Appeals Manual

This is a provisional manual issued to support the implementation of appeals changes in October 2006. An amended version will be issued in December 2006 to incorporate guidance on issues that have arisen during the first months of the new appeals procedures.

Contents

INTRODUCTION 6
OCTOBER 2006 – A NEW APPEALS PROCEDURE 7
Changes to the Funding Code 7
Changes to the Contracts 8
How have the changes been communicated? 9
The basis for the change 10
ABOUT THE REVIEW PANEL 11
What is the Review Panel 11
The Review Panel Arrangements 11
Training 12
Assessors, Adjudicators or Committees 12
CONFIDENTIALITY 13
What is confidential? 13
What is not confidential? 13
ACCOUNTABILITY AND INDEMNITY 15
What is expected of you? 15
The judge over your shoulder 15
Your protection 15
EQUAL TREATMENT 18
CONFLICTS OF INTEREST 19
When will a conflict of interest arise? 19
What should you do? 19
REMUNERATION OF REVIEW PANEL MEMBERS 21
How will you be paid? 21
What are the rates of pay? 21
DEALING WITH A REVIEW 23
Introducing the new procedure 23
The process 23
New information 24

Writing up your decision 25
WHEN TO ALLOW AN ORAL HEARING 26
The background 26
Should there be an attendance? 27
The key questions 29
WHEN TO REFER A MATTER TO A COMMITTEE 31
What the rules say 31
Complexity 31
PROCEDURES FOR COMMITTEES AND ORAL HEARINGS 33
Quorum & Decisions 33
Appointment of the Chair 33
Responsibilities of the Chair 33
Committee Procedure 33
The role of the committee clerk 34
Hearings 34
Requests for adjournment 35
Time allowed for representations 37
PUBLIC LAW ISSUES 38
Judicial Review 38
Conduct of reviews 38
Illegality 38
Irrationality 38
Procedural Impropriety 39
Legitimate expectation 40
Inadequacy of reasons 41
DECISIONS AND REASONS 42
Public duty and public money 42
The duty to give reasons 42
Key principles for good decisions 43
Grounds and Reasons 44
Decisions on Revocation / Discharge 46
Reasons where you do not make the final decision 48
Recommendations 50
Further Information 50

JURISDICTION & FUNCTION OF ADJUDICATORS 51
What does the Adjudicator review? 51
The review function 52
Issues the Adjudicator can determine 53
Other Issues 54
Mixed issues 55
Further Information 56
CRIMINAL CASES 58
The role of the Adjudicator under the Criminal Contract 58
COST APPEALS – GENERAL PRINCIPLES 60
The role of an assessor 60
The Standard Basis 61
The approach to assessment 62
The approach to work done 63
The Exercise of Discretion 65
CONTROLLED WORK 67
The basis of assessment 67
Some key contract terms 67
LICENSED WORK 70
The basis of assessment 70
ASSESSMENTS UNDER THE GENERAL CRIMINAL CONTRACT 72
The basis of assessment 72
Crime: Applications for Prior Authorities 72
Crown Court 73
Magistrates' Court/High Court 73
POINTS OF PRINCIPLE OF GENERAL IMPORTANCE 77
The new procedure 77
What are Points of Principle 78
Applications that still go to Committee 78
Cost Appeals Committee 79
ASSESSORS AND FRAUDULENT CLAIMS 80
APPENDIX 1 81
Human rights 81
APPENDIX 2 86

Determining applications for funding certificates to take judicial review proceedings 86

INTRODUCTION

This manual is designed to help new and existing Review Panel members by providing relevant information about acting as an Independent Funding Adjudicator or an Independent Costs Assessor. Detailed technical information and guidance is contained in the LSC Manual. This manual is not a substitute for being familiar with the relevant provisions, including the Commission's Supplier Contracts, the relevant Costs Assessment Guidance, the Funding Code and the Funding Code Guidance.

A version of this manual is on our website at www.legalservices.gov.uk and this will be updated with any changes that occur from time to time.

In this manual:

"FRC" refers to the Funding Review Committee;
"FC" followed by a number refers to Funding Code criteria;
"FP" followed by a letter and a number refer to Funding Code procedures;
"Guidance" refers to the Funding Code guidance contained in volume 3 of the LSC manual;
"The Act" refers to the Access to Justice Act 1999;
"Adjudicator" refers to an Independent Funding Adjudicator;
"Assessor" refers to Independent Costs Assessor;
"Committees" refers to both FRC's and Costs Committees

OCTOBER 2006 – A NEW APPEALS PROCEDURE

The procedure for dealing with appeals after 9th October 2006 is fundamentally different to the way that process that has existed for over 40 years. It is inevitable that we will have some teething difficulties and that the process will develop as we go along. For that reason you should keep an eye on the LSC website for process updates and new versions of this Manual. Your feedback on the new system will be essential in helping us get it right. We are aiming to issue a revised version in December 2006.

