

10. Family Graduated Fee Scheme

General

10.1 What is the Family Graduated Fee Scheme?

1. It is a scheme to provide a separate payment regime to pay counsel during the life of a case. It will operate alongside the existing arrangements for paying solicitors' profit costs and disbursements. The full provisions of the scheme are set out in the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. No. 1077 of 2001) (hereafter referred to as "the Order"). The scheme is currently under review following its first 18 months of operation. Subsequent updates to this manual will highlight any changes.

10.2 Purpose

1. It provides counsel with payment as work is done. In the majority of cases, it frees counsel from assessment of the costs at the end of the case. The amount paid is final and predictable. It provides certainty to both counsel and the funded client. It aids the Commission by increasing control of expenditure, and will inform the future development of contracting for publicly funded legal services.

10.3 Scope

1. The scheme applies to barristers in independent practice who undertake family work under funding certificates **granted on/after 1 May 2001**. If the certificate was granted before 1 May 2001, and is amended subsequently to cover further work or other family proceedings, the work done will continue to be paid under the relevant remuneration regulations in force before the introduction of the scheme—either *The Legal Aid in Family Proceedings (Remuneration) Regulations 1991* or the *Legal Aid in Civil Proceedings (Remuneration) Regulations 1991*.
2. It does not include the work of the solicitor conducting the case, nor an employed barrister, solicitor or other agents who undertake advocacy on behalf of the conducting solicitor. Such advocacy does not exactly match the role played by counsel in family work. The Lord Chancellor will conduct further consultation on how best to integrate other forms of advocacy into the scheme or to set comparable rates for comparable advocacy work. Until then work done by solicitors and their fee-earners (including employed barristers) will continue to be remunerated under the existing arrangements.

10.4 What work is included?

1. The scheme includes all family proceedings as defined in the Commission's Funding Code (See Article 2 of the Order and section 2.2 of the Funding Code). This is in fact wider in scope than the *Legal Aid in Family Proceedings (Remuneration) Regulations 1991*.
2. It also includes civil non-family work in the magistrates' court which is remunerated as family work (regulation 104 of the *Civil Legal Aid (General) Regulations 1989* - as amended).

3. All work in the following venues is included:
 - (a) magistrates' courts—(family proceedings court);
 - (b) county courts;
 - (c) High Court.
4. It does **not** however apply to:
 - (a) appeals—carried out in either the Divisional Court (on appeal from the FPC), Court of Appeal, or House of Lords;
 - (b) cases where the main hearing exceeds 10 days; or
 - (c) where the case is the subject of a high costs case contract from the Commission's Special Cases Unit.
5. Whilst appeals are generally excluded, certain appeals are included. Interim appeals (i.e. interlocutory or not final) that are not heard in the levels of court in 10.4.4(a) are treated as a function within proceedings. Where there is a substantive appeal from a District Judge to a Circuit Judge or a High Court Judge this will be treated as the commencement of a new set of proceedings. Advice on the merits of such an appeal will be paid as a Function F1. Those appeals that are heard in the levels of court set out in 10.4.4(a) are excluded and thus remunerated under the existing arrangements for payment of counsel's fees.

10.5 The nature of the Graduated Fee Payment

1. Payments to counsel under this new scheme are essentially set fee payments. The order provides a range of base fees for different pieces of work. These fees are set according to the nature of the proceedings, the work to be done, whether junior or leading counsel are employed and venue. There are also a range of additional payments which may be added to the fee due, to reflect special features and complexity.
2. In terms of the number of possible payments the scheme is quite complex but the payments are, as far as possible, fixed, objective and ascertainable prior to the work being undertaken.

10.6 What happens in escaped cases?

Appeals

1. Appeal work in other levels of court, as defined by 10.4.4 above, is remunerated under the existing remuneration arrangements for payment. First instance work and appeals therefore will fall within the scheme where the certificate was granted **on or after 1 May 2001**. If a certificate covers both the main action and any appeal, counsel will be paid under this scheme for first instance work only.

Main hearing exceeding 10 days and not subject to a High Cost Case Contract

2. This escape is always retrospective because the case must actually have lasted for more than 10 days. The fact a case is listed for that length of time but ends earlier is not enough to escape the scheme. If the case does escape, the payments already made under the scheme will be deemed to be payments made on account and will later be recouped against counsel's final fees following detailed assessment. Requests for payment under this scheme after the main hearing will be rejected. Counsel will need to submit his fee notes with the solicitors' costs for detailed assessment and solicitors will report on costs in the usual way.

A high cost case contract is issued

3. A case may be identified as a high costs case either at the outset of a case or at some point after the certificate is granted. The Commission's Funding Code introduces new procedures and funding criteria for very high costs cases. An application, or an existing certificate, must be referred to the Special Cases Unit (SCU) where it appears:
 - (a) the actual or likely costs under the certificate exceed £25,000;
 - (b) if the case were to proceed to a contested hearing, the likely costs under the certificate might exceed £75,000;
 - (c) the application relates to a multi-party action (MPA) or potential MPA.
(Funding Code Procedure C23).
4. The SCU will decide, on referral, whether the case should be the subject of an individual contract. Such a contract would allow progression of the case on a stage-by-stage basis with an agreed price for each stage. Information packs for both solicitors and barristers on high costs cases can be found on the Commission's website at www.legalservices.gov.uk.
5. If a contract is issued, it will determine the remuneration to be paid. The case plan and the overall contract price will be based on the anticipated venue for the hearing and its length. The majority of cases falling within the remit of the Special Cases Unit have a main hearing that concludes in under ten days.
6. If initially the case is considered to have a time estimate of more than ten days it will be remunerated without reference to the Graduated Fee Scheme. The contract price will be set in advance on the basis of the estimated trial length, applying rates applicable to counsel in an ex post facto assessment. Further guidance on the rates will be produced by the Special Cases Unit and be the subject of a separate consultation exercise. If the time estimate is less than ten days the contract price will refer to the graduated fee scheme.

7. Where the initial estimate turns out to be incorrect, e.g. a case that was due to take less than eleven days concludes on the twelfth day or a case that it was thought would last twelve days settles on day two of the main hearing, the contract price will be adjusted. In the first example, the contract price will be renegotiated and counsel paid as if the graduated fee scheme had never applied. In the second example, counsel will be offered the choice between the graduated fee and the contract price for the actual activities within the case plan that have been undertaken.

10.7 Funding Certificates

Generally

1. The scheme includes all levels of service applicable to family certificated work; Approved Family Help (Help with Mediation (HWM) and General Family Help (GFH), and Full Representation. As both HWM and GFH aim to resolve family disputes at an early stage, it is considered unlikely that counsel will be used, except in exceptional cases (see Family Guidance).

Prior Authorities

2. The existing requirement to obtain authority for counsel in proceedings in the Family Proceedings Court or where either Leading Counsel or multiple counsel are to be instructed will continue.
3. The use of counsel must be authorised by the certificate in three defined circumstances where:
 - (a) the case is to be heard in the Family Proceedings Court; or
 - (b) where Leading Counsel (a QC) is to be instructed; or
 - (c) where more than one counsel is to be instructed.
4. In the case of summary proceedings, authority is likely to be granted where the case poses:
 - i) unusually complex evidential problems; or
 - ii) novel or difficult points of lawbut not if the reason for instructing counsel is:
 - i) that the case is contested, has become protracted or involves the cross examination of witnesses or arguments on points of law;
 - ii) the personal circumstances or convenience of the solicitor where it would be more appropriate to instruct a solicitor agent.

5. If counsel is instructed without authority the solicitors' costs may be at risk (see 10.42). If authority has not been given in the certificate, the unauthorised costs involved in instructing counsel may be allowed on assessment or alternatively may be assessed on the basis that the solicitors undertook all the work with the amount allowed being shared between the solicitor and counsel (the maximum fee principle).

This means that on assessment there will be three possibilities:

- (a) prior authority granted for the instruction of counsel-counsel's reasonable fees are assessed and the solicitors' fees are assessed separately;
- (b) no prior authority given but it is considered on assessment that the conduct of the case required the use of solicitor and counsel. For example, there was a difficult evidential problem or a query on a point of law. Again, counsels' fees are assessed as in (a);
- (c) no prior authority granted and on assessment it is not considered that the circumstances justified the use of both solicitor and counsel-the maximum fee principle should be applied. However, the "agreed fee" used in the maximum fee calculation will always be the family graduated fee paid to counsel.

