

# Costs Assessment Guidance

*This is a draft of the proposed Costs Assessment Guidance to have effect from October 2007 in relation to work carried out under the Unified Civil Contract.*

## Part 1: All Contract Work

### 1.1 Basic Principles

#### Introduction

1. The Legal Services Commission is obliged to pay remuneration for civil cases properly due in accordance with the Community Legal Services (Funding) Order (as amended) and its contracted obligations.
2. This guidance applies to all civil matters and cases commenced from 1 October 2007 under the Unified Contract that are payable at Hourly Rates under the terms of the Specification to that Unified Contract
3. Work is remunerated according to time spent by a fee earner at the relevant hourly rate. The rates are set by Unified Contract and are found in the Payment Annex to the Contract Specification. The rates in the Payment Annex cover all civil matters or cases commenced under the Unified Contract save for those that become subject to an individual case contract with the Commission.

### 1.2 The approach to assessment

1. Many of the basic principles governing assessments are contained in the Civil Procedure Rules introduced in April 1999 which provide the general framework for dealing with costs, including the courts discretion in the making of costs orders, the form and process of detailed assessment, and the basis, and criteria for quantification of costs. In particular, all assessments of Contract Work as payable by the Commission are carried to be carried out on the Standard Basis (see Paragraph 8.1 of the Specification).

#### **CPR 44.4(2) states that:**

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

- (a) only allow costs which are proportionate to the matters in issue; and*
  - (b) resolve any doubts whether costs were reasonably incurred or reasonable and proportionate in favour of the paying party.”*
2. The primary document in assessing costs is the bill of costs or the claim form submitted, which sets out the items and amounts being claimed. Items not appearing in the bill or claim form will not be paid.

3. Assessment of fee-earner's costs involves making a judgment, having regard both to the bill and to supporting documents provided and all relevant circumstances, as to the whether, in respect of individual items of work and the case/matter as a whole:
  - (a) the work done;
  - (b) the time taken;
  - (c) the remuneration rates applied;
  - (d) any enhancement claimed;are in accordance with the provisions of the Unified Contract, reasonable, and proportionate. Assessment of disbursements is considered further at section 2

#### **Work done**

4. Allowance is only made for work claimed where it is supported by appropriate evidence on the file. The onus is on the supplier to provide evidence on the file that the work was done.
5. The assessor is not to take into account hindsight but is to try to view the question of what is reasonable from the perspective of the average competent fee-earner doing his or her best for his client at the particular time when the work was done.

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

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

6. However, the fact that an expert report was not used may justify a careful examination of the situation to decide whether it was reasonable to instruct the expert. The fact that a solicitor made an application to the court which was unsuccessful may lead the assessor to ask whether it was reasonable to have made the application.
7. Note that the provisions of CPR 48.8, concerning solicitor and client assessments, expressly do not apply to assessments of CLS funded work. In particular, the fact that the Client has requested that or approved work being carried out (CPR 48.8(2) (a)) does not mean that this work can be claimed against from the CLS fund. Further, the assessment against the CLS fund is on a standard rather than indemnity basis (see 1.3.1)
8. Accordingly, the question of whether an item is allowed on an assessment of costs payable from the CLS fund should be determined in the same way as whether it is allowable against another party on an inter partes detailed assessment, subject to the following specific exceptions falling within the definition of “legal aid only costs” in rule 8.26 of the Unified Contract Specification:
  - (i) Work (including counsel's fees, experts' reports or other disbursements) that the Commission has requested or authorised to assist in decision making regarding the grant, continuation or amendment of the terms of CLS funding;
  - (ii) Completion of the Commission's forms and other communications with the Commission

- (ii) Work for which the Commission has granted prior authority (Paragraph 6.15 Unified Contract Specification).

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

### **Time Spent**

9. The assessor must then assess whether the time spent was reasonable, in particular whether the work has been performed with reasonable competence and whether a reasonably competent fee-earner would have taken that time to perform the work. Again, there should be no difference in time allowable whether an item is being assessed on an inter partes detailed assessment or for payment from the CLS fund.

### **1.3 Contract Requirements**

1. Work is only payable in accordance with the terms of the Unified Contract. Certain rules within the Unified Contract Specification, at Paragraphs 1.1 and 8.35, apply to all levels of service of Unified Contracted work.

#### **Overheads and Administrative Work:**

2. Subject to any express exceptions, payment will not be made for time spent on purely administrative matters. This will include the costs of opening and setting up files, maintaining time costing records and other time spent in complying with the requirements of the Unified Contract other than the direct provision of legal services to a Client.
3. Expenses which may be classed as overheads of the contracting Supplier are generally not payable under the Contract. Photocopying in-house is generally an overhead expense as are the costs of postage, couriers, stationery, faxes, scanning, typing and the actual cost of telephone calls. However, see section 2.5.
4. Other examples of overheads include staffing expenses (including training), the cost of maintaining premises, taxes and administrative expenses.

#### **Legal Research**

5. Legal research is not usually allowable on assessment because:
  - (a) Fee earners carrying out work under the Unified Contract are assumed to have sufficient expertise in the relevant areas of law; and
  - (b) researching the law is not specific to the immediate matter or case but may be considered part of the overheads of the supplier in developing the fee-earner's knowledge of that area.
6. However, time spent in researching a novel, developing or unusual point of law or the impact of new legislation to the particular case may be allowed in exceptional cases. Where a claim for research is made, the assessor would expect to see evidence of the research on file, e.g. copies of case reports etc. Fee earners will usually already have at least a general knowledge

or understanding of the point being researched and should record their reasons for undertaking the research in addition to their assessment of the effect of the law on the individual circumstances of their case. A generalised attendance note not backed up by this evidence will be disallowed.

### **Compliance with the Funding Code**

5. All Contract work must be carried out in accordance with the Funding Code Criteria, Procedures and Guidance. The Funding Code Criteria appropriate to the level of service and type of case must be satisfied at all times that work is carried out and this work must be in accordance with the Criteria under which funding was granted.
6. In relation to Controlled Work Suppliers must not continue to act where the Criteria are no longer satisfied. In Licensed Work solicitors and other legal representatives are subject to a duty to report to the Commission in a number of circumstances under rules C43 and C44 of the Funding Code Procedures. These include a requirement to new information or a change of circumstances has come to light which may affect the terms or continuation of the certificate (rule C43 (iii)).
7. **Point of Principle CLA 3** states:  
*“If a solicitor fails to report a significant change, which is known to him, in either the circumstances of the funded client or the case, costs subsequently incurred may be considered not to have been reasonably incurred and may be disallowed”.*

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

1. In Contract work, routine letters and telephone calls are remunerated on fee per item basis. Other preparation and attendances are generally recorded in units of 6 minutes per time spent, payable according to the appropriate hourly rate.
2. Primarily, information from the files will consist of:
  - (a) letters;
  - (b) “notes” of work done, attendances on the client and others and telephone attendances;
  - (c) documents prepared and considered.
3. The letters and note of telephone calls on file will generally be sufficient to justify the unit charge for those items. For other preparation and attendance, including longer letters and telephone calls being claimed on a time basis, all time spent by a fee earner should be recorded on the file. Estimates are not generally allowed, particularly for substantial amounts of time. In *Johnson v. Reed* [1992] All E.R. 169 the court stated:  
*“Claims for unrecorded time are likely to be viewed with very considerable care on taxation and it would only be in an unusual case that any substantial allowance be made...”.*
4. Such time should only be allowed where clearly supported by the evidence from the file. This will include the length and complexity of letters or other documents prepared or considered and the hand written notes of attendances.

5. Even where preparation has been fully recorded with many entries with exact timings on precise dates, this does not mean that all the recorded time must be allowed. It must still have been reasonable to undertake the item of work claimed and the amount of time spent must be reasonable and proportionate.
6. The assessor must consider whether the attendance note contains sufficient information to justify the time spent or whether there is other supporting evidence on file of the work done. Where the attendance note does not justify the time spent the claim must be reduced to the amount of time, if any, justified by the evidence on the file (e.g. a statement of the client's instructions).
7. As well as looking carefully at individual attendance notes it is important to look at the total time claimed for advising on particular issues or considering or preparing particular documents in order that any duplication of work can be identified and an assessment made of the overall time spent. Further, the contents of the letters and attendance records are of general importance in allowing the assessor to make a judgment as to the weight and complexity of the case and the particular problems with which the solicitor had to deal.
8. Standardised attendance notes, without any confirmation or reference to specific instructions obtained from or advice given to the client are not satisfactory evidence of the reasonableness of the work done for any but the briefest of attendances.
9. In particular, any individual attendance note for providing advice or taking instruction over two units (12 minutes) should contain some detail showing the instructions taken or the advice given or how the case was progressed. This does not mean that every word of the advice given as to the law and procedure needs to be recorded-often advice on a particular procedure will be relatively standard, but one would expect to see some reflection in the attendance note of the personal circumstances of the client and the advice given on the case. The longer the attendance claimed, the more detail would be expected. In the absence of either such detail or of other appropriate supporting evidence it would normally be appropriate to reduce the attendance allowed to two units (12 minutes).
16. Appropriate supporting evidence could include:
  - (a) handwritten notes of the interview with the client;
  - (b) documentation prepared in the course of or as a result of the interview. For example, an attendance on a witness to take a statement could be evidenced by the presence of the statement on a file;
  - (c) letter confirming the advice given to the client on an attendance.
17. There is no requirement that attendance notes should be typed up. If they are, then a reasonable time, may be allowed for time spent dictating an attendance note where it is reasonably lengthy and detailed.

## **1.5 Preparation**

1. This item, sometimes, misleadingly, referred to as "documents", will include all drafting of documents, consideration of documents and evidence provided by the client or other parties, and general consideration of strategy, evidence needed and evidence to be put forward and

whether to make or accept offers to settle a case. Regardless of the benchmarks below in respect of what time may be allowed in respect of preparation, suppliers must claim time in excess of that actually spent.

### **Documentary evidence**

2. On receiving documents from the client and disclosure of documents from another party an initial brief perusal of all the documents will be reasonable in order to identify which documents are relevant. Having done that, the sufficiently competent and experienced fee earner should be able to identify the key issues and only consider in more detail those documents which are most relevant.
3. In any but the simplest cases there will be need from time to time to re-examine the core documents to consider their effect on the case. The degree to which this will be justified depends entirely on the complexity of the issues. In small to medium cases re-examination of the papers should be necessary primarily on reviewing the case prior to instructing or briefing counsel and again when trial bundles have to be prepared. The time spent on both these will inevitably be considerably less if the fee-earner has at an earlier stage separated the most relevant documents that are likely to be of use in court. Where this has not been done time spent in reading through all the documents may not be reasonably spent.
4. Where documents are scanned into a computer, the work of scanning is, of course, not claimable as legal work, the selection of documents to be scanned is.
5. In assessing the time spent for perusal and consideration of documents, if in doubt the assessor must have sight of attendance notes and copies of the documents concerned or at the very least full details of the type of documents concerned and the number of pages involved. This is likely to be essential in larger more complex claims

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

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

6. As a very rough guide it takes approximately 2 minutes per A4 page to read the most simple prepared document in order to consider its contents and significance. Time taken will depend on the quality and layout of the document e.g. whether handwritten or typed, single or double spaced, large or small font etc. Documents of greater complexity may take a longer time either to read, compare with other documents or prepare e.g. it may take 20 minutes or more to read a complex medical report although this will depend on the skill and knowledge of the fee-earner reading it. For some less experienced staff more time may be taken whilst a senior practitioner who specialises in medical negligence would take less.
7. There are cases where detailed examination of previous records is essential in order to progress the case properly. For example, in building disputes there will be many documents vital to the case like the contract, specification documents; plans; correspondence between the owner, architect and builder, architect’s instructions, minutes of site meetings, time

sheets, invoices, delivery notes and many others. Another example of where very careful consideration of the records is likely to be justified is that of medical negligence.

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

**Point of Principle CLA 7** states:

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

12. This is subject to the qualification that, although the fee-earner must have a general knowledge of what is in the medical records it is not uncommon for the records to be supplied to the Claimant’s medical expert who then takes on the responsibility of examining and often indexing the records. It would not be reasonable for both the fee-earner and the expert to be paid for detailed examination of the notes.

13. **Point of Principle CLA 12** states:

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

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

### **Drafting of documents**

14. The time allowed for drafting documents is based on the time reasonably spent by a fee-earner dictating that document (whether the fee earner in fact dictates or types the letter him/herself). The length and content of the court documents, the statements of witnesses, instructions/briefs to counsel and other documents should be considered particularly if lengthy time is claimed. To consider the reasonableness of the time spent preparing documents it will normally take 6–12 minutes preparation to consider and dictate each page of a straightforward document. More complex documents take longer.

