5. Authorities

1D-055

5.1 Introduction

1. For cases and matters under the Unified Contract Specification in force from 1 October 2007, applications for prior authority are governed by Paragraphs 6.14, 6.15 8.37(d) and 8.37(e) of the Specification. These replace the provisions under regulations 59 to 63 Civil Legal Aid (General) Regulations 1989..

2. Under Paragraph 6.14 of the Specification, costs in respect of which prior authority has been obtained will not be disallowed on assessment, provided the authority was not obtained on the basis of incorrect information. The duty to the Commission in relation to information relating to the application is a continuing one, and the grant of prior authority is conditional on the reasons and purpose for which the authority was given still subsisting at the point the costs are actually incurred.

3. In general, prior authority can be sought only in respect of costs that are unusual in their nature or amount. However, the Specification requires prior authority generally to have been obtained for the instruction of counsel in the magistrates' court, for the instruction of Queen's Counsel (where Queens Counsel will act and claim as such) and for the instruction of more than one counsel, but does not list other examples of potentially unusual expenditure, in the same way as regulation 61 of the 1989 regulations. See 5.2 below.

4 Authority cannot be given, for example, for disbursements that are of an entirely routine nature and amount in relation to the type of proceedings concerned. . Further, an inappropriate application for prior authority itself represents work that it was unreasonable to incur. Other than in relation to the fees of Queen's Counsel or more than one counsel, all costs within the scope of a certificate have the potential, based on the reasonableness of the particular step and the amount claimed, to be allowed on final assessment5. Although it is never compulsory to apply for a prior authority, suppliers should consider doing so where there is a significant risk that the costs in question may not be allowed on final assessment. The Commission will consider applications on the basis that costs which are at risk of being held to be unreasonable on assessment will usually come within the test of being either unusual in their nature or unusually large.

6. When obtaining authority to instruct Queen's counsel or to incur other unusual or unusually large expenditure, the supplier should also get the client's consent, after telling him or her what the additional costs are likely to be, together with their impact on the statutory charge (*Re Solicitors, Re Taxation of Costs [1982] 2 All E.R. 683*).

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7. The granting of prior authority is effectively a pre-assessment determination allowing particular costs. The Director will not give authority for costs of a nature or at a level that it is anticipated would be disallowed on a final assessment. Under Paragraph 6.15 of the Specification (unlike under the 1989 regulations) any decision to refuse or limit a prior authority below the amount requested may be appealed in the same way as a final assessment by the Commission. The Director must provide reasons for the decision and appeal will lie to the Independent Costs Assessor with the potential for an application for certification for a Point of Principle by the Costs Appeal Committee.

8. Note that whilst judicial views will always be considered, the court has no role in the prior authority system itself. A statement by the court that a particular disbursement is deemed reasonable is not binding on cost assessment and therefore does not replace the need to obtain a prior authority.

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5.2 Authority for Counsel

1. Under the Specification , the general rule is that a supplier may instruct counsel without the need for prior authority where it appears reasonable in the context of the case or proceedings. When counsel entrusts a case to another counsel the permission of the regional office is not required.

2. However, unless authority has been given in the certificate or subsequently, counsel should not be instructed in a magistrates' court (including family proceedings court), nor should Queen's Counsel or more than one counsel be instructed. Note that authority for Queen'scounsel is only required where Queen's counsel is acting as such. There may be circumstances where Queen's counsel choose to act and be paid at junior counsel rates, in which case no prior authority need be applied for.

3. In the case of proceedings a magistrates' court (including family proceedings court), unauthorised costs involved in instructing a single junior counsel may be allowed on assessment, or may be assessed on the basis that the solicitor undertook all the work with the amount allowed being shared between the fee-earner and counsel. This is known as the 'maximum fee principle'. This means that on assessment, there are three possibilities:

    (a) prior authority granted for the instruction of counsel – counsel's reasonable fees are assessed as for County Court proceedings;

    (b) no prior authority given but it is considered on assessment that the conduct of the case required the use of the fee-earner and counsel. For example, there may have been a difficult evidential problem or a query on a point of law. Again, assessment is as for County Court cases;

    (c) no prior authority granted and on assessment it is not considered that the circumstances justified the use of both solicitor and counsel – the maximum fee principle should be applied.

4. Where unauthorised costs incurred in instructing Queen's Counsel or more than counsel there is no discretion to allow such costs on detailed assessment as against the CLS fund. (Paragraph 8.37(e) of the Specification). On receiving instructions, counsel should satisfy him or herself that any necessary authority has been obtained and that a copy of the certificate together with any amendments and or authorities are included with the instructions (, Paragraph 6.16 of the Specification; see also *Hunt v. East Dorset Health Authority* [1992] 2 All E.R. 539).

