the prior authority given.

### **Travel/overnight expenses**

- 3.18 The cost of overnight accommodation should only be allowed in exceptional circumstances where the assessor is satisfied that an attendance at a distance is justified and that the need for an overnight stay is justified. The need for an overnight stay would only be justified if it would otherwise involve so much travelling that it would be unreasonable to undertake the travel and attendance in a single day or the attendance was likely to be so long that travel and attendance in a single day would be unreasonable.

- 3.19 The “Guide to Allowances” currently suggests an overnight allowance of £111.25 for expert and professional witnesses staying in London, Birmingham, Manchester, Leeds, Liverpool and Newcastle- Upon-Tyne City Centres and £81.25 elsewhere. These rates may therefore be applied for fee-earner expenses, however, please note that the rates may be subject to change.

The Guide to Allowances referred to above is the Guide to Allowances under Part V of the Costs in Criminal Cases (General) Regulations 1986. The latest version is dated June 2007 and can be found on the Ministry of Justice website (<http://www.justice.gov.uk>). Although it is titled Costs in Criminal Cases, it is also applicable to costs in civil cases.

### **The congestion charge**

- 3.20 The congestion charge may only be claimed as a disbursement where it is incurred exclusively in relation to the case or matter. Fee earners of providers based inside the charging zones will need to provide evidence that they would not have incurred the charge if it were not for that particular fee-earner case work, given that if a fee earner uses a private car to travel to/from his or her office inside the zone the daily charge will be triggered by his or her normal journey to/from work.
- 3.21 Further, the congestion charge should be taken into account when considering the most cost effective and appropriate form of travel.
- 3.22 No payment can be made without evidence that the congestion charge has been paid for the date claimed.

### **Client’s travelling expenses**

- 3.23 In a detailed assessment under Part 47 of the CPR there is no provision for payment of a legally aided client’s travelling expenses unless they are required to attend court as a witness of fact. The EU Directive on cross-border disputes (Directive 2002/8/EC – 27 January 2003) established minimum common rules on cross-border disputes, including travel, interpretation and translation costs.

### **Legally aided client’s travel costs to attend experts**

- 3.24 *R v. Legal Aid Board No. 15 Area Office (Liverpool) ex parte Eccleston [1998] 1 W.L.R. 1279* says that the Lord Chancellor does have power to grant prior authority for a legally aided client’s travel expenses to see an expert, where the report is essential for the proper conduct of the proceedings, and the legally aided client cannot afford the expense involved in travelling to the expert.
- 3.25 In licensed work cases the issue of whether to pay for a legally aided client’s travel costs to attend an expert is more likely to arise than in controlled work cases. Prior authority applications for costs that are either unusual in nature or unusually large can be made under Paragraph 5.25 of the Specification. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns the personal expense of the legally aided client may arguably make the expense unusual in its nature.
- 3.26 The fee earner is not, of course, obliged to seek a prior authority but may instead seek to justify the costs on assessment. However, it is advisable to seek prior authority given:

- (a) the exceptional nature of these costs; and

- (b) that prior authority is the only proper mechanism whereby costs covered by an inter partes costs order but not allowed on an inter partes detailed assessment may be allowed on assessment under legal aid.

3.27 In his judgment in *Eccleston*, Mr Justice Sedley determined that the client must be “impecunious” and that the expense must be necessary “in order to make or keep the case viable”. When considering an application for prior authority in connection with such expenses the following criteria should be applied:

- (a) It must be demonstrated that the expenditure is necessary to keep the proceedings viable. In other words the test is that the litigation would not be able to continue or would fail unless this expense is met;
- (b) The legally aided client must establish that he or she does not have the resources to meet the expense. The fact that a litigant is in receipt of legal aid does not automatically satisfy the test of “impecuniosity”. The legally aided client should provide a full breakdown of weekly income and outgoings, together with capital resources, to demonstrate that he or she cannot afford to meet the particular expense. This test will be more difficult to satisfy where the amount is small, although each case should be determined according to its individual circumstances;
- (c) If the expert is based locally, then it would not generally be reasonable for the legally aided client to seek financial assistance from the Lord Chancellor to attend the appointment. This is akin to a visit to the legally aided client’s own provider’s office. An application for prior authority or payment should generally be refused in these circumstances unless the legally aided client can demonstrate that the proceedings would otherwise fail;
- (d) If the expert is based some distance from the client’s home and the court where the case would be dealt with, justification should be provided as to why a local expert should not or could not be instructed. The fee-earner should set out the steps which had been taken to identify an appropriate local expert e.g. by reference to the Law Society Directory of Experts. It would not generally be reasonable to instruct a distant expert simply to avoid delay if adequate expertise is available locally;
- (e) The test should be based on the nature of the expertise available. It may be appropriate to instruct an expert outside of the local area if he or she has specific expertise that is unavailable locally or a limitation period is approaching and the legally aided client could not be seen promptly locally (provided that the legally aided client and his or her fee-earners were not responsible for the delay in instructing the expert). The nearest expert with appropriate expertise should be used, i.e. it is not necessarily justified to use a London expert in a Manchester case if an appropriate expert is available in Liverpool;
- (f) The legally aided client must justify why he or she needs to attend the meeting with the expert; for example, if a physical examination is necessary then clearly it would be reasonable for the client to attend;
- (g) The applicant must provide a full breakdown of the proposed expense;

- (h) Any available alternative sources of funding should be considered;
  - (i) The proposed expenditure must be proportionate in relation to the issues in the case.
- 3.28 Where a legally aided client is required to submit to a medical examination at the request of the other side, it is normal for those expenses to be borne by the party requesting the examination. In those circumstances, the expense is generally settled in advance and would not usually form part of the legally aided client's costs. If the expense had not already been paid by the opposing party, it should be claimed as an inter partes item in the bill where inter partes costs are ordered. Prior authority will generally be refused.

#### **Client's travel costs to attend court/witness**

- 3.29 Any person attending Court, whether as a party, or as a witness called or reasonably intended to be called to give evidence, is entitled to recover their expenses as to:
- (a) net loss of income;
  - (b) travel;
  - (c) hotel expenses;
  - (d) subsistence.
- 3.30 A fee earner may pay these expenses on behalf of his or her client and then include the payments in the bill of costs as they would generally be recoverable as a disbursement. Receipts should be produced where relevant.
- 3.31 The usual principles as to reasonableness and proportionality apply. If it was unreasonable for the client to attend the hearing in furtherance of his or her case, for example because the hearing was an interim hearing where the client's presence was not strictly necessary, then the disbursements would not normally be allowed.
- 3.32 The expenses must also be reasonable as to amount and could be expected to fall within the following categories:
- (a) Net loss of income: only actual losses are claimable; therefore if the client is still paid while attending Court, no notional loss of income is claimable.
  - (b) Travel costs:
    - (i) Travel by car at the appropriate mileage rate: (45 pence per mile);
    - (ii) Reasonable public transport costs: this will cover travel by the most economical and direct method. It would not generally be reasonable to allow a first class fare. Travel by coach may often be more economical than travel by rail;
    - (iii) Hotel expenses: accommodation charges vary considerably across the country and it is difficult to give guidelines on specific amounts. It would

be reasonable for accommodation to be of an adequate, but not luxurious standard;

- (iv) Subsistence: this would include reasonable expenditure on meals and non-alcoholic beverages, but not items such as cigarettes, newspapers, etc.

### **Disbursements in cross-border disputes**

3.33 The Lord Chancellor had implemented the European Directive on Legal Aid [13385/02] when it came into force. This Directive applied to ‘cross-border’ disputes which are cases where one party to proceedings in England and Wales, resides in an EU member state outside of that area. The Directive will not be retained as part of domestic legislation after the end of the transition period for the withdrawal from the EU (the implementation period completion day). As part of the original withdrawal agreement, however, the terms of the Directive will continue to apply to relevant legal aid applications received by the Director before the end of the transition period.

3.34. Article 7 of the Directive stipulates that legal aid should cover the following costs directly related to the cross-border nature of the dispute:

*“(a) interpretation;*

*(a) translation of the documents required by the Court ...which are necessary for the resolution of the case; and*

*(b) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the case is required ...and cannot be heard to the satisfaction of the Court by any other means.”*

3.35 In terms of travelling costs, the test is the same as set out in paragraph 3.27 in that the client’s presence at Court must be necessary in order to make or keep the case viable.

3.36 In a cross-border dispute, the costs of travelling to experts will be subject to the test in *Eccleston* (i) – see paragraph 3.27, except that the Agency will not require impecuniosity to be shown.

3.37 Articles 7(a) and (b) of the Directive provide a safety net for the payment of interpretation or translation costs. Where proceedings are initiated by public bodies it is a matter of human rights that the documentation of the proceedings are in a language the recipient will understand. In such cases, it would be reasonable to expect the public body to provide translated documents. In all other circumstances the Lord Chancellor will meet the translation/interpretation expenses where necessary and subject to reasonableness in amount.

### **Photocopying**

3.38 Section 4.16(5) of the Costs Practice Direction to CPR Part 43 states that the costs of making of copies of documents will not generally be allowed. This is reflected in paragraph 6.61 (e) of the Specification, as these costs are considered as office overheads.

Section 4.16(5) of the Costs Practice Direction to CPR Part 43 states as follows:

*“The cost of making copies of documents will not in general be allowed but the court may exceptionally in its discretion make an allowance for copying in unusual circumstances or where the documents copied are unusually numerous in relation to the nature of the case. Where this discretion is invoked the number of copies made, their purpose and the costs claimed for them must be set out in the bill.”*

- 3.39 The exception stated in the Practice Direction is if there are “...unusual circumstances...” or the documents “...are unusually numerous...” There is no guidance on determining these factors. However, as a rule of thumb, copying 500 pages will generally be considered exceptional, but a lower figure may be argued to be exceptional in the particular circumstances of a case. Where copying is sent out commercially the lowest available rate should be sought. Where copying is carried out in house the total amount claimed should not exceed the lowest commercial rate obtainable.
- 3.40 Where copies of documents held by the provider are requested by another party, this will be subject to the other party making payment per page requested, and no claim should be made on assessment regardless of the amount or nature of this copying. Where another party requests payment for copies of documents they provide this payment is claimable on assessment, subject to the reasonableness of the amount. However, the usual position will be that each party will request copies of documents from other parties following disclosure. In that case payment can only be claimed on assessment in respect of the balance of costs payable to another party.

