

13. Withdrawal of Funding

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13.1 General Approach

1. The Funding Code contains rules both for initially granting funding as part of the Community Legal Service and for ceasing funding thereafter. The general rules on withdrawal of funding are contained in section 15 of the Code Criteria, but the detailed rules on discharging and revoking certificates are contained in section 15 of Part C of the Code Procedures.
2. The process of withdrawal of funding depends on the Level of Service. For example, for Legal Help the supplier simply ceases to provide help. However, for Certificated Work, namely Legal Representation, Support Funding and Approved Family Help, withdrawal of funding is a more formal process governed by section 15 of Part C.
3. The approach to withdrawal of funding is straightforward for some Levels of Service:
 - (a) Legal Help – providers of Legal Help are under an obligation to consider the sufficient benefit test whenever work is carried out and will cease Legal Help where there is insufficient benefit to justify further work being carried out – see section 4.11;
 - (b) Help at Court – withdrawal of funding does not really arise for this Level of Help which is given only on a hearing by hearing basis. However the sufficient benefit test is still applicable;
 - (c) Family Mediation – Family Mediation may continue as long as the mediator is satisfied that mediation is suitable to the dispute and the parties and all the circumstances. In practice Family Mediation will continue as long as all parties remain willing to participate in mediation and there remain significant issues to be mediated;
 - (d) Help with Mediation – so long as Family Mediation is continuing or help is needed in finalising any agreement reached in mediation, Help with Mediation may be provided as required so long as the sufficient benefit test continues to be satisfied.
4. The remainder of this guidance is therefore primarily concerned with other forms of Certificated Work, namely all forms of Legal Representation and Support Funding and General Family Help. Some specific withdrawal grounds for certificates are described in section 13.4 below.

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13.2 Certificated Work

1. The three most important general grounds on which funding under a certificate may be brought to an end are:
 - (a) where the Criteria under which funding was originally granted are no longer satisfied (Criterion 15.2);
 - (b) where it is unreasonable for funding to continue in all the circumstances of the case, taking into account the interests of the client, any wider public interest and the interest of the Community Legal Service Fund (Criterion 15.3);
 - (c) where funding is no longer needed because all work authorised by the Commission has been completed (Criterion 15.5(v)).
2. It is important to note that withdrawal of funding is discretionary. The final decision does not flow automatically from any determination of matters such as prospects of success or cost benefit and may well involve consideration of other factors as discussed in the guidance below. The exception where withdrawal of funding is

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mandatory is where this is required under regulations on financial grounds, but even then the Commission has a discretion as to the date of discharge or revocation.

3. Under rule C61.1(iv) of the Code Procedures the Independent Funding Adjudicator has the jurisdiction to determine whether a certificate should be discharged or revoked on the grounds of the conduct of the client. However in all other circumstances, although the Adjudicator may review the matter, the final decision on matters of discharge or revocation rests with the Commission.

13.3 Discharge and Revocation

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1. A certificate may be brought to an end either by being revoked or discharged. Revocation has very serious consequences for the client because when a certificate is revoked the client must repay to the Commission all the costs paid or payable under the certificate. The client also loses any cost protection and will be fully liable to pay any costs due to the other side under orders made in the proceedings. Revocation takes place primarily where the client has been dishonest or failed to comply with his or her obligations under the Code or regulations. It can also take place where a client in receipt of emergency representation is assessed as financially ineligible or fails to accept an offer of funding subject to a contribution.
2. Discharge of a certificate is the more common way for a certificate to be brought to an end. It simply means that further funding ceases, but no additional penalties are imposed on the client.

13.4 Specific Withdrawal Grounds

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1. Section 15.5 of the Code Criteria set out six grounds for withdrawal of funding. Although these are of general application, in practice they need only be specifically considered in relation to Certificated Work. The grounds are:
 - (a) where the client has died – although the death of the client will lead to discharge of the certificate, proceedings may sometimes be continued under a fresh certificate. Where a certificate is issued in the name of the personal representative, the personal representative will be the client from then on, but for the purposes of both financial eligibility regulations and applying the cost benefit test it is the individuals who will benefit from the continuing action whose interests must be taken into account;
 - (b) where a bankruptcy order is made against the client – bankruptcy will usually lead to the discharge of a certificate since, on bankruptcy, most causes of action will automatically be transferred to the trustee in bankruptcy and will be for the benefit of the creditors not the client. However a certificate may continue if the client would benefit from the proceedings or if the cause of action is assigned back to the client from the trustee in bankruptcy. Sometimes an assignment back will include an agreement as to sharing the benefits of the litigation between the client and the creditors. Whenever proceedings will produce benefits both for the client and for creditors, the Commission's usual approach will be only to continue the funding if the creditors accept responsibility for a share of the costs of the litigation in proportion to the benefit they will receive;
 - (c) where the client is no longer financially eligible in accordance with Code Procedures and Regulations. This can arise where the client either goes out of scope on income or capital or fails to pay a contribution due to the Commission;
 - (d) with the consent of the client;
 - (e) where all work authorised by the Commission has been completed;
 - (f) on grounds of the conduct of the client – namely where it is unreasonable to continue funding in the light of the client's conduct. Rule 53 of Part C of the Code Procedures deals with revocation or discharge of a certificate on the

grounds of the client's conduct. The most important situations covered by these Rules are where the client has made an untrue statement when applying for funding or fails to disclose material information when making an application.