### **Formatted documents**

15. The time spent in the mechanical preparation of documents (i.e. time spent by a clerk/typist preparing documents and the printing/binding of the same). Such costs involved are considered to be part of office overheads. The fee-earner can claim the time spent considering and dictating new documents, subject to the reasonableness test.
16. Fee earners must prepare master bundles for disclosure to the court and often for counsel. Fee earners should identify the documents for the master bundle and draft the index to the bundle. This is fee earner work and should be allowed: *B v. B [1994] 1 FLR 323*. It is the making up or copying of any additional bundles that is not. It may be reasonable for fee earners, where the bundles are above average size, to check that the copies have been properly collated and reproduced.

## 1.6 Letters, Calls and emails

### Letters

1. In respect of claims for letters out appearing on the file there are in principle three possibilities on assessment:
  - (a) that no payment is allowed;
  - (b) the item fee from the payment schedule is allowed (routine letters out);
  - (c) preparation time is allowed at the appropriate hourly rate from the schedules (non-routine letters).

Subject to the following paragraphs, the default position would be the item fee (b).
2. The circumstances in which a letter may be disallowed are generally where it would not have been necessary to progress the case. The most likely examples of this are:
  - (a) Letters that would not have required the instigation of a fee-earner. For example, a letter simply confirming an appointment that has already been made would not generally be allowable but a letter requesting that the client make an appointment would.
  - (b) Multiple letters sent unnecessarily. A letter should be disallowed if its content could reasonably have been included in another letter that was sent on the same day. Clearly, that will not be the case if a second letter is drafted following a significant change of circumstance on that day, or where an open and a without prejudice letter are sent at the same time to another party. It may in any event be reasonable to have separate letters to deal with different matters for the sake of clarity, but it would be unusual for more than two letters to be sent to the same recipient on the same day.
  - (c) Letters arising from the oversight of the fee-earner. That would include a letter enclosing a document that the fee-earner had previously forgotten to send or otherwise to address a matter that should have been dealt with previously. Otherwise, however, covering letters enclosing documents are allowable.
  - (d) Letters with no content specific to the client or case, such as information on the supplier's file storage arrangements, that are, in effect, the supplier's leaflets.
3. For a claim for a non-routine letter to be allowed the time spent must (a) be outside the range of an average charge (as a bench mark it may be reasonable to expect the time taken to exceed 10 minutes before allowing a 'time charge') and (b) justified by the need to pay particular attention in drafting the letter. Correspondingly, as a rough guide it would be unusual to allow more than the standard rate for a letter which was not more than one page long unless the content of the letter was substantial enough to be likely to take additional preparation time. The letter must not be charged both as a routine letter and also as a time charge.
4. Where details are inserted into a standard format letter, the allowance for that letter is again based upon the time reasonably spent by the fee-earner in dictating the content to be inserted. Time spent by the fee-earner inserting the text him/herself (if greater) is not allowable. The letter will be payable as a routine or non-routine letter rate on the same

principle as in paragraph 3 above, having regard to the contents inserted into the standard template.

5. When considering the claim as a whole, the assessor should look at the nature of the proceedings and time spent with the client and/or witness(es) to see if the numbers of letters claimed are reasonable. If a large number of letters have been written, but there is no information on the face of the claim to justify the number claimed, the assessor should look at the file.
6. A claim for routine letters received can be made in family cases/matters but not in other civil proceedings. In both civil family and non-family proceedings a claim may be made for consideration of non-routine letters received where time in excess of 10 minutes is spent and this is justifiable in terms of the length and complexity of the letter.

### **Telephone calls**

7. Telephone calls may again be claimed as routine (with the item fee in the schedule) or non-routine, or may be not allowable at all.
8. Calls may be disallowed where they do not progress the case because e.g:
  - (a) they are administrative, such as a routine reminder of an appointment that has already been made or confirmation of receipt of correspondence;
  - (b) they arise from the previous oversight of the fee earner, for example forgetting to take instructions or provide an advice on a point in an earlier attendance, or the client's justifiable complaint about lack of contact or progress;
  - (c) they are abortive. However:
    - (i) It would be reasonable for an initial unsuccessful attempt to make a telephone to be charged, but not repeated attempts to the same number. A single routine call item may be allowed;
    - (ii) where justifiable, preparation time may instead be claimed for preparing for the call;
    - (iii) time may be charged for recording repeated attempts to make a call and the reasons for these repeated attempts;
    - (iv) where the fee earner actually gets through to the number but the person is unavailable, or where a message is left on an answerphone, these may reasonably be allowed as routine calls.
9. In relation to long calls the practice is that any call over ten minutes or more in length may be claimed as a timed attendance, but not also as a telephone call.
10. However, In *Bwanaoga v. Bwanaoga* [1979] 1 ALL ER 105 it was said:

*“It is not possible to justify by reason or logic a method of charging for time spent on telephone conversations, which would otherwise have necessitated interviews, different from the method of charging for the interviews which have been saved. In those circumstances...a practice should now be adopted of recording the time spent by fee earners on telephone calls relating to preparation for trial and such time should be aggregated and allowed on taxation at the hourly rate. It must be emphasised that distinction must be drawn between telephone calls which represent interviews whereby*

*material progress is made and routine calls which should be charged as in the past. Furthermore records must be kept of calls falling into the first class so that time spent and the content of the conversation can be considered.”*

The appropriate test is whether the call took the place of an interview and led to material progress being made. It is not just a question of the length of the conversation or call; in particular time ‘on hold’ cannot make .

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

#### **Faxes/E-mails**

12. Where an e-mail or fax is sent instead of a letter then it can be allowed as a letter on normal principles. A printout of the e-mail or fax must be kept on file. No separate claim can be made for sending a hard copy e.g. of a letter sent by e-mail or fax as no extra preparation time is involved. The assessor may in his or her discretion allow an actual time charge for preparation which properly amount to attendances provided that the time taken has been recorded.
13. Internal e-mail communication within a firm should be treated as an overhead. Routine e-mails or faxes received are not claimable as separate items. The same principle applies where the same e-mail or fax is copied to more than one recipient, i.e. only one item may be claimed for.

#### **1.7 Attendances on the client and others**

1. Attendance records should show not only the time spent but also what was done and in the case of an actual attendance, what was discussed.
2. The first question must be: was it reasonable to do the work recorded in the attendance note? To make this judgment it is necessary to have a clear view of the nature and complexities of the case and the client. It is clearly reasonable to interview a witness once. It might be possible to obtain a statement merely by writing to the potential witness, but the solicitor will usually wish to probe the information given and to get some view of the likely impression that witness might make on the court. Sometimes it may be necessary to see the witness a second time to go through the statement prepared by the supplier and get it signed though this should be less common. Further attendances to ask additional questions should only be allowed if there is good reason for them not being asked at the earlier interview(s). Such a reason might be the need to comment on a witness statement produced by the other party. The assessor should always ask: would a letter (or telephone call) have been sufficient? If so, the costs should be reduced to the cost of a letter or call.
3. It is the fee earner’s responsibility to ensure that attendances on the client are not excessive. Where such excessive attendances do occur they should not be allowed on assessment against the CLS fund any more than they would be on an inter partes detailed assessment

(see paragraph 1.2.8). Further, it should be remembered that, in Licensed Work, if the funded client is requiring the proceedings to be conducted unreasonably or in such a way as to incur unjustifiable expense to the fund, the fee-earner is under a duty to report this to the Commission (rule C44 (i) Funding Code Procedures) who may consider withdrawing funding. Where a fee-earner fails to do this when it was reasonable to have expected it, subsequent costs may in any event have been unreasonably incurred. Only a proper study of the file will reveal this.

4. As with preparation time, attendance notes or other relevant documents should justify the time claimed if the documentation does not provide adequate information or does not exist at all then the costs should be disallowed.
5. In exceptional cases, it may be appropriate to allow for the attendance of more than one fee earner on a client e.g. a fraud case where preparation work has been divided between more than one fee earner due to the volume of papers and complexity of the case. However, file must provide justification as to why the use of more than one fee earner was reasonable.
6. It will again only be in exceptional circumstances that a fee earner will be able to claim for attendance (or other communications) with other fee earners in the same organisation working in the same Category of Law. The attendance note will need to justify why it was necessary for the fee earner with conduct to seek advice from a colleague, given that fee earners should be given cases that are within their competence. Time spent in supervision of one fee earner by another should be considered part of the supplier's overheads.

## **1.8 Reviewing files**

1. Files will sometimes exhibit general claims for attendance of the following nature e.g. "reviewing file" or "perusing and considering file" or "considering next steps". Subject to the specific provisions for file review, as a general principle suppliers would be expected to be reasonably familiar with their files and should not be allowed to claim for general re-reading and consideration of the file, every time an action is taken. In order for such claims to be reasonable there must be some specific circumstances justifying the time in the particular case e.g. reviewing the file prior to an attendance on the client. This should be noted on the file. Such claims should generally be linked to a specific action.
2. Equally, if it has been some considerable time (usually at least a month) since any action has been taken on the file due to no fault of the fee earner then again it may be reasonable for that fee earner to claim for some time refreshing his or her mind as to the salient points. It should be borne in mind that the time allowed would generally be limited, in that re-reading a file with which one is already familiar even after an absence of several months-will only involve picking out the key areas and will not involve having to read every letter and document on the file. Equally, such attendance notes should be linked to some particular development or need to take further action on the file.
3. Extra time incurred that arises from conduct of the file changing from one fee earner to another within the supplier is not allowable. Such changes occur through the firm's own administrative arrangements and a private client, for example, would be unwilling to pay for the cost of a new fee earner familiarising him or herself with the file because the firm had chosen to transfer the matter.

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

### **Generally**

1. Where is doubt as to the reasonableness of the amount of time claimed for travel the assessor should usually allow an average amount of time which it would be reasonable to expect the solicitor to take to travel between the two places concerned.
2. Where travelling time is incurred a decision will need to be made whether it was reasonable for the fee earner to travel or whether the work could be done in some less expensive way, for example by instructing a local lawyer agent.
3. Normally, where a five hour round trip is required it may be difficult to justify the fee-earner's travelling time and expenses, and it would be more appropriate to instruct an agent who is able to attend within a one hour round journey. However, in some cases, e.g
  - (a) court applications, other than those that are straightforward;
  - (b) conference with counsel;
  - (c) interviewing a witness where the fee earner will wish to test the witnesses credibility for him or herself;
  - (d) because of the specialised nature of the case, the fee earner's close personal understanding of the matter or the nature of the client,it may be reasonable for the fee earner to travel. The reason for making the journey should be recorded on the file.
4. Where any claim for travel time is reduced because it is considered that a local agent should have been instructed, a notional allowance should be made for time that would have been spent briefing the agents and considering any reports or correspondence.

### **Travel to the funded client**

5. Usually, the funded client will be expected to attend the fee earner's offices. However, there may be circumstances where the solicitor has to travel to the client, for instance, because the funded client is house bound or may be being detained in prison or in hospital. Travelling time and disbursements may be reimbursed in these circumstances.
6. However, under Paragraph 8.35 (c) of the Unified Contract Specification, in respect of all travel time and expenses or agent fees, no extra costs are payable that arise from the fee earner being based in a location distant from to the client. The availability of other suppliers within the client's area should be taken into account in considering whether the fee-earner is based in a distant location.

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

1. Use of agents is subject to the requirements of Paragraph 5.33 of the Unified Contract Specification, reflecting the Contract Standard Terms. In particular the supplier conducting the case or matter is responsible for supervision of the agent and ensuring that the agent carries out the work in accordance with the Contract.
2. Where another supplier is instructed they stand in the shoes of the conducting supplier and their costs form part of the conducting solicitor's profit costs. They are not claimable as disbursements nor can any claim be made on account of solicitors' agents' fees. If agents are

instructed, London rates are payable where the agent is based within the Commission's London region.

4. Counsel in independent practice cannot be a supplier's agent. Suppliers may indicate that the reason they manage their work this way is because prior commitments or the distance of the court make instruction of counsel desirable where there are insufficient numbers of local solicitors to use as agents. Suppliers may of course continue to instruct counsel where necessary in the course of litigation but they must do so in accordance with the Unified Contract and regulations, in particular the requirement for prior authority where counsel is instructed in the magistrates' court. Counsel's fees must be charged as such, either under the family graduated fee scheme under a fee note delivered by counsel.
5. However, barristers who are employees of a solicitor's firm or other suppliers may be instructed as an agent in the same way as any other fee earner of that firm or supplier.