#### **Restrictions on Experts’ charges**

- 3.41 Experts’ charges are subject to maximum rates or fixed fees as listed in Schedule 5 of the Remuneration Regulations. Paragraph 6.62 of the Specification provides that the Lord Chancellor will not pay fees or at rates in excess of those listed in the Remuneration Regulations unless the Lord Chancellor considers it reasonable in exceptional circumstances and has granted prior authority to exceed the fees or rates.
- 3.42 The rates are maximum rates although the fees are prescribed fixed fees under the Remuneration Regulations. Hence providers remain under a duty, pursuant to Clause 2.2 of the Standard Civil Contract Standard Terms, and where the statutory charge and/or contributions may apply, towards the client, to seek to obtain the best value for money in instructing experts. This will be particularly relevant if a provider is aware that an expert is seeking to increase his/her previous rates or fees to the maximum allowed under the Remuneration Regulations. Where an expert is limited to a maximum hourly rate, the time claimed will of course remain subject to assessment.
- 3.43 Where the cost of instructing an expert would normally be shared between a legally aided client and other parties, the claim under legal aid cannot exceed the relevant proportion of the maximum rate or fee. For example:

A surveyor (non-housing disrepair) is jointly instructed by a legally aided client and local authority and the survey takes 6 hours, the maximum claim from legal aid will be £120, i.e. 3 hours at the maximum surveyor (non-housing disrepair) rate of £40 per hour. If the surveyor seeks to charge more than £240 in total, it will be a matter between the surveyor and local authority whether the authority are prepared to pay more than £120 in respect of their share. More specifically, if the surveyor sought to claim £480 or more for 6 hours work it would not be legitimate to claim the full 6 hours at the maximum rate of £40 per hour under legal aid, and the balance from the local authority; that

would not be charging the legally aided client's share of the instructed work at the appropriate hourly rate. Similarly, the maximum cost under legal aid of a jointly instructed DNA test would be £126, half of the maximum fixed fee.

- 3.44 Schedule 5 of the Remuneration Regulations and at paragraph 6.62 of the Specification define the test for exceptional circumstances for the purposes of paragraph 3.40, above, as meaning that the expert's evidence is key to the client's case, and either (i) the complexity of the material is such that an expert with a high degree of seniority is required; or (ii) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence. Note that this does not permit an expert to charge in excess of the usual maximum rates or fixed fee simply by virtue of being instructed at short notice.
- 3.45 Regarding the further requirement for claims in excess of the fees or rates within the Remuneration Regulations, that prior authority has been obtained from the Agency, in Licensed Work cases prior authority should be sought under Paragraph 5.25 of the Specification. For controlled work, however, there is no prior authority process. Instead, evidence supporting the claim for exceptional circumstances should be retained on file in case of assessment.
- 3.46 The Specification contains further restrictions on the charges made by experts that can be claimed from the Lord Chancellor in contract work. Paragraph 4.24 of the Specification prohibits claims in respect of separate administration charges or cancellation fees where more than 72 hours' notice is given of the cancellation. Schedule 5 of the Remuneration Regulations limits claims in respect of an expert's travelling costs to 45 pence per mile and travel time to £40 per hour.
- 3.47 Within the Remuneration Regulations, it is the location of the expert that determines whether London or non-London rates or fees apply. London rates will apply where the expert is based within a London Borough. If an expert has offices in more than one location, the location of the provider will be taken in account in deciding the appropriate rates.
- 3.48 Claims for experts' fees of a type not listed in the Remuneration Regulations will be assessed at the rate or fee that appears appropriate having regard to the purpose and importance to the case of the disbursement, the estimates obtained from different experts of that type and the rates allowed for other disciplines within the Remuneration Regulations.

#### **Disbursements for experts reports in Court of Protection cases**

- 3.49 Under Section 49 of the Mental Capacity Act 2005 the Court of Protection has a general power to call for reports to assist in any question relating to the person in question. Such a report may help the Court in determining whether an oral hearing is needed and can be obtained from the Public Guardian, a Court of Protection Visitor, a Local Authority or an NHS body.
- 3.50 A report under Section 49 is not an allowable disbursement under legal help.
- 3.51 Where legal representation is in force a proportionate share of the cost of the report may be an allowable disbursement if such costs could be charged to the client in the absence of legal aid

## 4. VAT

- 4.1 This section deals with general issues of Value Added Tax (VAT) as it affects the Agency and claims made by its providers for work done. VAT is a complex tax governed by the Value Added Tax Act 1994 (VATA) so this overview is very limited in scope.
- 4.2 VAT is a tax on consumer expenditure collected in the United Kingdom on all business transactions. It is collected whenever there is a taxable supply of goods or services by a taxable person as part of their business. The provision of legal advice, assistance and representation is a supply of services. Solicitors' firms are usually registered for VAT and provide a service in respect of their business. The position of Not for Profit Agencies may be more complicated,
- 4.3 When a VAT registered provider is preparing a bill to his or her client, VAT must usually be added to the value of the supply when the provider's bill is calculated. For example, a bill for £100 must, at current rate, have the VAT (of £20.00) added making the total the client is due to pay £120.00.
- 4.4 All services (whether legal help, help at court or legal representation) provided by the provider in a legally aided case are supplied to the client. As they are supplied to the client, the client is the recipient of the service so it is always the client's status that is relevant. This is particularly important if the client is considered to reside overseas. It will also be important where the proceedings have arisen during the course of the client's business.
- 4.5 For the purposes of VAT law, anything which is not a supply of goods but is done for a consideration is a supply of services (VATA, Section 5(2)). Whilst there must be a link between the service and the payment for those services, the payment itself does not have to come from the recipient. In legally aided cases, the fact that the Lord Chancellor pays the provider does not alter the relationship between the client and the provider for VAT purposes.
- 4.6 VAT is generally added to the work done by the provider, which is fairly straightforward. There are, however, a number of more complex issues which need to be borne in mind when calculating the exact value of the supply.

### Disbursements and expenses

- 4.7 Those items identified by providers as disbursements and expenses are not always the same as those that HM Revenue and Customs classify as disbursements for VAT purposes. The correct treatment depends on whether the item of expenditure is:
- (a) a cost incurred by the provider in the course of making a supply; or
  - (b) a disbursement incurred by the provider as the client's agent, which is then charged to the client.

### Costs incurred

- 4.8 Any item incurred by a provider in the course of making his or her own supply must be included in the value of the supply when VAT is calculated (*Rowe and Maw v. Customs & Excise Commissioners* [1975] STC 340).

- 4.9 The question to ask is whether or not the expenses incurred were an integral part of the provision of legal advice to the client. Some examples of such expenses are; the provider's travelling expenses; postage; and telephone charges.
- 4.10 If a provider has to go to court to represent the client the supply he or she makes is not just the provision of advocacy and advice but includes his or her travel time together with the incidental travelling expenses.
- 4.11 As a general rule, travelling expenses incurred by a provider in the performance of his or her client's instructions are not VAT disbursements and must be included as part of the provider's overall charge.
- 4.12 *Row & Maw* claimed that rail fares incurred by them in the course of carrying out their client's instructions did not represent a taxable supply of services for VAT purposes since the payment by the client of the sum demanded was not consideration for the supply but rather reimbursement of sums incurred by the solicitors as agents on the client's behalf. The Court held that the expenditure was on the services supplied to the solicitors rather than to the client and so the charge made by the solicitor was part of the total consideration for all the services supplied to the client and therefore could not be divided for the purposes of calculating VAT.
- 4.13 If a travel expense includes VAT, the VAT should not be claimed or calculated twice. The VAT should never be double charged, merely accounted for.

#### **True Disbursements**

- 4.14. Disbursements for the purposes of VAT are those where amounts are paid to third parties by the provider, acting as the agent of their client. There are a number of conditions that must be satisfied before a disbursement may be treated as such.

#### **Custom and Excise Notice 700, Paragraph 25.1.1:**

- (a) *the solicitor acted as an agent for his client when paying the third party;*
  - (b) *the client actually received and used the goods or services provided by the third party to the solicitor;*
  - (c) *the client was responsible for paying the third party;*
  - (d) *the client authorised the solicitor to make payment on his behalf;*
  - (e) *the client knew that the goods or services would be provided by a third party;*
  - (f) *the solicitor's outlay must be separately itemised when invoicing the client;*
  - (g) *the solicitor must recover only the exact amount paid to the third party;*
  - (h) *the goods or services paid for must be clearly additional to the supplies made by the solicitor to their client.*
- 4.15 All of these conditions must be satisfied before a payment can be treated as a disbursement for VAT purposes. The following may be treated as disbursements provided the guidelines set out above are adhered to:

- (a) company registration fees;
- (b) company search fees;
- (c) court fees;
- (d) witness fees;
- (e) sheriff agent fees;
- (f) oath fees paid to a solicitor or Commissioner for Oaths.

- 4.16 Recent caselaw<sup>1</sup> has indicated a restrictive approach to what can be considered a true disbursement. Note, in particular that since the *Brabners LLP* case, the HMRC concession that the fees for postal searches could be considered true disbursements has been withdrawn. The Law Society have provided guidance on this issue.
- 4.17 Because of uncertainty as to the treatment of some disbursements, in particular in relation to experts' reports and interpreters' fees, where a provider is in doubt how to account for VAT they should contact either their HMRC office or their usual tax advisers.

#### **How should VAT disbursements be treated?**

- 4.18 The provider has two options. The first is to pass on the cost of the disbursement to the client as a VAT inclusive amount (if taxable) and exclude it from the calculation of any VAT due on the main supply of legal services to the client. The provider cannot reclaim the input tax on the supply.
- 4.19 Unless the invoice for the disbursement is addressed directly to the client, the client is also prevented from reclaiming input tax as he would not hold a valid VAT invoice.
- 4.20 Generally it is only advantageous to use this method of treating a VAT disbursement where the client is not entitled to reclaim the VAT. This generally happens in legally aided bills, except where the client can reclaim (for example where the proceedings were brought in the course of the client's business).
- 4.21 Alternatively, services can be treated as supplied to and by the provider under Section 47(3) VATA. The provider can then reclaim the related input tax (subject to the normal rules) and must charge VAT on the onward supply if appropriate. If a provider supplies goods as an agent and issues an invoice in his or her own name, he or she must account for VAT as if he or she were the seller.

#### **How should providers claim VAT?**

- 4.22 When submitting a claim there is a requirement that disbursements are detailed on the relevant pages of the CIV CLAIM1, CLAIM 1A and CIV CLAIM2. On whatever basis a VAT component of a disbursement is being claimed (i.e. whether as part of the provider's supply of services or because a true disbursement invoice contains a VAT element), the net and the VAT elements of the disbursements must be itemised separately in the appropriate sections of the form.