2. When a certificate is discharged under paragraphs 1(a), (d) or (e) above, there is no right to have the discharge reviewed by the Director or Independent Funding Adjudicator. A discharge under paragraph 1(c) above (financial grounds) may be reviewed by a Director, but not by the Independent Funding Adjudicator.

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13.5 Discharge on the Merits

1. When it comes to discharging certificates on the merits, it is convenient to split certificates into four main groups:
 - (a) Special Children Act Proceedings and related proceedings – these are a special case since there is no merits test for such proceedings. Therefore funding will almost invariably continue until the proceedings in question reach a conclusion at first instance (note that appeals, whether interim or final, do not come within the definition of Special Children Act Proceedings). The Commission does reserve the right to withdraw funding in Special Children Act Proceedings, for example where the client is requiring proceedings to be conducted unreasonably, but this will be exceptional. See further the guidance at section 20;
 - (b) Investigative Funding – guidance on withdrawal of funding for Investigative Help or Investigative Support is set out in section 13.6 below;
 - (c) non-quantifiable claims – guidance on withdrawal of funding where the cost benefit Criterion is not expressed in terms of ratios of damages to costs is contained in section 13.7 below;
 - (d) guidance on withdrawal funding in quantifiable claims which are subject to damages to cost ratios as contained in section 13.8 below.
2. The application of the affordability Criterion to continued funding is discussed in 13.9 below.
3. The importance of a case to the client must always be considered in decisions to discharge, especially if discharge is being considered at a very late stage in the proceedings. The client's rights under ECHR Article 6 must be considered in such circumstances. For example it would not be appropriate to discharge a certificate on cost benefit grounds alone if:
 - (a) The case was approaching trial;
 - (b) It would be impossible for the client to have effective access if proceeding in person (taking into account the level of representation and funding of the client's opponent);
 - (c) The prospects of success of the case were better than 50%; and
 - (d) There had been no significant change of circumstances since funding was last approved.

(See *Alliss v. Legal Services Commission*, CO/3348/02, 25 September 2002).

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13.6 Investigative Funding

1. Investigative Help and Investigative Support cease when sufficient work has been carried out to enable prospects of success to be determined, i.e. to estimate prospects of success in one of the bands provided for in the Code other than "unclear". Certificates for Investigative Help or Investigative Support are limited to the specific work necessary to be in a position to estimate prospects of success. Therefore usually it will only be possible to predict prospects of success when all the work covered by the initial limitation on the certificate has been completed. However it often happens that during the course of the investigation facts emerge which make the strength of

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the claim clearer earlier than had been expected, most commonly when expert evidence indicates that a claim is likely to fail.

2. The discharge of certificates for investigative funding is supported by obligations under sections 12 and 14 of the Code Procedures. Rule 43.2(ii) of the Procedures requires the solicitor to report to the Director where the certificate is for Investigative Help and prospects of success can be estimated in one of the Code categories other than “unclear”.
3. For certificates for Investigative Support, there is a similar obligation on the solicitor in Rule 48.1 in section 14 of the Code Procedures. In addition the solicitor is required to report either if he or she has entered into a conditional fee agreement in the case or if investigations have proceeded such that a determination whether or not the case should proceed under a conditional fee agreement can be made. In either of these circumstances the certificate for Investigative Support will be discharged (Criterion 15.4).
4. During investigations it may also emerge that, whilst the prospects of success of the claim remain unclear, nevertheless the likely size of the claim may turn out to be less than was originally expected, or the likely costs to disposal may be greater than previously predicted. Such developments can also lead to the discharge of an investigative certificate. This is because it is a Criterion of Investigative Help or Investigative Support that there must be reasonable grounds for believing that, when investigative work has been carried out, the claim will be strong enough in terms of prospects of success and cost benefit to satisfy the relevant Criteria for Full Representation (Criterion 5.6.4 for Investigative Help) or to proceed privately under a conditional fee agreement (Criterion 5.8.3 for Investigative Support).
5. A certificate for Investigative Help or Investigative Support for a damages claim in a non-priority case may also be discharged if the estimate of damages falls to below £5,000 (Criterion 5.6.3 for Investigative Help or 5.8.2 for Investigative Support). The damages limit for housing cases is £1,000.