### **1.11 Waiting**

1. Most waiting will occur on attendances at court, and the solicitor will have very little control over the length of time involved.
2. Few fee earners will wish to spend time in waiting. However, fee earners should not be unreasonably cautious in assessing the time that he or she needs to arrive at court. The earliest should be half an hour before a case is timed to start or before any pre trial conference.
3. Where time is claimed at court as attendance or conference, rather than waiting, rates for taking further instructions from the client, conferences with counsel or negotiations with other parties, the important question is whether there is evidence on the file of attendances that advanced the case. Fee earners and/or barristers may generally be expected to be fully prepared before the hearing, but sometimes, it may be more convenient for the fee earner or barrister to arrange a conference at court prior to a hearing than at their offices or chambers at a different time. Where further documents or evidence are served at the last minute it may also be a legitimate use of the time available to take further instructions. In some cases, such as possession proceedings brought by social landlords, the initial hearing may represent the first opportunity to address the case with the opponent.
4. In most cases it will be more difficult to justify claiming time for attendance or conference beyond the time that the matter was due to go into court, unless the Judge directs that the parties spend time considering settlement or other issues. If the parties are still in discussion at the time of the hearing, however, it may be reasonable for the discussions or negotiations to continue if the case is not immediately called on. A lunchtime adjournment is not included in waiting time, but claims may be made for any attendance or conference that takes place.
5. It is, of course, essential that no time is claimed both as attendance/conference and waiting.

## 1.12 Work done in connection with the proceeds of Crime Act 2002

### Introduction

1. Work done by a supplier to comply with the Proceeds of Crime Act (POCA) 2002 and the money laundering regulations generally (i.e. work done that is not client-specific), is administrative work and as such is not claimable from the legal aid fund.

Similarly, internal consultations (e.g. between a fee-earner and the firm's money-laundering compliance officer) would be administrative work under general cost assessment principles.

The situation is more complex in situations where the work is client-specific and is not an internal consultation. This is work that is directly involved in the provision of contracted legal services to the client and so may be claimed from the fund, subject to reasonableness and the views below as to what may be allowed against the Fund.

This work may include:

- (a) Procedures for checking the client's identity;
- (b) Providing advice to the client on the effect of the money laundering laws;
- (c) Taking further instructions where the solicitor has knowledge or is suspicious that a money laundering offence may have taken place;
- (d) Considering whether to make a report to NCIS;
- (e) Reporting to NCIS where appropriate;
- (f) Applying to the court for guidance;
- (g) Considering whether the firm can continue to act for the client in the circumstances;
- (h) Considering how to advise the client without 'tipping off'.

### Checking identity and making a risk assessment

2. In identifying whether someone is likely to be involved with the proceeds of crime, the Financial Services Authority recommends that advisers undertake a risk assessment and high risk businesses are identified as any that involve an intensive use of cash, e.g. plant hire, restaurants, night clubs, dry cleaning, building, plumbing, electrical or decorating services, mini cabs and market traders. Whilst this does not mean that individuals who have these trades/are employed in these businesses are guilty of offences, it is the higher use of cash transactions that might lead to some monies being received that might be proceeds of crime. Checking the identity of a client is a pre-instruction procedure whereby the solicitor must ensure they obtain proof of the client's identity. This procedure was in place prior to the new money laundering regulations and is not new to legal advisers. The cost of this procedure will be borne by the supplier in any event, as it is a preliminary step to determine whether instructions can be accepted from that client.

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

3. To what extent these costs are chargeable will depend on why the work is being done and when. The Law Society recommends that solicitors change their client care letters to explain the law in this area so that the client understands at the outset what steps can be taken and that when taken they are directly chargeable to the client. It would be an amendment to the

firm's standard client care letter and should not form a separate letter. The Law Society advises that the explanation should be in general terms without reference to the client's particular circumstances.

After initial instructions are received there may be points at which the solicitor and client spend time on POCA issues, for example, considering another party's finances. Such time is chargeable to the Fund, subject to the reasonableness of the time spent.

**Taking further instructions on whether an offence has or will be committed, considering whether to make a NCIS report, making a report to NCIS**

4. The firm may be receiving monies from (or otherwise becoming concerned in financial arrangements) with the client or someone else – common examples would be:
- transactions or settlements during the case;
  - private payment for legal services; or
  - receiving legal aid contributions (under the proposed new system for means-testing criminal legal aid).

Reflecting on whether an offence has been committed and what steps to take may be driven by a number of reasons, including:

- (a) to avoid the solicitor committing the offence of failing to disclose;
- (b) to determine whether the client's or someone else's assets are criminal property in the context of assessing financial eligibility; or
- (c) to obtain consent from NCIS where the firm is to receive monies from (or otherwise becoming concerned in financial arrangements) the client or another.

If the purpose of the work is to consider how to avoid an offence by the solicitor of failing to disclose, it is **not allowable** against the fund. This work does not benefit the client, and its performance has no effect on the question of whether the firm can continue acting.

In contrast, if the firm has made a report to NCIS and has to also consider whether it can continue acting and how to advise without 'tipping off', this work would be claimable, subject to reasonableness.

If the purpose of the work is to determine whether the client's or someone else's assets are criminal property in the context of applying financial eligibility criteria, it is **not claimable**. Work done in the context of applying financial eligibility criteria is not claimable.

If the purpose of the work is to obtain a consent from NCIS (and therefore a defence to substantive money laundering offences) because the firm is to receive monies from or otherwise concerned in suspected financial arrangements, it is **claimable if** the transaction or settlement is in the context of the case. This work can be properly described as directly involved in the provision of contracted legal services, as a necessary part of the process.

If the reason for receiving monies or becoming concerned in arrangements is the collection of private payment for legal services, then by definition it is nothing to do with the Commission and is therefore **not claimable**.

If the reason is to do with collecting contributions under the proposed new system for means-testing criminal legal aid, it should be **claimable if** and to the same extent as the work done collecting other types of contributions may be claimable.

## **Considering whether the firm can continue to act and whether ‘ tipping off’ has been committed and seeking guidance from the Court**

5. Any application for an adjournment within proceedings is generally within the scope of the certificate. If a firm has to seek directions and guidance from the Court as to whether or not they should continue as the client’s solicitor, this will fall within the scope of proceedings. Whilst this is not a usual step, in the sense that it is not common within the proceedings, it arises out of the solicitor’s professional obligation to appear as they are on the court record as the acting solicitor. It is anticipated that directions would only be sought where there was a pending hearing and the solicitor was unsure whether to continue to act. In such cases, this is client specific work.

If, however, the reference to the Court is to seek the Court’s guidance on whether or not the solicitors should report to NCIS, the driver for the application is the firm’s position and is therefore not within the proceedings and not client specific. It is not capable of an amendment to the certificate as it does not fall within the proceedings.

Whilst considering whether the firm can continue to act is client specific work, and will be allowed subject to reasonableness, considering whether the firm has ‘tipped off’ or making an application directly to the Court in respect of the firm’s own position is not client specific.

### **Complying with Production Orders**

6. Once NCIS has conducted an investigation the Assets Recovery Agency (ARA) may decide to initiate proceedings. This can include a production order served on a firm for the release to ARA of client documentation.

Whether this is chargeable will depend on the funding position. If the client is a former client, with no current relationship existing between client and solicitor, the work in complying with the order will be borne by the firm. Where however the client is a current client with the benefit of public funding, compliance with the order would be client specific.

## **2 DISBURSEMENTS**

### **2.1 General**

1. “Disbursements” means travelling and witness expenses and other out of pocket expenses properly incurred by a fee earner which would be properly chargeable to a client. Disbursements are assessed on the basis of determining whether they were reasonably and proportionately incurred and are reasonable in amount subject to any prior authority granted. “Reasonable” means what is reasonable for the proper conduct of the case in all the circumstances.
2. The test is based on the reasonably competent fee earner at the time the disbursement was incurred. Hindsight should not be used.
3. Regard must be had to the purpose and importance of the disbursements to the case, the particular service involved and the extent to which there is a choice of alternative service

providers and whether all elements of the service are justified in the particular case and at the particular time.

4. Payment for disbursements that are more expensive by reason of the distance of the client from the supplier's office payment will be limited to what would have been reasonable for a supplier instructed in the client's location

### **Costs of Sign Language Interpretation**

5. A disbursement does not include costs which are overheads of the firm or to be borne by them by way of some professional obligation. The Disability Discrimination Act 1995 places an obligation on service providers to make reasonable adjustments so that they can assist clients with disabilities. The supplier as service provider is therefore obliged to make adjustments, where it would be reasonable to do so. The adjustment is not a disbursement as it is to be borne by the supplier. Where it would not be reasonable to make the adjustment, the client can be charged and so the costs may be a disbursement and reimbursed by the Commission. In recognition of the level of these costs and to prevent any gap in provision, the costs of sign language interpretation have been deemed unreasonable for suppliers to bear on an ongoing basis. These costs may be reimbursed by the Commission. It is important, however, for the costs of the interpretation, and any additional preparation time incurred by the interpretation, to be calculated and notified to the Commission separately, so that the cost does not get passed onto the BSL client via the statutory charge.

## **2.2 Agents' Fees**

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

## **2.3 Fee Earner's Travelling Expenses**

1. Generally, the questions that will arise are:

- (a) was there a reasonable need for the journey;
  - (b) was the appropriate form of transport used.
2. Most travel will be to court, to counsel for a conference, to take statements from witnesses, to inspect the scene of the incident or to see the client. All these have been dealt with elsewhere when considering the time spent.
3. These expenses are generally to be allowed at the actual expense or at a specified mileage rate. Whether it was reasonable to travel by car rather than public transport should be considered in the context of reasonable convenience and the saving of the claim for travelling time that may have resulted. The question of mode of travel depends on comparative costs, taking into account the fares incurred and the time saved by use of the more expensive mode of transport.
4. The use of taxi travel may well be reasonable in that although the disbursement claim will be higher, the travelling time would be substantially less than that incurred as a result of travelling by public transport or it is reasonable in the circumstances e.g. where heavy bundles have to be transported. However, if there is no saving in travelling time and no evidence of special circumstances then the disbursement should be reduced to the equivalent of that which would have been incurred using public transport.
5. Paragraph 4.16 of the Practice Direction to Rule 43.4 CPR states that local travelling expenses incurred by solicitors will not be allowed on assessment and that, as a matter of guidance, 'local' will, in general, be taken to mean within a radius of 10 miles from the court dealing with the case at the relevant time. Accordingly, such time will not be allowed on assessment by the Commission.
6. The cost of travel by air may only be allowed if there is no reasonable alternative and the class of fare is reasonable in all the circumstances, or if the air travel is more economical taking into account the time saved. Cheap air fare offers should be used where possible, however, the more money spent on an air ticket, the greater degree of flexibility is purchased in terms of late booking facilities, flight availability and refund on cancellation. It would be usual to expect alternative quotes to be sought to identify the most competitive route. If the assessor determines that it was unreasonable to use air travel, the appropriate rate for travel by an alternative means of public transport should be allowed.
7. Invoices/receipts should always be produced in support of claims for travel expenses. Claims for up to £10 will not normally require substantiation by provision of a receipt or disbursement voucher, but should be justified on file. All expenses of £10 or more (excluding mileage) must be substantiated by the relevant disbursement voucher or an explanation why it is not available on the claim or on file. If prior authority has been obtained to cover the expense, then the voucher and a copy of the authority must be available but there is no need to justify why the expense was incurred, unless the amount exceeds the prior authority given.

#### **Travel/overnight expenses**

8. The cost of overnight accommodation should only be allowed in the exceptional circumstances that the assessor is satisfied that an attendance at a distance is justified and that the need for an overnight stay is justified. This would involve so much travelling that it

would be unreasonable to undertake the travel and attendance in a single day or such a long attendance that travel and attendance in a single day would be unreasonable.

- 9 The “Guide to Allowances” currently suggests an overnight allowance of £59.90 for expert and professional witnesses saying in inner London and £54.55 elsewhere.

### **The Congestion Charge**

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

### **2.4 Client’s Travelling Expenses**

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

### **Funded Client’s travel costs to attend experts**

2. *R v. Legal Aid Board ex parte Eccleston* says that the Commission does have power to grant prior authority for a funded client’s travel expenses to see an expert, where the report is essential for the proper conduct of the proceedings, and the funded client cannot afford the expense involved in travelling to the expert.
3. In Licensed Work cases, where this issue is more likely to arise, prior authority applications will be made under Paragraph 6.15 of the Unified Contract Specification, for costs that are either unusual in nature or unusually large. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns a personal expense of the funded client may arguably make the expense unusual in its nature.
5. The fee earner is not, of course, obliged to seek a prior authority but may instead seek to justify the costs on assessment. However, it is advisable to seek prior authority given
  - (a) the exceptional nature of these costs; and
  - (b) that prior authority is the only proper mechanism whereby costs covered by an inter partes costs order but not allowed on an inter partes detailed assessment may be allowed on assessment against the CLS fund.