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<sup>1</sup> First-tier Tac Tribunal in *Brabners LLP v The Commissioners for her Majesty's Revenue & Customs* [2017] UKFTT 0666 and the *obiter* comments of the Court of Appeal in *British Airways v Prosser* [2019] EWCA Civ 547  
Costs Assessment Guidance 2013: for use with the 2010 Standard Civil Contract (Version 6)

## **Counsel's fees**

- 4.23 A concessionary treatment for counsel's fees was agreed when VAT was first introduced in April 1973. The provider may treat counsel's advice as supplied directly to the client and the settlement of the fee as a disbursement. Counsel can elect to apply on their fees the VAT rate applicable at the time the service was provided or apply the rate at the time that the total bill is presented. Either is acceptable subject to the VAT rate being valid. Counsel's VAT invoices may be amended by adding the name and address of the client and inserting "per" before the agent's own name and address. The fee note from counsel can be recognised as a valid VAT invoice in the hands of the client. Equally for counsel it is the client's VAT status that is relevant.

## **Legal services supplied to overseas clients**

- 4.24 If an individual receives legal services for a non-business purposes, i.e. in their own personal capacity, for VAT purposes the services are deemed to have been provided where the individual belongs (VATA Section 7A and Schedule 4A, paragraph 16(2)(d)). UK VAT is therefore generally not chargeable where the services are provided to a client who is considered to reside overseas. However, it should be noted that supplies in relation to land in the UK are always chargeable to UK VAT (VATA, Schedule 4A, paragraph 1).
- 4.25 In legally aided cases involving ownership and related issues of United Kingdom property, therefore, VAT must be charged irrespective of the client's place of residence. Examples include possession proceedings, landlord/tenant cases or declaration of ownership claims. It will not include services relating to land on the administration of a deceased persons estate or where the services relating to land are incidental to a much larger transaction.

## **What is an "overseas client"?**

- 4.26 For individuals receiving services in a personal capacity, section 9 VATA provides that they belong where they have their "usual place of residence or permanent address". "Usual place of residence" does not have to mean permanent residence although length of stay is a factor.
- 4.27 Three factors determine "usual place of residence". These are established in a Tribunal decision of US AA Limited (LON/92/19504) as:
- (a) where the person actually lives irrespective of homes and other countries;
  - (b) where their family is; or
  - (c) where their job is.

## **It is the individual facts of the case that will determine the answer.**

- 4.28 This issue usually arises in respect of the immigration status of an individual in the UK. If a client's asylum status is not yet determined (or has been determined and they have no right to stay), HMRC's view is that, even though the client may be physically present in the UK, their place of residence can only be in the country from which they have originated. The same VAT position will apply to other individuals with no right to stay, for example an illegal entrant who is not an asylum seeker.

- 4.29 Once a person has been granted a right to stay (for example a person serving on overseas forces, students attending university in the UK, or self-employed nurses under contract) VAT applies as normal. In cases where the client is resident, VAT can be accounted for in the usual way. If the client is the sponsored person residing overseas, then VAT does not apply and is not accounted for.
- 4.30 Consequently, **any** legal services provided to asylum seekers (or others without a right to stay), whether for their asylum applications or in relation to other areas of law, are supplied to them in their country of origin. This places the service outside the scope of UK VAT.
- 4.31 The tax point will be at the conclusion of the legal work, not the date that the claim is submitted and no apportionment should be necessary unless other work is done after the determination of the right to stay, when the client would be resident and VAT chargeable. However, if VAT is chargeable for part of the life of the case or matter, for example because the legally aided client changes their residence during its course, the bill or claim will be apportioned accordingly. However, VAT cannot be apportioned across a fixed fee and where a client is not subject to VAT at the commencement of a stage then VAT should not be paid on the fixed fee. If the client has lost contact with the provider before the case has concluded, it would be right not to charge VAT for the work done.
- 4.32 If an applicant without a right to reside in the UK does not have an identifiable county of origin, they might be considered not to “belong” anywhere. In those circumstances they could not fulfil the condition under paragraph 16(1) Schedule 4A to VATA of belonging to a county other than the UK or the Isle of Man, and the place of supply is deemed, under section 7(2)(b) VATA, to be where the provider belongs. UK VAT is, therefore, VAT chargeable when the country in which the person ‘belongs’ has not been determined. HMRC guidance VATPOSS04600 states that such situations are likely to be exceptional.
- 4.33 Where a client is granted, or otherwise possesses, the right to remain in the UK, the place of supply of services to them will remain the UK even if they subsequently overstay (section 3.8 VAT Notice 741A). Where the right to remain is subsequently revoked, they should still be treated as resident in the UK for VAT purposes until the issue is finally resolved (through any appeal or other legal process). See again the HMRC guidance VAPOSS04600, above.
- 4.34 Providers will need to be aware of their client’s immigration status in order to know how to treat the supply for VAT purposes correctly. HMRC policy in relation to overseas clients is available at the HMRC pages on [www.gov.uk](http://www.gov.uk). Any queries on VAT in individual cases should be referred to the HMRC’s National Advice Service on 0845 010 9000.

#### **Business cases and payment of a third party’s costs**

- 4.35 Business cases may be paid under legal aid for legal persons under an individual case contract where the effective administration of justice test is met. Separate guidance for Exceptional Funding Cases should be referred to in those circumstances. However, guidance on VAT issues for business cases is that VAT paid can be offset as “input tax” where the proceedings relate to the business. If the business client wins the case and gets a costs order against the losing party, the paying losing party will pay net of VAT

(i.e. not pay VAT) on the costs order. It remains the Lord Chancellor's responsibility to pay VAT on the legal costs incurred.

### **Changes to VAT rates**

- 4.36 Legally aided cases can generally be viewed as a single supply of services to the client, such that a uniform VAT rate can be applied to profit costs (including disbursements forming part of the provider's supply of services to the client) based on the date of final work (excluding bill preparation) contained in the providers claim form. This will not apply to VAT that has been charged on a true VAT disbursement before the rate charge. However, other methods of accounting for VAT may be permissible, and providers should liaise with HMRC if they wish to claim VAT on a different basis.

## **5. Work relating to the Proceeds of Crime Act 2002**

### **Introduction**

- 5.1 Work done by a provider to comply with the Proceeds of Crime Act (POCA) 2002 and the money laundering regulations generally (i.e. work done that is not client-specific), is administrative work and as such is not claimable under legal aid. Similarly, internal consultations (e.g. between a fee-earner and the firm's money-laundering compliance officer) would be administrative work under general cost assessment principles.
- 5.2 The situation is more complex in situations where the work is client-specific and is not an internal consultation. This is work that is directly involved in the provision of contracted legal services to the client and so may be claimed under legal aid, subject to reasonableness and the views below as to what may be allowed under legal aid.
- 5.3 This work may include:
- (a) Procedures for checking the client's identity;
  - (b) Providing advice to the client on the effect of the money laundering laws;
  - (c) Taking further instructions where the solicitor has knowledge or is suspicious that a money laundering offence may have taken place;
  - (d) Considering whether to make a report to NCIS;
  - (e) Reporting to NCIS where appropriate;
  - (f) Applying to the court for guidance;
  - (g) Considering whether the firm can continue to act for the client in the circumstances;
  - (h) Considering how to advise the client without 'tipping off'.

### **Checking identity and making a risk assessment**

- 5.4 In identifying whether someone is likely to be involved with the proceeds of crime, the Financial Services Authority recommends that advisers undertake a risk assessment and high risk businesses are identified as any that involve an intensive use of cash, for example plant hire, restaurants, night clubs, dry cleaning, building, plumbing, electrical

or decorating services, mini cabs and market traders. Whilst this does not mean that individuals who have these trades/are employed in these businesses are guilty of offences, it is the higher use of cash transactions that might lead to some monies being received that might be the proceeds of crime.

#### **Advice to the client about the solicitor's responsibilities under POCA**

- 5.5 To what extent these costs are chargeable will depend on why the work is being done and when. The Law Society recommends that solicitors explain the law in this area in their client care letters so that the client understands at the outset what steps can be taken and that when taken they are directly chargeable to the client. It would be an amendment to the firm's standard client care letter and should not form a separate letter. The Law Society advises that the explanation should be in general terms without reference to the client's particular circumstances.
- 5.6 After initial instructions are received there may be points at which the fee-earner and client spend time on POCA issues, for example, considering another party's finances. Such time is chargeable under legal aid, subject to the reasonableness of the time spent.

#### **Taking further instructions on whether an offence has or will be committed**

- 5.7 The provider may be receiving monies from (or otherwise becoming concerned in financial arrangements) with the client or someone else – common examples would be:
- transactions or settlements during the case;
  - private payment for legal services; or
  - receiving legal aid contributions
- 5.8 Reflecting on whether an offence has been committed and what steps to take may be driven by a number of reasons, including:
- (a) to avoid the fee-earner committing the offence of failing to disclose;
  - (b) to determine whether the client's or someone else's assets are criminal property in the context of assessing financial eligibility; or
  - (c) to obtain consent from NCIS where the firm is to receive monies from (or otherwise becoming concerned in financial arrangements) the client or another.
- 5.9 If the purpose of the work is to consider how to avoid an offence by the fee-earner of failing to disclose, it is not allowable under legal aid. This work does not benefit the client, and its performance has no effect on the question of whether the provider can continue acting.
- 5.10 In contrast, if the provider has made a report to NCIS and also has to consider whether it can continue acting and how to advise without 'tipping off', this work would be claimable, subject to reasonableness.
- 5.11 If the purpose of the work is to determine whether the client's or someone else's assets are criminal property in the context of applying financial eligibility criteria, it is not

claimable. Work done in the context of applying financial eligibility criteria is not claimable.

- 5.12 If the purpose of the work is to obtain a consent from NCIS (and therefore a defence to substantive money laundering offences) because the provider is to receive monies from or otherwise concerned in suspected financial arrangements, it is claimable if the transaction or settlement is in the context of the case. This work can be properly described as directly involved in the provision of contracted legal services, as a necessary part of the process.
- 5.13 If the reason for receiving monies or becoming concerned in arrangements is the collection of private payment for legal services, then by definition it is nothing to do with the Lord Chancellor or the Director and is therefore not claimable.
- 5.14 If the reason is to do with the collection of contributions which have been assessed as being payable after a means assessment for criminal legal aid, it should be claimable if and to the same extent as the work done collecting other types of contributions may be claimable.

#### **Considering whether the provider can continue to act**

- 5.15 Any application for an adjournment within proceedings is generally within the scope of the certificate. If a provider has to seek directions and guidance from the Court as to whether or not they should continue as the client's solicitor, this will fall within the scope of proceedings. Whilst this is not a usual step, in the sense that it is not common within the proceedings, it arises out of the provider's professional obligation to appear as they are on the court record as the acting representative. It is anticipated that directions would only be sought where there was a pending hearing and the fee-earner was unsure whether to continue to act. In such cases, this is client specific work.
- 5.16 If, however, the reference to the Court is to seek the Court's guidance on whether or not the provider should report to NCIS, the driver for the application is the provider's position and is therefore not within the proceedings and not client specific. It is not capable of an amendment to the certificate as it does not fall within the proceedings.
- 5.17 Whilst considering whether the provider can continue to act is client specific work, and will be allowed subject to reasonableness, considering whether the provider has 'tipped off', or making an application directly to the Court in respect of the provider's own position is not client specific.

