

Pages of Prosecution Evidence Guidance

Introduction

1. The Legal Services Commission (LSC) administers Crown Court funding for defence practitioners by way of a Litigators' Graduated Fee Scheme (LGFS) and an Advocates' Graduated Fee Scheme (AGFS).¹
2. Currently, HM Court Service (HMCS) processes AGFS claims on behalf of the LSC but this work will gradually be transferred to the LSC throughout 2010.
3. Pages of Prosecution Evidence (PPE) is a key determinant for claims made under both graduated fee schemes, and is normally referred to as one of the case proxies.²
4. Following feedback from Representative Bodies and HMCS, the LSC agreed to provide further guidance on PPE. This document aims to provide PPE guidance in relation to the operation of LGFS and AGFS that can be used by the LSC, legal aid providers, Representative Bodies and HMCS. Part B may be used as a reference guide for those prosecuting authorities unfamiliar with the PPE process.
5. This PPE guidance supports the LGFS Guidance³ and will be incorporated in the next LGFS Guidance update. This guidance has been approved by the Crown Prosecution Service (CPS) and HMCS and has been consulted with Representative Bodies.

Structure

6. This document is divided into two parts. Part A looks at the definition of PPE and Part B looks at validation of PPE.

¹ Funding for cases with a trial estimate of 41 days or more and some 25-40 day cases (Very High Cost Cases) is administered by way of hourly rates, managed under a VHCC Panel Contract.

² Other case proxies include case type, offence type (e.g. murder, fraud etc), trial length, number of defendants (for litigators only), number of prosecution witnesses (for advocates only).

³ The LGFS Guidance can be found at http://www.legalservices.gov.uk/criminal/litigator_graduated_fee_scheme.asp

Part A

Definition

7. Paragraphs (1)(2) of Schedules 1 and 2 of the Criminal Defence Service (Funding) Order 2007 (as amended) (“Funding Order”) state that:

For the purposes of this Schedule, the number of pages of prosecution evidence served on the court includes all

- a) witness statements;*
- b) documentary and pictorial exhibits;*
- c) records of interviews with the assisted person; and*
- d) records of interviews with other defendants*

which form part of the committal or served prosecution documents or which are included in any notice of additional evidence, but does not include any document provided on CD-ROM or by other means of electronic communication.

8. In table 1 following this paragraph, we explain each of the criteria that must be satisfied for the evidence to be counted as PPE. Please note **all** of these criteria must be met before it can be claimed as PPE.

Table 1 – PPE criteria

Elements of the PPE definition	Explanation
Pages	<ul style="list-style-type: none"> • Evidence must be in the form of ‘pages’ • Any page that is classified as PPE is to be counted as one page regardless of the number of lines or images on the page or the size of small or large typefaces
Served on the court	<ul style="list-style-type: none"> • Evidence must be served on the court
Type of evidence	<ul style="list-style-type: none"> • Evidence must be witness statements, documentary exhibits, pictorial exhibits or interviews of the defendant or co-defendants
Included in the prosecution bundle or NAE	<ul style="list-style-type: none"> • Evidence must be served as part of committal bundle for either way cases, or form part of the prosecution bundle for indictable only cases (served prosecution documents) or be included in any notice of additional evidence (NAE)
Excludes electronic evidence	<ul style="list-style-type: none"> • Electronic evidence cannot be claimed as PPE • Please note that where the defence team are served prosecution evidence on CD-Rom or DVD, and a paper copy of that evidence has been served on the court, the pages that have been served on the court will be counted as PPE for the purpose of the graduated fee • Where the defence team and the court are served prosecution evidence on CD-Rom, and all of the above

	criteria are met, a claim can be made by way of special preparation (see Special Preparation section below)
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Evidence not counted as PPE

9. Consideration of evidence that does not meet the PPE criteria is wrapped up in the graduated fee. For the avoidance of doubt, the following is a list of evidence that is excluded from the PPE proxy (note this list is not exhaustive):
- a) Evidence that is not served on the court
 - b) Evidence that does not form part of the prosecution bundle or that is not supported by a NAE
 - c) Evidence that is served in electronic format⁴
 - d) Title pages, index pages, exhibit labels and separator pages
 - e) Evidence served after the litigator or advocate is no longer representing the client
 - f) Defence generated evidence (including the product of any defence analysis of forensic computer images or copies of electronic storage media (e.g. hard drives))
 - g) Transcripts edited for the purpose of being put before the jury⁵
 - h) Pre-sentence and psychiatric reports
 - i) Physical exhibits
 - j) Spreadsheets or databases
 - k) Unused material
 - l) Audio and video evidence⁶
 - m) Advance disclosure⁷
 - n) Applications for Special Measures
 - o) Prosecution Opening
 - p) Case Summary
 - q) Indictment
 - r) Application to adduce bad character or hearsay evidence⁸
 - s) Evidence served for confiscation proceedings

⁴ Please note evidence that meets the criteria (e.g. witness statements in the committal bundle that is served on the court) that is served in electronic format can be claimed as Special Preparation where the work is assessed and paid by way of hourly rates.