13.7 Claims Not Subject to Cost Benefit Ratios

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1. This guidance applies to:
 - (a) certificates for Full Representation in which the cost benefit Criterion is either the private client test or the general cost benefit Criterion that “the likely benefits of the proceedings must justify the likely costs”;
 - (b) certificates for General Family Help;
 - (c) certificates for Full Representation or Litigation Support in proceedings which have a significant wider public interest.
2. The starting point in deciding whether such a certificate should continue or should be discharged is to reapply the relevant Criteria for the Level of Service in question, taking into account the latest available information. In practice, the most likely factors to change during the course of the case are the estimates of prospects of success and the estimates of likely costs to disposal. Estimates of likely costs to disposal will necessarily change if proceedings continue beyond the point at which it was originally expected that settlement would take place. When reapplying prospects of success and cost benefit Criteria in these cases, the following approach should be adopted:
 - (a) if the other side has made offers to settle the proceedings, these must be taken into account in deciding what constitutes a “successful outcome” for the purpose of the prospects of success Criteria. Where an offer of settlement has been made, a successful outcome means the chance of the client achieving at trial an outcome which the client would reasonably regard as a significant improvement on what is currently on offer from the other side;

- (b) when applying either the private client test or a general cost benefit test the prospect of recovering costs incurred to date should be taken into account as an extra benefit which would flow from pursuing the case to a successful conclusion. This will be an important factor in non-family cases, but is less important in family cases where there is no general rule that costs will be ordered in favour of the most successful party;
 - (c) nevertheless when considering cost benefit all the costs of the proceedings should be taken into account, both those already incurred and future costs to disposal of the case. In effect this means that past costs are taken into account in two different ways – on the positive side as an additional benefit from continuing the proceedings if it is thought they are likely to be recovered and on the negative side as part of the overall assessment of costs to disposal.
3. If, when prospects of success and cost benefit Criteria are applied to the certificate as interpreted in the way described above, those Criteria are satisfied, funding will continue and the certificate will not be discharged. If those Criteria are not satisfied, the certificate will normally be discharged, but the Commission will retain a discretion to continue funding. This discretion will generally be approached in the following way:
- (a) funding will be continued if there is a significant wider public interest in doing so. For example, in a public interest case which is seeking to establish an important point of law it may in exceptional cases be appropriate for funding to continue to trial so that the point of law is finally established, even if it appears at a late stage in the case that the prospect of establishing the legal issue in the proceedings is low. Sometimes benefit comes as much from clarifying the law as from establishing a particular legal proposition;
 - (b) even when a certificate is to be discharged, it may be appropriate to delay doing so for a limited period if there are reasons for believing that it may be possible to settle the action. It will usually be appropriate to give the client an opportunity to find the best deal available to bring the proceedings to an end. A small costs limit extension may be given for this purpose;
 - (c) if proceedings have not commenced, or are at an early stage, and there is no immediate prospect of settlement, the certificate should be discharged;
 - (d) if proceedings are at a late stage the client's Article 6 rights must be considered – see section 13.5 above;
 - (e) otherwise the issue for the Commission is whether it is in the interests of the Community Legal Service Fund for funding to continue. The certificate should be continued if it is in the Fund's interest to do so, but discharged if it is not. For example, if at a late stage in proceedings the prospects of success are only borderline and are assessed by the Commission at 40%, but over 80% of the total costs to trial have already been incurred, it may be appropriate for the certificate to be continued. A 60% risk of incurring full costs to trial is better for the Fund than the certain loss of 80% of the costs. When the interests of the Fund are considered the risk, if any, of a costs order against the Fund under regulation 5 of the Community Legal Service (Cost Protection) Regulations 2000 (previously section 18 of the Legal Aid Act 1988) must also be taken into account.
4. Note that in this section and in section 13.8, the reference to “past costs” means:
- (a) in the case of Litigation Support all the costs of the case, including costs incurred privately prior to the grant of Litigation Support. For this purpose all costs should be calculated at the specified remuneration rates for Litigation Support (see section 14.6 of this Guidance);
 - (b) in the case of Full Representation or General Family Help past costs refer only to costs incurred by the Community Legal Service Fund or to costs incurred by

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the client privately which have actually been paid by the client to his or her own solicitor. Costs which have been incurred by the client which have not been paid to the solicitor and are unlikely to be paid in the future should not be taken into account; to do so would effectively mean that Community Legal Service funding was being provided to support the financial interests of the lawyers rather than the client. All costs should be calculated at prescribed rates.