5. All requests for authority to instruct or brief Queen's Counsel and more than one counsel are handled by experienced Case Managers in the Special Cases Unit (SCU). In family cases, all such applications are dealt with by the SCU in London. Non family applications are considered by any SCU office.

6. When applying for authority for counsel the supplier should make it entirely clear whether authority is sought to:

   (a) brief Queen's counsel alone;

   (b) brief Queen's and junior counsel;

   (c) instruct Queen's counsel alone; or

   (d) instruct Queen's and junior counsel (or continue to instruct junior counsel);

   (e) brief two junior counsel; or

   (f) instruct two junior counsel.

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and should submit the application in good time with sufficient information for the decision to be made. Applications (including late applications) with insufficient information will not be granted and oral applications are likely to be granted only very exceptionally as it should be possible to submit the necessary information in writing at the earliest opportunity. Applications should be made on form APP8 with supporting letter and/or note from counsel.

7. An authority for "briefing counsel" in respect of a hearing only covers the brief to appear itself, any necessary conference/consultation on the brief after its delivery and preparation of any necessary skeleton argument. It does not cover any conference/consultations or other work done on instructions before the delivery of the brief ((see *Din v. Wandsworth London Borough Council* (No 3)[1983] 1 W.L.R. 1171).

8. An authority for "instructing counsel" is wider than one for "briefing counsel". It covers the involvement of counsel generally in the further conduct of the proceedings including being briefed to appear, subject only to assessment.

9. An authority for "instructing leading counsel alone" permits him or her to settle pleadings or draft such other documents as are normally drafted by junior counsel.

10. The agreement of the client must be sought to the instruction of Queen's or additional counsel where the additional cost may affect the amount of the statutory charge. If the client has not been informed of the position the propriety of any authority may be queried on assessment (see *Re Solicitors, Re Taxation of Costs [1982] 2 All E.R. 683).*

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5.3 Factors taken into account in relation to authorities for counsel

Generally

1. Authority for Queen's Counsel or more than one counsel will generally only be granted in cases of exceptional complexity or importance. The question for the Commission is whether the issues in the case are such that the interests of the client cannot be fairly and properly determined without the assistance of Queen's Counsel or more than one counsel.

2. For example, in non family cases if there are very difficult issues of causation and/or very substantial quantum this will make it more likely that an authority will be granted. Factual or evidential complexity alone is unlikely to justify an authority for Queen's Counsel but might, exceptionally, justify an authority to brief two juniors. If the reason for the application is merely that the case is of great importance to the funded client (e.g. a parent in opposed care or adoption proceedings) this will not of itself be sufficient to justify a grant.

3. The urgency of the case or the convenience of the supplier or counsel are not factors to be taken into account (although see below regarding the possibility of an authority for two junior counsel). The fact that the application concerns an appeal (including to the Court of Appeal) is not of itself a sufficient justification for authority (and see below regarding the House of Lords).

4. It does not follow that if one party has Queen's Counsel or two counsel then all the parties should have Queen's Counsel or two counsel. The case for/against each party may be different. Each individual application will be considered on its own facts and merits and the role and the involvement of each party within the proceedings will also be considered. If the only reason for the request being made is that another party has Queen's Counsel it will be appropriate to consider the reason(s) why. Another party having Queen's Counsel is not a factor that alone merits authorisation. Conversely if one party seeks authority for Queen's or two counsel, when the other party or parties …

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do not, any justification for this will depend on the client's own case and position in the proceedings.

5. Where cases are linked or a number of parties are publicly funded in the same set of proceedings and there is no conflict of interest sufficient to justify the use of separate

advocates then every attempt must be made to instruct the same counsel, including the same Queen's counsel or second counsel.

Family Matters

6. Although family matters are by their very nature emotive, dealing with difficult and complex personal issues and the outcome of these cases are of the utmost importance to the parties involved, in the majority of family cases the principles and law are generally well settled and therefore the matters in which the instruction of Queen's Counsel is justified will be exceptional. This includes public law cases which are generally managed by junior counsel.

7. It is unusual (although not unheard of) for the decision to grant authority for Queen's Counsel to rest on a single issue. Normally, there is an accumulation of issues and the difficulty is deciding at what point the level of complexity tips the balance. The factors to take into account when considering a request for authority are numerous and varied and may appear in any combination and to differing degrees. They may include:

   - A genuine and significant challenge to statute or precedent case law;
   - Significant novel points of law;
   - Numerous experts with conflicting expert opinion on an issue key to the case outcome;
   - Allegations of extremely serious abuse or non-accidental injury;
   - Concurrent or threatened criminal proceedings of the most serious nature;
   - Unusually complex evidential problems.

8. This is of course a non-exhaustive list and each case can reflect elements of any of the above in varying degrees. This highlights why it is so important to consider each application on its own merits and for each issue to be described in detail in any application for authority. Most of the above issues singly and in some combinations will be within the capabilities of experienced junior counsel. In order for there to be merit in instructing Queen's Counsel there would have to be an accumulation of these factors and/or other individual factors of the most exceptionally complex nature.