⁵ Please note that when a transcript has been expanded, because the original was deemed insufficient for the jury, the fullest transcript produced will be included in the PPE count. The version that is in the committal bundle should also be counted.

⁶ Please see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2981.html> for a High Court decision confirming that the PPE definition does not and cannot include DVD footage so it cannot be claimed as PPE or as special preparation.

⁷ Please see paragraph 16.

⁸ Except where supported by a NAE

Notice of Additional Evidence

10. A notice of additional evidence is not defined in the regulations. The CPS routinely serves additional evidence under a standard NAE but not all prosecuting authorities follow the same format. Therefore, in limited circumstances, a formal document from the prosecuting authority, identifying the new evidence as being used evidence and formally served as part of the prosecution case may be sufficient.
11. If evidence is served on providers and it is unclear whether the evidence should form part of the prosecution bundle, providers should seek written clarification from the prosecuting authority at the time.
12. Please note that an application to adduce bad character or hearsay evidence cannot be classed as a NAE.

PPE limitation

13. Where a litigator stops representing their client for any valid reason, the volume of PPE that can be claimed is limited to what has been served on the court up to the date the litigator stops representing that client.
14. The PPE proxy reflects the work done by the provider, therefore it would not be appropriate to include pages served after they have no further involvement in the case.

Multiple defendants

15. Where a litigator or advocate represents more than one defendant on a case, and an identical (or nearly identical) bundle of PPE is served for each defendant, only the PPE from one bundle may be included for the purposes of claiming a graduated fee under the LGFS or AGFS. The remuneration for extra work likely to have been undertaken for additional defendants is catered for in the defendant uplift within each scheme.

Advance disclosure

16. Advance disclosure does not count towards PPE. This is because such evidence is often duplicated in the committal or first prosecution bundle.
17. However, in circumstances where the case concludes before the prosecution documents are served, and it does not fall within paragraph 18 of Schedule 1 or paragraph 16 of Schedule 2 of the Funding Order, and the PPE count is relevant, the correct number of pages of PPE is the material served on the court for the purposes of enabling the Judge to deal with the case, which is usually similar to the advance disclosure bundle.⁹

⁹ Para 1(3) of schedules 1 and 2 of the Funding Order

Bad character and hearsay

18. Where bad character or hearsay evidence is not served under a NAE, it cannot be claimed as PPE.¹⁰

Evidence served at trial

19. CPS practice is to have blank NAEs available at court and to serve evidence during the trial under a NAE. Where this does not happen, the defence teams can raise it with the prosecution casework manager at court who will serve a NAE if appropriate.

20. When a witness produces a new piece of evidence whilst in the witness box and it's agreed to exhibit that evidence, a NAE cannot be served as the evidence has already been adduced. Such evidence cannot be objectively validated and it does not fall within the definition in the Funding Order. It therefore cannot be claimed as PPE.

Special preparation for litigators

21. Litigators can claim special preparation where:

- a) any or all of the prosecution evidence, as defined in paragraph 1(2) of the Funding Order, is served in electronic form only, or
- b) the representation order is dated on or after 3 August 2009 and the number of PPE exceeds 10,000

and the determining officer considers it reasonable to make a payment in excess of the graduated fee, within the circumstances of the case.

22. The appropriate officer must consider:

- a) the reasonable number of hours to view the evidence where 21(b) applies;
- b) the reasonable number of hours to read the evidence where 21(a) applies.

23. There is a 100,000 page cap on PPE for representation orders granted on or after 14 January 2008 but before 3 August 2009. There is no provision for special preparation for pages in cases with representation orders granted before 3 August 2009.

Special preparation for advocates

24. Advocates can claim special preparation where:

- a) it has been necessary to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue;
- b) the representation order is dated on or after 2 August 2004 and the number of PPE exceeds 10,000;

¹⁰ Please see http://www.cps.gov.uk/publications/finance/gfs_faq.html#_22 for further information.

- c) any or all of the prosecution evidence, as defined in paragraph 1(2) of the Funding Order, is served in electronic form only

and for b) and c) the determining officer considers it reasonable to make a payment in excess of the graduated fee, within the circumstances of the case.

