

25. Guidelines on Funding Code Opinions

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25.1 Preliminary

Status of these Guidelines

1. These Guidelines are prepared by the Legal Services Commission. They are intended as statements of good practice to be followed when opinions are prepared on the merits of applications or certificates issued under the Funding Code. As statements of good practice these Guidelines should not be too rigidly applied. An opinion will, however, be rejected if it does not contain the information necessary for the Commission to make its decision under the Code.
2. These Guidelines have been agreed by the Bar Council and incorporated in the Code of Conduct of the Bar of England and Wales. (Annex A).

Scope

3. These Guidelines apply to legal opinions sent to the Legal Services Commission for the purpose of decisions made in individual cases under the Funding Code. The Guidelines are most relevant to decisions made under certificates or contracts covering Legal Representation or Support Funding, but also may be relevant to other levels of service.
The Guidelines apply to counsel and to solicitors with higher rights of audience who are instructed to give an independent opinion on the merits of a case. The term “counsel” in the Guidelines therefore includes a solicitor with higher rights of audience.
4. The Guidelines do not apply directly to solicitors giving a report to the regional office in a case which they are conducting or proposing to conduct. Such a report may be shorter and more informal than an opinion on the merits, but these Guidelines should still be borne in mind by solicitors when such reports are prepared.

Preliminary Considerations

5. All opinions must be prepared in accordance with the Funding Code and having regard to the Funding Code guidance prepared by the Commission. This guidance is set out in the Commission’s Manual, and on the Commission’s website at www.legalservices.gov.uk. Every person preparing an opinion must have access to and consult the guidance as necessary.
6. When counsel is instructed to provide an opinion in writing, counsel should first consider whether it is necessary to have a conference, for example to enable counsel to assess the reliability of the client’s evidence in a case where that evidence is likely to be contested. Where counsel considers that a conference is necessary and would be cost effective, the costs of such a conference may be covered by the certificate provided it is within any overall cost limitation on the certificate and is justified as reasonable on assessment at the end of the case. In the case of a high cost case contract, any conference must be justified within the agreed case plan for the action.

25.2 Contents of Opinions

Issues to be Covered

1. The primary purpose of an opinion is to provide the Commission with the information and legal opinion necessary to apply all relevant Funding Code criteria, rather than to provide a personal opinion on what the funding decision should be.
2. Each opinion should state at the outset:
 - (a) the **level of service** under which the opinion is given and if appropriate, the level of service being applied for;
 - (b) the **case category** into which the proceedings fall, giving reasons if there is likely to be an issue as to which case category is appropriate.
3. In every opinion counsel should identify any potentially excluded work in the case, ie. aspects of the case which may fall within the excluded categories in paragraph 1 of Schedule 2 of the Access to Justice Act 1999. Where excluded work arises counsel should specify any of the Lord Chancellor's directions which may bring the case back into scope.
4. It is not necessary for an opinion to discuss separately every criterion relevant to the decision. For example, it is not usually necessary for counsel to refer to the standard criteria in section 4 of the Code unless, in the particular circumstances of the case, one or more of these criteria is likely to be material to the Commission's decision. Unless otherwise instructed an opinion should always cover the following:
 - (a) **Prospects of success** (except for special Children Act proceedings or other proceedings which do not have a prospect of success criterion). The opinion should specify what constitutes a successful outcome for the client, having regard to guidance, and must specify with reasons the prospects in one of the six categories provided for in the Code. Where prospects are "borderline", the issues of fact, law or expert evidence which give rise to that assessment must be identified. Where prospects of success are "unclear" the necessary work to clarify prospects of success must be identified.
 - (b) **Cost benefit** (save for those cases which do not have a cost benefit criterion). The opinion must identify the benefit to the client from the proceedings and, for quantifiable claims, provide a figure for "likely damages" as defined in the Code. See paragraph 14 below as to estimates of "likely costs".
 - (c) Where the application is for **Investigative Help** to be granted or continued, the opinion must deal with matters relevant to criteria 5.6.2 (the need for investigation) and 5.6.4 (prospects after investigation). The opinion should explain why 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.
 - (d) Where the issue is whether funding should be **withdrawn** on the merits, the opinion should cover matters relevant to applying criteria 15.2 to 15.4, taking into account the interests of the client, the interests of the Community Legal Service Fund and relevant guidance.
5. An opinion on merits should:
 - (a) where **factual issues** are involved (a) set out in sufficient detail, (although not necessarily at great length), the rival factual versions to enable the Commission to assess their relative strengths, and (b) express a clear opinion as to the likelihood of the applicant's version being accepted by a court and why;
 - (b) where **legal issues** or difficulties of law are involved (a) summarise those issues or difficulties in sufficient detail to enable the Commission to come to a view about them without looking outside the opinion, and (b) express a clear view as