Where there is no inter partes taxation there is no discretion to allow unauthorised costs incurred in instructing counsel (

Din v. Wandsworth London Borough Council (No.3)

[1983] 1 W.L.R. 1171;

Robyn Hayley Hunt v. East Dorset Health Authority

[1992] 1 All E.R. 539 and Civil Legal Aid (General) Regulations 1989, Regulation 63 (3).

10.8 Categories

Generally

1. All family work is divided into four categories for the purposes of determining the level of remuneration for particular proceedings. The four categories are:
 - (a) family injunctions;
 - (b) public law children;
 - (c) private law children;
 - (d) ancillary relief and all other family work.

These categories are identical to the types of family case identified in the Funding Code.

2. Categories are important because different levels of fees are prescribed for each category. Each function must be claimed under one and only one category (see 10.14 below).

10.9 What does each category include?

1. Schedule 2 of the Order defines the general type of proceedings within each category. The text of the Order and the Commission's guidance on what generally falls within each category is set out below.
2. The wordings in Volume 3 of the Legal Services Commission Manual will be amended to identify the relevant category in this scheme for each CIS wording. Consequently, the wording for each proceeding on the face of the funding certificate will clearly identify which category of fee applies to assist both counsel and their instructing solicitor.

10.10 Family injunctions

1. Paragraph 1 of Schedule 2 defines these as:
“Family proceedings (other than those for ancillary relief) for an injunction, committal order, or other order for the protection of a person (other than proceedings for the protection of children within paragraph 2)”.
2. This category will include all proceedings for the protection of the person arising from a family relationship (commonly known as domestic violence proceedings). It will include any application for a non-molestation or occupation order under Part IV of the Family Law Act 1996, injunctive relief under the Protection from Harassment Act 1997 or personal protection injunctions based in tort (assault and trespass).
3. It does not include applications for a section 37 injunction made under the Matrimonial Causes Act 1973 (an avoidance of disposition order) nor section 40 of the Family Law Act 1996 (orders for maintenance or financial issues following an occupation order where the application is made after the making of the occupation order), as they are not free standing applications but rather made within or are incidental to ancillary relief proceedings.

10.11 Public law children

1. Paragraph 2 of Schedule 2 defines this category as:
“Family proceedings under Parts III, IV or V of the Children Act 1989, adoption proceedings (including applications to free for adoption), and other family proceedings within the inherent jurisdiction of the High Court concerning the welfare of children (other than proceedings for ancillary relief)”.
2. This is a broad category which encompasses all “Special Children Act Proceedings”, namely applications under the Children Act 1989 (care or supervision orders (s.31); a child assessment order (s.43); an emergency protection order (“EPO”)(s.44); its discharge or extension (s.45)) either on behalf of the child, their parent or a child brought before the court for a secure accommodation order (s.25) who requires representation.

3. Other public law children cases include proceedings concerning the welfare of children including other proceedings under Parts IV & V of the Family Law Act 1996, adoption proceedings and proceedings under the inherent jurisdiction of the court.
4. This category will also include applications for residence contact etc. under the Children Act 1989 where these are either made within care proceedings or are “related proceedings”. It does not cover such applications between individuals which are dealt with under 10.12 below.

10.12 Private law children

1. Paragraph 3 of Schedule 2 defines this category as:
“Family proceedings between individuals concerning the welfare of children (other than those for ancillary relief or within paragraph 2)”.
2. This category is for applications made between individuals in relation to the welfare of children (residence, contact, prohibited steps, parental responsibility etc.) other than those relating to applications for maintenance or other financial orders.

10.13 Ancillary relief and all other family work

1. Paragraph 4 of Schedule 2 defines this category as:
“All other family proceedings not within paragraphs 1 to 3”.
2. This category covers ancillary relief proceedings and all other family work not falling within categories 1–3. It specifically includes all applications for financial relief work whether within divorce or for children and other miscellaneous applications i.e. Human Embryology Act applications, Inheritance Act applications or declarations of parentage. It will also include cases brought under the Child Abduction Act, as they are not public law or children cases within the definition of category 2.

10.14 Mixed categories

1. In family cases, the certificate will often either be issued to cover a number of proceedings or be subsequently amended to add or substitute proceedings during the life of the certificate.
2. When the proceedings fall within more than one category, counsel must, for the purpose of payment under the scheme, choose under which single category they would wish to be paid for all the function work performed when making a claim for payment. Usually, counsel will claim at the category that pays the highest rate. For example, a residence/contract application (Cat 3) which subsequently involves allegations of abuse to a degree that the local authority issues care proceedings (Cat 2). At the point at which the certificate is amended to include the higher category 2 proceedings, counsel can claim all future function work (including work done under the Cat 3 proceedings) at the higher category 2 rate.

3. Where a function includes work from two categories but it falls within a single set of proceedings (as defined in Article 6(4) of the order) only one function fee will be paid—see 10.15 below.

Example:

It is common for public law and private law children proceedings to be heard together by the court e.g. care proceedings which, in the alternative, consider residence and contact applications. If there is a main hearing to determine all issues it will fall within two categories (public law children and private law children). Counsel may only claim one function fee for the main hearing (see below) but can choose which of the two categories to claim under. In practice, counsel will always choose the category with the highest rate, which in the example given, would be the public law children category.

10.15 What is a single set of proceedings?

1. For particular functions only one fee can be claimed per case. In order to determine what is or is not a 'case' for the purposes of determining appropriate claiming, (see 10.15.3 below), the Order defines what is to be treated as “a single set of proceedings”.
2. A single set of proceedings is defined by Article 6(4) as:

“For the purposes of this Order, applications to the court constitute a single set of proceedings irrespective of whether they are made separately or together where they are:

 - (a) heard together or consecutively; and*
 - (b) treated by the court as a single set of proceedings”*
3. The purpose of this definition is to be able to ensure that claims for payment are made appropriately and cases are not presented in such a way as to maximise recovery or to alter existing court or administrative practices.
4. The definition covers separate statutory applications made either within the same proceedings, or in the alternative, and those cases where proceedings are issued separately but heard together or consecutively.
5. The functions are defined in 10.16 to 10.17 below on Functions. For each single set of proceedings payment will only be made once for Functions F1, F4 and F5. Functions F2 and F3, in contrast, may be paid for as often as they happen. This recognises that they are interim applications and may happen more or less frequently within different types of proceedings or due to the circumstances of the case. (Article 6(1)).
6. Where function work is done within a single set of proceedings, which covers a number of categories, only one function fee is due, rather than one function fee per category. (Article 6(2)).
7. Where counsel represents more than one party in a single set of proceedings, s/he is paid as if s/he represented a single party but may be able to claim a Special Issue Payment for representing more than one child (see 10.26).

8. Generally work undertaken in each of the four categories constitutes a single set of proceedings. For example, family injunctions usually proceed with a separate timetable of applications and hearings from other family work. The process starts generally with an urgent application for an ex parte order, leading up to a hearing to make a final injunction order. This would generally constitute a single set of proceedings.
9. Similarly, it is usual for the court to deal with residence and contact issues separately from financial issues in a divorce. Both aspects may be treated as a separate set of proceedings unless or until the court orders them to be heard together.
10. Sometimes simultaneous separate proceedings within a single category might become a single set of proceedings. For example, if there are contact issues relating to the children of the family the court is likely to deal with both children within the same timetable for the proceedings. Even if the arguments in favour or against contact orders are different for each child the whole procedure would result in the applications being treated as a single set of proceedings for the purposes of payment, rather than two.
11. A care case which hears, in the alternative, residence and contact will be one single set of proceedings if heard together or consecutively by the court. See 10.15.2.

Functions

10.16 What are functions?

1. For the purposes of payment, all work undertaken within a single set of family proceedings is broken down into five functions. The definition of what work each includes and guidance on the same is set out below.

10.17 The Functions

F1—Pre-litigation work and advisory or drafting work falling outside the other functions

1. Article 2 of the Order defines this function as:
“all work, other than conferences:
 - (a) *which is carried out prior to the issue of proceedings; or*
 - (b) *which does not fall within Functions F2 to F5”.*
2. This function covers all pre issue work and any free standing post issue work which does not fall within any other function. For example, providing advice or drafting pleadings/affidavits after issue where no instructions have been received to do other function work.
3. The function includes all advisory work (whether written or oral), and any drafting work undertaken before the issue of the proceedings in the case or if proceedings have been issued that does not fall within any other function.

4. In appeals covered by the scheme, advice on the merits of the appeal will be a Function F1.

F2—Applications for injunctive relief or enforcement procedures

5. Article 2 of the Order defines this function as:

“all work carried out in connection with a hearing relating to injunctive relief or enforcement procedures, other than work which falls within function F5, including but not limited to preparation, advocacy, advising and drafting”.