#### **Complying with Production Orders**

- 5.18 Once NCIS has conducted an investigation, the Serious Organised Crime Agency (SOCA) may decide to initiate proceedings. This can include a production order served on a provider for the release to SOCA of client documentation.
- 5.19 Whether this is chargeable will depend on the legal aid position. If the client is a former client, with no current relationship existing between client and provider, the work in complying with the order will be borne by the provider. However, where the client is a current client with the benefit of legal aid, compliance with the order would be client specific.



## Part B: Controlled work

### 6. Civil Legal Aid Legislation

- 6.1 Only work within the appropriate forms of service can be paid for. In particular, the issue and conduct of legal proceedings is not permitted under legal help.
- 6.2 All aspects of carrying out controlled work are delegated to providers and they, rather than the Director, are the assessing authority for the client's means under the Financial Regulations. This principle remains relevant in relation to delegated functions under the Merits or Procedure Regulations as well.

CLA 56 provides as follows:

*“At all times where a supplier exercises devolved powers to provide advice assistance or representation, it is only open to the LSC assessor and/or ICA to reject the claim on the basis of section 5 of the Funding Code where the supplier's decision was manifestly unreasonable. However, the supplier must be aware that the continuing obligation to review merits and sufficient benefit is fundamental to the legal aid scheme, and therefore such review should be continued throughout the exercise of devolved powers.”*

- 6.3 This Point of Principle cannot apply, however, in respect of work that is not within the scope of the Act. The Director has no power to determine that an applicant qualifies for services not described in Part 1, Schedule 1 of the Act other than in the context of an exceptional case determination under section 10 of or Schedule 3 to the Act. Hence no power to make such a determination can be delegated to providers. Accordingly any work that is out of scope of the Act cannot be paid, although an assessment decision to this effect is, of course, subject to the usual contractual appeal process.

### 7. Escape fee cases

- 7.1 Escape fee cases were formerly known as exceptional cases, however, with the creation of the provision for exceptional case funding for out of scope work under Section 10 of LASPO, there has been a need to rename this type of claim to escape fee cases.

Matters that are initially subject to Standard or Graduated Fees will be assessed by the Director where the provider claims the matter has escaped the Standard Fee on the basis that the costs, as calculated at hourly rates, exceed the relevant threshold. A claim for an escape fee is made on form EC-Claim1.

- 7.2 In escape fee cases the time spent in preparing the EC-Claim1 form may in principle be claimed within that form on the same basis as time spent in preparing a Claim1 in licensed work proceedings. However, where the costs of the matter (excluding the preparation of the EC-Claim1) do not reach the relevant escape fee threshold, the costs of preparing the EC-Claim1 may not be used to qualify the matter as one which attracts an escape fee. If such a claim is submitted to the Agency the costs of preparation of the EC-Claim1 would be disallowed as unreasonably incurred and the matter would be paid as a Standard or Graduated Fee.

- 7.3. If the amount payable for the Claim, not including the costs of preparing the form EC-Claim1, is assessed as being below the threshold for payment of an escape fee, then only the Standard or Graduated Fee is payable for the matter and there is no discretion to allow the costs of preparing the EC-Claim1 as an additional item.

## 8. Disbursements

- 8.1 Note that in controlled work matters, court fees are not a permitted disbursement.
- 8.2 The Standard and Graduated Fees do not include payment for disbursements. These are claimable as incurred, subject to potential assessment, on a monthly basis. All claims for disbursements are potentially subject to assessment. Details of disbursements incurred must be included in any claim for an escape fee in form EC-Claim1.
- 8.3 Under controlled work, the general position is that counsel's fees do not count as a disbursement and are not claimable in addition to any Standard or Graduated Fee. Counsel may be instructed under controlled work but, subject to category specific provisions of the Specification, the provider is responsible for agreeing and paying any counsel's fees out of (but not limited to) the Standard or Graduated Fee – see Paragraphs 3.75 to 3.79 of the Specification..
- 8.4 The following category specific provisions of the Specification contain further rules as the use of counsel under controlled work:

<b>Mental Health</b>	9.42 – 9.47
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## Part C: Licensed work

## 9. The legal aid certificate

### General

- 9.1 The legal aid certificate and any amendments to it are conclusive as to what work the provider or counsel have been authorised to do. On assessment it is the only authority under which providers and counsel may be paid.
- 9.2 Even where a certificate covers the proceedings up to and including trial, it will bear a limitation to that effect. Subsequent work such as implementation or enforcement is only covered to the extent specified.
- 9.3 The certificate may, however, be limited as to steps in the proceedings, to particular parties or to certain work, for example the obtaining of an opinion from counsel. If the certificate is limited payment will not be made from legal aid for work done outside the limitation.
- 9.4 A certificate limited to counsel's opinion or to preparation of papers for and obtaining counsel's opinion will cover the costs of preparatory work reasonably necessary to refer the matter to counsel and a pre-opinion conference with counsel (if reasonably necessary) but will only cover one written opinion from counsel and will only cover settling pleadings where this is specified. Providers may charge for reasonable costs incurred in responding to a notice to show cause which may result from counsel's opinion, or any other report on case from the provider.
- 9.5 Even with a full certificate a fee earner may seek a prior authority under Paragraph 5.25 of the Specification if he or she wants to be sure of payment of specific costs.
- 9.6 The certificate can only cover one action, cause or matter, apart from the exceptions set out in Regulation 37 of the Procedure Regulations.
- 9.7 However, in *Gareth Pearce v Ove Arup Partnership Ltd* [2004] EWHC 1531 (Ch), it was held that the equivalent provision under regulation 46 (3) of the Civil Legal Aid (General) Regulations 1989 only prevented a certificate covering more than one set of civil proceedings in existence at the same time. Thus where solicitors had issued but not served a first set of proceedings they were not prevented from claiming in respect of a second set of proceedings under the same certificate.
- 9.8. The certificate will cover only one legally aided client. Joint certificates cannot be issued. In the case of a minor or a person under disability although a litigation friend or child's guardian may be named in the certificate the legally aided client will be the minor or person under disability.
- 9.9 The legal aid certificate will specify both an individual nominated fee earner and provider. If there is a change of provider (even if the same individual fee earner continues to be nominated), an amendment of the certificate should be applied for to amend the name of the conducting provider.
- 9.10 Work under the legal aid certificate can be carried out by any caseworker within the provider's office.

- 9.11 The Agency's computer system determines the individual proceedings within each action, cause or matter. Each legal aid certificate issued will set out for each of the proceedings a limitation on the scope of the certificate for the work authorised to be undertaken as well as a limitation on the allowable costs that can be incurred in respect of the work authorised.
- 9.12 It is essential that both fee earners and counsel ensure that the legal aid certificate covers all the work that needs to be done for the legally aided client. All legal aid certificates contain a limitation and it is particularly important to ensure that any work done is within the limitation if payment is to be made. Clause 30.17 of the Contract Standard Terms obliges the provider to check the legal aid certificates issued.
- 9.13 Generally if the wording is incorrect or not in accordance with the needs of the legally aided client, it will affect:
- (a) provider and counsel, who will not get paid for work outside the scope of the certificate;
  - (b) the legally aided client who might not be covered for all that is necessary and who may become vulnerable to a personal claim for costs by the other party;
  - (c) a successful opposing party who might not be able to claim costs under legal aid.
- 9.14 On assessment regard must be had to the scope of the legal aid certificate. Where work is unauthorised or falls outside the cover provided all such costs including counsel's fees/expert fees and other disbursements will be disallowed.

#### **Work claimed pre- or post-certificate**

- 9.15 Subject to the specific exceptions set out in paragraph 10.16 below, payment will not be made under legal aid for any work done in advance of the date from which the legal aid certificate takes effect or after the date of its withdrawal. Note, however, that work carried out following a delegated, telephone or faxed application grant of legal aid, including the completion of forms reporting the exercise of delegated functions and applying for a substantive legal aid certificate will be within the temporal scope of the legal aid certificate. Further, since legal aid certificates are issued with effect from a particular date, but not a particular time, work carried out before the actual exercise of delegated functions but on the same date will also be within the temporal scope.
- 9.16 In respect of work carried out after the date of withdrawal of the certificate, the following exceptions apply:
- (i) The retainer between a legally aided client and provider determines upon receipt of a notice of withdrawal of a legal aid certificate. The retainer will determine immediately or if an appeal has been brought which has been dismissed, it will determine after receipt of the notice of the dismissed appeal. If proceedings have been issued, the provider retainer does not determine until the fee earner has served the appropriate notice, the appropriate notice upon withdrawal of the legal aid certificate is set out in Regulation 49 of the Procedure Regulations. The provider will be entitled to be paid for lodging and

-serving the appropriate notice, once the legal aid certificate has been withdrawn.

- (ii) Any work reasonably done pending the dismissal of the appeal against withdrawal of the legal aid certificate in order to protect the interests of the client should be allowed. This must relate to the proceedings rather than the appeal itself.
- (iii) If the appeal is successful and the Director substitutes a determination for the withdrawal, the determination (unless the Director directs otherwise) takes effect as if the original determination had not been made. Therefore, any work conducted by the provider in the intervening period will be remunerated as if the withdrawal had never happened.
- (iv) Where proceedings have not been issued the provider is not obliged to serve such notices. Indeed, the retainer may in fact have determined before the application for withdrawal of the legal aid certificate is applied for.
- (v) Closing letters to the client and other interested parties will also be claimable following withdrawal of the legal aid certificate.
- (vi) Preparation and checking of a bill of costs and the costs of detailed assessment proceedings are payable under the legal aid certificate. Time spent completing forms Claim1, Claim 1A and Claim2 may also be claimed under the legal aid certificate.
- (vii) Time may be claimed for work in correcting a legal aid certificate after withdrawal to correct a mistake on the legal aid certificate.

## Forum

- 9.17 Where a legal aid certificate specifies the forum for proceedings then that forum must be used. Where a legal aid certificate is silent proceedings may be taken either in a county court or the High Court. Point of Principle CLA44 States:

*Where a legal aid/public funding certificate contains a limitation that proceedings are to be issued in the Family Proceedings Court but the proceedings are in fact issued in a different Court then no costs relating to the issue or conduct of the proceedings may be paid by the Commission as these would be outside the scope of the certificate granted. Solicitors must check the limitations on the certificate and seek an amendment if they wish to act outside them.*

- 9.18 Where the legal aid certificate specifies proceedings in a county court it will not, unless amended, cover proceedings after a transfer to the High Court. If the legally aided client wishes to transfer the proceedings to the High Court then an application for an amendment of the legal aid certificate must be made to the Director. If an application for transfer is made by any other party, or by the court's own motion, an application for the amendment of the legal aid certificate should be made immediately after the order transferring the proceedings. In the absence of an amendment the legal aid certificate will not cover any subsequent work.