All of the changes being implemented in October 2006 were subject to consultation with the Law Society, the Bar Council, LAPG and others. Copies of the consultation document and the Commission's outcome paper are available on our website.

The technical changes to replace committees and to remove the general right of attendance have been achieved by amending the Funding Code and the Contracts. These amendments come into force on 9th October 2006 and that is why the changes happen from that date.

Changes to the Funding Code

The procedure and rules for Funding Review Committees are set out in the Funding Code. The changes to the Funding Code are as follows:

- The term "Funding Review Committee" is replaced by the term "Independent Funding Adjudicator" or "Adjudicator" for short;
- Anything mentioning the absolute right of attendance is removed;
- Provisions are inserted to empower the Adjudicator to allow an attended hearing in certain circumstances or even to allow a 3 member appeal panel in some circumstances;
- The inclusion of a provision to ensure that if the Adjudicator wants to make a decision on a different basis to the original LSC decision, that he

gives the appellant an opportunity to address the new points or just refers the matter back to the Director to make a new decision – and thus for a new right of appeal to accrue.

You will notice that we have used the term “Director” rather than “Regional Director” – this is because the Funding Code is also being changed to reflect the fact that most “operational” issues (including decisions on whether or not to grant, refuse or terminate funding are now taken by staff ultimately reporting to our Director of Business Delivery rather than to Regional Directors – as are decisions in relation to our assessment of solicitor’s costs).

Changes to the Contracts

The details of the Costs Committee (including CCA) procedures are set out in the Contract. All three contracts (Crime, Civil and NfP) have been amended from 9th October to reflect the new appeals system.

Sadly, so far as Point or Principle (“POP”) applications is concerned, we will (until April 2007) have two separate procedures. There will be one POP procedure for CCA matters and another for normal civil / crime bills assessment matters. More detail on these two procedures will be given below.

To effect the contract changes, all service providers were sent a Contract Notice in late August setting out the key changes and telling them that they would be coming into force from 2nd October (though this implementation had to slip to 9th October). This notice also mentioned the FRC changes so all service providers should now be aware of the changes.

The key contract changes are:

- The replacement of the term “Costs Committee” by the term “Independent Costs Assessor” or “Assessor” for short;
- The removal of the general right of attendance;

- Provisions are inserted to empower the Assessor to allow an attended hearing in certain circumstances or even to allow a 3 member appeal panel in some circumstances;

- The inclusion of a provision to ensure that if the Assessor wants to make a decision on a different basis to the original LSC decision, that he gives the appellant an opportunity to address the new points or just refers the matter back to the Director to make a new decision – and thus for a new right of appeal to accrue.

- A change to the CCA POP process so that a POP, rather than coming at the end of the appeal, can be sought at any point during an appeal if there is confusion which needs to be clarified.

The costs appeals process in respect of civil licensed work (certificated work – civil bills appeals) is contained in Part 6 of the Contract Specification. That part merely says that the procedure will be the same as is set out in the Civil Legal Aid (General) Regulations 1989.

For various reasons, we have been unable to amend those Regulations but this is unimportant as, in law, they do not exist as Regulations for Contract Work but rather as contract terms – as the effect of part 6 is to import them into the contract. Thus the replacement of the term Costs Committee with Independent Costs Assessor applies to those provisions in exactly the same way that it does for CCA costs appeals. However the POP procedure for civil bills appeals remains as it always was. In April 2007 we hope to be formally incorporating all of the assessment provisions which are currently in the Regulations into the contract. At this time we will re-write them to reflect the changes made now in the CCA provisions.

How have the changes been communicated?

As mentioned above, all service providers have now had a contract notice setting out the nature of the changes. In addition the whole process has been subject to consultation with the profession's representative bodies – as well as

all of our existing committee members who were sent notice of the consultation process.

The paper setting out our response to the consultation paper and our next steps has been available on the LSC website since mid August and the whole reform package has been mentioned both in FOCUS and FOCUS on CDS.

The basis for the change

These changes are premised on the understanding that legal aid is delivered by a limited number of quality assured and specifically contracted service providers – all of whom have warranted a certain level of expertise in their chosen field. We ought to be able to expect, as a minimum, that providers supply all relevant information both with applications and appeals and that they are capable of making their appeals in writing.

Clients who are unrepresented at the time of the appeal may be less able to present their cases however, as you will read, we are taking steps to ensure that they provide all of the necessary information in documentary form rather than having to come to, what for many, would be a difficult and intimidating appeal hearing.

ABOUT THE REVIEW PANEL

What is the Review Panel

The Review Panel is an independent body made up of solicitors and barristers from which Adjudicators, Assessors and Committees are appointed to hear reviews of decisions made by the Legal Services Commission staff in regional offices.

The Review Panel Arrangements

Provisions for the appointment of Review Panel members and for the administration of the Panel are set out in the Legal Services Commission Review Panel Arrangements 2000 (as amended) ("the Arrangements") which can be found in volume 1 of the LSC Manual or on the LSC website.