6. The function covers all work relevant to such hearings including incidental work and preparation e.g., advice, drafting and other work as well as the advocacy within the hearing itself.

Example:

An application for the protection of an individual under Part IV of the Family Law Act 1996 will fall within category 1 (family injunctions). The work done prior to issue, where counsel is instructed, will be paid as a Function 1. The work for the without notice hearing will be paid at the Function 2 rate within that category. The on notice hearing will be paid at a Function 5 rate and any subsequent committal work as a Function 2 (enforcement of the order). NB: There is no Function 3 in category 1 proceedings.

7. A Section 37 injunction falls within category 4 (all other work) as an application within ancillary relief proceedings. Work done would be paid as a Function F2 application at the applicable rate for category 4 work.
8. Where preparation work for a hearing is carried out and the hearing does take place then the payment will cover all the preparatory work, as above, including the hearing units.

F3—Preliminary applications, interim applications and review hearings

9. Article 2 of the Order defines this function as:

“all work carried out in connection with a hearing, other than work which falls within Function F2 or F5, including but not limited to preparation, advocacy, advising and drafting”.

10. This function covers all other hearings other than those falling within F2 or the main hearing itself. Commonly, this will cover all directions hearings including the first appointment in an ancillary relief case (and the Financial Dispute Resolution hearing), interim hearings or a review hearing within care proceedings. All ancillary or incidental work relating to the application, e.g. schedules, chronologies, skeleton arguments, as well as the preparation involved, will be included in the fee.
11. There is no Function F3 in a family injunction case because the proceedings usually consist of a without notice hearing (paid as an F2) and subsequently an on notice hearing (paid as an F5). If committal proceedings occur they are enforcement proceedings (paid as an F2).

12. To reflect the importance, complexity and additional preparation required for the FDR in ancillary relief proceedings an increased payment in addition to the set F3 fee is paid. An additional sum of £150.00 is paid to Queens Counsel and £60.00 to junior counsel. This additional sum is also paid if counsel attends the first appointment and it turns into the FDR.

F4—The Conference Fee

13. Article 2 of the Order defines this function as:

“all work carried out in connection with a conference (including a telephone or video conference) other than any conference which takes place on the same day as a hearing for which payment is claimed under Function F5, including but not limited to preparation and advice”.

14. Conferences are not generally separately remunerated within the scheme but it is accepted that there should be a separate payment for a single 'main' conference within the case, whenever that may take place. Only one conference function fee is payable in each single set of proceedings (Article 17(4)). This 'main' conference cannot, however, be held on the same day as the main hearing (Function 5) in the proceedings.
15. Counsel will need to designate which conference s/he seeks payment for. Ideally, it should be selected towards the end of the case when counsel will be able to choose the appropriate conference and any additional payments it may attract.
16. Where different counsel is subsequently instructed and the Function 4 payment has already been claimed, no further Function 4 payment can be made. This is so even in circumstances where the later conference was more substantial. Where one counsel has replaced another, counsel must make enquiries whether the Function 4 payment has been claimed from either the outgoing counsel or instructing solicitors.
17. Work in this function includes all preparatory work for the chosen conference, keeping a conference note on the issues discussed and work done with the solicitors and experts immediately after the conclusion of the conference. It can, however, include conferences on the same day as other hearing functions (F2 or F3).
18. Where pre issue work has been undertaken and counsel holds a conference, whether or not proceedings are subsequently issued counsel may claim a Function F4 payment in addition to the Function F1 payment.

F5—The Main Hearing

19. Article 2 of the Order defines this function as:

“all work carried out in connection with the main hearing, including but not limited to preparation, advocacy, advising and drafting”.

20. The main hearing is defined as *the hearing at which the substantive issues are listed to be determined and are considered by the court*. It is essentially the hearing at which it is anticipated the proceedings will conclude within the first instance jurisdiction.
21. For example in care proceedings, it would be the hearing at which the court should determine whether or not a care order is made; in ancillary relief proceedings, where the court will determine the form of relief entitlement; in family injunctions the on notice hearing which will determine the form and continuation of the without notice injunction order made. The function includes all preparation or incidental work relating to the hearing so includes advices, and drafting of schedules, chronologies, skeleton arguments and draft orders.

Payment—the Graduated fee

10.18 The calculation of the graduated fee

1. Article 5 of the Order defines how the graduated fee is calculated. The text of that Article is set out below:
 - (1) *The amount of the graduated fee for counsel shall be the base fee or the hearing unit fee, as appropriate, in respect of the function for which the fee is claimed, which is specified in the Schedules to this Order as applicable to the category of proceedings and the counsel instructed, increased by any:*
 - (a) *settlement supplement (“SS”) or additional payment;*
 - (b) *special issue payment (“SIP”);*
 - (c) *court bundle payment (“CBP”).*

so specified.
 - (2) *The total graduated fee, as set out in paragraph (1), shall be increased by 33% in respect of all work carried out while the proceedings are in the High Court.*

10.19 The Starting Point

1. Each function has a base fee or hearing unit, which is the primary amount counsel will get paid. The total fee due may in hearing units be multiplied to reflect time spent in court. Payments may then be increased by other additional sums, where the work done is within the criteria and rules for additional payments. The fees for each function are set out by category in Schedule 1 to the Order. The specific rules for the calculation of the hearing unit are set out in Article 8 of the Order.

10.20 The base fee in Functions F1 and F4

1. These are both non-hearing functions and, as such, have a set base fee according to the category of the proceedings. This is in contrast with the hearing units which have a base fee calculated by time spent—see 10.21.2.

Example:

The F1 payment for a family injunction is £60 for junior counsel and £150 for Queen's counsel.

The F4 payment in the same proceedings would be £50 for junior counsel and £125 for Queen's counsel.

Rules for F1 and F4

2. One base fee will be paid for all the work carried out in each of Functions F1 or F4. [Article 6(1)].
3. Special issue payments can be claimed. Settlement supplement payments are not paid, unless settlement occurs within Function 1 in an ancillary relief case. Counsel must choose which conference undertaken is to be treated as the main conference.

10.21 Functions F2 and F3

1. These are hearing units and the graduated fee is calculated on the time spent at court. Travel time and expenses are paid separately (see IPs at 10.28).

Hearing Units for Functions F2 & F3

2. One hearing unit is paid for each period of time of two and a half hours (or less) during which the hearing continues (Article 8(2)(a)). The period starts at the time the hearing is listed to begin (unless the court specifically directs counsel to attend earlier) and ends when the hearing concludes or at 5.00 p.m., whichever is earlier. The time spent at the luncheon adjournment is discounted (Article 8(2)(b)). No discount is made for periods when the hearing is adjourned if it is still continuing e.g. for negotiations between the parties, or whilst an order is being drafted. The hearing will end when the judge makes an order or approves any negotiated consent order.
3. Where a case goes past 5.00 p.m. but concludes that same day, the time spent from 5.00 p.m. will be paid as an extra one half hearing unit. (Article 8(2)(c)).

Example 1:

A case is listed for 10.30 but, due to the hearing of other applications, the hearing does not start until 11.30. It runs on until 12.45 when the lunchtime adjournment starts. The case is due to recommence at 2.00 but does not start again until 2.15 because the judge hears a family injunction application first. The case finally concludes at 3.55.

The time spent before lunch (10.30 to 12.45) is 2 hours 15 minutes. The lunchtime adjournment is 1 hour 15 minutes (because the court sits again at 2.00 p.m. even though the judge hears an urgent application first). The period following lunch is 1 hour 55 minutes. The total time at court is 5 hours 25 minutes. The lunchtime period of 1 hour 15 minutes must be deducted so only 4 hours 10 minutes is claimable time. This is two hearing units.

Example 2:

If, amending the example above, the post-lunch period ran from 2.15 (because the case was not due to recommence until 2.15) to 5.15, when the Judge signed the draft order, the total time spent at court would be 6 hours 45 minutes. The lunchtime period now of 1 hour and 30 minutes is deducted so the claimable time is 5 hours 15 minutes. The total claim would be for 2½ hearing units.