   If any of the factors above are present, how they affect the management of the individual client's case is also relevant. The relevance of each factor may well be different for each parent, child or other parties.

   At first instance venue is an issue to which weight may be given although clearly the less complex cases will be heard in the County Court and Family Proceedings Court. It is recognised that some cases that would otherwise be heard in the High Court are retained in the County Court for reasons of timetabling, expedition and judicial availability.

Authorities for Leading and Junior Council

9. If authority is sought for Queen's and junior counsel (as opposed to Queen's counsel alone):

   (a) there will be a presumption that Queen's counsel will operate without the assistance of a junior, and it is not a relevant factor that Queen's counsel is not prepared to appear without a junior;

   (b) an application for both Queen's and junior counsel must justify:

      (i) the work to be undertaken by each counsel and their role in the proceedings;

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      (ii) why the client cannot be adequately represented by one counsel alone.

   (c) generally Queen's counsel will only be authorised where the nature of the case raises very significant public interest issues, or is exceptionally complex, such that the interests of the client cannot be properly determined without the assistance of Queen's counsel.

10. Where authority is sought for both instruction of Queen's Counsel and retention of previously instructed junior counsel, it may be suggested that there is merit in keeping the experience, knowledge and trust that the funded client has in junior counsel. However, the fee-earner with conduct should also have this experience, knowledge and working relationship with the funded client, but may not be present at every hearing. Each case will be considered individually to determine the objective need for the continued instruction of junior counsel.

11. If junior counsel is to be retained, the respective roles of Queen's and Junior Counsel must be identified and justified. Authority may be given for Queen's and Junior Counsel where the considerations for Queen's Counsel alone apply, but the following will be taken into account:

   - • The involvement of junior counsel already is such that it can be demonstrated that his/her assistance to Queen's Counsel will materially save time for Queen's Counsel sufficient to justify the junior's fees.

   - • The papers in the case are so voluminous that it would be practically impossible for Leading Counsel to handle them without a junior, either in preparation for the trial or at the trial itself.

   - • There are such a large number of witnesses that trial management requires Queen's Counsel to be assisted by junior counsel.

12. All of these factors will be affected by the timing of the instruction of Queen's Counsel. The sooner in the action authority is given the more likely it is that Queen's Counsel will be able to manage the case alone and vice versa.

13. Where authority has initially been granted for Queen's Counsel alone, but it subsequently emerges that junior counsel will be required for reasons not apparent when the initial authority was granted, an application for further and wider authority can be made and should be supported by a note from Queen's Counsel.

Junior Counsel Taking Silk

14. Authority to instruct Queen's Counsel is only needed where Queen's Counsel will be acting as such. When a junior who has been instructed takes silk, the Commission will, on an application for authority for him or her to continue as a leader, take the following into account:

(a) Queen's Counsel is permitted, and should normally be willing at any time before the first anniversary of being appointed as Queen's Counsel, to do any ordinary work of a junior in any proceedings he or she was instructed to settle before appointment;

(b) he or she may, at his or her discretion, continue to act as a junior for an unlimited time, inter alia, in a civil suit in which he or she was instructed before being appointed as Queen's Counsel and appeared as a junior at the trial or on an appeal before the first anniversary of the appointment;

(c) except as above, he or she should refuse to act as a junior after the first anniversary of being appointed as Queen's Counsel unless, in his or her opinion, such a refusal would cause harm to the client. In that event he or she may, at his or her discretion, continue to act until the second anniversary of the appointment;

in the event of Queen's Counsel not electing or being able to continue as a junior, it is open to a supplier to instruct a fresh junior.

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Authority for two Junior Counsel

15. Authority for two junior counsel is needed where two counsel propose to claim separate fees. It is not, however, needed where there is an informal sharing of work and fees within a set of chambers. In any case where the Director would be prepared to grant authority to instruct Queen's and junior counsel authority may be granted for two junior counsel, recognising that many experienced junior counsel prefer to continue with such cases with the assistance of a second junior. In a case which would not otherwise warrant the instruction of Queen's Counsel, authority for two junior counsel might be justified by the volume and complexity of the work and the timescale of the proceedings– for example where, unavoidably, a party is joined at a very late stage in a significant and complex case.

Magistrates' Court (Family Proceedings Court/Summary Proceedings)

16. In the case of summary proceedings, authority is likely to be granted where the case poses:

(i) unusually complex evidential problems; or

(ii) novel or difficult points of law;

but not if the reason for instructing counsel is:

(i) that the case is contested, protracted or involves the cross examination of witnesses or arguments on points of law;

(ii) the personal circumstances or convenience of the fee-earner in circumstances where it would be more appropriate to instruct an agent.