6. In his judgment, Mr Justice Sedley determined that the client must be “impecunious” and that the expense must be necessary “in order to make or keep the case viable”. When considering an application for prior authority in connection with such expenses the following criteria should be applied:
- (a) It must be demonstrated that the expenditure is necessary to keep the proceedings viable. In other words the test is that the litigation would not be able to continue or would fail unless this expense is met;
  - (b) The funded client must establish that he or she does not have the resources to meet the expense. The fact that a litigant is in receipt of public funding does not automatically satisfy the test of “impecuniosity”. The funded client should provide a full breakdown of weekly income and outgoings, together with capital resources, to demonstrate that he or she cannot afford to meet the particular expense. This test will be more difficult to satisfy where the amount is small, although each case should be determined according to its individual circumstances;
  - (c) If the expert is based locally, then it would not generally be reasonable for the funded client to seek financial assistance from the Commission to attend the appointment. This is akin to a visit to the funded client’s own solicitor’s office. An application for prior authority or payment should generally be refused in these circumstances unless the funded client can demonstrate that the proceedings would otherwise fail;
  - (d) If the expert is based some distance from the client’s home and the court where the case would be dealt with, justification should be provided as to why a local expert should not or could not be instructed. The solicitor should set out the steps which had been taken to identify an appropriate local expert e.g. by reference to the Law Society Directory of Experts. It would not generally be reasonable to instruct a distant expert simply to avoid delay if adequate expertise is available locally;
  - (e) The test should be based on the nature of the expertise available. It may be appropriate to instruct an expert outside of the local area if he or she has specific expertise which is unavailable locally or a limitation period is approaching and the funded client could not be seen promptly locally (provided that the funded client and his or her solicitors were not responsible for the delay in instructing an expert). The nearest expert with appropriate expertise should be used e.g. it is not necessarily justified to use a London expert in a Manchester case if an appropriate expert is available in Liverpool;
  - (f) The funded client must justify why he or she needs to attend the meeting with the expert; e.g. if a physical examination is necessary then clearly it would be reasonable to do so;
  - (g) The applicant must provide a full breakdown of the proposed expense;
  - (h) Any available alternative sources of funding should be considered;
  - (i) The proposed expenditure must be proportionate in relation to the issues in the case.
7. Where a funded client is required to submit to a medical examination at the request of the other side, it is normal for those expenses to be borne by the party requesting the examination. In those circumstances, the expense is generally settled in advance and would not usually form part of the funded client’s costs. If the expense had not already been paid

by the opposing party, it should be claimed as an inter partes item in the bill where inter partes costs are ordered. Prior authority will generally be refused.

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

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

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

12. The Commission has implemented the European Directive on Legal Aid [13385/02). This Directive applies to 'cross-border' disputes which are cases where one party to proceedings in England and Wales, resides outside of that area. Article 7 of the Directive stipulates that legal aid should cover the following costs directly related to the cross-border nature of the dispute:

*“(a) interpretation;*

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

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

13. In terms of travelling costs, the test is the same as set out in paragraph 15 in that the client’s presence at Court must be necessary in order to make or keep the case viable.
14. In a cross-border dispute, the costs of travelling to experts will be subject to the test in Eccleston (i) – see paragraph 7, except that the Commission will not require impecuniosity to be shown.
15. Articles 7(a) and (b) of the Directive provide a safety net for the payment of interpretation or translation costs. Where proceedings are initiated by public bodies it is a matter of human rights that the documentation of the proceedings are in a language the recipient will understand. In such cases, it would be reasonable to expect the public body to provide translated documents. In all other circumstances the Commission will meet the translation/interpretation expenses where necessary and subject to reasonableness in amount.]

## **2.5 Photocopying**

1. Section 4.16(5) of the Costs Practice Direction to CPR Part 43 states that the costs of making of copies of documents will not generally be allowed. This is reflected in Rule 8.35 (f) of the Unified Contract Specification, as these costs are considered part of office overheads.
2. The exception stated in the Practice Direction is if there are “...unusual circumstances...” or the documents “...are unusually numerous...”. There is no guidance on determining these factors. As a rule of thumb, copying 500 pages may be considered exceptional. Where copying is sent out commercially the lowest available rate should be sought. Where copying is carried out in house the total amount claimed should not exceed the lowest commercial rate obtainable.
3. Where copies of documents held by the supplier are requested by another party, this will be subject to the other party making payment per page requested, and no claim should be made on assessment regardless of the amount or nature of this copying. However, where request payment for copies of documents they provide this payment is claimable on assessment, subject to the reasonableness of the amount. However, the usual position will be that each party will request copies of documents from other parties following disclosure. In that case, payment can only be claimed on assessment in respect of the balance of costs payable to another party.

## **3 VAT**

1. This section deals with general issues of Value Added Tax (“VAT”) as it effects the Commission and claims made by its suppliers for work done. VAT is a complex tax so this overview is very limited in scope. A full guide has been published by the Law Society and can be accessed at their website [www.lawsociety.org.uk](http://www.lawsociety.org.uk) following the “Tax Law” and “Law Society VAT Guide” links.

2. VAT is a tax on consumer expenditure collected in the United Kingdom on all business transactions. It is collected whenever there is a supply of goods or services by a taxable person as part of their business. The provision of legal advice, assistance and representation is a supply of services. Solicitors' firms usually registered for VAT and provide a service in respect of their business for profit. The position of Not for Profit Agencies may be more complicated,
3. When a VAT registered solicitor is preparing a bill to his or her client, VAT **must usually** be added to the value of the supply when the solicitor's bill is calculated. For example, a bill for £100 must have the VAT (of £17.50) added making the total the client is due to pay £117.50.
4. All services (whether Legal Help, Help at Court or Legal Representation) provided by the solicitor in a publicly funded case are supplied to the client. As they are supplied to the client, the client is the recipient of the service so it is always the client's status that is relevant. This is particularly important if the client is considered to reside overseas. It will also be important where the proceedings have arisen during the course of the client's business, but that will be unusual in proceedings under the Access to Justice Act.
5. For the purposes of VAT law, anything, which is not a supply of goods but is done for a consideration is a supply of services (Value Added Tax 1994, Section 5(2)). Whilst there must be a link between the service and the payment for those services, the payment itself does not have to come from the recipient. In publicly funded cases, the fact that the Commission pays the supplier does not alter the relationship between the client and the solicitor for VAT purposes.
6. VAT is generally added to the work done by the supplier, which is fairly straight forward. There are however a number of more complex issues which need to be borne in mind when calculating the exact value of the supply.

### **Disbursements and expenses**

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

### **Costs Incurred**

8. Any item incurred by a solicitor in the course of making his own supply must be included in the value of the supply when VAT is calculated (*Rowe and Maw v. Customs & Excise Commissioners* [1975] STC 340).
9. The question to ask is whether or not the expenses incurred were an integral part of the provision of legal advice to the client. Examples of such expenses are; the solicitor's travelling expenses; postage; telephone charges; and interpreter's fees. CPR PD 44 confirms this approach.

10. If a solicitor has to go to court to represent the client the supply he or she makes is not just the provision of advocacy and advice but includes his or her travel time together with the incidental travelling expenses.
11. As a general rule, travelling expenses incurred by a solicitor in the performance of his or her client's instructions are not VAT disbursements and must be included as part of the solicitor's overall charge.
12. *Row & Maw* claimed that rail fares incurred by them in the course of carrying out their client's instructions did not represent a taxable supply of services for VAT purposes since the payment by the client of the sum demanded was not consideration for the supply but rather reimbursement of sums incurred by the solicitors as agents on the client's behalf. The Court held that the expenditure was on the services supplied to the solicitors rather than to the client and so the charge made by the solicitor was part of the total consideration for all the services supplied to the client and therefore could not be divided for the purposes of calculating VAT.
13. If a travel expense includes VAT, the VAT should not be claimed or calculated twice. The VAT should be never be double charged, merely accounted for.
14. If the client does not speak English sufficiently to provide instructions themselves, then the use of an interpreter is an integral part of the supply as it is necessary for the interpretation to be provided before any legal advice can be given.

### **True Disbursements**

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

*[Custom and Excise Notice 700]:*

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

The following can be treated as disbursements provided the guidelines set out above are adhered to:

- (a) company registration fees;
- (b) company search fees;
- (c) land registry postal search and registration fees;

- (d) land charges postal search and registration fees;
- (e) court fees;
- (f) witness fees;
- (g) sheriff agent fees;
- (h) fees for medical or police reports;
- (i) oath fees paid to another solicitor or Commission for Oaths.

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

- 17. The solicitors have two options. The first would be to pass on the cost of the disbursement to the client as a VAT inclusive amount (if taxable) and excluded from calculating any VAT due on the main supply of legal services to the client. The solicitor cannot reclaim the input tax on the supply.
- 18. Unless that invoice for the disbursement is addressed directly to the client, the client is also prevented from reclaiming input tax as he does not hold a valid VAT invoice.
- 19. Generally it is only advantageous to use this method of treating a disbursement if no VAT is chargeable on the supply by the third party where the client is not entitled to reclaim the VAT. This generally happens in publicly funded bills except where the client can reclaim. Those circumstances are limited to where the proceedings were brought in the course of the client's business.
- 20. Alternatively, services can be treated as supplied to and by the solicitor under Section 47(3) of the Value Added Tax Act 1994. The solicitor can then reclaim the related input tax (subject to the normal rules) and must charge VAT on the onward supply if appropriate. If a solicitor supplies goods as an agent and issues an invoice in his or her own name, he or she must account for VAT as if he or she were the seller.

#### **How should solicitors claim VAT?**

- 21. Page 6 of the CLSCLAIM1 and pages 4 and 7 of the CLSCLAIM2 contain boxes for suppliers to detail disbursements incurred. The first box described as "disbursements subject to VAT" covers those costs incurred which are truly part of the solicitors integral service. These must be entered here with VAT amounts even if no VAT has been charged e.g. travel expenses and interpreters fees. This box should also be used for disbursements which are "true disbursements" where VAT has been charged e.g. experts reports. The second box described as "disbursements not subject to VAT" is for those items which would not form part of the integral supply "true disbursements" e.g. court fees, search fees and also expert reports where no VAT is paid because the expert is not VAT registered.

#### **Counsel's fees**

- 22. A concessionary treatment for counsel's fees was agreed when VAT was first introduced in April 1973. The solicitor may treat counsel's advice as supplied directly to the client and the settlement of the fee as a disbursement. Counsel's VAT invoice may be amended by the name and address of the client and inserting per before the agent's own name and address.

The fee note from counsel can be recognised as a valid VAT invoice in the hands of the client. Equally for counsel it is the client's VAT status that is relevant – see 23 below.

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

23. Where the services are provided to a client who is considered to reside overseas, VAT is not chargeable if the client resides outside the EU. It should be noted however that supplies in relation to land are always chargeable.
24. Following the introduction of the VAT (Place of Supply of Services) Order 1992 in January 1993 services are not “zero-rated” but rather deemed to be supplied in the country where the client resides and are thus outside of scope of United Kingdom VAT. The exception to this general rule is the supply of legal services relating to land.
25. In publicly funded cases involving ownership and related issues of United Kingdom property, VAT must therefore be charged irrespective of the client's place of residence. Examples include possession proceedings, landlord/tenant cases or declaration of ownership claims. It will not include services relating to land on the administration of a deceased estate or where the services relating to land are incidental to a much larger transaction.

### **What is an “overseas client”?**

26. These are of two types: clients either resident or whose place of belonging is situated within other EU states and/or clients who reside/belong outside of the EU.
27. If an individual receives services for a non business purpose i.e. in their own personal capacity, they belong for VAT purposes where they have their “usual place of residence”. “Usual” place of residence does not have to mean permanent residence although length of stay is a factor.
28. Three factors determine “usual place of residence”. These are established in a Tribunal decision of *US AA Limited* (LON/92/19504) as:
  - (a) where the person actually lives irrespective of homes and other countries;
  - (b) where their family is; or
  - (c) where their job is.

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

29. HMRC take the view that the legal services are supplied where the client belongs, i.e. where they have their place of residence. If the client's asylum status is not yet determined (or has been determined and they have no right to stay), HMRC's view is that, even though the client may be physically present in the UK, their place of residence can only be in the country from which they have originated. The same VAT position will apply to other individuals with no right to stay, e.g. an illegal entrant who is not an asylum seeker.
30. Once a person has been granted a right to stay, e.g. overseas forces, students attending university here, or self-employed nurses under contract, VAT applies as normal. In cases where the client is resident, e.g. services supplied to a resident sponsor, VAT can be accounted for in the usual way. If the client is the sponsored person residing overseas, then VAT does not apply and is not accounted for.