This will be claimed as follows:

- (a) 10.30 to 12.45 & 2.15 to 5.00 is 5 hours. This is 2 hearing units.*
- (b) 5.00 to 5.15 p.m. is claimed separately as an extra half hearing unit. This extra half unit would not be payable if the case had not concluded at that point.*

4. If a Function F2 or F3 hearing lasts for more than one day, the relevant multiples of the hearing unit are paid for the time spent on each day during which the hearing continues, but not for the time spent after 5 pm unless the case concludes on that day.
5. Although there is no specific payment for waiting time, as the time for calculating the hearing period commences from the time when the case is *listed* time spent waiting for the hearing to commence is included in the calculation provided it is incurred after the time listed for the start of a hearing. Moreover, while the court will generally indicate on the notice of listing that representatives should attend at least 10 minutes before the listed time, this is not the specific direction referred to in Article 8(2)(b)(i). Where however, after listing, the court provides a specific direction for earlier attendance in respect of that particular hearing time will run from the earlier time if counsel is able to establish that such a specific direction was made.
6. Special issue payments (see 10.26 to 10.30) can attach to Functions F2 and F3 but these are only claimable once per function. Whilst these may be applied for and certified any number of times, the special issue payment can only be claimed once. Counsel must select which hearing in Functions F2 and F3 the special issues are to be claimed for. Payment will be made for the special issues certified in relation to the chosen hearing. [Article 9(7)].

10.22 Function F5

1. As Function F5 is a hearing function the main hearing payment is also based on hearing units. Because it is the hearing to determine and conclude the case, the hearing unit is based on the number of days taken rather than smaller periods of time. One hearing unit is paid from the time the main hearing actually begins to 5 p.m. on that day (Article 8(3)(a)).
2. The first full day is paid as a primary hearing unit whilst all the other days are paid as secondary hearing units. This mirrors the existing system of brief fees and refreshers and the levels of payments reflect this (Article 8(3)(c)).
3. Where the hearing continues after 5 p.m. on any day of the main hearing and concludes on that day, the time spent after 5 p.m. will be paid as one half of the hearing unit (Article 8(3)(b)).

4. Where the court lists the case for the main hearing and starts to consider the case the first date is the primary hearing unit. All other days will be paid as secondary hearing units including later dates when the case is part-heard or adjourned to a later date. (Article 8(3)(c)(i) and (ii)). If the case is listed as a main hearing but for some reason is adjourned or postponed before the court has considered the substantive issues, the hearing will not be a function F5 but a function F3 e.g. on or before the due date it emerges a party has not been served correctly or the wrong hearing date was sent. For split hearings in care cases see 10.34.

10.23 No Hearing in F2, F3 or F5

1. A “hearing” may take place by any method directed by the court e.g. by either video or telephone conference, without attendance at court. If the court directs an alternative method of hearing then a hearing will be deemed to have taken place in contrast to the situation where no hearing has taken place because the application is withdrawn.
2. Where preparatory work for **any** hearing is carried out but no hearing actually takes place then one half of the relevant hearing unit fee, without any additional special issue payment, will be paid (Article 8(1)). A “no hearing” may happen for example where an application is discontinued or withdrawn, the case settles, or the funding certificate is revoked or discharged, or the hearing is otherwise abortive.
3. The same payment (i.e. one half of the relevant hearing unit fee) is made as compensation where counsel is prevented from representing the client at the main hearing by either of the following circumstances (Article 8(1)(b)):
 - (a) where the counsel has had to withdraw from the proceedings with the permission of the court because of his or her professional code of conduct or to avoid embarrassment in the exercise of their profession; or
 - (b) where counsel has been dismissed by the client.

The half fee paid includes all preparation work, related advices and any drafting work undertaken.

4. The Commission expects the conducting solicitor to inform it of the reasons why any counsel instructed has been prevented from attending a hearing in the circumstances set out in Article 8(1)(b)(i) and (ii). The Commission may then have notice of any conduct issues that may be raised on later costs assessment, particularly as this may involve circumstances that would entitle the funded client to reopen the payments made to counsel (see Article 19 and 10.38 post).
5. Where a hearing actually takes place but is not conclusive and is adjourned part heard, the hearing fee applicable to the relative function is paid. When the hearing recommences a new hearing fee will be paid. In F2 and F3 this will be paid as a further F2 or F3 payment. This is in contrast to adjournments of the main hearing, see 10.22.4.

10.24 Payment to replacement counsel

1. In the situation where one counsel replaces another in an ongoing function (and not in circumstances where Article 8(1)(b) applies), e.g. in relation to a hearing function where one counsel has undertaken advice or drafting but is unable through prior commitments to make the hearing itself, the papers may be passed to another counsel to complete the function by doing the advocacy.
2. As this work is all part of the same function, both counsel will expect some payment. The Commission will make the function payment to the counsel who completed the function i.e. the counsel who did the advocacy and who is in a position to make a claim for payment. (Article 14).
3. No separate payment is made to the first counsel for wasted preparation. The matter of how exactly the fees will be apportioned is left to “arms length” discussions between counsels' clerks.
4. A claim cannot be accepted from the first counsel as s/he will be unable to certify that all the function work has been completed. Any application for payment by the first counsel will be rejected. Where it is discovered after the event that payment has been made incorrectly the erroneous sum will be recouped from the next payment due to counsel under the power provided by Article 19(8).
5. Where however different counsel perform different function work on the same case, each counsel will be entitled to claim payment at the permitted payment points (see 10.37 post). Only one F1 & F4 will be paid per single set of proceedings however regardless of the number of counsel involved (Article 17). A Function F5 be paid for each main hearing (where the certificate contains multiple sets of family proceedings).

10.25 Multiple Applicants

1. Where there are multiple parties, who are represented by one counsel and the court deals with the applications by hearing them together, only one fee is due. For example, if there are three children each making a Section 8 application under the Children Act 1989 and the court hears all the applications together and they are all represented by the same counsel, only one fee will be paid for the hearing rather than three. (Article 7). In this scenario, counsel will be entitled to a special issue payment for representing more than one child. [Article 9(1)(c)].
2. Where three applications are made in such circumstances the Commission will process one claim for payment but reject the others and link the files accordingly to prevent duplicate payment. If the statutory or contractual charge arises the single fee will need to be apportioned equally between the certificates involved.

Payment—Additional Sums

10.26 Special Issue Payments (SIPs)

Generally

1. The circumstances of a case may require payment to compensate for the extra work undertaken by counsel or to reflect its complexity. Such circumstances are referred to as “special issues”. The criteria entitling counsel to an additional payment (a ‘SIP’) are that the proceedings involve one or more of the special issues set out below. Special issues (a) to (c) are simple questions of fact and do not depend on the exercise of judicial discretion. For example either the litigant was in person or s/he was not. In relation to (d) to (g) they must also be of substance and relevant to any of the issues before the court.
 - (a) **Litigant in person:**

This requires one party to be representing themselves.
 - (b) **More than two parties:**

This would commonly be seen in care cases. It would not include cases where the divorce involved a co-respondent as they play no part within subsequent proceedings i.e. ancillary relief or contact, or contact cases brought by grandparents who are acting in consort with the parents.
 - (c) **Counsel representing more than one child:**

Whilst such representation is paid as a single function fee, the special issue payment reflects the additional complexity involved.
 - (d) **More than one expert:**

This covers both experts appearing for cross-examination, or where reports have to be read.
 - (e) **A relevant foreign element.**

A forum conveniens issue, issues of foreign law or assets held abroad.
 - (f) **Relevant assets not or may not be under exclusive control of any of the parties.**

Company assets, trusts, pensions, partnership, insolvency issues.
 - (g) **Conduct issues:**
 - i) cases involving children—the conduct by virtue of which a child the subject of the litigation has, may have or might suffer very significant harm. This is aimed at significant incidences of really serious bodily or emotional harm e.g. rape, buggery, bestiality, repeated sexual/emotional, physical abuse or factitious illness syndrome. This test is higher than that contained within the Children Act 1989.

- ii) ancillary relief cases—the intentional conduct of any party has or could or might significantly reduce the assets available for distribution by the court.
2. In the following examples, the SIP is paid as a percentage of the function base or single hearing unit fee.

Example 1:

Junior counsel does a Function 5 hearing in a family injunction case which lasts 3 hours and the respondent is acting in person. The primary hearing unit fee due is £320. The SIP is 5% (£16) and so the total claim will be for £336.

Example 2:

Junior Counsel has had a one-day main hearing in a care case involving two experts and there are three parties to the proceedings. The Function F5 primary hearing unit is £430 and the SIP for experts is 20% and for multiple parties 40%. Consequently, the base fee is multiplied by 60% (£258) to bring the total claim to £688. In an F2/F3 function it is the single hearing unit that is multiplied by the relevant SIP percentage.