- to the likelihood of the applicant's case on the law being accepted by a court and why;
- (c) draw attention to (a) any **lack or incompleteness of material** which might bear on the reliability or otherwise of the applicant's version, and (b) any other factor which could – whether now or in the future – materially affect the assessment of the outcome of the case.
6. Where appropriate an opinion should suggest or formulate for the Commission any limitation or condition, whether as to the scope of work that should be covered, or as to costs, which ought to be imposed on the grant of funding in order to safeguard the Fund. In complex cases, including cases proceeding on the multi-track, the opinion should, specify any future point in the proceedings at which it is likely to be sensible to re-assess the merits.

Information From Other Sources

7. There will often be information relevant to a merits decision which is not readily available to counsel. Where such information is not included in counsel's instructions, the opinion should specify the information which should be provided by the instructing solicitors, usually in the form of a covering letter to accompany counsel's opinion.
8. The following issues should usually be dealt with by instructing solicitors:
- (a) estimates of **likely costs**. This includes estimates of whether costs incurred to date, likely future costs to disposal, or future costs to trial. Assessments of likely costs may be relevant not just to any cost benefit criteria, but also to other criteria such as the thresholds for support funding, or the affordability of a high cost case. Such estimates will sometimes best be made in the light of counsel's opinion as to prospects of success and the future conduct of the case. Alternatively instructing solicitors may provide relevant estimates of costs to counsel with counsel's instructions so that such figures may be incorporated in the body of the opinion;
 - (b) assessments of whether a case is suitable for a Conditional Fee Agreement and whether affordable insurance is available, in cases which are being considered under the General Funding Code.

Specific Issues

9. Where it is suggested that a case has a significant wider public interest counsel's opinion should:
- (a) identify the nature of the benefits which the case might bring to persons other than the client;
 - (b) identify the group or section of the public who might benefit from the case, if possible giving at least a rough estimate of likely numbers;
 - (c) where people may benefit indirectly from a test case, explain the individual issues which other clients would need to establish in order to succeed with their claims;
 - (d) where the public interest of the case derives from establishing an important point of law, set out that legal issue clearly and explain the likelihood of the court resolving the issue one way or another for the benefit of other cases.
10. Where it is suggested that a judicial review or claim against a public authority raises significant human rights issues, the opinion should identify the specific articles of the Convention which may have been breached by the public body and the importance of those issues to the client and the general public.

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11. Where it is suggested that a case has **overwhelming importance** to the client as this is defined in the Code, the nature of the importance to the client must be identified in the opinion having regard to the Commission's guidance on this issue.
12. In cases involving more than two parties, counsel should consider carefully whether **separate representation** for each client is justified (criterion 5.4.5). This is particularly important in many family cases and in appeals where the points at issue in the appeal may not require separate representation from every party to the proceedings at first instance. Counsel should consider whether the arguments on which his or her client relies will be put forward on behalf of another party whose interests in the proceedings are substantially the same. Counsel should report to the Commission with proposals for minimising representation by solicitors and counsel.
13. In high cost cases in which the Commission will be considering whether the action is **affordable** in the light of available resources (criterion 6.4) counsel's opinion should address those aspects of the case which, in accordance with the Commission's guidance, are relevant to the affordability decision. It will not be possible or appropriate for counsel to consider the question of the resources available to the Commission, or the reasonableness of funding the individual case as against other cases, as these are matters solely for the Commission.

25.3 Continuing Duties to the Fund

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1. A barrister is under a specific duty to comply with the provisions of the Access to Justice Act 1999 and any regulations or code in effect under that Act (paragraph 304 of the Bar Code of Conduct). Since these duties are directed at ensuring that public funding is granted and continued only in justifiable cases, it follows that counsel acting under a funding certificate is under a duty to bring to the attention of the Commission any matter which might affect the client's entitlement to funding, or the terms of his or her certificate, at whatever stage of the proceedings that might occur.
2. Counsel and any other legal representative acting under a certificate or contract are also subject to the specific obligations set out in Rule C44 of the Code Procedures. This includes a general obligation to inform the Director of new information or a change of circumstances which has come to light which may affect the terms or continuation of a certificate.
3. Where counsel is under an obligation to draw matters to the attention of the Commission, he or she may do so by drawing matters to the attention of his or her instructing solicitors and asking that they be passed on to the Commission, or counsel may contact the Commission directly if that is appropriate in the particular circumstances of the case.