31. Consequently, **any** legal services provided to asylum seekers (or others without a right to stay), whether for their asylum applications or in relation to other areas of law, are supplied to them in their country of origin. This places the service outside the scope of UK VAT where that country is outside of the EU. Inside the EU, the service attracts VAT (where the supply is not for the purposes of any business activity of the client).
32. The tax point will be at the conclusion of the legal work and no apportionment should be necessary unless other work is done after the determination of the right to stay, when the client would be resident and VAT chargeable. However, if VAT is chargeable for part of the life of the case or matter, for example because the funded client changes their residence during its course, the life the bill or claim will be apportioned accordingly. If the client has lost contact with the supplier before the case has concluded, it would be right not to charge VAT for the work done.
33. As this is existing HMRC policy, although the policy was not matching common practice, suppliers may have previously over claimed VAT. The Commission is not, however, expecting suppliers to identify such cases and actively seek refunds until the Commission has established a refund policy with HMRC. For all pending cases unbilled, and for all future work on or after 1 October 2005, VAT should not be charged.
34. Suppliers will need to be aware of their client's immigration status in order to know how to correctly treat the supply for VAT purposes. Any queries on VAT in individual cases should be referred to the HMRC's National Advice Service on 0845 010 9000. Any queries on the Commission's approach to VAT should be referred to [anthony.cox@legalservices.gov.uk](mailto:anthony.cox@legalservices.gov.uk)

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

36. In business cases, VAT paid can be offset as "input tax" where the proceedings relate to the business. Such cases are extremely unusual under the Access to Justice Act 1999, but may be funded where, for example, there are serious allegations of abuse of position by a public authority. If the business client wins the case and gets a costs order against the losing party, the paying losing party will pay net of VAT (i.e. not pay VAT) on the costs order. It remains the Commission's responsibility to pay VAT on the legal costs incurred.

## **4. Form Completion**

1. The general position is that time may not be claimed for the completion of forms that do not have legal content or progress the case. No time can be claimed for completion of forms that are required purely to meet suppliers' contracting obligations towards the Commission (see further paragraph 8.35 (a) of the Specification).
2. Accordingly, time may not be claimed for completion of the Legal Help form Controlled Work 1. In respect of that form, additionally, the client has not been assessed as eligible to receive the public funding service before its completion and no funded level of service is in place in respect of that matter.
3. You may however, claim for completion of application forms for Controlled Legal Representation in Immigration cases and for Licensed Work certificates. The general time standard for such forms is 30 minutes, but more may be payable in complex cases. A

(usually) lower amount of time may also be claimed for completion of forms to seek amendments to Licensed Work certificates and for increases to upper financial limits in Controlled Work Cases.

4. Completion or assistance with completion of means forms is not normally claimable. This is not legal work, but compliance with the requirements of the Unified Contract in respect of provision of services only to clients who are financially eligible. Information on means, further, is usually that of the client. In exceptional circumstances, where the client does not have relatives, friends or other support to provide assistance, it may be permissible to claim for time in relation to means forms. This would be in circumstances analogous to those of *Ecclestone*, above, where without such assistance the client's case or matter would not be viable because they would be unable to obtain public funding. Care must be taken to ensure that the fee earner does not assume responsibility for the statement of the client's means.

## **5. Appeals and Reviews**

- 5.1 The procedures for appealing assessments of Contract Work are set out at paragraphs 8.47 to 8.65 of the Unified Contract Specification

## **Part 2: Controlled Work**

### **1. Funding Code**

1. Only work within the appropriate level of service can be paid for. In particular, the issue and conduct of legal proceedings is not permitted under Legal Help.
2. Work will not be paid where the appropriate Funding Code Criteria are not met. This applies both to merits on a continuing basis (e.g. sufficient benefit of the work at Legal Help) and, at the outset of the matter, financial eligibility. This reflects the fact that all aspects of carrying out Controlled Work are devolved to suppliers and that they, rather than the Commission, are the assessing authority for the client's means under the Community Legal Service (Financial) Regulations 2000

### **2. Exceptional Cases**

1. Matters that are initially subject to Standard or Graduated Fees will be assessed by the Commission where the supplier claims the matter as an Exceptional Case on the basis that the costs, as calculated at hourly rates, exceed the relevant threshold.
2. In such assessments, where it appears that the supplier has delayed applying for a Licensed Work level of service in order to allow the costs to reach the exceptional threshold, any costs incurred after the point when an application for Licensed Work should have been made will be disallowed and the matter paid at the standard/graduated fee level.
3. Such a reduction will not be made, however, automatically at the point where an application for Licensed Work could have been made. In particular, it will be reasonable to delay such

an application where it appears that the matter may shortly be capable of settlement under the existing level of service.

## **Disbursements**

1. Note that in Controlled Work matters, court fees are not a permitted disbursement, save under Controlled Legal Representation in applications to the High Court for review or reconsideration of an Asylum and Immigration Tribunal decision under Section 103A Nationality Asylum and Immigration Act 2002, where the client is unable to obtain exemption from that fee.

## **Part 3: Licensed Work**

### **1 The Funding Certificate**

#### **1.1 General**

1. The funding certificate, and any amendments, are conclusive as to what work the solicitor/counsel have been authorised to do. On assessment it is the only authority under which suppliers and counsel may be paid.
2. Even where a certificate covers the proceedings up to and including trial, it will bear a limitation to that effect. Subsequent work, e.g. as to implementation/enforcement, is only covered to the extent specified.
3. The certificate may, however, be limited as to steps in the proceedings, particular parties or to certain work, e.g. obtaining an opinion from counsel. If it is limited, payment will not be made out of the Community Legal Service Fund for work done outside the limitation. Solicitors should be aware that work done outside of the certificate cannot be paid for by the funded client or anyone else on the client's behalf (s.22(2) Access to Justice Act 1999 and Paragraphs 7.1 to 7.6 of the Unified Contract Specification) save in the limited exceptions set out in *Littaur v. Stegges Palmer* [1986] 1 WLR 287.
4. A certificate limited to counsel's opinion or to preparation of papers for and obtaining counsel's opinion will cover the costs of preparatory work reasonably necessary to refer the matter to counsel and a pre-opinion conference with counsel (if reasonably necessary) but will only cover one written opinion from counsel and will only cover settling pleadings where this is specified.
5. Even with a full certificate a fee earner may seek a prior authority under Paragraph 6.15 if he or she wants to be sure of payment of specific costs.
6. The certificate can only cover one action, cause or matter, apart from the exceptions set out in C35 of the Funding Code Procedures (in particular, no client should generally have more than one certificate for private law family proceedings).
7. However, in *Gareth Pearce v Ove Arup Partnership Ltd* [2004] EWHC 1531 (Ch), it was held that the equivalent provision under regulation 46 (3) of the Civil Legal Aid (General) Regulations 1989 only prevented a certificate covering more than one set of civil proceedings in existence at the same time. Thus where solicitors had issued but not served

in a first set of proceedings they were not prevented from claiming in respect of a second set of proceedings under the same certificate.

8. The certificate will cover only one funded client. Joint certificates cannot be issued. In the case of a minor or a person under disability although a litigation friend or child's guardian may be named in the certificate the funded client will be the minor or person under disability.
9. The certificate will specify both an individual nominated fee earner and supplier. If there is a change of firm (even if the same individual solicitor continues to be nominated), an amendment of the certificate should be applied for to amend the name of the conducting firm.
10. Work under the certificate can be carried out by any Approved Personnel within the fee earner's office.
11. The Commission's computer system CIS determines the individual proceedings within each action, cause or matter. Each certificate issued will set out for each of the proceedings a scope limitation for the work authorised to be undertaken as well as a costs limitation on the costs to be incurred in respect of such work authorised.
12. It is essential that both fee earner and counsel ensure the certificate covers all the work that needs to be done for the funded client. All certificates contain a limitation and it is particularly important to ensure the work to be done is within the limitation, if payment is to be made. The Standard Terms of the Unified Contract (28.28) oblige the supplier to check the certificates issued.
13. Generally if the wording is incorrect or not in accordance with the needs of the funded client, it will affect:
  - (a) solicitor and counsel, who will not get paid for work outside scope;
  - (b) the funded client who might not be covered for all that is necessary and who may become vulnerable to a personal claim for costs by the other party;
  - (c) a successful opposing party who might not be able to claim costs against the Community Legal Service Fund.
14. On assessment regard must be had to the scope of the certificate. Where work is unauthorised or falls outside the cover provided all such costs including counsel's fees/expert fees and other disbursements will be disallowed.

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

15. Payment will not be made out of the fund for any work done in advance of the date of the certificate or after the date of its discharge or revocation (as being outside the scope of the certificate) subject to the following exceptions:
  - (a) under a non-means, non-merits tested, certificate for Special Children Act proceedings, if the application is submitted within three working days of receiving instructions. (Rule C7 Funding Code Procedures)) work can be claimed for up to three days before its date. Time spent completing an application for funding in Special Children Act proceedings is treated as work done by a fee-earner under the Certificate – point of principle CLA 39

## Post certificate work

- (c)
- (i) The retainer between a funded client and supplier determines upon receipt of a notice of revocation or the notice of discharge of a certificate. The retainer will determine immediately or, if an appeal has been brought which has been dismissed, it will determine after receipt of the notice of the dismissed appeal. If proceedings have been issued, the supplier retainer does not determine until the fee earner has served the appropriate notice under Rule 56.5 Funding Code Procedures (Regulation 4 Community Legal Service (Costs) Regulations 2000). Therefore the supplier will be entitled to be paid for lodging and serving the appropriate notice, once the certificate has been revoked or discharged.
  - (ii) Any work reasonably done pending the dismissal of the appeal in order to protect the interests of the client should be allowed. This must relate to the proceedings rather than the appeal itself.
  - (iii) If the appeal is successful, the discharge or revocation may be rescinded and therefore work done in the intervening period will be remunerated as if the discharge/revocation never happened. If the appeal is unsuccessful the discharge/revocation period cannot generally be paid for and only the work done in relation to the exceptions above will be allowed.
  - (iv) Where proceedings have not been issued the solicitor is not obliged to serve such notices. Indeed, the retainer may in fact have determined before the application for discharge was applied for.

## Forum

16. Where a certificate specifies the forum for proceedings then that forum must be used. Certificates covering private law proceedings under the Children Act 1989 may contain a condition as to the court in which proceedings are to be commenced. Where a certificate is silent proceedings may be taken either in a Family Proceedings Court, county court or the High Court. Point of Principle CLA44 States:
- Where a legal aid/public funding certificate contains a limitation that proceedings are to be issued in the Family Proceedings Court but the proceedings are in fact issued in a different Court then no costs relating to the issue or conduct of the proceedings may be paid by the Commission as these would be outside the scope of the certificate granted. Solicitors must check the limitations on the certificate and seek an amendment if they wish to act outside them.*
17. Where the funding certificate specifies proceedings in a county court it will not, unless amended, cover proceedings after a transfer to the High Court. If the funded client wishes to transfer the proceedings to the High Court then an application for an amendment must be made to the Director. If an application for transfer is made by any other party, or by the court's own motion, an application for the amendment of the certificate should be made

immediately after the order transferring the proceedings. In the absence of an amendment the certificate will not cover any subsequent work.

18. No amendment is required on a transfer of proceedings from a county court to the High Court where the certificate does not specify a particular court. Nor is an amendment required where the certificate specifies proceedings in the High Court and the proceedings are transferred down to a county court.

## **1.2 Costs Limitations**

1. Costs limitations are imposed on all certificates issued under the 1999 Act by the express authority of C33 of the Funding Code Procedures. Suppliers only have cover to carry out work up to the costs limitation imposed. The limitation limits the costs to be incurred under the approval/certificate to a figure including disbursements and any counsel's fees but excluding VAT.
2. Although a number of cost limitation figures may be imposed throughout the progress of the case, it is only the limitation imposed on the final version of a certificate that is relevant for assessment (Rule C38.2 Funding Code Procedures). Bills or claims do not need to be apportioned to reflect the different costs limitations throughout the case.
3. A costs limitation is binding on assessment either by the Court or the Commission. Any claim for costs must be submitted in accordance with the final costs limitation of the certificate. Irrespective of the sum of costs on the assessment certificate the fund's liability does not exceed the final costs limitation imposed and the Commission will not pay in excess of that limitation (Clause 28.28 Unified Contract Standard Terms and Paragraphs 7.63 and 7.64 of the Specification).
4. The Commission considers it a part of the supplier's obligation of good faith to draw the Court's attention to the final costs limitation on a detailed assessment where costs have exceeded that limitation. The Commission's practice will be to require that any claim for costs based on an assessment certificate that exceeds the costs limitation be resubmitted (Paragraph 7.56 Specification).
5. Claims for costs for assessment by the Commission may be submitted in excess of the limitation, on the basis that costs may be assessed down in any event, but the final amount allowed on assessment will not exceed the limitation.