3. SIPs may be paid once only for each function in any single set of proceedings so counsel must elect which F2, F3 or F4 s/he wishes the SIPs to attach to. With regard to functions F2 and F3, where more than one of these function hearings have taken place, whilst counsel may apply in each for the relevant SIPs to be verified, counsel must specify in respect of which single particular hearing in each function that SIP payments should be made.

Point of principle CLA 31

If a judge certifies the same special issue at more than one hearing in a single set of proceedings, Article 10(7) of the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 provides that only one Special Issue Payment (SIP) may be made. But a SIP may be made in respect of each different special issue certified, whether at the same hearing or at separate hearings. If different counsel represent the client at successive hearings and submit claims for the same SIP, the first claim to be received will be paid.

This confirms that where special issues have been verified by the court each may be payable once.

4. In relation to the main hearing SIPs are applied to both Primary and the Secondary hearing units, when appropriate.

5. When a hearing involves special issues it is the judge who will decide, following an application at the end of a hearing which SIPs are due for payment. If SIPs (a) to (c) arise they must be certified. SIPs (d) to (g) require the Judge to additionally determine whether the case involved those special issues and that they were of substance and relevant to any of the issues before the court.
6. The judge's decision is final except on a point of law although the decision is, of course, capable of judicial review.
7. Subject to the rules on when a SIP may be claimed, payment will only be made for those special issues certified by the Judge. Any claim requesting special issues payments must be supported by a copy of the certified SIPs.
8. In a non-hearing function, it is the Commission which will consider claims for SIP payments. Counsel will be required to set out the grounds for payment on the claim form submitted to the Commission, to include whether the issues were of sufficient relevance and substance to assist in the determination of an issue and whether the work was reasonably carried out. (Article 10(5) and (6)).

Examples:

Multiple parties 9(1)(b)

9. The fact a co-respondent or other party was cited in divorce proceedings would not trigger the more than two parties provision in an application for ancillary relief because they are not parties to that application.
10. In proceedings relating to children, e.g. if grandparents of a child or children together seek orders for either residence or contact, their opponents being the parents acting in consort, it cannot be said there are more than two parties so as to justify a SIP. If, however, the grandparents become involved in proceedings between the parents, creating a triangular contest, the more than two parties SIP will arise.

Experts: 9(1)(d)

11. This is most likely to arise in public law children cases but could also arise within an ancillary relief application. An example might be a party having been permitted to rely on the evidence of a valuer in respect of real or personal property where values are in contention and another expert concerning a pension. However, the fact a valuer has been employed to value the former matrimonial home where the amount has never been in issue should not contribute towards achieving a “more than one expert” special issue payment.

Foreign Element: 9(1)(e)

12. The fact the parties were married for romantic reasons at Gretna Green or on a beach in the Seychelles will not, in the normal course of events, of itself found a special issue payment for a foreign element. If, however, the law of the foreign jurisdiction becomes relevant e.g. on the validity of the marriage, a special issue payment will be justified where the point requiring consideration is of substance and relevant to any of the issues before the court.

Assets outside of the parties exclusive control: 9(1)(f)

13. In circumstances in which certain assets of the parties are not under their exclusive control (pensions, trusts, company assets, etc) or where third parties claim entitlement to or interest in assets that would otherwise be available for distribution it may be possible to justify a special issue payment but not if the assets in question, by being kept out of the equation, have no effect on the outcome.

Conduct Issues: 9(1)(g)(i) and (ii)

14. The test in Article 9(1)(g)(i) is deliberately framed to indicate harm or potential harm to child or children beyond the threshold provisions for a care order under the Children Act i.e. “very significant harm”. Examples may be of really serious physical emotional harm e.g. rape, buggery, bestiality, and repeated sexual, emotional or physical abuse over a long period of time.

15. The conduct provision may cover the commonplace scenario in financial provision proceedings where allegations are made that the other party has been a spendthrift or otherwise cavalier in disregard to the household fund. In order to obtain a special issue payment the dissipation must be serious and occasioned by deliberate conduct to the extent that it could or might significantly reduce the assets available for distribution.

10.27 Court Bundle Payments

1. The Order includes provision for payment to be made according to the size of the court bundle in each function. If the bundle comprises 176 to 350 a “CBP1” payment will be made and if 351 to 700 a “CBP2”.
2. Where however the court bundle is 701 pages or more the fee is at the discretion of the court in a hearing function.
3. In a non-hearing function it is the Commission's assessor who decides what number of hours should be paid for the time spent in preparation in excess of the norm—see 10.31.
4. The court bundle is not defined by the Funding Order. The Family Practice Direction: 10 March 2000 however prescribes the format of the bundle for the main hearing. It covers all family proceedings in the High Court or heard in the Royal Courts of Justice or cases of an estimate of more than ½ day in all care centres, family hearing centre and divorce county court.
5. The Practice Direction only covers preparation for the main hearing. For other family hearings, if there is a court bundle it should contain such documents as are reasonably necessary for that type of hearing; e.g., application, statements/affidavits, expert reports and other documents.
6. In the event there is no court bundle e.g. a hearing for which there is no court bundle, a non-hearing function or where no hearing took place, payment is made on the basis of the number of pages within counsel's brief.

10.28 Incidental items (IPs)

Generally

1. The fee paid may also include incidental items that counsel may have incurred. These are:
 - (a) *Audio tapes, Discs or Videotapes:* Where the case necessitates counsel listening to or viewing video/audio or other recorded evidence an incidental payment may be made. This payment is made only once per tape in each case and calculated at a fixed rate of £10.90 per 10 minutes for the running time of the tape (Article 13(a)).
 - (b) *Travel expenses:* Where it is reasonable for counsel to incur travel or hotel expenses an incidental payment may be made (Article 13(b)(ii) & (iii)). Payment for travel expenses is paid at a mileage rate of 45 pence per mile if counsel drives or at the cheapest second class train fare where available.

Whether it was reasonable to travel by car rather than public transport should be considered in the context of reasonable convenience and the savings of the claim for travelling expenses 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.

No payment may be made where the court is within 40 kilometres of Charing Cross or where there is a local bar within 40 kilometres of the court town unless the use of specialist counsel is required and no suitably qualified counsel are available from the local bar. If the local bar is small, where the members may not reasonably be expected to cover all the cases that are listed daily in the local courts, it may be reasonable to instruct counsel from further afield. Similarly, if the local bar is insufficiently specialist to deal with the particular case or if the instructing solicitors were unable to find counsel either available or prepared to accept a family graduated fee case, it would be reasonable to instruct counsel outside of the local bar. Counsel should be able to justify their instructions in the CLAIM 5 and should supply written reasons for instruction from their instructing solicitors.

Point of principle CLA 30

Where a solicitor shows that the conduct of proceedings required specialist counsel, and that no specialist barrister was available from chambers within 40 km of the town in which the proceedings took place, the Commission may pay counsel's travel expenses and costs if they were reasonably and necessarily incurred. Factors affecting the decision whether counsel's travel expenses may be allowed include: the complexity of the issues; the distance between counsel's chambers and the court where the proceedings took place; counsel's possession of particular expertise relevant to the case; the location of the solicitor and client; and the need for continuity, particularly if there has been an earlier meeting or conference between counsel and the lay client.

- (c) *Hotel expenses:* These will be paid at prescribed rates depending on the area where the hotel is situated. For a hotel within the area of the Commission's London regional office £85.25 is paid per night and where a hotel is outside of that area, £55.25 is paid per night.
- (d) *Travel time:* will be paid at a fixed hourly rate of £13.60. The assessor has discretion to allow what is reasonable. In the absence of unusual circumstances where there is doubt as to the reasonableness of the amount of time claimed the assessor should allow an average amount of time which it would be reasonable to expect counsel to take to travel between the two places concerned. Whether it was reasonable to travel by public transport or car should be considered in the context of reasonable convenience and the saving on the claim for travelling time that may have resulted Article 13(b)(i).

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 incurred as a result of travelling by public transport (or) it is reasonable in the circumstances e.g. where heavy bundles have to be transported. However, if the travelling time is not less than the time it would have taken on public transport then the extra time should not be allowed. If it was not reasonable in comparison, the expenses should also be reduced to the equivalent of that which would have been incurred using public transport.

10.29 Settlement Supplement (SS)

1. Where settlement takes place during a hearing function, counsel dealing with the settlement will be entitled to a settlement supplement payment. This is paid as a percentage of the basic hearing unit fee or hearing unit fee. (Article 12(1) and (2)).