House of Lords Appeals

17. Queen's counsel appearing in the Court of Appeal can apply to the Court of Appeal for leave to appeal to the House of Lords, but may not settle an application for leave to appeal to the Lords. Authority may be granted for him or her to advise the Legal Services Commission on the merits of such an appeal, but only where he or she conducted the appeal hearing in the Court of Appeal (Practice Direction House of Lords Civil Appeals; 1.20 [2005]). The instruction of both Queen's and junior counsel may be appropriate once leave has been granted, although the instruction of Queen's counsel alone is increasingly common.

18. In House of Lords cases the following authority wordings will normally be used:

(a) Authority is included to instruct leading and junior counsel, but only after leave to appeal has been obtained;

(b) Authority is included to instruct leading counsel alone, but only after leave to appeal has been obtained;

19. These authority wordings reflect the following considerations:

(a) The House of Lords will not authorise payment of Queen's Counsel's fees for settling the petition for leave (Practice Direction H.L, 1.20 [2006]).

(b) Applications for leave are generally dealt with on the papers. If there is an oral hearing the House of Lords directions provide only for the payment of junior counsel's fee (Practice Direction H.L., 1.20 [2006]).

(b) A consultation with Queen's Counsel before leave is obtained would not be allowed on assessment, but a conference with junior counsel may be (Practice Direction H.L. 1.20 [2006]).

20. Petitioners and respondents to a petition for leave to appeal may instruct leading or junior counsel, but on taxation (assessment of costs) the House allows only junior counsel's fees for any stage of a petition for leave to appeal, even if a public funding or legal aid certificate provides for leading counsel. The only exception to this practice is where leading counsel

who conducted the case in the court below are …

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instructed by the Legal Services Commission or legal aid authorities to advise on the merits of an appeal.

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5.4 Employment of Experts

1.. A request for authority to instruct an expert must include an explanation as to why a pre-determination of the costs to be allowed is considered necessary, for example because expert evidence is sought in an usual subject area in relation to the nature of the case or where a second expert opinion is requested on an issue for which an expert's fees have already been incurred; or where the costs are unusually high because of the rate charged by the expert, requested, the expert has indicated that she or he will incur an unusually large amount of time in preparing a report or travelling and/or accommodation costs would be incurred by virtue of the distance of the expert from the client or supplier.

2. The request for prior authority must also be supported by sufficient information to justify the reasonableness of the costs requested, .having regard to their unusual nature or amount,

3. If authority is granted, it will specify the maximum fee payable for any report, opinion, expert advice or transcript. This may be less than the amount applied for. If the ultimate fee is difficult to predict, an initial sum may be authorised to establish the benefit and costs involved in undertaking further work.

4. Suppliers are expected to identify and instruct appropriate experts directly (rather than through any agency or third party, whose involvement is considered to be an unjustifiable expense).

5. Where a partner or employee (including a solicitor employee) of a supplier advising or acting for a client is involved in the provision of non-legal services, then authority will be refused unless the regional office is satisfied that:

   (a) the business providing the service (e.g. photography) has been legitimately set up and does exist as a separate entity;

   (b) those involved appear to have the necessary expertise to undertake the work involved;

   (c) it appears unlikely that those involved would have to give evidence – other than formal evidence;

(d) the expenditure is justified in terms of the work to be undertaken and the amount involved, at least one other estimate being available, and

(e) the client has been informed of the position and agrees that the disbursement should be incurred using the business connected with the supplier: in relation to solicitors' firms, see Principle 15–04 of the "Guide to Professional Conduct of Solicitors".

6. This reflects the private client position, and is intended to ensure that the client's interests are protected, having particular regard to any contribution payable and the possible operation of the statutory charge.

7. Factors which may influence the regional office include the following:

(a) the total financial commitment as far as an expert is concerned, including the cost of obtaining a report and tendering evidence;

(b) whether the funded client has agreed to costs which may increase the amount of any statutory charge.

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5.5 Funded clients' Travel Costs and Other Expenses

1. The basic principle is that costs, whether paid by the client or the Fund, are in reimbursement of the supplier's profit costs, counsel's fees and disbursements properly and reasonably incurred. Since the supplier is instructed by the client, it is …

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only in limited circumstances that the supplier could properly incur a disbursement in relation to his client's own expenses, e.g. travel costs.

2. The case of *R. v. Legal Aid Board, ex p. Eccleston* (QBD April 3, 1998, Law Society's Gazette May 20, 1998, The Times, May 5 1998) clarified the law on this subject. Mr Justice Sedley concluded that an assisted person's travel expenses could amount to a proper solicitor's disbursement, for which the Legal Aid Board could grant prior authority, if the assisted person needed to see an expert whose report was essential for the proper conduct of the proceedings, and the assisted person could not otherwise afford the expenses involved in travelling to see that expert.