### **How do fee earners calculate whether their costs are within the financial limit?**

6. The profit costs figure should be calculated by reference to the relevant remuneration hourly an uplift or enhancement is likely to be claimed this figure should be added to the profit costs. Fee earners should have sufficient knowledge of the case and assessment of similar cases to identify items of work that would be enhanceable and the level of enhancement recoverable.
7. The limitation does not include the costs of assessment nor disbursements related to those costs (Rule 7.46 Specification)..

### **What happens on assessment?**

8. The procedure would normally be for costs are assessed in the usual way, and the costs limitation imposed at the end of the assessment by disallowing the amount of costs in excess of the limitation. Alternatively, the assessment could end at the point that costs have been allowed up to the final costs limitation. However, the former approach will be preferable, particularly where an inter partes detailed assessment is also conducted. It is important to note that
- (i) work does not become out of scope (and therefore not recoverable inter partes) by virtue of having been conducted outside of the costs limitation in force at the time of that work, as it would where work is conducted beyond the terms of a scope limitation; the costs limitation is a restriction on final payment from the CLS fund;
  - (ii) accordingly, where a bill exceeds the final costs limitation, it is not the costs at the end of the case that are specifically outside of the limitation any more than the costs of any other part of the case;
  - (iii) however, the restriction of costs to the final costs limitation is properly a part of the assessment, by either the court or the Commission, itself, and not a separate deduction or penalty following that assessment.

### **Does the limitation affect recovery of costs between the parties?**

9. Paragraph 7.5 of the Specification places it beyond doubt that the indemnity principle does not apply to costs limitations. A costs limitation on a certificate protects the client and the fund. It does not however, inhibit costs recovery between the parties. A successful funded client may recover costs from the paying party in excess of the final costs limitation imposed.

### **What happens if costs are disallowed where counsel's fees and other disbursements have been incurred?**

10. It is primarily the supplier's fee earner who is responsible for monitoring the total costs under the certificate and for ensuring that the costs are kept within the financial limitation imposed.
11. In general, if the total of counsel's fees and the supplier's costs exceed the costs limitation, counsel will be paid in full and the shortfall will be borne entirely by the conducting solicitor.
12. The exception to this is where counsel's fees alone exceed the costs limitation on the certificate and counsel has been sent a copy of the certificate or amendment bearing the relevant costs limitation. In those circumstances, counsel will only be paid the sum due under the costs limitation. Any remaining shortfall in counsel's fees will be a matter between counsel and the conducting solicitor, and will not concern the Commission further. If counsel had no knowledge of the limitation the solicitor will be obliged to indemnify counsel for his/her loss. However, this should be rare because suppliers are under an obligation to send counsel a copy of the certificate and any amendments to it.

13. There is no similar specific provision for experts' fees or other disbursements. Expert's fees and other disbursements are solely a matter between the expert or other service provider and the supplier. Even if the total amount due to the supplier is reduced as a result of the costs limitation, the expert or other service provider will be able to recover from the supplier such fees as have been contractually agreed between them. It is not a matter that concerns the Commission or affects the amount allowed on assessment.
14. An example of the position regarding counsel's fees is set out below (all figures are exclusive of VAT):
  - A certificate bears a costs limitation of £2,500.
  - On assessment, the supplier's bill, as initially assessed, is £4,000 which consists of £1,000 counsel's fees and £3,000 profit costs and other disbursements.
  - Under the costs limitation the maximum payable from the fund is £2,500. The payment made would be £1,000 to counsel and the balance of £1,500 to the supplier covering both profit costs and disbursements.
  - If however, counsel's fees alone were £3,000 and the supplier's profit costs and other disbursements were £5,000, counsel would be paid £2,500 and the supplier nothing. Additionally, counsel could seek an indemnity for his or her loss of £500 if he or she had not been given notice of the costs limitation imposed.
  - Where counsel had such notice he or she would receive the £2,500 due under the limitation but would not be entitled to claim further sums from the solicitor.

#### **How does the costs limitation work when the certificate is transferred to another supplier?**

15. One of the first tasks of an incoming supplier must be to consider the costs actually incurred to date and, where necessary, to apply for an increase in the costs limitation, and determine whether the cost benefit aspect of the Funding Code Criteria continue to be satisfied. It is good practice for the outgoing supplier promptly to provide the incoming solicitor with details of costs incurred.

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

16. Because of the way the Commission's CIS computer system works, a certificate covering more than one set of proceedings will have more than one costs limitation imposed. It is not intended that the limitations are to be cumulative. There should be only one applicable costs limitation for all the work authorised by the certificate. Accordingly, the applicable costs limit is the highest of the limitations specified.
17. Suppliers do not need to apportion their costs between the proceedings covered by each limitation and need only apply for an amendment when the total costs for the work to be done under the whole of the certificate are likely to exceed the highest limitation.

#### **When should suppliers apply for an amendment?**

18. An amendment should be applied for when the future work to be done is likely to exceed the costs limitation imposed. Any decision to amend must be based on whether it is justifiable. Regional offices will, when considering amendment requests for future work, make a

decision as to the reasonable level of costs to be incurred for that work in relation to the scope of the certificate.

19. An increase will not be granted merely because the existing limitation has been exceeded. Any decision to increase the cost limitation in order to cover costs incurred in excess of the existing limitation (sometimes, wrongly, referred to as retrospective amendment) must be exceptional. Particular considerations are:
- (i) there is no provision for amendment of certificates after their discharge or revocation (the Commission will in any event discharge a certificate after assessing a final bill). Accordingly any application to amend the costs limitation at the end of the case must be made before discharge or costs assessment when the certificate will be final.
  - (ii) Regional offices will exercise their discretion on the facts of each case. A retrospective amendment is more likely to be granted where costs were incurred by events outside of the supplier's control. In any event all requests for extension should be made in a timely manner. If a supplier exceeds the limitation by reason other than the circumstances of the case, or the request for amendment is made many months later or on preparation of the bill of costs, the amendment is less likely to be granted.
  - (iii). Some examples of when it may be reasonable for such an amendment to be granted are:
    - (a) urgent injunction work requiring weekend work when the regional office is closed: or
    - (b) during the final hearing or up to five days prior to its commencement;
      - (i) unexpected witnesses appear;
      - (ii) issues which were thought to be agreed turn out not to be agreed;
      - (iii) witnesses take longer than estimated to give their evidence;
      - (iv) large amounts of unexpected new evidence are received from the opponent;
    - (c) it becomes clear the hearing will last for longer than estimated.
20. Particular care must be taken in cases where counsel's fees are subject to the Family Graduated Fee Scheme. Where the final hearing in such a case exceeds 10 days in length, the Scheme will no longer apply to any fees of any counsel instructed in those proceedings. Although there is no reason in principle why counsel's fees should significantly increase in this situation, they will no longer be fixed at the levels previously paid under the Scheme. Where:
- (i) The main hearing (as defined under the Community Legal Service (Counsel in Family Proceedings) (Funding) Order 2001) becomes listed in advance for more than 10 days, suppliers should request estimates of counsels' fees for the whole proceedings as if paid outside the Scheme and, where necessary, request an increase to the costs limitation accordingly;
  - (ii) the main hearing carries on to an eleventh day, suppliers should request the details of counsel's revised fees as a matter of urgency and, if necessary, seek an amendment to the costs limitation as soon as possible.

## 2 Enhancement of Costs

### 2.1 General Discretion

1. It is for the supplier to claim enhancement where he or she considers that it is justified, to indicate the level of enhancement sought and to justify both the need for enhancement and the level sought. It is not for the assessor assessing the bill to look for justifications for enhancement. S/he must judge the strength of the arguments put forward by the solicitor.
2. The code for the enhancement of bills is contained in Section 7 Unified Contract Specification (Paragraphs 1.1.4 to 1.1.9). The Specification provide a fixed level of remuneration which may be increased by up to 100%. In civil non-family proceedings only, the rates may be increased potentially by up to 200% in a High Court, Court of Appeal of House of Lords case. The Specification provides a two stage process.
3. The first stage is a threshold test-whether any enhancement should be allowed.
4. The 'relevant authority' - the costs officer or caseworker assessing the case - must be satisfied that:
  - (a) the work was done with exceptional competence, skill or expertise;
  - (b) the work was done with exceptional dispatch; or
  - (c) the case involved exceptional circumstances or complexity'.
5. To be 'exceptional' the case or work must be significantly 'out of the ordinary' If the assessor is satisfied of this, then it will be appropriate to go on to the second stage to consider the amount of any increase.
6. The second stage has its own set of criteria, namely that the 'relevant authority' shall have regard to:
  - (a) the degree of responsibility accepted by the fee earner;
  - (b) the care, speed and economy with which the case was prepared;
  - (c) the novelty, weight and complexity of the case.
7. Enhancement is not in principle a means by which payment is to be made at commercial rates. The question is what enhancement properly rewards the particular circumstances of the case treating the prescribed rate as adequate remuneration for the average case. Any enhancement allowing a 100% mark up should only be allowed in rare cases.
8. The suggested approach to the level of enhancement is to consider 5% or 10% steps increasing as more of the factors in paragraph 7 are present and as one or more of them is particularly strong.
9. In considering whether a case qualifies for any enhancement, the comparison is to be made with other proceedings for which public funding is available. There is no basis for arguing that proceedings within specific categories of law, or types of proceedings such as judicial review, are inherently more complex than other funded proceedings.
10. Enhancement can now be claimed for work in the Family Proceedings Court.

## Enhancement Of Whole Or Part

10. Enhancement rates can be applied to the whole case, to classes of work or to individual items. In general, one of the latter two approaches will be preferable. It would be unusual to allow enhancement on routine letters or telephone calls or travel and waiting.

### 2.2 Panel Membership and the Guaranteed Minimum Enhancement

1. A guaranteed minimum enhancement of 15% is payable in respect of work carried out by a fee-earner on the Resolution Accredited Specialist Panel, the Law Society's Children Act Panel (in respect of proceedings relating to children) or The Law Society Family Law Panel Advanced;
2. Where the guaranteed minimum enhancement of 15% has been claimed by a suitably accredited specialist, higher amounts of enhancement may be granted on discretion by the assessor if the case justifies it.
3. Where the fee-earner is a member of the accredited specialist panel of Resolution or the Law Society Panel Advanced, the enhancement is applied to all work done in any family case. In contrast where the fee-earner is a member of the Law Society's Children Act Panel the enhancement is only available for work done under a certificate that includes proceedings relating to children. This means that if a certificate covers both children proceedings and ancillary relief all the work done will attract the minimum enhancement but this is not so if the certificate only covers ancillary relief. Proceedings relating to children are defined as "*proceedings within which the welfare of children is determined, including without limitation, proceedings under the Children Act 1989 or under the inherent jurisdiction of the High Court in relation to children*".
4. The minimum guaranteed enhancement is not available for supervision or to work done by other fee-earners. When preparing the bill for assessment the narrative must clearly state the fee-earner for whom the enhancement is claimed and the basis for the enhancement.

### 2.3 Enhancement in Clinical Negligence cases

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

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

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

### **3. Counsel's Fees**

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

1. Prior to the introduction of the Civil Procedure Rules, no fee could be paid to counsel attending in the High Court in chambers, in the county court on an interlocutory hearing or where multiple counsel were used unless the court certified the case as "fit for counsel".
2. CPR 44.8.7 now provides that on detailed assessment the costs judge should have regard to any order of the court which expresses an opinion as to whether or not the hearing was fit for the attendance of one or more counsel. The court is unlikely to make an order unless:
  - (a) expressly asked by the paying party;
  - (b) more than one counsel appeared; or
  - (c) the court wishes to record that the case was not fit for counsel.
3. The court will always express an opinion where more than one counsel appears. Assessors should ensure they have sight of such orders. If counsel's fees are not to be allowed, there should be a notional assessment of the costs as if the solicitor/fee earner had acted as advocate (as well as a disallowance of the counsel's brief fees and the fee earner's costs of his or her instruction). The Commission will follow this principle. If the court order expresses an opinion it will be considered on assessment.