Example 1:

Junior counsel agrees a settlement in an ancillary relief case on the first day of a main hearing which was listed for four days. The Category 4 early settlement fee in Function 5 is 10% of the primary hearing unit of £305.00. An additional £30.50 is allowable.

Example 2:

Junior counsel agrees a settlement at the end of a Financial Dispute Resolution Hearing which took all day. The settlement was finally reached at 5.15 p.m. Two and a half hearing units are due under Function 3: category 4. The total hearing unit fee for that function would be £300 (2 1/2 times £120). The settlement fee at that function is 50% of the single hearing unit of £120 making a settlement supplement of £60 due. The additional payment for the Financial Dispute Resolution Hearing of £60 is added making the total payment £420.

2. The settlement payment is available in all hearing functions but not in functions F1 and F4 except in relation to proceedings for ancillary relief (if the case settles within the function F1).
3. In relation to a main hearing, the settlement supplement payment may only be paid where settlement occurs on the first day of a main hearing listed for two days or more. (Article 12(2)). A settlement supplement is not available in this function where the case is listed for less than two days and not in relation to any secondary hearing unit.
4. A settlement supplement can only be paid once in a single set of proceedings, and only when the settlement leads to the resolution of the case.
5. Counsel would usually be directly involved in reaching the settlement. If still instructed and the function is not yet complete when settlement occurs, counsel is entitled to a settlement fee. For example, where counsel's advice results in a negotiated settlement which finally concludes the proceedings. Counsel would be paid half the hearing unit fee for the preparatory work and would be entitled to a settlement supplement payment.

10.30 Post trial applications

1. Post trial applications will be paid at the appropriate function rate e.g., F2 or F3).

Examples:

Enforcement proceedings are paid under function F2. This includes committal proceedings in family injunction cases. Advice on appeal is a new function F1 preliminary to the appeal proceedings. The appeal is a separate set of proceedings to the first instance case. In a private law children case where the court has made a "final" order but sets a review for some months later, for a review of the Order, the review hearing will be paid as a F3.

10.31 Special Preparation Fee

Generally

1. Whilst the graduated fee is generally expected to be total payment for counsel's work supplemental amounts can be paid for additional work as defined by Article 16(2).
2. Article 16 applies where:
 - “(a) *the proceedings to which the relevant certificate relates involve exceptionally complex issues of law or fact; or*
 - (b) *in public law children proceedings, in relation to work carried out within the secondary hearing unit of Function F5, where the main hearing is split so that a period of at least four months elapses between its commencement and the time at which it resumes;*

such that it has been necessary for counsel to carry out work by way of preparation substantially in excess of the amount normally carried out for proceedings of the same type; or

 - (c) *the court bundle comprises of more than 700 pages”.*
3. Payment for the extra hours spent by way of preparation will be at the scheme's prescribed hourly rate of £40.20 for Junior Counsel and £100.50 for Queens Counsel for the number of hours allowed as over and above the norm for a case of the same type (Article 16(3)).

10.32 Claiming for Special Preparation

1. In relation to Article 16(2)(a) in hearing Functions (F2, F3 & F5) the judge will decide following an application for a special preparation fee firstly, whether the special preparation fee is justified with reference to the criteria, and secondly what number of extra hours counsel should be paid. There will be no appeal against the decision of the hearing judge, in relation to the fee or the number of extra hours due, save on a point of law. (Article 16(5)).
2. The special preparation fee allowed is for substantial additional preparation. Counsel must therefore state what the normal preparation time would have been in order to justify the additional necessary and to establish that it is substantial. The judge indicates the number of additional hours rather than the fee to be paid for all preparation time.
3. In F1 and F4 counsel claiming a special preparation fee will submit their claim for payment to the Commission, supplying sufficient proof of the complexity of the relevant issues of law or fact and of the number of extra hours of preparation. The claim should identify what number of hours of preparation counsel would have normally undertaken as well as the extra number of hours involved. The Commission will decide what, if any, special preparation fee shall be paid. There is an appeal from this decision to the Commission's Costs Committee. (Article 16(4)).

4. Counsel who seek a special preparation fee under Article 16(2)(a)–(c) in a hearing function, must apply at the conclusion of the hearing.

10.33 Exceptional Complexity

1. For a payment under Article 16(a) the case must be exceptionally complex, not just “exceptional” and not just “complex”.
2. As new proceedings are introduced, or changes in the law occur, counsel should not assert that consideration of the issues is exceptionally complex requiring extensive research and preparation. Lawyers practising in a particular field are generally expected to have the appropriate expertise and cannot charge for the time spent in research.

Perry v. The Lord Chancellor

The Times 26.5.94 QBD.

10.34 Public Law Children Cases

1. In public law children cases a special preparation fee may be made for additional preparation in excess of the amount normally carried out, where the main hearing is split and more than four months elapses between the two hearings. Counsel must state what the normal preparation time would have been to justify the additional necessary and to establish that it was both necessary and substantial.

10.35 Court Bundles

1. The payment is entirely at the discretion of the judge in a hearing function and the assessor in non-hearing functions. The calculation will be a multiple of hours at the set hourly rate (£100.50 for Queen's Counsel and £40.20 for Junior Counsel).

Payment

10.36 Payment Points

1. Counsel may lodge a claim for payment for all work done at defined points in the case (Article 17(2)). In that claim counsel may apply for the payment of all work done up to that point where it has not previously been claimed for.
2. The payment points are:
 - (a) when the proceedings to which the certificate relates are concluded;
 - (b) when the certificate is discharged or revoked and any review by the Commission or the Funding Review Committee has been completed;
 - (c) when counsel has completed all instructed work, up to and including Function 2 or Function 3 as appropriate. (Note: where both functions have been performed only one application for payment can be made);
 - (d) when counsel has completed all instructed work in Function 5;

- (e) where three months have elapsed since counsel carried out work and s/he has not received any further instructions.
3. Requests for payment made outside of these payment points will be rejected.
4. The final claim for payment must be made within three months of the discharge/revocation of the certificate. If counsel fails to do so, his costs may be reduced (Article 17(6))—see 10.40 post.
5. All claims for additional payment must be made at the same time as the claim for the function payment. If not claimed any later claim will be rejected as the Commission has no power to pay them separately (Article 17(7)).

10.37 How to claim payment

1. From April 2003 it will not be necessary for the work that counsel has done in non-hearing functions (or where no hearing has taken place) to be verified by the solicitor. Counsel should be prepared to supply such documentation as the Commission may request to justify the work done. In all hearing functions work done and additional payments will continue to be verified by the judge, where a hearing takes place..
2. The General Civil Contract has been amended to reflect this new payment scheme. Category Specific Rule 7.2(b) obliges the solicitor to provide written confirmation of instructions, and such other information as is required for the purpose of making a claim for payment under the scheme, within seven working days. Where the solicitor delays in complying with that obligation, counsel should inform the Commission's contracting team at the relevant regional office.
3. The Commission has designed specific forms for counsel to claim a graduated fee and this form (CLS Claim 5) must be used whenever a claim is made by counsel under this order.

The Commission's Role on Assessment

10.38 The approach to assessment

1. The General Civil Contract governs payment of solicitors' costs for family work. Remuneration is explained fully in Section E of Volume 1 of the Legal Services Commission Manual.
2. Whilst Rule 6.5 of the Contract applies the regulations for assessment of costs, the Community Legal Service (Funding) Order 2000 deals with remuneration for contracted work. It prohibits the Commission from contracting at rates higher than those prescribed by the relevant regulations. Article 6 of the Order provides that whilst the contract sets remuneration and stipulates assessment in accordance with the existing regulations, the power is statutory rather than contractual.
3. The Commission will assess all fees due to counsel under this scheme whilst the conducting solicitors profit costs and disbursements will be assessed in the usual way, through assessment by either the Commission or the Court.

4. The assessor will consider the following matters:
 - (a) whether counsel was instructed appropriately or used excessively;
 - (b) whether the solicitor was over reliant on counsel;
 - (c) whether counsel acted in accordance with his or her instructions or the certificate;
 - (d) whether the correct fee was applied for;
 - (e) whether the criteria have been met for any additional payments;
 - (f) the reasonableness of any incidental expenses claimed.
5. This is not an exhaustive list of all considerations of the issue of what sums are properly and reasonably due to counsel under the Order for work carried out within the scope of the certificate. (Article 17(8)).