- 9.19 No amendment of the legal aid certificate is required on a transfer of proceedings from a county court to the High Court where the legal aid certificate does not specify a

particular court. Nor is an amendment required where the legal aid certificate specifies proceedings in the High Court and the proceedings are transferred down to a county court.

## **10. Costs limitations**

### **General**

- 10.1 Costs limitations are imposed on all certificates issued under LASPO by the express authority of Regulation 35 of the Procedure Regulations. Providers only have cover to carry out work up to the costs limitation imposed. The limitation limits the costs to be incurred under the legal aid certificate to a figure including disbursements and any counsel's fees, but excluding VAT.
- 10.2 Although a number of cost limitation figures may be imposed throughout the progress of the case, it is only the limitation imposed on the final version of the legal aid certificate that is relevant for assessment. Bills or claims do not need to be apportioned to reflect the different costs limitations throughout the case.
- 10.3 A costs limitation is binding on assessment either by the Court or the Agency. Any claim for costs must be submitted in accordance with the final costs limitation of the legal aid certificate. Whatever sum of costs is claimed on the legal aid certificate the liability for costs under legal aid will not exceed the final costs limitation imposed on the legal aid certificate and the Lord Chancellor will not pay in excess of that limitation (Clause 30.17 of the Standard Terms and Paragraphs 6.57, 6.64 and 6.65 of the Specification).
- 10.4 Claims for costs for assessment by the Agency may be submitted in excess of the limitation on the legal aid certificate on the basis that costs may be assessed down in any event, but the final amount allowed on assessment will not exceed the limitation.
- 10.5 When calculating costs, the profit costs figure should be calculated by reference to the relevant remuneration hourly rate. If any uplift or enhancement is likely to be claimed this figure should be added to the profit costs. Fee earners should have sufficient knowledge of the case and assessment of similar cases to identify items of work that would be enhanceable and the level of enhancement recoverable.
- 10.6 The limitation does not include the costs of assessment or disbursements related to those costs, but does include the costs associated with preparing and checking the bill of costs (Paragraph 6.44 of the Specification).

### **Procedure on Assessment**

- 10.7 The procedure is that costs are to be assessed in the usual way, and the costs limitation on the legal aid certificate should be imposed at the conclusion of the assessment by disallowing the amount of costs claimed in excess of the limitation under the legal aid certificate. Alternatively, the assessment could conclude at the point that the costs limitation is reached. However, the former approach will be preferable, particularly where an inter partes detailed assessment is also conducted. It is important to note that:

- (i) work does not become out of scope of the legal aid certificate (and therefore not recoverable inter partes) by virtue of having been conducted outside of the

costs limitation on the legal aid certificate in force at the time of that work, as it would where work is conducted beyond the terms of a scope limitation; the costs limitation on a legal aid certificate is a restriction on final payment under Legal Aid;

- (ii) accordingly, where a bill exceeds the final costs limitation on a legal aid certificate, it is not the costs at the end of the case that are specifically outside of the costs limitation any more than the costs of any other part of the case;
- (iii) however, the restriction of costs to the final costs limitation of the legal aid certificate is properly a part of the assessment, by either the court or the Agency and is not a separate deduction or penalty following that assessment.

### **Recovery of costs between the parties**

10.8 Paragraph 1.50 of the Specification places it beyond doubt that the indemnity principle does not apply to costs limitations. A costs limitation under a legal aid certificate protects the client and legal aid itself. However, it does not inhibit costs recovery between the parties. A successful legally aided client may recover costs from the paying party in excess of the final costs limitation imposed.

### **Impact on counsel's fees and disbursements**

10.9 It is primarily the provider's fee earner who is responsible for monitoring the total costs under the legal aid certificate and for ensuring that those costs are kept within the costs limitation.

10.10 In general, if the total of the counsel's fees and the provider's costs exceed the costs limitation on the legal aid certificate, counsel should be paid in full and the shortfall will be borne entirely by the conducting provider.

10.11 The exception to this is where counsel's fees alone exceed the costs limitation on the certificate and counsel has been sent a copy of the certificate or amendment bearing the relevant costs limitation. In those circumstances, counsel will only be paid the sum due under the costs limitation. Any remaining shortfall in counsel's fees will be a matter between counsel and the conducting provider, and will not concern the Lord Chancellor further. If counsel had no knowledge of the limitation the provider will be obliged to indemnify counsel for his/her loss. However, this should be rare because providers are under an obligation to send counsel a copy of the certificate and any amendments to it.

10.12 There is no similar specific provision for experts' fees or other disbursements. Expert's fees and other disbursements are solely a matter between the expert or other service provider and the provider. Even if the total amount due to the provider is reduced as a result of the costs limitation under the legal aid certificate, the expert or other service provider will be able to recover from the provider such fees as have been contractually agreed between them. It is not a matter that concerns the Lord Chancellor or affects the amount allowed on assessment.

10.13 An example of the position regarding counsel's fees is set out below (all figures are exclusive of VAT):

- A certificate bears a costs limitation of £2,250.

- On assessment, the provider's bill, as initially assessed, is £4,000 which consists of £1,000 counsel's fees and £3,000 profit costs and other disbursements.
- Under the costs limitation the maximum payable under legal aid is £2,250. The payment made would be £1,000 to counsel and the balance of £1,250 to the provider covering both profit costs and disbursements.
- If however, counsel's fees alone were £3,000 and the provider's profit costs and other disbursements were £5,000, counsel would be paid £2,250 and the provider nothing. Additionally, counsel could seek an indemnity for his or her loss of £750 if he or she had not been given notice of the costs limitation imposed.
- Where counsel had such notice he or she would receive the £2,250 due under the limitation but would not be entitled to claim further sums from the provider.

### **Certificates transferred to another provider**

10.14 One of the first tasks of an incoming provider must be to consider the costs actually incurred to date and, where necessary, to apply for an increase in the costs limitation under the legal aid certificate. The new provider should also determine whether the relevant cost benefit criteria aspect of the Merits Regulations continue to be satisfied. The outgoing provider should provide the incoming provider with details of the costs incurred up to transfer promptly. If, on assessment, there is a shortfall between the costs claimed and the costs limitation and this is because of a failure of the first provider, the shortfall should be met out of the costs that would be apportioned to the first provider.

### **What if the certificate contains multiple proceedings?**

10.15 Because of the way the Agency's current computer system (CIS) works, a certificate covering more than one set of proceedings may have more than one costs limitation imposed. It is not intended that the limitations are to be cumulative. There should be only one applicable costs limitation for all the work authorised by the certificate. Accordingly, the applicable costs limit is the highest of the limitations specified.

On the Agency's new computer system (CCMS) which will be in use in some areas from 1 April 2013 and all areas subsequently, there will be only one cost limitation per certificate, no matter how many proceedings there are.

10.16 Providers do not need to apportion their costs between the proceedings covered by each limitation and need only apply for an amendment when the total costs for the work to be done under the whole of the legal aid certificate are likely to exceed the highest limitation.

## **11. Enhancement of costs**

### **General discretion: providers**

11.1 It is for the provider to claim enhancement where he or she considers that it is justified and to indicate the level of enhancement sought. It will also be advisable for the provider to draw attention to any factors on which they particularly rely to justify either the need for enhancement or the level sought. However, in any event the assessor has

a duty to consider, on the evidence before him or her, whether the claim for enhancement is justified.

11.2 The criteria for the enhancement of provider's bills is contained in Section 6 of the Specification (Paragraphs 6.15 to 6.20). The Specification provides a fixed level of remuneration that may be increased by up to 50%. The rates may be increased potentially by up to 100% in High Court, Upper Tribunal, Court of Appeal or Supreme Court cases. The Agency's approach will be to consider the appropriate level of enhancement and apply a cap of 50% or 100%; it will not apply a general 50% reduction to the enhancement.

11.3 The Specification provides a two stage process for enhancements. The first stage is a threshold test - whether any enhancement should be allowed.

11.4 The 'relevant authority' - the costs officer or caseworker assessing the case - must be satisfied (Paragraph 6.16) that:

- (a) the work was done with exceptional competence, skill or expertise;
- (b) the work was done with exceptional speed; or
- (c) the case involved exceptional circumstances or complexity.

If the assessor is satisfied that this test is met then it will be appropriate to go on to the second stage to consider the amount of any increase.

11.5 The second stage has its own set of criteria, namely that the 'relevant authority' shall have regard (Paragraph 6.18) to:

- (a) the degree of responsibility accepted by the fee earner;
- (b) the care, speed and economy with which the case was prepared; and
- (c) the novelty, weight and complexity of the case.

For counsel, the tests for applying an enhancement are contained in Regulation 7 of the Remuneration Regulations, and further guidance is set out from paragraph 11.12 below.

11.6 Under the Specification, enhancement only applies to hourly rates, never to Standard or Graduated Fees. F

11.7 There is clearly some overlap between the factors that will justify enhancement under the 'threshold test' and the factors determining the level of enhancement. In neither case can an exhaustive list of features of a case be identified that will demonstrate the presence of these factors, and each claim must be considered on its own merits, but examples of indicators that an assessor may look to are given below.

11.8 In relation to the threshold test, the case must be viewed as exceptional in one of the ways referred to in Paragraph 6.16 of the Specification, the comparison suggested by Paragraph 6.20 being with the generality of legally aided proceedings to which the prescribed rates apply. 'Exceptional' has its normal meaning of "unusual" or "out of the ordinary", hence more than simply above the average. In relation to the three limbs of 6.16:

(a) **The work was carried out with exceptional competence, skill or expertise**

This may cover work where the fee-earner demonstrates unusually detailed knowledge relevant to the case or skilfully pursues an unusual or difficult legal argument, it may also include unusual skill in identifying and marshalling evidence in pursuing or defending a case and/or identifying a particularly effective tactic on behalf of the client. Enhancement may be indicated under this heading where the provider has carried out the case or particular work in a way that has required less time than would have been expected of a notional reasonable fee-earner, or may have conducted the case so well that the client has received a better result than might usually have been expected. Another example of unusual skill may be taking instructions and providing effective representation for a client who is a child, is seriously mentally ill or is otherwise very vulnerable.

(b) **The work was done with exceptional speed**

Enhancement may arise under this provision where the fee-earner has proactively pursued a case, for example in obtaining with unusual speed re-housing, community care support, receipt of welfare benefits, an injunction, release from mental health detention or other resolution of the client's problem; it may also be justified if the fee-earner carries out substantial work at short notice because of urgent deadlines, such as proposed deportation or dispersal or injunction hearings where the client is a defendant.