#### **3.2 Entitlement to instruct counsel**

##### **High Court and County Court**

1. There are specific restrictions on the use of counsel in the Specification. In the High Court and county court, (in both civil and family proceedings) Paragraph 7.62(e) provides that unless there is specific authority in the certificate, or an authority has been given by the Regional Director, a Queen's Counsel or more than one counsel shall not be instructed.
2. No counsel's fees should be allowed in these circumstances unless the appropriate authority has been given, except that a QC's fees will be allowed at junior rates. This does not, however, prevent counsel's fees being recovered on an inter partes assessment.
3. Even where authority is given to instruct more than one counsel or a Queen's Counsel the fees should not be allowed unless the solicitor has, in addition to obtaining the authority, obtained his client's informed consent. *Re: Solicitors; Taxation of Costs [1982] 2 ALL ER 841*. The supplier's file will therefore be checked to ensure that there is evidence of explanation to the client of the possible effect such instructions may have if not recovered inter partes, and of the client's acceptance of this.

#### **3.3 Using Counsel in a Magistrates' Court**

1. Under Paragraph 7.62(d) of the Specification, counsel may not be instructed in the magistrates' court unless authority is given in the public funding certificate or by the Director. However, in family proceedings such costs may still be allowed on assessment

2. There are three possible situations:
  - (a) Prior authority granted – counsel’s fees are to be allowed as for county court proceedings under family graduated fee scheme.
  - (b) no prior authority given but it is considered that it was reasonable to instruct counsel e.g. because of a point of law, evidential problem or it is considered to be a complex care case (for a magistrates court) - fees are allowed as under (i);
  - (c) no prior authority given, not deemed reasonable to instruct counsel - apply the Maximum Fee Principle – see 3.6

### 3.4 Terms of the authority

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

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

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

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

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

### 3.5 Quantum of Counsel’s Fees

#### General

1. Subject to the rules for Fast Track Trials, Counsel’s fees in civil and family law cases are ‘at large’, i.e. at the discretion of the assessing officer in all cases except those which fall within

the prescribed rates in the Family Graduated Fee Scheme. Payment of counsel for attending an interlocutory hearing or a trial is by way of Brief Fees and Refreshers.

### **Fast track trials**

2. Under CPR 46.1 the advocate in a fast track trial is paid a fixed amount for the costs of the trial. These are fixed by reference to the value of the claim.

<b>Value</b>	<b>Amount of fixed costs the court can award</b>
Up to £3,000	£350
£3,001 to £10,000	£500
More than £10,000	£750

3. If the advocate acts for more than one party only one award is made (CPR 46.4). The court cannot award more or less than these fixed costs unless it decides not to award any fast track costs or CPR 46.3 applies and the court awards an additional £250 in respect of the legal representative's attendance. Further costs may be awarded if there is a separate trial of an issue. These additional costs cannot exceed 2/3rds of the amount of the claim. For other hearings the fee is at large and the guidance below applies.

### **In the Multi Track**

4. The brief fee is intended to cover the preparation of the case for trial (or other hearing) travelling to court and any other work carried out on the first day of trial together with the first five hours of the trial. The brief fee includes:
  - (a) all preparation for the trial;
  - (b) travelling time and expenses to the first day of the trial (except for junior counsel in Family Remuneration Regulation cases);
  - (c) overnight expenses for the first day of the trial;
  - (d) waiting time on the first day;
  - (e) negotiating, discussions with the solicitor and conferences at court on the first day.
5. The brief fee also includes, where relevant or appropriate, the preparation of a note of the judgement, transcribing such a note and submitting it to the judge for approval, revising it and providing any necessary copies; however an additional fee may be charged for attending on a later day when judgement is not given at the conclusion of the trial
6. The brief fee should reflect all the work that is necessary to ensure that the client is properly represented. This can include more than simply appearing in court. There may be meetings of counsel to agree strategy and tactics, meeting with experts, and preparation of final submissions. In publicly funded cases it is proper for counsel's clerk to reflect such work after the event in the brief fee. *Loveday v. Renton and Anor (No 2) [1992] 3 ALL ER 184* – an important case in discussing the nature of brief fees at least in very complex actions.
14. The fact that counsel carries out work in preparation for the trial in anticipation of the delivery of a brief does not prevent the fee recognising such work (provided always that the

work was done at a time when any necessary authority for the instruction of counsel had been given): *Loveday v. Renton* (above).

15. If the trial continues after five hours a refresher fee is allowed for each period of five hours.

### **Refresher fees**

16. Refresher fees were dealt with in RSC Ord 62, App 2 Pt 1 para 2(2)(b):

*“A refresher fee, the amount of which shall be in the discretion of the taxing officer shall be allowed to counsel either;*

*(a) for each period of five hours (or part thereof) after the first, during which a trial or hearing is proceeding; or*

*(b) at the discretion of the assessing officer, in respect of any day after the first day, on which the attendance of counsel at the place of trial was necessary”.*

The period of five hours excludes the lunchtime adjournment (*Wright v. Bennett [1947] KB 828*).

17. Generally speaking the second alternative is applied only where counsel attends court but for reasons outside his control there is no hearing or the hearing is delayed, e.g. by the unavailability of the judge or the interposition of another case.
18. Where a case lasts only part of a second or subsequent day the refresher fee may be reduced although it is not appropriate to make a simple mathematical calculation of the ratio between the time spent and five hours (*Re. Mercury Model Aircraft Supplies Ltd [1956] 1 WLR 1153*).

### **Quantum**

19. Unfortunately there is little specific guidance as to the assessment of the proper brief fee. The points made in *Re H* are relevant. “There is ... no precise standard of measurement. The Taxing Master, employing his knowledge and experience, determines what he considers the right figure.” It is largely a matter of experience and comparison of one case with another.
20. Guidance for junior counsel’s brief fee for those hearings that last up to one hour and for those lasting up to one day can be found in the Guidance on Summary Assessment as published by the Supreme Court Costs Office. Time spent by counsel at a hearing will include conferences and negotiations at the door of the court as well as time spent in advocacy. *Lawson v. Tiger [1953] 1 All ER 698*.
21. Travelling time or expenses are not allowed in addition to the brief fee except in Family cases.

## 3.6 The Maximum Fee Principle

### Authority for the maximum fee

1. Where counsel is instructed in the magistrates' court without prior authority it is not considered on assessment that counsel's instruction was justified counsel's fees are not payable, but in family proceedings, counsel will be paid but the supplier's costs assessed on the basis that counsel was not instructed.

### Calculating the maximum fee

45. This is a calculation by the assessor of the work that would have been incurred had the case been conducted by a single fee earner without recourse to counsel. In assessing the maximum fee it should be remembered that the usual rule for assessments still applies-that payment should only be made for work reasonably and necessarily done.

#### (a) Stage one

Assess the work reasonably and necessarily done by the fee earner excluding:

- (i) all work arising out of the instruction of counsel, e.g. preparation of the brief, letters and telephone calls with counsel and chambers, etc.;
- (ii) all work duplicated because of the instruction of counsel, e.g. the preparation of hearings attended by counsel, attendances at Court with counsel, including associated travel, waiting and expenses, conference with counsel and client, etc.

Applying the relevant Contract rates to the work remaining after excluding (a) and (b) will give the first figure to be added into the maximum fee and the most that can be paid to the solicitors.

#### (b) Stage two

Assess the work undertaken by counsel as it may have been done by the fee earner had the case been conducted without counsel. This is not simply an addition of the work done by counsel. For instance the supplier advocates may be more familiar with the case and may not be expected to spend as much further time as counsel preparing or attending upon the client. Counsel's actual times are only a guide to the time that the supplier fee earner would have spent.

Included in this second stage should be the hearing time and waiting and travelling. However, consider whether the fee earner would have instructed agents. If it is considered agents should/would have been instructed, travel time and expenses are disallowed but a notional allowance made for instructing agents. If you travel is included, the time should only be that which the solicitors would have incurred, not counsel.

Again, the relevant Contract rates apply to the work of stage two.

The maximum fee is the total of the figures arrived under stage one and two. It is the most that can be paid out of the CLS Fund to cover the costs/fees of supplier and counsel.

**(c) Stage three**

Assess the reasonable fees of counsel as though the case had been undertaken in the county court. By deducting what you intend to allow to counsel (before VAT) from the maximum fee, you arrive at the amount available to pay the solicitors. The supplier should be paid this amount or the figure arrived at in stage one whichever is the lesser figure. To pay the supplier more than the stage one figure would be to pay them for work which counsel is already being paid.

Under the Community Legal Service (Counsel in Family Proceedings) (Funding) Order 2001, where counsel's instruction in the Family Proceedings Court is not considered justified, counsel is now paid at the supplier's Contract rate, rather than under the family graduated fee scheme itself. In that situation, the Stage three calculation is based on the actual times spent by counsel; for example, it is counsel's actual travel time that is assessed and paid to counsel, not the notional time that would have been spent by the instructing fee earner (which is relevant to stage 2 of the calculation)

**3.6 Family Graduated Fees**

1. Guidance on this scheme is contained in Section 10 to Part D of Volume 1 of the LSC Manual beginning at paragraph 1D-071.

**4. The Commission's Assessment Limits**

**4.1 Magistrates' Courts**

Any bill in respect of proceedings in the magistrates' or Family Proceedings Courts, regardless of whether proceedings have been issued or not, or the amount of the claim, must be assessed. There is no option for detailed assessment by the courts (Paragraph 7.37(a) of the Specification).

**4.2 County or Higher Courts**

**Proceedings not commenced**

1. Any bill in respect of proposed proceedings in the County or Higher Courts, where the solicitor's retainer is determined before proceedings are actually begun, must be assessed by the Commission. There is no limit on the amount of the claim and there is no option for detailed assessment by the courts.

### **Proceedings commenced where the costs are under £2,500**

2. Any bill for proceedings in the County or Higher Courts, where proceedings have been commenced and the total amount of the claim does not exceed £2,500, must be assessed by the Commission. There is no option for detailed assessment by the courts.

### **Proceedings commenced and the costs are over £2,500**

3. All other claims in the County or Higher Courts where proceedings have been commenced and the total of the costs exceeds £2,500 must be submitted to the relevant court for detailed assessment – Paragraph 7.37 (b) of the Specification (although see 6 below for exceptional circumstances).

### **Costs orders between the parties – inter partes costs Legal Aid only claims**

4. Wherever the court has to actually determine such costs the costs claim must be assessed by the court. The Commission will only assess legal aid only claims.

### **Assessment where inter partes costs are agreed and paid**

5. Where inter partes costs have been agreed and recovered, the solicitor may claim his legal aid only costs from the fund (Paragraph 7.48 of the Specification). Regardless of the amount of the inter partes costs, if the total of the legal aid costs claimed is up to £2,500 then they must be assessed by the Commission, and, if they exceed £2,500, they must be assessed by the Court, as above.

### **Special Circumstances**

6. If proceedings have been commenced and the costs exceed £2,500 the supplier may request assessment by the Commission where there are special circumstances, where assessment would be against the interests of the assisted person or would increase the amount payable from the fund (Paragraph 7.37).

## **4.3 Costs recovery bills**

Where after payment of a final bill enforcement proceedings take place (after the discharge of the certificate) and the supplier pursues recovery of inter partes costs under authority from the regional office, such costs can be assessed under Paragraph 7.38 of the Specification.

## **4.4 Protective claims**

1. For the purposes of Paragraph 7.37 proceedings are commenced when a claim form is issued at court. Issuing a protective claim, therefore does constitute the issue of proceedings.

## **4.5 Calculating the Limit**

1. When considering the £2,500 limit in Paragraph 7.37 of the Specification, the total amount of the costs is calculated by the total claim being the profit costs of all suppliers, plus

all counsel's fees including those paid under the Family Graduated Fee Scheme, and any disbursements but excluding VAT.

2. The cumulative totals refer to separate proceedings and different totals should be calculated for separate proceedings, i.e. ancillary relief proceedings in matrimonial cases, enforcement proceedings or pre-action discovery work.
3. Sometimes claims may be submitted which marginally exceed the limits on the basis that, following assessment, the costs will then be below the limit imposed in the Specification. Such claims will be rejected because the assessment limit relates to the costs as claimed not as assessed.
4. The costs limit relates to the proceedings so that in cases where the supplier represents a number of clients and the costs are to be apportioned the limit is not per certificate but the total costs of the work done and to be assessed. For example: acting for two parties in care proceedings where the total costs of the proceedings are £5,000 and if apportioned equally the costs per certificate are £2,500, the costs claims will be rejected by the Commission as the true costs are £5,000 and the assessment limit has been exceeded.