10.39 The solicitor's obligations on detailed assessment

1. Rule 7.2 of the General Civil Contract has been amended to state:

“In proceedings where remuneration of counsel is determined under the CLS (Funding) (Counsel in Family Proceedings) Order 2001 (“the Graduated Fee Order”) the procedures for assessment of remuneration as set out in Rule 6.5 above take effect subject to the following:

 - (a) You must notify any counsel instructed in family proceedings, within fourteen days of:
 - i) those proceedings being finally settled or otherwise concluded, and
 - ii) receiving notice of final revocation or discharge of the relevant certificate (following any review by the Regional Director and Funding Review Committee), whichever is the sooner, that the proceedings have been settled or otherwise concluded, or as the case may be, that the certificate has been discharged or revoked.
 - (b) Where so requested, you must provide counsel with written confirmation that they were instructed to carry out the work in question, together with such other information as counsel may reasonably request for the purpose of applying for payment under the Graduated Fees Order. You must comply by sending the requested confirmation or information within seven working days of:
 - i) receipt by you of the request together with any necessary accompanying documentation (such as counsel's claim form) or (ii)
 - ii) receipt by you of any other information or documentation reasonably necessary for you to provide the confirmation or information (e.g. documentation required to show that a payment point has been reached such as notices of discharge of a certificate),

whichever is the later.

- (c) You must include details (and attach confirmation) of all sums paid to counsel in the proceedings on any claim for costs you make on assessment or detailed assessment. Where counsel has carried out work in the proceedings to date that has not yet been paid, you must await the receipt of confirmation of payment before submitting your claim.
 - (d) On any assessment of costs, if it appears to us or to the court on assessment that counsel has been instructed either:
 - i) without any prior authority required under the Rules and where the use of counsel was not justified; or
 - ii) in any other circumstances where it was not necessary for counsel to be instructed, but counsel's fees are paid or payable under the graduated fees scheme, your costs will be assessed as if counsel had not been instructed in the proceedings. Any sums paid or payable under the Graduated Fees Order shall be deducted from the amount so assessed when calculating your fees.
 - (e) Where the total sums payable on assessment exceed any cost limitation imposed by the Commission under the relevant certificate or contract, the costs payable to you shall not exceed the amount payable in accordance with that costs limitation less such sums as are paid or payable to counsel under the Graduated Fees Order.
 - (f) Without prejudice to your obligations under Regulation 112 of the Civil Legal Aid (General) Regulations 1989 (duty to inform counsel) you must inform counsel whenever counsel's fees are reduced under Article 19 of the Graduated Fees Order and any reasons for that deduction, and provide counsel with such information as he or she requires in order to pursue any review or appeal against the assessment allowed under this contract or under the Order”.
2. This Rule sets out how graduated fee payments affect the final assessment of costs at the end of the case. The solicitor is obliged to notify counsel within 14 days of discharge or revocation so counsel may be aware of the date from which the time limit starts to run (see 10.40 below).
3. The solicitor is also obliged to provide details of sums paid to counsel on any claim made for assessment. The Commission notifies the solicitors of sums paid during the case, for the purposes of calculating the running total of costs, but the solicitor may seek further information from counsel if required. Solicitors must await payment of counsel's final claim before proceeding to assessment, so it is important for counsel to claim promptly after the conclusion of the case in order to minimise delay to the solicitor's costs assessment.

4. In cases where the statutory charge applies, or the client otherwise has a financial interest, payments to counsel under the Graduated Fees Order will form part of the client's liability. Therefore the client must be informed of payment to counsel and be given an opportunity to raise any objections on the assessment of costs. The Commission will provide the solicitor with details of payments to counsel in each case.
5. The Rule also sets out what happens where counsel has been instructed unnecessarily in the proceedings, has been instructed without prior authority, or where the total of the solicitor's fees and counsel's fees exceed a cost limitation on the certificate or contract. Whilst payments to counsel will continue to be governed by the Graduated Fees Order, such payments may be deducted from the sums that would otherwise be payable.

10.40 Time limits for submission

1. Sanctions for delay on solicitors' costs were implemented at the end of October 2000. Solicitors are subject to a three-month time limit for submitting costs claims under Regulation 105 of the Civil Legal Aid (General) Regulations 1989 (as amended).
2. Counsel will have three months from the discharge/revocation of the certificate to submit a final claim, if any. In order for this provision to work, the solicitor is obliged to serve counsel with notice of discharge or revocation of the funding certificate to ensure counsel is aware of the date from which the three months will run. Rule 7(2)(a) of the General Civil Contract obliges the solicitor to serve such notice within fourteen days.
3. In order to prevent unnecessary hardship to solicitors when complying with contract rule 7.2(c), counsel is requested to promptly submit all costs claims due under this scheme following the main hearing or conclusion of the case.

10.41 Sanctions for late submission

1. Where counsel fails to submit the claim in time they will be subject to a reduction in the amount allowed. A percentage deduction may be applied. Where however the fault for the delay lies with the solicitor the penalty should be deducted from the solicitors' costs rather than counsel. The fault could relate to either the solicitors failure to provide notice of discharge/revocation or failure to supply the verification documentation in good time.
2. Counsel may appeal to the Costs Committee against a decision made by the Regional Director and such an appeal shall be commenced within 21 days of the decision by giving notice in writing to the Costs Committee specifying the grounds of appeal.
3. Although claims may be submitted out of time, a fair balance has to be achieved between the interests of the Legal Services Commission in securing prompt submission of bills, those of the client who needs to be aware of the extent of their statutory charge liability, and those of the profession in not being deprived, merely due to late submission, of costs for work properly carried out.

4. It will, however, generally be reasonable to expect counsel to be aware of and to comply with the time limits, particularly as time limits already apply to the submission of bills for detailed assessment and in relation to solicitors' costs claims. Counsel will wish to obtain payment as soon as possible and should have access to appropriate support systems to monitor their cashflow.
5. There is no longer a requirement for the time limit to be extended. Where costs are submitted outside of the time limit, deductions will be immediately considered.

The guideline deductions are:

- bills submitted up to 9 months late - 5%
- bills submitted between 9 and 18 months late - 10%
- bills submitted between 18 and 27 months late - 15%
- bills submitted between 27 and 36 months late - 20%
- bills submitted between 36 and 45 months late - 30%

Generally, it should be possible for late claims to be submitted within 48 months of the conclusion of the matter (i.e. up to 4 years out of time) but if the claim is submitted later, higher deductions may be applied.

6. The percentage reductions are a guide, so if counsel provides an explanation that justifies the delay, the regional office will consider what is the appropriate reduction in the circumstances. There may, for example, be circumstances where a bill submitted up to 3 months out of time has been delayed through no fault of the counsel and thus no deduction should be applied. Where circumstances are outside of the counsel's control it is less likely that a penalty will be imposed.

Regard will be had to what reasonable steps could have been taken to minimise delay. The factors below are indicators that it may be reasonable for some delay to have occurred. The regional office will evaluate what period of delay is reasonable and make a reduction in accordance with that decision. For example, counsel has a serious illness and is away from practice for three months but it is 15 months before the cost claim is submitted. When it was known counsel would be away for a considerable period, steps should have been taken to ensure their costs claims were assessed promptly. In the circumstances, it may have been reasonable for a delay of up to six months to be incurred. If so, a deduction of 5% would be made on the basis that the costs claim should have been submitted only six months out of time.

What is reasonable and proportionate in the circumstances?

This is a question of fact in every case. Regard will be had to the particular firm's history of late claiming.

Reasonableness

Common examples of where it may be reasonable for some delay to have been incurred are:

- (a) linked or related actions awaiting final disposal;
- (b) the court has delayed in sending the final order;
- (c) where the solicitor has failed to provide information or documentation;

Proportionality

In considering the deduction to be applied the size of the claim may be a relevant factor. If the costs claim is above average, i.e. over £2,500, it may be appropriate for a lesser deduction to be applied than that in the guidelines. In claims under £2500 the guideline deductions are considered to be proportionate and therefore it will be a case of considering the reasonableness of the reason for late submission when applying them.

7. Deductions are calculated on the total of the fee due. The deductions will be made from counsel unless the solicitor has been responsible for the delay.
8. It is anticipated that counsel may raise queries regarding apparent non-payment of claims where payment has in fact been made but counsel has not posted the payment in his or her accounts. It is reasonable to expect counsel to monitor the receipt of payments on a regular basis and therefore to be in a position to raise such queries promptly after having posted payments and checked remittance advises. Except in a small minority of cases, claims will be paid by the Commission within a maximum of four to six weeks of receipt of the fully completed claim forms. Counsel should therefore only make an enquiry of the regional office if payment is not received within two months of submission of the claim.
9. Before raising a query with the relevant regional office counsel should specifically check for payment and, if an enquiry of the regional office is appropriate, should confirm that all remittance advises since the submission of the original claim have been checked for the appropriate payment and a copy of the claim previously submitted together with any proof of receipt should be forwarded to the regional office. The process of counsel checking for payment and the inclusion of a copy of the claim (and any supporting documents available) will reduce unnecessary queries and assist the regional office in dealing with such queries as are received. Where counsel cannot provide proof of receipt of the claim by the regional office, the matter may be treated as a late claim.