3. The implications of this judgment affect both costs assessments and applications for prior authority made under Paragraph 6.14 of the Specification as an item which is either unusual in its nature or involves unusually large expenditure.

4. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns a personal expense of the client may arguably make the expense unusual in its nature.

5. The supplier is not, of course, obliged to seek a prior authority. Such expenses may be recoverable on assessment as a disbursement provided that they have been reasonably incurred and are reasonable in amount. If the expense is allowed as a disbursement and the client recovers or preserves money or property as a result of the proceedings, then it will serve to increase any statutory charge liability. This type of expense will generally not be recoverable inter partes (as an item of costs as opposed to part of a special damages claim), but may be recoverable on a publicly funded assessment by the court or the Commission.

6. 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.

7. A supplier may pay these expenses on behalf of his or her client, and then include the payments in the bill, as they would generally be recoverable as a disbursement. Receipts should be produced where relevant. The usual principles as to reasonableness apply. If it was unreasonable for the client to attend the hearing in furtherance of his or her case, for instance because there was no intention that the client would give evidence, or the hearing was an interim hearing where the client's presence was not strictly necessary, then the disbursements would not normally be allowed.

8. 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 mileage rate;

      (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;

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(iv) subsistence: this would include reasonable expenditure on meals and non-alcoholic beverages, but not items such as cigarettes, newspapers etc.

9. Following *Eccleston*, a funded client may be entitled to recover his or her travel expenses in connection with attending a medical or other expert. 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 will 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 social security benefits or does not automatically satisfy the test of "impecuniosity". The 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. A relatively small expense is unlikely to justify the grant of a prior authority, and should not generally be allowed on assessment unless the client is so impecunious as to be unable to meet even that small 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 client to seek financial assistance from the Fund to attend the appointment. This is akin to a visit to the client's own supplier's office. An application for prior authority or payment should generally be refused in these circumstances, unless the client can demonstrate that he or she is impecunious and 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 supplier should set out the steps which have been taken to identify an appropriate local expert, for instance, 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.

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 client could not be seen promptly locally (provided that the client and his or her supplier was not responsible for the delay in instructing an expert). The nearest expert with appropriate expertise should be used. For example, it is not necessarily justified to

use a London expert in a Manchester case if an appropriate expert is available in Liverpool;

(e) the client must justify why he or she needs to attend the meeting with the expert. For instance, e.g. if a physical examination is necessary, then clearly it would be reasonable to do so;

(f) the application must provide a full breakdown of the proposed expense;

(g) any available alternative sources of funding should be considered.

10. Before granting an application for prior authority the regional office should take into account all the above criteria, and determine whether it is necessary for the proper conduct of the proceedings to incur the expense. If the authority is refused, written reasons must be provided for the decision.

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11. When considering applications, regional offices should also consider whether a private client of moderate means would incur the expenditure in all the circumstances of the particular case.

12. 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 client's costs. If the expense has not already been paid by the opposing party, it should be claimed as an inter partes item in the bill. Prior authority should be refused.

13. The same criteria as above should be applied to funded clients' travel costs to attend legal advisers, such as for a conference with counsel. It would generally not be reasonable for the client to seek prior authority to cover such expenses unless the criteria can be met, for instance where attendance in conference with a specialist counsel in London was essential before counsel could review the merits of the case.

14. So far as the costs of an expert attending on the funded client are concerned, the general principle is that litigants are expected to visit their professional advisers unless they are unable to do so. It is generally more economical for the funded client to visit the expert rather than vice versa, as the attendance of an expert on the client would involve a claim for both travel and incidental expenses, and the time spent in travelling as well as the attendance.

15. Prior authority for an expert's costs of visiting the client should only be granted in exceptional circumstances, for instance where the client is unable to visit the expert due to physical incapacity, or the visit itself is the purpose, such as assessing the client at home.

16. So far as funded clients' travel costs to hospital are concerned, hospitals will pay the fares of patients attending for NHS treatment if they are in receipt of certain benefits such as income-based Jobseeker's Allowance, income support, or if they are covered by a low income exemption certificate issued by the Benefits Agency's Benefits Unit.

17. The above covers the most common scenarios. However, other types of application of a similar nature may be made, such as the costs of travel pursuant to a court order for interim contact with a child, attendance at a social services case conference, an assessment centre or family mediation appointment. If the expense would have arisen even if the person was not publicly funded, because it arose due to the circumstances generally rather than directly and solely as a consequence of the proceedings or proposed proceedings, it does not constitute a disbursement and must be refused. If the expenses arise as part of the implementation of a court order or agreement, they do not form part of funded client's costs, but are rather the consequences of implementation. In these circumstances applications for prior authority and payment should be refused.