13.8 Claims subject to Cost Benefit Ratios

3C-111

1. This guidance applies to certificates for Full Representation or Litigation Support for quantifiable claims which have no significant wider public interest.
2. Decisions to discharge such certificates on the merits are similar to the approach described above in section 13.7 for non-quantifiable claims except that the decision will be less discretionary as the estimates of damages will be quantifiable. Prospects of success and cost benefit Criteria should be interpreted as follows:
 - (a) if the opponent has made a payment into court the prospect of success means the prospect of the client securing an award of damages greater than the amount of the payment into court. This applies to any other offer of settlement by the other side which the court will take into account at the end of the case on the question of costs;
 - (b) past costs should be treated as a potential benefit of the proceedings and therefore the amount of the past costs recoverable from the other side in the event of a successful outcome should be added to the estimate of likely damages when applying the cost benefit Criterion and ratios;
 - (c) where there has been a payment in or other money offer the figure for “likely damages” is the amount the client would recover at trial beyond what is already on offer;
 - (d) in the cost benefit Criterion, the estimate of “likely costs” should include both the past costs and likely future costs to disposal. In effect, past costs should be taken into account on both sides of the cost benefit ratio, just as in 13.7.2 (c) above.
3. Cases which pass the cost benefit Criteria interpreted in this way will continue to be funded and will not be discharged. Cases which do not pass such Criteria will be discharged, subject only to:
 - (a) the Commission’s discretion to delay discharge only for a limited period to allow for settlement: see 13.7.3(b) above;
 - (b) consideration of the client’s Article 6 rights: see 13.5.3 above;
 - (c) the Commission’s overriding discretion to continue funding if it is in the interest of the Community Legal Service Fund to do so: see 13.7.3(d) above.

Example

Assume a contract claim for damages is being pursued under the General Funding Code. The size of the claim is estimated to be £100,000. When Full Representation was first granted the prospects of success were in the 60%-80% bracket and the claim easily satisfied the required cost benefit ratio of 2:1. However, costs to date have been higher than expected and have now reached £15,000. It seems likely that the case will not settle and will proceed to trial. Estimated future costs are £30,000 (so the total costs of the case all the way to trial would be £45,000). Prospects of success are now estimated at 50%-60%. Should funding continue?

The minimum damages to costs ratio for a General Funding Code in the 50% bracket is 4:1. The damages estimate should be treated as £115,000, taking into account the past costs which may be recovered. The total costs of the case to disposal are £45,000. The ratio of

damages to costs, i.e. £115,000:£45,000 is only a little over 2:1. Therefore the cost benefit Criterion is not satisfied and subject to Article 6 arguments, the certificate should be discharged unless it is in the interests of the Community Legal Service Fund for the certificate to continue.

From the Fund's point of view, if the certificate continued there would be an approximately 50% chance of the Fund incurring a total loss of £45,000. That amounts to an average expected loss of £22,500. This is not an acceptable risk and it is in the Fund's interests to withdraw funding and accept the lost costs to date of £15,000. The certificate is therefore likely to be discharged.

Note that the outcome might be different if the case were at a later stage. If past costs were £30,000 and likely future costs were only £15,000, the certificate might not be discharged, as it would be in the interests of the Fund for the certificate to continue in force. An average expected loss of £22,500 is likely to be preferable to a certain loss of £30,000.

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13.9 Affordability

1. The affordability Criterion and its application in practice are discussed in sections 15.4 to 15.8 of this guidance. Whilst the affordability Criterion can lead to funding being refused at the outset of the case, once the Criterion has been applied and a certificate granted, the certificate will not be discharged under the affordability Criterion provided the case remains within the predictions of cost set out in its agreed case plan. However, if a case which has been subject to the affordability Criterion exceeds the likely costs set out in the case plan, the affordability of continued funding of a case must be considered by the Commission. The Commission will, in those circumstances, apply the guidance which is in force at the time that the further funding decision is made which is applicable to the latest estimates of the likely costs of the case. For example, if the likely costs to disposal or to trial of the case place the case in Band 2, the Commission would consider the latest guidance on affordability within Band 2. If the case did not meet that guidance, the certificate would be discharged and the individual contract terminated, subject always to the Commission's discretion to continue funding for a short period to encourage a settlement or to continue funding where it is in the interests of the high cost case budget to do so.
2. The affordability Criterion will also be applied to certificates which are issued by a Regional Office under the normal Code provisions, but subsequently turn out to have high costs and are referred to the Special Cases Unit. Those cases will be subject to the guidance which applies to the cost band relevant to them at the time they are referred. Again, if the case does not meet those minimum requirements, the certificate will be discharged subject to the discretion of the Commission to continue funding as described above. Where possible the Commission will seek to avoid discharging a certificate in a case which is almost completed and is approaching a final hearing or settlement.