25. The appropriate officer must consider:

- a) the number of hours in excess of the amount considered reasonable for cases of the same type where 24(a) applies;
- b) the reasonable number of hours to read the evidence where 24(b) applies;
- c) the reasonable number of hours to view the evidence where 24(c) applies.

Assessment of Special Preparation

26. Where evidence has been served in electronic format on the court and the defence teams, the following will apply when making a determination for special preparation:

- a) Where pages of statements, exhibits or interviews are scanned into a computer and served electronically for convenient presentation¹¹, and it meets the PPE definition, the determining officer may adjust the special preparation fee so that the provider receives an amount as if this evidence had been served in paper format
- b) Where electronic media material is served (e.g. a sample of individual documents or images extracted from a computer hard drive that are not scanned statements or exhibits but which the prosecution are relying on), and it meets the PPE definition, the determining officer may consider the reasonable hours of time spent viewing the material.

¹¹ The CPS have confirmed that paper copies will normally be served. However, paragraph 28(a) may still apply in some circumstances.

Part B

History of validation of PPE

27. Both the LSC and HMCS validate claims against official court records by reference to information contained on the court's CREST system.
28. In August 2008, a high volume of PPE disputes led to the establishment of a PPE Stakeholder Group (consisting of LSC, HMCS, CPS, Ministry of Justice and Representative Bodies) who developed an improved process of validating PPE. The process was for CPS to endorse the PPE on the committal bundle front sheet and endorse an updated running total of PPE on any subsequent NAE. At the conclusion of the case the defence advocate completes the PPE form either agreeing with the latest CPS PPE figure or explaining why there may be a discrepancy, before handing the PPE form to the Court Clerk for validation purposes.¹² There is no requirement for the prosecution advocate to endorse the PPE form. The new process was introduced in May 2009.
29. However, in August 2009, the LSC discovered there were still large-scale PPE disparities, which posed an unacceptable risk to the legal aid fund. The LSC took immediate remedial action and requested that advocates provide objective evidence supporting the alleged PPE with the PPE Form and that litigators provide objective evidence supporting the claimed PPE for LGFS claims.

Current process for validating PPE

30. The PPE Stakeholder Group agrees that the LSC must be able to confidently validate claims against the court records captured in CREST. The Group agrees that the benefits of the current process are starting to be realised and with time, the LSC believes the process can be further improved as confidence in the data held on CREST increases.
31. In the meantime, the process for validating PPE is as follows:
- a) CPS will provide paginated evidence bundles supported by an endorsement of the PPE on the committal bundle and updated running totals of PPE on any NAE¹³
 - b) Defence advocates complete the PPE Form in accordance with the PPE process and provide objective evidence of the PPE
 - c) HMCS update information on CREST
 - d) Defence advocates submit claims to HMCS
 - e) Litigators submit claim to the LSC supported by evidence of the claimed PPE (along with the documents specified in the LF1¹⁴)

¹² PPE Form and PPE process can be found at http://www.legalservices.gov.uk/criminal/new_advocacy_rates.asp

¹³ The LSC and HMCS are exploring rolling out this process to other prosecuting authorities.

¹⁴ Please note litigators are not longer required to submit the PPE Form http://www.legalservices.gov.uk/criminal/cds_news_10517.asp?page=2

- f) The LSC validate claims against CREST and supporting evidence. Where information is inconsistent, the LSC will liaise with HMCS so the information on CREST can be updated if necessary.

32. Please note the following in relation to this process:

- a) Evidence of PPE must be sourced from material generated by the prosecution and provided to the defence teams in the course of the client's case. Such evidence of PPE includes:
- Committal bundle or NAE front sheets endorsed with the CPS page count
 - Index of evidence
 - Paginated pages
 - Any other objective evidence that has been generated by the prosecution.
- b) Evidence of PPE must be generated by the prosecution office and cannot be a document prepared by the defence and prosecution advocate.
- c) The PPE form is no longer mandatory for LGFS claims.
- d) Where the prosecution have provided a committal bundle or NAE cover sheet or have paginated the evidence, it is the responsibility of providers to ensure they maintain this evidence for the purposes of claiming payment.
- e) HMCS is not required to provide copies of any documents.
- f) Prosecuting authorities are not required to provide duplicate copies of supporting evidence for PPE purposes.
- g) The LSC and CPS have agreed that where the bundles of evidence have not been paginated or indexed, or where a running total of the PPE has not been endorsed on committal bundles or NAE then litigators should inform the LSC using the contact details below, and the LSC will raise this as an issue with CPS direct.
- h) The CPS will not routinely deal with queries raised directly with them by defence litigators in relation to PPE after cases are concluded.
- i) For non-CPS cases, litigators should inform the LSC where evidence has not been paginated or indexed and they can therefore not provide PPE evidence to support their claim.

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