18. Each application should be considered on its own merits.

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5.6 Joint Instructions and Apportionment Generally (see also para 5.7 below)

1. Parties should use a single expert jointly instructed where this is appropriate to the circumstances of the case (including in particular in ancillary relief applications). If the funded client unreasonably refuses to do so, then this should be reported by the supplier as incurring an unjustifiable expense to the Fund (Funding Code procedures C.44).

2. Disbursements should be appropriately apportioned between parties (whether publicly funded or not) where that is reasonable, e.g. where only one report is to be obtained for the use of the court (possibly following joint instruction), with or without the leave of the court. This may be equally as between the number of parties (but see para 5.8 below regarding public law Children Act cases).

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3. However, the existence of public funding cannot affect the exercise of the discretion of the court (section 22(4) of the Access to Justice Act 1999). It is therefore both inappropriate and unreasonable to transfer the responsibility for an expenditure to a publicly funded party having regard to their publicly funded status. This is particularly relevant in private law Children Act proceedings, including contact proceedings, where only one of the adult parties or only the child may be publicly funded. Suppliers should not agree liability or apportionments which place or transfer financial liability on the funded client(s) on the basis that they are in receipt of public funding and the court will need to have regard to section 22(4) as against the particular circumstances and expenditure. Suppliers must take care not to accept that funded clients will, through their certificates, bear costs and expenses unless this would be appropriate in the case of a private paying client. It must also be remembered that a prior authority from the LSC is the only way that the ultimate costs assessor can be bound as to both the principle and amount of any costs or disbursements.

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5.7 Residential assessments; treatment, therapy and training and related expenses

1. It is not the role of the Community Legal Service Fund to meet the costs of, or expenses relating to residential assessments or treatment, therapy, training or other interventions of an educative or rehabilitative nature (see Funding Code paragraph 1.3).

2. Funding Code Criteria 1.3 is widely drafted. It provides that costs of, or expenses **relating to** the residential assessment of a child or treatment, therapy or training or other interventions of an educative or rehabilitative nature may not be charged as disbursements and extends to costs or expenses of work undertaken with a view to, or to support, excluded work.

3. A residential assessment is defined as any assessment of a child, whether under section 38(6) of the Children Act 1989 or otherwise, in which the child, alone or with others, is assessed, on a residential basis, at any location other than his or her normal residence. It also includes an assessment or viability assessment, whether residential or not, preparatory to or with a view to the possibility of a residential assessment (Funding Code paragraph 2.4). This definition is wide and excludes initial assessments or pre-assessments however they are described (the term viability assessment is sometimes used) and whether residential or not where they are preparatory to or with a view to a residential assessment. This paragraph of the Funding Code reverses the decision in *The London Borough of Lambeth v S and C and V and J and the Legal Services Commission* [2005] EWHC 776 (Fam).

4. These exclusions are clearly not confined to the costs and expenses of such interventions. Any accommodation or other expenses, including subsistence and travelling expenses relating to these items cannot therefore be charged as disbursements and must also be excluded from any application made by the conducting solicitor for prior authority (or for any increase in the costs limitation applicable to the certificate of public funding). This applies to all cases including public and private law Children Act cases.

5. Where it is not clear whether such costs or expenses are excluded in a case where this appears to be relevant, an application for prior authority or an amendment to the costs limitation will be refused for further information or confirmation.

6. Suppliers should, in relevant cases, draw the attention of the judiciary to the extent of the availability of public funding as a court order cannot be followed by the Commission where excluded work would, as a consequence, be remunerated out of the Fund. Suppliers should not reach any agreement which anticipates, or may lead to, excluded costs or expenses being met by a funded client , nor which would transfer liability for payment of an expense on the basis that a particular party is publicly funded. It should also be noted that careful consideration needs to be given by suppliers to what constitutes a legitimate disbursement which can legally and reasonably be expected to be met out of the Community Legal Service Fund – for example the costs of an assessment which could not be directed by the court under S38(6) or otherwise agreed by the parties would not be met. The parties cannot bind the ultimate costs assessor.

7. The funding Code amendments which exclude all residential assessments from the scope of funding apply to any disbursements incurred on or after 1 October 2007, regardless of when the certificate was issued (see preamble to the Funding Code Criteria).

1D-062.1

5.8 Public Law Children Act Cases

1. .The guidance in this section applies only to costs or expenses which do not relate to residential assessments or other disbursements which are excluded from the scope of funded as explained in section 5.7 above. In the light of the judgment in *Calderdale Metropolitan Borough Council v S* (2004) Times, 18 November 2004 and [2004] EWHC 2529 (Fam) (Bodey J), the Commission accepts that where an apportionment is appropriate then it should generally be on a proportionate or pro rata basis – i.e. each party paying equally towards the costs (but see below regarding section 38(6) assessments). In *Calderdale*, Bodey J treated the children's guardian as the funded party, although there were in fact two children who were funded parties. The Commission accepts that any proportionate apportionment should accurately reflect the numbers of parties (including children) – however, see paragraph 3 below regarding the appropriate considerations.

