

## 10. Investigative Help

### 10.1 Scope of Investigative Help

3C-077

1. Investigative Help is one of the two forms of Legal Representation, the other being Full Representation. Investigative Help is only available where prospects of success are unclear. It covers only the cost of investigating a potential claim. Special rules apply in family, mental health and immigration cases, but for all other proceedings Full Representation is available only where prospects of success are clear. Full Representation can cover all reasonable work in legal proceedings.
2. Investigative Help is often a preparatory step before the grant of Full Representation. Certificates for Investigative Help can be amended to cover Full Representation. However, not all cases need go through the stage of Investigative Help. As explained in section 4.4, Full Representation may be granted immediately (although often in a limited form) provided prospects of success are clear and the other Criteria are satisfied. The importance of Investigative Help varies greatly according to the subject matter of the case. For example, Investigative Help is crucially important to clinical negligence claims, but far less so for housing claims.
3. Investigative Help is not available at all for family proceedings, although such cases can receive a different Level of Service, General Family Help, as explained in section 20. Investigative Help is also not available in cases to which the mental health and immigration Criteria in the Code apply. However, for those specialist categories, the relevant Criteria allow Full Representation to be granted even if the prospects of success are unclear.
4. The legal scope of Investigative Help is set out in section 2.1 of the Code Criteria. Investigative Help covers only reasonable work necessary to investigate the strength of a proposed claim. Usually it does not cover the issue and conduct of proceedings, but can do so in the following three limited circumstances:
  - (a) where proceedings are necessary to obtain disclosure of relevant information, e.g. an application to the court for pre-action discovery;
  - (b) where representation is necessary in existing proceedings to protect the client's position at a forthcoming urgent hearing;
  - (c) where proceedings must be issued to protect the client's position for limitation purposes.

### 10.2 Potential for a Conditional Fee Agreement (CFA)

3C-078

1. Investigative Help may be refused if the nature of the case or circumstances of the client are such that investigative work should be carried out privately with a view to a Conditional Fee Agreement (Code Criterion 5.6.1). This criterion applies only to Investigative Help applications under the General Funding Code and is disapplied in all the category-specific criteria in sections 7–14 of the Code, save for certain claims related to multi-party actions (see s15.10 of the Guidance). The Commission's approach to this criterion is similar to the approach for Full Representation – see s11.2 of the Guidance.
2. At the Investigative Help Stage, when merits are by definition unclear, it is unlikely that either a solicitor or any insurer would be prepared immediately to support a CFA. Therefore, the issue is whether the solicitor can reasonably be expected to carry out any essential investigative work without legal aid, with a view to a CFA.
3. This will depend primarily on the volume of investigative work that is reasonably necessary before prospects of success can be determined. The Commission's

approach is similar to that when considering whether investigative work should be carried out under Legal Help instead of Investigative Help – see s10.3 of this Guidance. If more than 6 hours of fee-earner work reasonably needs to be carried out, a grant of Investigative Help may be appropriate so that suitability for a CFA can then be assessed when any application is made to extend the certificate to Full Representation.

**3C-079**

### **10.3 The Need for Investigation**

1. Criterion 5.6.2 provides that Investigative Help may only be granted where the prospects of success of the claim are unclear and substantial investigative work is required before those prospects can be determined. Guidance on when prospects of success should be regarded as unclear is at section 4.4.
2. In deciding whether substantial investigative work is required, it is appropriate to consider disbursements (including for this purpose any counsel's fees) separately from profit costs. A certificate for Investigative Help may be granted if either:
  - (a) the solicitor will reasonably need to carry out at least six hours of fee earner investigative work; or
  - (b) disbursements together with any counsel's fees would cost £400 or more excluding VAT.
3. Where investigative work below these thresholds is required, it would be more appropriate for such work to be carried out at the level of Legal Help. However, if investigative costs are above these levels an application for Investigative Help may be granted. It is not necessary for work to be done at the Legal Help level up to the thresholds before applying for Investigative Help.
4. A different approach is appropriate for those clients who are not eligible for Legal Help. For such clients a certificate for Investigative Help may be justified provided at least two hours fee earner work is necessary or disbursements and counsel's fees would exceed £100 excluding VAT.
5. Note that when considering what amount of investigative work is necessary for this purpose it is only costs necessary to investigate the strength of the claim that should be taken into account. For the purpose of applying criterion 5.6.2 the cost of an expert report or legal opinion about the size of the claim should not be taken into account, although if Investigative Help is granted such work could in principle be covered.