(c) **The case involved exceptional circumstances, novelty, weight or complexity**

Complexity may relate to legal issues, questions of expert evidence or other evidential issues, for instance seeking or challenging witness evidence in possession proceedings based on allegations of nuisance. It may also take into account difficulty in taking instructions from the client or other witnesses. Alternatively, that may be viewed as falling within "exceptional circumstances", which may also include the nature of the issues as they affect the client, such as liberty, right to remain in the country, the roof over the client's head, addressing domestic violence or avoiding destitution. A case requiring substantial out of hours work may also be considered to fall under this limb or particular work may be considered under 6.16(b) of the Specification.

11.9 In relation to the level of enhancement, within the limbs of Paragraph 6.18 there are a number of possible factors:

- (a) **Degree of Responsibility:** in respect of the degree of responsibility accepted by the fee-earner, one consideration will be the extent to which the provider has carried out work without recourse to counsel, whether in relation to analysis and planning of the case, drafting or advocacy. Another point may be that the fee-earner has identified or addressed evidential issues that might otherwise have incurred the time of an expert;
- (b) **Care, speed and economy:** this contains three components:

- (i) Care: this may include aspects of the skill with which the fee-earner has carried out work within the case and in particular the care with which the fee-earner has dealt with a vulnerable client;
  - (ii) Speed: will involve similar considerations as in paragraph 11.8(b) above in relation to exceptional speed;
  - (iii) Efficiency: enhancement under this provision will reflect a reward for the provider for claiming less time or less in disbursements than might otherwise have been expected, whether because of the way in which particular items of work have been carried out or because of the way in which the case has been planned more generally;
- (c) **Novelty, weight and complexity:** this again contains three components:
- (i) novelty: it should be clear from the provider's claim whether the case involves a novel point of law or legal context;
  - (ii) weight: may refer to the volume of documentation, other material, or the number of issues arising. It may also refer to the importance of the case to the client;
  - (iii) complexity: this is discussed at paragraph 12.8(c) above

11.10 Enhancement is likely to be allowed at higher levels where more of the above seven factors are present in the case and where any of the factors are strongly present. The fact that enhancements are capped at 50% in proceedings below the High Court and otherwise 100% does not mean that these maximum enhancements are only payable where all the above factors are present within the case or work. A maximum enhancement could be payable on the basis of one factor alone where it is particularly strong.

11.11 In considering whether a case qualifies for any enhancement, the comparison is to be made with other proceedings for which legal aid is available, not solely with cases within the same category of law (in non-family cases) or with cases of the same type of proceedings, such as judicial review. However, there is no basis for arguing that proceedings within specific categories of law, or types of proceedings will inherently satisfy the above criteria, such that an enhancement should be payable in every such case. Each claim must be considered on its own facts.

#### **Enhancement of counsel's costs (non-family)**

11.12 There is a discretion under Regulation 7(3) of the Remuneration Regulations to pay an enhancement to the normal hourly rates set out in Table 1 of Schedule 2 of the Remuneration Regulations where:

- a) the work was done with exceptional competence, skill or expertise;
- b) the work was done with exceptional speed; or
- c) the case involved exceptional circumstances or complexity

When calculating the percentage by which the hourly rates may be enhanced, the Regulations require regard to be had to:

- i. the degree of responsibility accepted by counsel;
- ii. the care, speed and efficiency with which counsel prepared the case; and
- iii. the novelty, weight and complexity of the case.

Any such enhancement cannot exceed either 100% for proceedings in the Upper Tribunal or High Court; or 50% for all other proceedings. These are effectively the same tests that apply to providers.

However, Regulation 7(5) makes further provision in relation to the percentage increase to be allowed, notably that “care” includes the skill with which the case has been carried out and, in particular, the care that counsel has shown towards a vulnerable client, and that “weight” means the volume of documentation or other material in the case; the number of issues arising in the case; or the importance to the client of the case.

### **Claims for enhancement from both provider and counsel on the same matter**

11.13 The questions of whether both the provider and counsel should apply for an enhancement and the amount of any enhancement fall into three categories:

1. where it would be difficult for both the provider and counsel to claim the enhancement;
2. where the provider and counsel could both potentially claim, dependent on their performance on the case;
3. where both are likely to be able to claim.

11.14 The threshold tests as set out in paragraphs 11.4 to 11.12 above must be applied to the circumstances of each case where an enhancement is claimed. In some cases it may seem clear that one of the provider or counsel has met the enhancement criteria and it may then be difficult for the other to claim an enhancement as well. Assessors will have to consider whether the claims for enhancement made by the provider and counsel on the same case both satisfy the enhancement criteria.

In cases which have required the provider or counsel to conduct work which could meet the enhancement criteria then it may be possible for both the provider and counsel to claim, depending on the part that each has played in the case. For example, the provider may need to deal with some issues with exceptional speed whilst on the same case counsel may demonstrate exceptional competence or expertise in advising or representing that particular client such that both would be entitled to an enhancement.

Finally, where the case itself involved exceptional circumstances or complexity then it will be possible for both the provider and counsel to make claims for enhancement, if the nature of the case required each to conduct work such that the enhancement criteria were met. The percentage of enhancement payable will then be subject to the criteria described in paragraph 11.5 above for providers and 11.12 (i) to (iii) for counsel.

### ***General points on enhancement of both provider and counsel's fees***

11.15 Where there are claims from both provider and counsel on the same matter, the assessor needs to be satisfied that each claim satisfies the criteria for enhancement.

11.16 Counsel will not be entitled to an enhancement simply by virtue of the fact that the provider has felt the need to instruct him or her for advice or advocacy. The fact that counsel is instructed could simply reflect different skills that providers and counsel have. However, it may be that counsel does take an unusual share of the load on a case and any enhancement should be made accordingly. Alternatively, the instruction of counsel may suggest that the degree of responsibility accepted by the provider is passed on to counsel at least to some extent. Therefore, any claim for enhancement may be more difficult for the provider to justify. That does not mean that a provider can never claim an enhancement where they have instructed counsel, however, the assessor would need to consider whether or not both the provider and counsel meet the relevant enhancement criteria on the same case.

#### **Enhancement of whole or part**

11.17 Enhancement rates can be applied to the whole case, to classes of work or to individual items. In general, one of the latter two approaches is likely to apply. It would be less usual to allow enhancement on routine letters or telephone calls or travel and waiting. However, one exception would be where the enhancement is being awarded owing to speed, for example securing an out of hours injunction, where it may be inappropriate to differentiate between time drafting and attending and making urgent telephone calls or sending urgent letters when applying the enhancement.

#### **Enhancement in clinical negligence cases**

11.18 Solicitors can be members of the Law Society's Medical Negligence Panel. While this is a relevant matter in considering enhancement, **Point of Principle CLA 21 (amended)** states:

*"Membership of the Law Society's Negligence Panel is not in itself an exceptional circumstance justifying payment of an enhanced rate under Regulation 5(1)(c) of the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994, but membership of the Panel may be a factor which contributes to a decision that enhanced rates are justified.*

*Factors which may indicate whether a clinical negligence case was conducted with exceptional competence, skill or expertise, so as to justify an enhancement under Regulation 5(1)(a) of the same Regulations, include: the extent to which the solicitor relied on his or her own expertise rather than counsel; and whether the solicitor him or herself has obtained the client's medical records, identified and assessed the relevant contents, and following that analysis, sent a detailed letter of instruction to the client's medical expert or experts."*

## **12. Counsel's fees**

### **General Position**

12.1 Providers are generally free to instruct counsel under licensed work, subject to the requirement to obtain a prior authority to instruct Queen's Counsel or more than one counsel. The approach to such authorities can be found by following the "Narrative and

guidance: public funding” link on the Ministry of Justice website at <http://www.justice.gov.uk/legal-aid/funding>

Note, however, that (as confirmed by the Administrative Court in *R(SP) v Lord Chancellor* [2013] EWHC 4011 (Admin)) under the Standard Terms of the Contract it is only possible for a third party to carry out work as either: an Agent, Counsel or Expert in non-legal matters. Counsel cannot therefore be paid as an Expert for providing legal advice. Any work carried out by a barrister in independent practice is subject to the remuneration provisions for counsel within the Remuneration Regulations.

- 12.2 Rules on payments to counsel are contained in Paragraphs 6.88 to 6.89 of the Specification. Counsel’s fees are subject to assessment by the Agency or the court but fees due to counsel are generally paid directly by the Lord Chancellor.

### **The Reasonableness of Using Counsel**

- 12.3 Paragraph 5.1 of Practice Direction 44 to rule 44.2 CPR (Civil Procedure (Amendment) Rules 2013) provides that on detailed assessment the costs judge should have regard to any order of the court which expresses an opinion as to whether or not the hearing was fit for the attendance of one or more counsel. The court is unlikely to give any expression of opinion unless:

- (a) expressly asked by the paying party;
- (b) more than one counsel appeared; or
- (c) the court wishes to record that the case was not fit for counsel.

- 12.4 Assessors should ensure they have sight of such orders. If counsel’s fees are not to be allowed, there should be a notional assessment of the costs as if the fee earner had acted as advocate (as well as a disallowance of the counsel’s brief fees and the fee earner’s costs of his or her instruction). The Agency will follow this principle. If the court order expresses an opinion it will be considered on assessment.

### **Entitlement to instruct counsel**

- 12.5 There are specific restrictions on the use of counsel in the Specification. Paragraph 6.61(d) of the Specification provides that unless the provider has obtained prior authority, or an authority has been given by the Lord Chancellor, a claim for costs for a Queen’s Counsel or more than one counsel will not be allowed.

- 12.6 No counsel’s fees should be allowed for two counsel or at QC rates unless the appropriate authority has been given, except that a Queen’s Counsel’s fees will be allowed at junior rates. This does not, however, prevent counsel’s fees being recovered on an inter partes assessment.

- 12.7 Even where authority is given to instruct more than one counsel or a Queen’s Counsel the fees should not be allowed in cases where the statutory charge applies, unless the provider has, in addition to obtaining the authority, obtained his or her client’s informed consent: *Re: Solicitors; Taxation of Costs* [1982] 2 ALL ER 841. The provider’s file will therefore be checked to ensure that there is evidence of explanation to the client of the possible effect such instructions may have if not recovered inter partes, and of the client’s acceptance of this.