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2. In *Calderdale*, Bodey J accepted that a specialist report can and, on some occasions, should be comprised within a local authority's core assessment and/or should be part of the local authority's own basic case (para 28). Local authorities will apply the statutory guidance of the Department for Children, Schools and Families or the Welsh Assembly Government and the applicable assessment framework in relation to what constitutes appropriate local authority work and preparation falling to be undertaken prior to the issue of proceedings.

3. In the absence of any statutory or regulatory guidance on the distinction between reports which ought to be at the expense of the local authority and reports which should be funded by all the parties (except those unaffected by it), the following non-exhaustive considerations set out by Bodey J apply (para 35):

   (a) The court has to exercise its discretion to apportion the relevant costs fairly and reasonably, bearing in mind all the circumstances of the particular case.

   (b) The court will have regard to the reasonableness of how the local authority has conducted the information gathering process and with what degree of competence and thoroughness.

   (c) The court will use its experience and 'feel' to be alert for cases where a local authority has done quite little preparation or else has prepared rather poorly. If for example, a local authority proposes the instruction of an independent social worker consultant (which for good practical reasons is agreed to be done on a joint-instruction basis), where the work would normally have been expected to be undertaken by the local

authority as part of its core preparation, then the local authority will certainly or almost certainly be ordered to pay 100% of the costs involved.

(d) The court will have regard to the extent to which the report in question goes merely to satisfying the so called 'threshold' for state intervention, as distinct from helping the court to decide more generally what overall 'disposal' would best serve the interests of the child's welfare.

(e) A further consideration is the type of expert concerned and the nature of his or her involvement with the family and/or his or her role in the case. 'Treating' experts and others who have had a 'hands on' role with the family already are more likely to have to be paid for, if they charge a fee, by the local authority. Conversely, the fees of a purely forensic expert brought in specifically to make a full overview report to the court within the context of his or her discipline, are much more likely to be ordered to be shared in principle between the parties.

(f) One reason that the costs of a jointly commissioned report ordered by the court will, generally speaking, be ordered to be shared in some way is that each party has an interest in having confidence in the integrity of the forensic process. However, if a party genuinely opposes a report being jointly commissioned, or disputes the need for a report at all then, provided this opposition is mounted for substantive reasons and not merely cosmetically or tactically, the court may take this factor into account in deciding how to exercise its discretion.

(g) The fact that a party is publicly funded is not a reason for taking a different decision about costs from that which would otherwise have been taken. It would be wrong to pin a costs responsibility on the LSC which would not otherwise have been ordered against the publicly funded individual concerned (section 22 of the Access to Justice Act 1999).

4. The judgment makes it clear that there will be cases where a party has intervened on a discrete issue (for example, as to contact) and should plainly not be required to join in the costs of a jointly commissioned report on other issues (para 53). Likewise, it was accepted that there will be some cases where even though it is determined that the costs of a joint report should in principle be shared, some apportionment other than equally between the parties would clearly be appropriate. Ultimately apportionment is a matter for the discretion of the court (para 54).

5. The decision in *Calderdale* suggests that wheresoever possible, issues regarding payment for jointly commissioned assessments and reports should be resolved by agreement in a collaborative way, having regard to the guidance which may appear in …

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reported authorities and to the particular circumstances of the case in question. 6. The Commission accepts that suppliers should seek to agree apportionments, having regard to the guidance given in the *Calderdale* case and that where an apportionment is justified this may be on a proportionate or pro rata, i.e. party headcount, basis. However, regard must be had to the work which should have been or should be carried out by the local authority. If funding issues cannot be agreed, then the court will need to apply the appropriate guidelines and indeed any agreement will in any event be subject to the approval of the court. Excluded work cannot be remunerated in any event (see para 5.7 above).

7. In The London Borough of Lambeth v S and C and V and J and the Legal Services Commission, 3.5.05, [2005] EWHC 776 (Fam). Ryder J decided that

although the court can bind the costs assessing authority as to the principle of involving the expert and as to the apportionment of the costs, the costs themselves remain to be considered by the costs assessing authority or indeed by the Commission on any application for prior authority, payment on account or increase to a costs limitation.

8. Suppliers should be aware of the decision in *Re G* [2005] UKHL 68 and of the impact it has on assessments under section 38(6) as well as on the conduct of care proceedings generally. This decision makes it clear that an assessment of the capacity of the parent to change falls outside the section as does assessment for the purpose of rehabilitation of the family. Furthermore, it is not a proper use of the court's powers under section 38(6) to seek to bring about change. A proposed assessment must be of the child if it is to fall within section 38(6). The main focus must be on the child but can also include an assessment of attachment between a parent and child. Article 8 rights do not extend to being made a better parent at public expense.