**3C-080**

### **10.4 Minimum Damages Level**

1. Under Criterion 5.6.3, if the client's claim is primarily a claim for damages and has no significant wider public interest, Investigative Help will be refused unless the damages are likely to exceed £5,000. This Criterion ensures that public funds cannot be used to investigate a potential claim if, even were the investigations to be successful, that claim would be modest in size. In fact, most claims worth less than £5,000 which are within scope of the new scheme would be refused funding in any event on the grounds that they would be likely to be referred to the small claims track. Note that a different threshold applies to housing disrepair claims as explained in section 19.3.
2. The Criterion only applies where the claim is primarily a claim for damages. In deciding this it is necessary to look at the substance of the case in much the same way as for prospects of success and cost benefit Criteria as described in sections 4.2 and 4.5. The minimum damages Criterion therefore does not apply in the following situations:
  - (a) if the client is primarily seeking a non-quantifiable remedy;
  - (b) if the client is a defendant or third party;

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- (c) if the case is of overwhelming importance to the client;
- (d) if the case has a significant wider public interest.

### 10.5 Prospects after Investigation

3C-081

1. Under Criterion 5.6.4 Investigative Help may only be granted if there are reasonable grounds for believing that, when the 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. This Criterion ensures that public funds cannot be used to investigate claims unless there is good reason to believe that, once those investigations have been carried out, the case will be able to proceed.
2. By definition, prospects of success are unclear at the investigative stage so it is not possible to apply any precise Criteria, nor is it easy at that stage to make accurate predictions as to likely costs and damages. A legal judgment must be made as to whether a case looks promising enough on the limited information available to justify proceeding. By the same token, work should cease on reaching the conclusion that the criteria for Full Representation will not be met.
3. In the General Funding Code the application of this Criterion depends on which of the three main types of case is being considered:
  - (a) quantifiable claims – there must be grounds for believing that, following investigations, the minimum cost benefit ratios in the General Funding Code would be satisfied. Even for cases with 80% plus prospects of success, likely damages must exceed likely costs to settlement. Therefore Investigative Help should be refused if the likely size of the claim is small and is unlikely to exceed the total costs (including the investigative costs) to reach a settlement. In practice, it is very unusual for cases with unclear prospects of success suddenly to come into the 80% plus bracket – it is more usual for successful investigations to place claims in the 50%-60% or 60%-80% categories which will require damages to exceed likely costs by ratios of 4:1 and 2:1 respectively;
  - (b) unquantifiable claims – the private client approach applies. Would a private paying client pay the costs of investigating this claim and, having done so, is there reason to believe that the overall benefits of the case would justify the likely costs to disposal?;
  - (c) public interest cases – if a case has a significant wider public interest, Investigative Help is less likely to be refused under this Criterion, but the extent of public interest must still justify the likely costs. This is discussed further in section 5.

### 10.6 Certificate Limitations

3C-082

1. Certificates for Investigative Help may contain additional scope limitations and will always include a cost limitation.
2. If the investigative work needed under an Investigative Help certificate consists primarily of taking a single step, such as obtaining counsel's opinion or a particular expert report, a scope limitation will be placed on the certificate restricting work to that step. However there will be some certificates for Investigative Help which require a range of work to be undertaken and which do not require additional scope limitations. The primary control in such cases is the definition of Investigative Help so that only reasonable investigative costs can be claimed under the certificate. Such certificates will, subject to the cost limitation, allow an experienced practitioner to carry out whatever investigative work is necessary to establish the strength of the claim.

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3. Note also that under rule C43.2(ii) a solicitor must notify the Director immediately once investigations have been carried out such that prospects of success can be estimated in one of the main categories provided for under the Code (i.e. anything other than unclear).
4. All certificates for Investigative Help will also contain a cost limitation. It would be unusual for the initial certificate for Investigative Help to have a cost limitation exceeding £1,500.