Note, however, that authority for Queen’s Counsel is only needed where counsel is acting as such; it is always open for Queen’s Counsel to act and be paid at junior counsel rates. See further the guidance on prior authorities by following the “Narrative and guidance: public funding” link on the Ministry of Justice website at <http://www.justice.gov.uk/legal-aid/funding>

### **Terms of the authority**

12.8 It is also important to ensure that the instruction of counsel, where authority is required, is strictly in accordance with the terms of the prior authority given by the Lord Chancellor. The following points should be noted:

- (a) where an authority is given or the terms of a limitation allow the obtaining of counsel’s opinion that authority/limitation covers one opinion only, see Point of Principle CLA 1 (amended):

*“A certificate bearing a limitation containing the words ‘Limited to obtaining counsel’s opinion’ covers the obtaining of one opinion only (which may follow a conference). Work done by a solicitor to clarify a genuine ambiguity in the opinion itself could, however, be allowed. If at the time of receipt of counsel’s written opinion, counsel is not in a position to advise on the settling of proceedings no further work can be carried out until the limitation is removed or amended to allow either a further written opinion from counsel or further work by the solicitor.”*

The points of Principle of General Importances Manual can be found here: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/323997/legal-aid-point-principle-manual.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323997/legal-aid-point-principle-manual.pdf)

- (b) authority to instruct a Queens Counsel does not cover a senior junior;
- (c) an authority for ‘briefing counsel’ covers only:
  - (i) attendance at the trial;
  - (ii) a conference after delivery of the brief;
  - (iii) preparation of a skeleton argument (certainly in an appeal or in the Court of Appeal and where reasonable in any court) *Din (Taj) & Anor v. Wandsworth London Borough Council (No. 3) [1983] 1 WLR 1171;*
- (d) an authority for ‘instructing counsel’ includes any instructions to or briefing of counsel after the date of the authority; and
- (e) an authority for ‘instructing a QC alone’ will cover work by the Queen’s counsel normally done by a junior such as settling court documents.

**Note:** These definitions are not exclusive and counsel’s preparation may include drafting a chronology/ submissions/skeleton argument and draft orders.

## Quantum of Counsel's Fees and Enhancements

- 12.9 The majority of counsel's fees in non-family proceedings in the county court, High Court, Court of Appeal and Supreme Court will be determined by reference to prescribed rates set out in Schedule 2 of the Remuneration Regulations. The location of counsel's chambers will determine whether the London or non-London rate is applicable. Where a chambers has more than one address the location of the provider will be taken into account.
- 12.10 There is a discretion under Regulation 7(3) of the Remuneration Regulations for the Lord Chancellor to pay an enhancement to the normal hourly rates set out in Table 1 of Schedule 2 of the Remuneration Regulations. Full details of the circumstances where an enhancement can be claimed can be found at paragraph 11.12 above.

### **General**

- 12.11 For cases not falling within the provisions of Schedule 2 to the Remuneration Regulations and subject to the rules for fast track trials, counsel's fees are 'at large', i.e. at the discretion of the assessing officer. Payment of counsel for attending a hearing or a trial is by way of brief fees and refreshers.

### **Fast track trials**

- 12.12 Fast track trial (and multi track trial) provisions are subject to the prescribed remuneration rates. They apply only in the limited circumstances where the prescribed rates do not cover the level of counsel instructed or court.
- 12.13 Under CPR 45 Section VI the advocate in a fast track trial is paid a fixed amount for the costs of the trial. These are fixed by reference to the value of the claim.

<b>Value</b>	<b>Amount of fixed costs the court can award</b>
Up to £3,000	£485
£3,001 to £10,000	£690
£10,001 to £15,000	£1,035
For proceedings issued on or after 6 <sup>th</sup> April 2009, more than £15,000	£1,650

- 12.14 If counsel appears for more than one party only one award is made (CPR 45.40). The court cannot award more or less than these fixed costs except in accordance with CPR 45.39 in which case the court may award an additional £345 in respect of the attendance of the fee earner or other representative of the provider. Further costs may be awarded if there is a separate trial for an issue. These additional costs cannot exceed two thirds of the amount of a claim of that particular size, subject to a minimum award of £485. For other hearings, the fee is at large and the guidance below applies.

### **Other trials and hearings**

- 12.15 The brief fee is intended to cover the preparation of the case for trial (or other hearing), travelling to court and any other work carried out on the first day of trial together with the first five hours of the trial. The brief fee includes:

- (a) all preparation for the trial;
- (b) travelling time and expenses for the first day of the trial;
- (c) overnight expenses for the first day of the trial;
- (d) waiting time on the first day;
- (e) negotiating, discussions with the provider and conferences at court on the first day.

12.16 Where relevant or appropriate the brief fee also includes the preparation of a note of the judgement, transcribing such a note and submitting it to the judge for approval, revising it and providing any necessary copies. However an additional fee may be charged for attending on a later day if judgement is not given at the conclusion of the trial

12.17 The brief fee should reflect all the work that is necessary to ensure that the client is properly represented. This can include more than simply appearing in court. There may be meetings of counsel to agree strategy and tactics, meetings with experts and preparation of final submissions. In legally aided cases it is proper for counsel's clerk to reflect such work after the event in the brief fee. *Loveday v. Renton and Anor (No 2) [1992] 3 ALL ER 184* – is an important case in discussing the nature of brief fees, at least in very complex actions.

12.18 The fact that counsel carries out work in preparation for the trial in anticipation of the delivery of a brief does not prevent the fee recognising such work (provided that the work was done at a time when any necessary authority for the instruction of counsel had been given): *Loveday v. Renton* (above).

12.19 The brief fee does not cover:

- (a) preparing written skeleton arguments in appeal courts;
- (b) written skeleton arguments in exceptionally complicated cases; or
- (c) written closing or additional submissions invited by the court.

A separate fee is payable in respect of such work.

### ***Refresher fees***

12.20 A refresher fee is paid for any day or part day on which a trial continues after the first.

### ***Quantum***

12.21 Unfortunately there is little specific guidance as to the assessment of the proper brief fee. The points made in *Re H [1995] 2 FLR 733* are relevant. "There is ... no precise standard of measurement. The Taxing Master, employing his knowledge and experience, determines what he considers the right figure." It is largely a matter of experience and comparison of one case with another.

- 12.22 Guidance for counsel's brief fees for those hearings that last up to one hour and for those lasting up to one day can be found in the Guidance on Summary Assessment as published by the Senior Court Costs Office. Time spent by counsel at a hearing will include conferences and negotiations at the door of the court as well as time spent in advocacy. *Lawson v. Tiger [1953] 1All ER 698*.
- 12.23 Travelling time or expenses are not allowed in addition to the brief fee.

### **13. The Agency's assessment limits**

#### **General**

- 13.1 Paragraph 6.39 of the Specification provides that, subject to the general discretion of the Lord Chancellor, licensed work costs will be assessed by the Agency in cases not involving an inter partes detailed assessment

#### **Inter Partes Costs**

##### ***Court assessment***

- 13.2 Where a legally aided client is successful in proceedings there may well be an order for the other side to pay part or all of their costs. Costs payable by the other side are known as inter partes costs or costs between the parties.
- 13.3 Only the court can assess costs between the parties. If it is, or may be, necessary for the court to assess costs between the parties then the court will also assess costs payable under legal aid.

##### ***Agreed Inter Partes Costs***

- 13.3 Where inter partes costs have been agreed and recovered, the provider may claim their legal aid only costs under legal aid. Such costs will be assessed by the Legal Aid Agency (Paragraph 6.46 of the Specification).

##### ***Fixed and Undetermined Orders***

- 13.4 From the Agency's perspective, an order for costs will be a fixed order or an undetermined order. If the order is fixed, then the amount of the costs to be paid will be determined when the order is made, and specified in the order. In that case, inter partes costs are not subject to detailed assessment and the claim may be assessed by the Agency.
- 13.5 However, an order of the form "defendant to pay the claimant's costs in this application limited to £250", the bill must be assessed by the courts. The receiving party is only entitled to £250 if the bill is assessed by the court at that or a higher sum.
- 13.6 With any other form of inter partes costs order in favour of the legally aided client, only the court can determine those costs if the parties have not agreed the figure between themselves.

### **14. The Assessment Process**

### **Authority for Assessment of Costs under legal aid**

- 14.1 The right to assessment of costs is governed by Paragraph 6.36 of the Specification.
- 14.2 Where proceedings have been issued, the normal event giving rise to the right for assessment under Legal Aid is a final order for public funding assessment.
- 14.3 If the proceedings end without such an order, acceptance of an offer of settlement or discontinuance of proceedings by either party is an authority for a public funding assessment, as it gives rise to a right to assessment under 6.36(b) Specification and CPR 47.7.
- 14.4 Otherwise, whether or not proceedings have been issued, the withdrawal of the legal aid certificate (after any appeal has concluded and after service of any required notices by the provider) is authority for a public funding assessment.
- 14.5 If on receipt of a claim the legal aid certificate has not been withdrawn and there is no order for assessment, the Agency can still assess the claim if the legal aid certificate is ready for withdrawal on non-contentious grounds, i.e. the case has concluded or the legally aided client consents to the withdrawal of the legal aid certificate.
- 14.6 However, if there is no withdrawal of the legal aid certificate and the only likely grounds for withdrawal are contentious, i.e. because of an unfavourable counsel's opinion or the provider being without instructions, the show cause procedure will be implemented and the claim returned to the provider with instructions to resubmit the claim when a withdrawal has been made.
- 14.7 Summary assessment under the CPR is not possible in relation to payment to providers under legal aid or under an inter partes order for costs where the receiving party is legally aided (Practice Direction 9.8 of CPR 44.6).

### **Preparation of a bill**

- 14.8 Bills drawn up by law costs draftsmen after 26 April 1999 are "work done" within the meaning of paragraph 18(3) of the Practice Direction to Part 41 of the Civil Procedure Rules (CPR). A law costs draftsman's fee may be paid, in accordance with the guidance below, for any bill drawn up for assessment by the Agency where it was reasonable to instruct a draftsman to draw the bill.
- 14.9 Although the cost draftsman's fee may sometimes have been viewed as a disbursement, the better view is that this work forms part of a providers' profit costs, with any draftsman acting as their agent (*Crane –v- Canons Leisure Centre* [2007] EWCA Civ. 1352). Whilst the draftsman may charge the provider at a percentage of the profit costs as drawn in the bill, the rate claimed for drafting the bill should be that for preparation within the relevant table of the Remuneration Regulations. The same will apply where the preparation of any Precedent H Costs Budget is carried out by the costs draftsman.
- 14.10 Under the Contract, time for preparing a bill is in principle claimable in this way for civil non- family cases in all forums. However, for cases covered by Standard or Graduated Fees, time for preparing a bill cannot be claimed in addition to the Standard or Graduated Fee and will only be payable for cases which escape that fee.