9. Solicitors are urged not to seek prior authority in cases subject to the Protocol for Judicial Case Management in Public Law Children Act cases unless the expense involved is exceptional in amount or nature (for example it is in excess of £5,000 per funded client). This is because the process is discretionary and generally no prior authority is justified to incur costs in relation to obtaining a report or to a court attendance by an expert whose instruction and work

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have been authorised specifically by the court. Applications for prior authority may serve only to delay the instruction of the expert and the Court timetable for the proceedings. However, an amendment to the costs limitation may still be necessary. Where prior authority or an amendment to the costs limitation is sought details of the work to be undertaken, the rates applied and the total cost apportioned to the funded client must be provided (including,

in any case where it is relevant, confirmation that any charges for or expenses in relation to treatment, therapy, training or other interventions of an educative or rehabilitative nature have been identified, costed and excluded). This information should be provided to the court at the outset when a decision is being made as to the need for the expert work which is being considered.

10. In some cases the information received is that no treatment, therapy or educative or rehabilitative work with the child or family is included in the work being carried out under section 38(6). If this is the case then the whole cost of the work to be carried out, including any reasonable accommodation and subsistence expenses, can be met by the Fund (as appropriately apportioned and following consideration by the court).

11. Before the Re G decision courts were, in some cases, adopting an approach whereby they deducted a percentage from the total amount of the assessment before this was apportioned between the parties to take into account elements of treatment, therapy and training – based, however, only on the court's understanding of the case and the type of work to be carried out. This will inevitably lead to inconsistencies. There have also been different approaches in the 'discounts' allowed by the courts in apportioning the costs of assessments where the child/children would have otherwise been accommodated at local authority expense.

12. Where it is apparent that there may be an element of treatment, therapy or training but the supplier does not give any breakdown of work in an assessment to be carried out under section 38(6), LSC regional offices will be forced to conclude that all the work must be relating to treatment, therapy, training or educative or rehabilitative work. As stated above, if **no** elements of treatment, therapy or training are included in the assessment then an appropriate apportionment of reasonable costs can be met. However, if any elements of treatment and therapy are included in the assessment, then **all** the costs and expenses of accommodation and subsistence must be excluded so far as funded clients and the Fund are concerned – either by the court or subsequently by the regional office.

13. Where having regard to the decision in Re G, treatment, therapy, training or educative or rehabilitative work are nonetheless included in the work to be undertaken but they cannot be accurately identified by the supplier, any application for prior authority (or for an increase in the costs limitation) must be refused. However, …

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these costs may, and ideally should, have been identified and then considered at the hearing at which the court directed the assessment and any apportionment. This is to ensure that no ultra vires payments are made from the Fund following ultimate costs assessment by the court or the LSC's regional office on the conclusion of the case.

1D-062.2

5.9 Contact centre fees (see also para 5.6 regarding apportionment)

1. Contact centre fees are not an allowable disbursement for all levels of service (see section 2.13 of the Contract Specification and paragraph 2.5, sub paragraph 3, of the Funding Code decision making guidance). Contact centre fees are a client expense and not recoverable. Supervised contact involves professional supervision and/or observation of the contact having regard to safety issues and/or contact reintroduction. Supported contact is contact taking place at a specified, neutral venue without any professional supervision although there may be contact centre staff present.

2. In general therefore contact centre fees (including the referral fee for supported contact) cannot be charged as disbursements. However, in exceptional circumstances the costs of an assessment of supervised contact (but not supported contact) or other professional assessment of contact may exceptionally be met by the funded client (through the Fund), provided the cost is appropriately apportioned having regard to section 22(4) Access to Justice Act 1999 (see paragraph 5.6 above) and:

   (a) CAFCASS cannot reasonably be expected to assist through a report or other support;

   (b) Contact sessions are reasonable both in number and extent, and court has ordered an assessment report of the contact to be submitted to assist in the final determination of an application pending before the court; and

   (c) Any charges for or expenses in relation to treatment, therapy, training or educative or rehabilitative work with the child or family are met elsewhere.

3. The following points should be noted:

   - following an assessment of suitability and where it is necessary and in the child's interest, CAFCASS can be directed to supervise contact, including outside normal working hours. It is reasonable to expect this to be the first port of call – enabling CAFCASS to have a continuing, seamless role in assessing suitability, facilitating, supervising and assessing contact in cases where it already has an involvement.

   - It should not be necessary and will usually be inappropriate to involve third parties in facilitating (i.e. setting up) contact arrangements, for example around contact re-introduction. All such cases should be referred to CAFCASS.

   - The CAFCASS private law "pathway" or practice model and the Children and Adoption Act 2006 both anticipate CAFCASS supporting and gatekeeping the appropriate use of supervised contact.

1D-062.3

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