10.42 Inappropriate Use of Counsel

1. Where counsel has been used inappropriately or excessively the solicitor will be sanctioned. This means that counsel will be paid but the solicitor put on notice that those sums, because they were inappropriate will be deducted at the point of payment of their final bill in the case. At that point (normally at the end of the detailed assessment proceedings) the Commission will have power to reduce the sums due to the solicitor by the inappropriate fee, subject to the solicitors' right of appeal.
2. Amendments have been proposed to the General Civil Contract, see specific Rule 7(2)(d), which authorises the approach above.

10.43 Where Counsel has been used without Authority

1. If the solicitor instructs counsel without authority in the example given in 10.7.3(a), there are two possibilities:
 - (a) it is not complex and the use of counsel is unjustified; or
 - (b) it is a complex case which would justify counsel but no application for authority was made, either at the outset or later in the case.

In example (ii), counsel's fees may be paid. In (i) the “maximum fee principle” is applied to calculate the costs due as if the solicitor undertook all the work. Counsel still obtains payment but the graduated fee due is deducted from the adjusted total due to the solicitor. This will apply to magistrates' court work, as now, and Approved Family Help certificates. In order to undertake the maximum fee calculation, counsel will be expected to provide a breakdown of the time spent on the case.

2. Where Leading Counsel is instructed without authority counsels fees will be disallowed entirely.
3. If multiple counsel are instructed without authority, work done by the second counsel is outside the scope of the certificate and the fees and any associated costs will be disallowed.
4. Amendments have been proposed to the General Civil Contract, see specific Rule 7(2)(d) which authorises the approach above.

10.44 Costs Limitations

1. Counsel has a duty to check the limitations placed on the certificate both as to scope and costs to be incurred.
2. The amended Regulation 107A ensures that counsel is only penalised where counsel's fee itself exceeds the costs limitation imposed. In other circumstances, the excess is deducted from the conducting solicitor and ensures payment to both counsel and experts.

3. Where the total payable on assessment exceeds the costs limitation imposed on the relevant certificate or contract the costs paid to the solicitor will be the amount of the costs limitation less any sums due to counsel under this order: Rule 7(2)(e) of the General Civil Contract.

10.45 POA'S and Recoupment

1. As there are a number of potential payment points during the scheme, which ensure that counsel need not wait more than three months to make a claim for payment there are no payment on account provisions at all. Applications for either an annual payment on account or hardship payment will be rejected. (Article 17(10)).
2. Where the case escapes from the scheme because it is a high cost case or has lasted more than 10 days at the final hearing, counsel's costs will be assessed either under the contract by the Special Cases Unit or by the court alongside the solicitors' costs in the usual way.
3. As escape is retrospective, the fees paid under this scheme will be deemed to have been payments made on account. (Article 19(1)). When assessment of all the costs due under the certificate is concluded and the final bill is received, payments so made will be recouped in the usual way.

10.46 The Statutory Charge and Review of Payments

1. Estimating costs is made simpler in that the fees due to counsel are directly calculable from the work counsel is instructed to perform within the proceedings. Once counsel's fees have been assessed by the Commission a letter confirming the payment made will be sent to the solicitor. The solicitor is thus made aware of the fees actually paid to counsel. Nothing in the Order obliges counsel to inform the solicitor of any appeal from an assessment. The Commission will provide the solicitor with notification of the outcome of any costs appeal made by counsel under this scheme.
2. The Commission's notification to the solicitor of sums paid to counsel will enable the solicitor to inform his client of the sums incurred, and to calculate costs for the purpose of staying within the costs limitation imposed on the certificate.
3. Where the client has a financial interest they have a right on assessment of costs to object to the costs incurred under the certificate. This includes the fees paid to counsel. Nothing within the scheme overrides the client's existing right to make representations as to the use of counsel within the proceedings.
4. Consequently, whilst counsel may have received payments under this scheme they are capable of review within the detailed assessment of costs at the end of the case. The Costs Officer can re-open the payments already made if it is considered counsel has been used excessively, inappropriately, acted incompetently, improperly or the fees paid are excessive. The Commission will comply with any public funding assessment certificate received and recoup excess payments made under Article 19(5).

5. For the purposes of detailed assessment the solicitors' bill of costs must identify all work done by counsel as well as the sums paid by the Commission. The Costs Officer can then identify whether any payments made to counsel need to be reopened and adjust the public funding assessment certificate accordingly.

10.47 Balancing

1. The Commission balances the funded client's account on receipt of the solicitor's final bill. This will continue. Where the Court assesses the solicitor's claim for costs the solicitor's claim will generally arrive later than counsel's final claim for payment because of the time required for detailed assessment.
2. Counsel will need to submit the final claim under the scheme within three months of the conclusion of the case. (See 10.40 above). Where, however, the Commission is due to assess the costs of both solicitor and counsel, submission of the claims are subject to the same time limits. To avoid inappropriate balancing, solicitors will be asked in the claim form to identify the number of counsel and number of times they were used so the Commission can ensure all counsel's fees have been received before marking the solicitor's claim as the final bill.
3. Where the Commission balances the case and distributes money but thereafter receives a claim from counsel, it will be treated as a late claim without either "good reason" or "exceptional circumstances" and disallowed in full.

10.48 Appeals

1. Appeals can be made against the decision of the Legal Services Commission to the Costs Committee from decisions made regarding individual function fee payments or other assessment decisions, save where the decision is of the judge and is final (Article 18).
2. Counsel must submit any request for an appeal, on Form APP10 or in writing, giving reasons within 21 days of the decision made, or a later date the Regional Director considers justified (Article 18(1)).
3. In any appeal counsel has no right of attendance but may, if requested and at his/her own cost attend to make representations. Counsel should ensure any documentation or representation in support of the appeal is with the regional office 7 days before the listing of the costs appeal.
4. As in any costs appeal the Costs Committee may review the Commission's assessment and may uphold the decision made or, as they are looking it afresh assess a greater or lesser sum.
5. If counsel remains dissatisfied the next level of appeal is to obtain a point of principle of general importance from the Committee. This request must be made within 21 days of the Costs Committee's decision. The consideration of a point of principle will be put back to a Costs Committee of the Commission for consideration. There is no right of attendance.

6. The Costs Committee on consideration of the case will need to assess whether the result of the review raises a point of general importance to the profession. The purpose of this is to ensure that points of principle to be heard on appeal by the Costs Appeals Committee do not turn on the particular facts of a case but raise issues of principle which are likely to affect other assessments/determination in the future. Where most points of principle are likely to arise are in the interpretation of the regulations effective in costs assessment or governing their application on assessment. The Costs Committee will consider the issue on the papers without attendance by counsel who will usually make written representations.
7. Counsel should, when making submissions for the certification of a point of principle of general importance, provide the exact wording of the point of principle they wish to be certified.
8. The Costs Committee must, when certifying a point of principle of general importance, consider whether there are any existing points of principle in the Manual of Points of Principle relevant to the request for certification. The Costs Appeals Committee's decisions are binding on future costs assessment and are maintained in the Legal Services Commission Manual. Notification of all new decisions is given via Focus and publication in further updates of the Legal Services Commission Manual.
9. If the request is granted, a clear certified point of principle must be made at the date of the meeting. If no point is certified, reasons for refusal will be given which will state either or both limbs of the basis on which the point can be certified, i.e. is it a point of principle? If it turns on the individual facts of the case, it is likely that no principle has arisen. Is it of general importance? If it turns on the very particular facts and is unlikely to arise again (and even if it did would not be generally applicable) it is not of general importance.
10. Counsel will be notified of the result. If no certification is given, there is no further avenue of appeal except judicial review of the decision. If a point is certified, the letter notifying counsel will inform him/her that they must apply direct to the Policy and Legal Department within 21 days. Any appeal must be forwarded to: The Secretary of the Costs Appeals Committee, Policy and Legal Department, 85 Gray's Inn Road, London WC1X 8TX, (DX 328 LONDON/CHANCERY LANE), Telephone number 020 7759 0000.