## **The statutory charge and contributions**

- 14.11 Under Regulation 6(1)(b) of the Statutory Charge Regulations, the costs of drawing and checking the bill are not part of the costs of the assessment process, as they are incurred before the commencement of the assessment proceedings. Such work, and the associated costs thus fall within the costs of the main proceedings and count towards the statutory charge and the costs to which the client is required to pay contributions, where relevant (Paragraph 6.44(b) of the Specification).

## **Time taken**

- 14.12 In the majority of cases an allowance of 30 - 60 minutes will be appropriate. Where a greater time is claimed, the provider should justify the additional time spent with reference to the circumstances of the individual case. It may be reasonable to make greater allowance where the preparation is made more complex by the nature or circumstances of the case. A lengthier amount of time will be allowable where the assessable costs exceed £2,500. The allowance for preparation is in addition to the time allowed for checking and signing the bill.

## **Costs recovery bills**

- 14.13 Where after payment of a final bill, enforcement proceedings take place (after the discharge of the legal aid certificate) and the provider pursues recovery of inter partes costs under authority from the Lord Chancellor, the provider can apply to the Agency for assessment of the costs incurred.

## **The costs of assessment**

- 14.14 Under paragraph 6.41 of the Specification, detailed assessment proceedings are deemed to be proceedings to which the legal aid certificate relates, whether or not it has been revoked or withdrawn. The costs are, therefore, to be paid under legal aid unless the court orders otherwise. The conducting providers may prepare and attend on a detailed assessment where necessary without requiring any amendment to the legal aid certificate. This work is remunerated on an hourly rate basis at the same rates and subject to reasonableness in the same way as other preparation and (where relevant) advocacy.
- 14.15 Under Paragraph 6.42 of the Specification, any such costs claimed in respect of an inter partes assessment will be set off against any inter partes costs recovered in the case as a whole. This is subject to the limited exception of those costs properly falling within the definition of legal aid only costs at Paragraph 6.52(b) or (c) of the Specification.
- 14.16 The costs of the detailed assessment proceedings do not form part of the statutory charge (nor those costs to which the legally aided client may be required to pay a contribution). This exception, however, does not include the costs of drawing up the bill (see 15.13)
- 14.17 Detailed assessment proceedings commence with the filing of a Request for Detailed Assessment or, if earlier, the service of Notice of Commencement. Included in the costs of detailed assessment proceedings are the work in preparing the Request or Notice; (where applicable) considering points of dispute and preparation of replies; court fees; the costs of attendance on the detailed assessment; time spent checking any provisional assessment; or completing the legal aid assessment certificate. However, the costs

allowable for completion of the Claim1, Claim 1A or Claim2 do not fall within the costs of detailed assessment.

- 14.18 More generally, there is no provision allowing the costs of an assessment by the Agency to be claimed under the legal aid certificate. Allowance is made for the costs of the Claim1, Claim 1A and Claim2 as constituting bill preparation. No time may be claimed under the legal aid certificate for appeals against assessments by the Agency.
- 14.19 The allowance for checking a provisional assessment can only be granted in the event that a provisional assessment (i.e. a reduction) has been made of the substantive costs. If a claim for checking a provisional assessment is included in a bill for assessment it will not be payable if the costs are allowed as claimed. This work is allowable only on the basis that the provider is giving consideration as to whether to request a full detailed assessment hearing. No allowance is payable in respect of checking an assessment by the Agency since no payment is allowable in respect of such assessments generally.

### **Late claims**

- 14.20 Under Paragraph 6.36 of the Specification, all claims for Assessment or claims for payment must be submitted to the Agency within three months of the right to claim accruing.
- 14.21 Under Paragraph 6.38 of the Specification, there is provision for reduction or disallowance in respect of late claims in cases where the client has a financial interest in the claim because the statutory charge may arise, the client has paid contributions and/or his or her legal aid certificate has been withdrawn.

After the 3 month period referred to in 6.36 the Agency may serve a notice requiring the claim to be submitted within a further two months. If the provider fails to submit their claim within that period, costs may be disallowed up to the value of the client's financial interest.

This provision of the Contract was made in order to limit delays in Agency being able to account to legally aided clients for monies owed to them or, in the case of revocation, to prevent the Lord Chancellor's position on recovery from the client being prejudiced (Legal Services Commission v Rasool [2008] EWCA Civ 154).

- 14.22 More generally, under Clause 14.5 of the Contract Standard Terms, persistent submission of late claims may lead to contract sanctions, including termination.

## **15. The legally aided client's rights on assessment**

### **General**

- 15.1 Paragraph 6.59 of the Specification confers certain rights on a legally aided client who has a financial interest in the assessment of their provider's costs and corresponding obligations on the conducting fee earner.

### **Definition of a "Financial Interest"**

- 15.2 A legally aided client has a financial interest if he or she is required to make any contribution or if the statutory charge will apply to his or her case. If the question of whether the statutory charge may arise has not been determined, or if an assessment

or reassessment of means is pending, then it should be assumed that the legally aided client does have a financial interest.

- 15.3 Revocation of a determination of legal aid will also give the legally aided client a financial interest (Paragraph 5.30 of the Specification) because upon revocation they are liable for the costs allowed.

#### **The legally aided client's rights**

- 15.4 The rights given to a legally aided client are that on an assessment, review or appeal he or she can make written representations to the Agency or to a costs assessor within 21 days of being notified of his or her rights.

#### **The fee earner's obligations**

- 15.5 The obligations imposed on the fee earner are threefold:

- (a) To supply the legally aided client with a copy of the bill of costs;
- (b) To inform the legally aided client of their financial interest and their right to make written representations;
- (c) To endorse on the bill whether or not the legally aided client has a financial interest, has been supplied with a copy of the bill and has been informed of their right to make written representations.

- 15.6 In the event that the statutory charge applies, or if any part of the contribution needs to be refunded, payment will be made to the provider but no balancing of the legally aided client's account will take place until the outcome of any costs appeal is known. The amount due after a provisional assessment by the Agency would be paid to the provider and, depending on the outcome of any appeal, the Lord Chancellor may pay the additional sum or recoup as appropriate.

- 15.7 The following is a suggested form of the endorsement:

*"I certify that a copy of the attached bill has been provided to the legally aided client pursuant to Paragraph 6.60 of the 2010 Standard Civil Contract Specification, with an explanation of his/her financial interest in the assessment of the bill and his/her right to make written representation on the bill and thereafter on any subsequent review to an Independent Costs Assessor or appeal to the Agency's Costs Appeals Committee. I confirm that either 21 days have passed since the copy bill was provided to the legally aided client or the legally aided client has confirmed in writing (copy attached) that he/she will not be making any objections to the bill."*

- 15.8 The paragraph requires that the endorsement be on the bill, however, where the claim is to be assessed by the Agency it can also be by way of a covering letter with the costs claim

#### **Procedure upon receipt of written representations in assessment by the Agency**

- 15.9 If written representations are received from the legally aided client in respect of their provider's bill, a copy of the representations will be sent to the conducting fee earner prior to the assessment requesting comments within 21 days. The bill will not be

processed until the time limit expires. If the bill is received without any comments, where representations have been made known, comments should be requested unless the fee earner says he/she has none to make.

Representations by a legally aided client may:

- (a) relate to the conduct of the case, i.e. that costs had been wasted or that work was not reasonably done; or
- (b) state that there is an inaccuracy in the bill, for example, that work claimed was not actually undertaken.

15.10 Following assessment, the outcome will be confirmed to the legally aided client. They will be notified of their continuing rights on an appeal where the bill has been reduced and at the same time (if representations directly led to a reduction in the claim) the provider will be informed that written representations made by the legally aided client were taken into account in assessing the bill and a copy of those representations is attached.

15.11 If the provider goes on to appeal to a Costs Assessor, the legally aided client has similar rights but only if representations were made before the provisional assessment and the representations affected it. It is recognised that whilst there is no specific entitlement for the legal representative to attend on an appeal they are allowed to do so. The legally aided client must also be given an opportunity to attend, if they so wish.

## **16. Detailed assessment and appeals from detailed assessment**

### **Detailed assessment by the Court**

16.1 Costs that fall to be determined by way of detailed assessment through the courts will need to comply with the provisions of Part 47 of the Civil Procedure Rules (CPR).

### **Time Limits**

16.2 CPR 47.18(2) sets a three month time limit, from the date on which the right to detailed assessment arose, for the commencement of detailed assessment proceedings. CPR 47.14 also introduces a time limit for within which a detailed assessment hearing must be filed.

16.3 CPR 47.8 contains sanctions for delay in the commencement of detailed assessment proceedings. A paying party is entitled to apply to the court for an order that the receiving party commences the detailed assessment procedure. The court may direct that unless the proceedings are commenced within a specified period then all or part of the defaulting party's costs may be disallowed. Where the receiving party commences proceedings late, but no application has been made by the paying party, the court may disallow interest on costs for the relevant period. In legally aided cases CPR 47.8 applies as if the Lord Chancellor is the paying party.

16.4 Where delay is brought to the Agency's attention the Agency will make applications to the court under CPR 47.8. This provision is to enable counsel to be paid his/her fees or for the client's case to be balanced and monies released where the provider has failed to commence detailed assessment proceedings promptly. Counsel is not entitled to

commence detailed assessment proceedings in his/her own right. The Agency will, once notified, write first to the defaulting provider warning of the possibility of a 47.8 application. If the detailed assessment process is not then commenced within the time frame given, the Agency will make the application and the provider's costs will be at risk.

### **Appealing from assessment of Costs**

16.5 In the circumstances set out in CPR 52.3, permission must be sought to appeal.

### **Costs of appealing against a detailed assessment**

16.6 There is no presumption that the provider will recover their costs from legal aid where they appeal against the assessment of their costs under CPR Part 52. The costs will be recoverable only to the extent that the court hearing the appeal orders the costs to fall within the legal aid certificate (Paragraph 6.43 of the Specification).

16.7 A provider who wishes to appeal against the detailed assessment of their costs in a legally aided case must therefore consider whether, having regard to factors such as:

- (a) the amount in issue;
- (b) the merits of their argument, and
- (c) any wider principle involved,

the appeal will succeed and the court will award costs under legal aid, if not the opposing party.

16.8 The client is not a party to the proceedings. In reality any appeal will be brought by the provider and not the client in any event. Since there is no presumption that the legal aid certificate covers the costs of the appeal, the client has no protection under Section 26(1) LASPO in respect of their opponent's costs of the appeal. In the event that the client has a financial interest and has pursued the appeal, an order for costs could be made against the client. The Court, however, could order that the costs of the appeal are covered by the legal aid certificate.

16.9 If the court orders that the provider's and/or counsel's costs be paid by legal aid:

- (a) the client does not have to pay a contribution in respect of those costs and
- (b) the costs do not add to the statutory charge (Paragraph 6.44(a) of the Specification).

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