#### **4.6 Judicial Review proceedings**

1. If an oral or written application has been made for permission, even if unsuccessful, this does constitute proceedings (*R. v. Darlington Borough Council, ex p. The Association of Darlington Taxi Owners* [1994] COD 424) and therefore if the costs exceed the Paragraph 7.37 limit then the claim must be assessed by the courts.

#### **4.7 Inter Partes Costs**

1. Where a funded client is successful in proceedings there may well be an order for the other side to pay part or all of their costs. Costs payable by the other side are known as inter partes costs or costs between the parties. From the Commission's perspective, an order for costs it will be a fixed order or an undetermined order.

##### **Fixed orders**

2. If the order is fixed, then the amount of the costs to be paid will be determined when the order is made, and specified in the order. In that case, inter partes costs are not subject to detailed assessment and, if within the £2,500 limit, the claim may be assessed by the Commission (see section 4.2 paragraph 4 above).
3. However, an order of the form "defendant to pay the claimant's costs in this application limited to £250", the bill must be assessed by the courts. The receiving party is only entitled to £250 if the bill is assessed by the court at that or a higher sum.

##### **Undetermined orders**

4. With any other form of inter partes costs order in favour of the funded client, only the court can determine those costs if the parties have not agreed the figure between themselves.

#### **4.8 Authority for Assessment of Costs against the CLS Fund**

1. Summary assessment under the CPR is not possible in relation to publicly funded cases.
2. Where proceedings have been issued, the normal event giving rise to the right for assessment against the CLS fund is a final order for public funding assessment.
3. If the proceedings end without such an order, acceptance of an offer of settlement or discontinuance of proceedings by either party is an authority for a public funding assessment, as it gives rise to a right to assessment under CPR 47.7.
4. Otherwise, whether or not proceedings have been issued, the discharge or revocation of the public funding certificate (after any appeal has concluded and service of any required notices by the supplier) is authority for public funding assessment.
5. If on receipt of a claim the certificate is undischarged and there is no order for assessment, the Commission can still assess the claim if the certificate is ready for discharge on non-contentious grounds, i.e. the case is concluded or the funded client consents to the discharge.
6. If, however, there is no discharge and the only likely grounds for discharge are contentious, i.e. unfavourable counsel's opinion or the solicitor is without instructions, the show cause procedure will be implemented and the claim returned to the solicitor with instructions to resubmit the claim when a discharge has been made.

#### **4.9 Magistrates' Court cases transferred up**

1. Family cases started in the magistrates' courts may subsequently be transferred to the higher courts. If so costs are to be both assessed by the Commission and the courts. All magistrates' court costs must be assessed by the Commission. If the case is transferred up and the costs in the higher court do not exceed £2,500, then they also can be assessed by the Commission. However, if the costs in the higher court exceed £2,500, they must be assessed by the higher court.
2. In such circumstances, it is acceptable to assess the magistrates' court element upon transfer to the higher court; it is not necessary to await conclusion of the proceedings in the higher court. However, if suppliers choose to do so they will not be penalised for late submission.

#### **4.10 Matrimonial/Family proceedings**

1. If separate ancillary applications are concluded with an order for assessment then an assessment of costs incurred up to the date of that order plus costs of implementing the order may take place. If subsequently the same certificate covers other ancillary applications then, on conclusion of those subsequent applications, further assessments can take place. In each case, the ancillary application being assessed must have been concluded before the next application has started. The £2,500 limit would apply to each bill for assessment. If there is any overlapping of applications those applications should be assessed together in one claim.

## **5 Claims for Assessment by the Commission**

### **5.1 Preparation of a bill**

1. Bills drawn up by law costs draftsmen after 26 April 1999 are “work done” within the meaning of paragraph 18(3) of the Practice Direction to Part 41 of the Civil Procedure Rules (CPR). A law costs draftsman’s fee may be paid, in accordance with the guidance below, for any bill drawn up for assessment by the Commission where it was reasonable to instruct a draftsman to draw the bill.
2. Whilst the draftsman may charge the solicitor at a percentage of the profit costs as drawn in the bill, the rate claimed for drafting the bill should be that for preparation within the relevant table of the Payment Annex .

#### **The statutory charge and contributions**

3. Under Regulation 40(4) of the Community Legal Service (Financial) Regulations 2000, the costs of drawing and checking the bill are not part of the costs of the assessment process, as they are incurred before the commencement of the assessment proceedings. Such work, and the associated costs thus fall within the costs of the main proceedings and count towards the statutory charge and the costs to which the client is required to pay contributions, where relevant.

#### **Time taken**

6. In the majority of cases that fall within the Commission’s assessment limit an allowance of 30 - 60 minutes will be appropriate. Where a greater time is claimed, the solicitor should justify the additional time spent with reference to the circumstances of the individual case. It may be reasonable to make greater allowance where the amount of the costs reasonable to make greater allowance - up to 3 hours where the amount of the costs claim exceeds £2,000 or where the preparation is made more complex by the nature or circumstances of the case. The allowance for preparation is in addition to the time allowed for checking and signing the bill..
8. Separate claims for time spent before and after the commencement of the assessment may be made. The allowance for checking a provisional assessment will only be allowable in the event that a provisional assessment has been made of the substantive costs and if included in a bill for assessment will not be payable if the costs are allowed as claimed

## **5.2 The Costs of Assessment**

### **5.2.1 Generally**

1. Under rule 8.16 of the Unified Contract Specification detailed assessment proceedings are deemed to be proceedings to which the certificate relates, whether or not it has been revoked or discharged. The costs therefore are to be paid from the fund unless the court orders

otherwise. The conducting suppliers may prepare and attend on a detailed assessment where necessary without requiring any amendment to the certificate.

2. Under Regulation 40(4) of the Community Legal Service (Financial) Regulations 2000 the costs of the detailed assessment proceedings do not form part of the statutory charge (nor those costs to which the funded client may be required to pay a contribution). This does not include the costs of drawing up the bill (see 5.1.3)
3. Detailed assessment proceedings commence with the filing of a Request for Detailed Assessment or, if earlier, the service of Notice of Commencement. Included in the costs of detailed assessment proceedings are the work in preparing the Request or Notice, court fees, the costs of attendance on the detailed assessment, time spent checking any provisional assessment or completing the legal aid assessment certificate.

## **6.3 The Funded Client's Rights on Assessment**

### **6.3.1 General**

1. Paragraph 8.34 of the Unified Contract Specification confers certain rights on a funded client assisted person who has a financial interest in the assessment of their supplier's costs and corresponding obligations on the conducting fee earner.

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

1. A funded client has a financial interest if he or she has any contribution or if the statutory charge will apply to his or her case. If the question of the statutory charge may arise but has been undetermined, or if an assessment or reassessment of means is pending, then it should be assumed that the funded client has a financial interest.
2. Revocation of a certificate does not strictly give the funded client a financial interest because once a certificate is revoked they are deemed never to have been a funded client. However, since they are liable for the costs allowed, such clients also be served with a copy of the bill.

### **6.3.3 The funded client's rights**

1. The rights given to a funded client are that on any assessment, review or appeal he or she can make written representations to the Director to a Costs Assessor within 21 days of being notified of his or her rights.

### **6.3.4 The Fee Earner's obligations**

1. The obligations imposed on the fee earner are threefold:
  - (a) To supply the funded client with a copy of the bill of costs.
  - (b) To inform the funded client of their financial interest and their right to make written representations.

- (c) To endorse on the bill whether or not the funded client has a financial interest, has been supplied with a copy of the bill and informed of their right to make written representations.
2. In the event that the statutory charge applies, or if any part of the contribution needs to be refunded, payment will be made to the supplier but no balancing of the funded client's account will take place until the outcome of any costs appeal is known. The amount due after a provisional assessment by the Commission would be paid to the solicitors and, depending on the outcome of any appeal, the regional office may pay the additional sum or recoup as appropriate.
3. The following is a suggested form of the endorsement:

*“I certify that a copy of the attached bill has been provided to the funded client, pursuant to Paragraph 8.34 of the Unified Contract Specification, with an explanation of his/her financial interest in the assessment of the bill and his/her right to make written representation on the bill and thereafter on any subsequent review to an Independent Costs Assessor or appeals to the Legal Services Commission’s Costs Appeals Committee. I confirm that either 21 days have passed since the copy bill was provided to the funded client or the funded client has confirmed in writing (copy attached) the he/she will not be making any objections to the bill.”*
4. The Paragraph requires that the endorsement be on the bill, however, where the claim is to be assessed by the Commission it can also be by way of a covering letter with the costs claim

### **6.3.5 Procedure upon receipt of written representations**

1. If written representations are received from the funded client in respect of their supplier's bill, a copy of the representations will be sent to the conducting fee earner prior to the assessment requesting comments within 21 days. The bill will not be processed until the time limit expires. If the bill is received without any comments, where representations have been made known, comments should be requested unless the fee earner says he/she has none to make. Representations by a funded client may:
  - (a) relate to the conduct of the case, i.e. that costs had been wasted or that work was not reasonably done; **or**
  - (b) state that there is an inaccuracy in the bill, e.g. that work claimed was not actually undertaken.
2. Following assessment, the outcome will be confirmed to the funded client. They will be notified of their continuing rights on an appeal where the bill has been reduced and at the same time (if representations directly led to a reduction in the claim) the supplier will be informed that written representations made by the funded client were taken into account in assessing the bill and a copy of those representations is attached.
4. If the supplier goes on to appeal to a Costs Assessor, the funded client has similar rights but only if representations were made before the provisional assessment and the representations affected it. It is recognised that whilst there is no specific entitlement for the legal representative to attend on an appeal they are allowed to do so. The funded client must also be given an opportunity to attend, if they so wish.

## **7 Detailed Assessment and Appeals from Detailed Assessment**

### **7.1 Detailed Assessment by the Court**

#### **Generally**

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

#### **Time Limits**

2. CPR 47.17(2) sets a three month time limit, from the date on which the right to detailed assessment arose, for the commencement of detailed assessment proceedings. CPR 47.14 also introduces a time limit for requesting a detailed assessment hearing.
3. CPR 47.8 contains sanctions for delay in the commencement of detailed assessment proceedings. A paying party is entitled to apply to the court for an order that the receiving party commences the detailed assessment procedure. The court may direct that unless the proceedings are commenced within a specified period then all or part of the defaulting party's costs may be disallowed. Where the receiving party commences proceedings late, but no application has been made by the paying party, the court may disallow interest on costs for the relevant period. In publicly funded cases CPR 47.8 applies as if the Commission is the paying party.
4. Where delay is brought to the Commission's attention the Regional Office will make applications to the court under CPR 47.8. This provision is to enable counsel to be paid his/her fees or for the client's case to be balanced and monies released where the solicitor has failed to commence detailed assessment proceedings promptly. Counsel is not entitled to commence detailed assessment proceedings in his/her own right. Regional offices will, once notified, write first to the defaulting firm warning of the possibility of a 47.8 application. If the detailed assessment process is not then commenced within the time frame given, the Commission will make the application and the solicitor's costs will be at risk.

### **7.2 Appealing from Assessment of Costs**

#### **Procedure**

1. In all cases except those where:
  - (a) the bill was taxed before 26 April 1999, or
  - (b) the appeal is against a decision of an authorised court officer,the solicitor needs permission under CPR 52.3 to appeal against a detailed assessment.

### 7.3 Costs of appealing against a detailed assessment

1. There is **no presumption that the supplier will recover their costs from the Fund** where they appeal against the assessment of their costs under CPR Part 52. The costs will be recoverable only to the extent that the court hearing the appeal orders the costs to fall within the funding certificate : Paragraph 8.17 of the Unified Contract Specification.
2. A supplier who wishes to appeal against the detailed assessment of their costs in a funded case must therefore consider whether, having regard to factors such as:
  - (a) the amount in issue;
  - (b) the merits of their argument, and
  - (c) any wider principle involved,the appeal will succeed and the court will award costs against the Fund, if not the opposing party.
3. The **client** is not a party to the proceedings. In reality any appeal will be brought by the solicitor and not the client in any event. Since there is now no presumption that the certificate covers the costs of the appeal, the client has no protection under Section 11(1) Access to Justice Act 1999 in respect of their opponent's costs of the appeal. In the event that the client has a financial interest and has pursued the appeal, an order for costs could be made against the client. The Court, however, could order that the costs of the appeal are covered by the certificate.
4. If the court orders that the supplier's and/or counsel's costs be paid out of the fund:
  - (a) the client does not have to pay a contribution in respect of those costs and
  - (b) the costs do not add to the statutory charge: Paragraph 7.45 Specification.

## 8. Prior Authorities

- 8.1 Guidance on the use of prior authorities can be found at section 5 to Part D of Volume 1 of the LSC Manual, paragraphs 1D-055 to 1D-062.1.