The Review Panel is divided into Regional Panels corresponding to the geographical area covered by all of the Commission's regional offices. The regions are defined in the Commission's Regional Arrangements 2000.

Although members are appointed to a national Review Panel, the appointments are made by reference to each Regional Panel in accordance with the criteria and guidance contained in the Annex to the Arrangements. Under paragraph 4 of the Arrangements new members are appointed by the Annual General Meeting of each Regional Panel, except that each Regional Panel Chair has the ability to appoint temporary members subject to subsequent ratification at the next Annual General Meeting.

Each Regional Panel has a Chair and one or two Vice-Chairs normally elected at the Review Panel's Annual General Meeting. At each AGM, the relevant Director will normally give an annual report on the workings of the office and of developments in Community Legal Service and Criminal Defence Service since the last meeting.

Training

Training events relevant to the role of the Review Panel are provided to members on a regular basis (particularly in conjunction with the AGM) and we hope to increase the amount of training offered. If you would like specific training on a particular area or general training on being an Assessor or Adjudicator, please contact your regional Appeals Administrator. During December 2006 we will be developing a detailed training package for Review Panel members.

Assessors, Adjudicators or Committees

Review Panel members will be appointed to hear applications for review either as Independent Funding Adjudicators ("Adjudicators") or Independent Costs Assessors ("Assessors"). For a transitional period after 9th October 2006 they may also be appointed to hear applications for review either as Funding Review Committees (FRC's) or Costs Committees.

Adjudicators (or FRC's) deal with reviews of the Commission's decisions in relation to the refusal or withdrawal of CLS or CDS funding.

Assessors (or Costs Committees) deal with appeals against assessments of costs by the Commission.

CONFIDENTIALITY

What is confidential?

Information sent to the Commission for the purposes of appeals would normally be subject to Legal Professional Privilege between the solicitor and client, and is also likely to be “personal data” and thus covered by the non-disclosure provisions of the Data Protection Act 1998.

Sometimes the information might be commercially sensitive to the solicitor. Much of the information that you will see as a Review Panel member will also be subject to Section 20 of the Act which makes it a criminal offence to disclose information other than as permitted by that section.

As a result you should treat review papers (reports, bundles and ancillary documentation) as strictly confidential. You should not discuss appeals other than with the parties to that appeal, in committee or, if you need to discuss the matter with another Review Panel member, with that member having firstly ensured that he or she is not conflicted in any way (and obviously keeping a full attendance note of the conversation). If a Review Panel member contacts you to discuss an appeal you are similarly bound to keep any appeal information confidential.

What is not confidential?

The Commission, as with most public bodies, is subject to the provisions of the Freedom of Information Act 2000 and thus there may be times where we are required to disclose information about the Review Panel (including, for instance, remuneration rates and panel membership). In addition, in the context of litigation (or even complaints), your notes or other appeals documents will be discloseable. Please ensure that you write everything with the expectation that both the appellant and a judge will see it.

It is also normal practice for the Commission to confirm to an appellant the name of the Assessor or Adjudicator considering their appeal. We will not give them address or contact details nor will we confirm your name if it is evident that there may be some risk to you in our doing so.

ACCOUNTABILITY AND INDEMNITY

What is expected of you?

As a member of the Review Panel, you will be expected to carry out this important public duty by strict implementation of the Act, regulations and Funding Code as well as the relevant provisions contained in the Commission's service provider contracts.

The judge over your shoulder

It is essential to remember that, in exercising this public function, you must adhere to the key principles of public law. Your decisions must be unbiased and fair and, of course, those decisions may ultimately be subject to Judicial Review. For this reason it is essential that every decision you make is properly justified with adequate and appropriate reasons.

Your protection

The Legal Services Commission and the Lord Chancellor's Department have agreed the following indemnity for Review Panel Members in carrying out their functions:

> *"An individual Review Panel member or Regional Chair or Vice Chair who has acted honestly and in good faith will not have to meet out of his or her own personal resources any personal liability which is incurred in the execution or purported execution or his or her function, save where the person has acted recklessly"*

The Commission will determine the applicability of the indemnity according to the facts of any particular case. The indemnity is subject to the Review Panel member's agreement to be bound the Code of Best Practice for Legal Services Commission Members. A copy of the Code is on the Commission's website at www.legalservices.gov.uk and members should familiarise themselves with its

contents. Key to that code of practice is adherence to the 7 Principle of Public Life. They are:

Selflessness

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisation that might influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all decisions and actions that they take. They should give reasons for their decisions and restrict information only when wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and by example.

In practice, the need for the indemnity to come into effect will arise only in very exceptional circumstances. Any judicial review proceedings in relation to a committee decision are invariably taken against the Commission and not against the individual committee members concerned.

EQUAL TREATMENT

Our clients, and potential clients, are a diverse group with diverse needs. They are young, old, black, white, Asian, British, Muslim, Christian, disabled, able-bodied, gay, straight. Some have difficulties accessing information and advice services for all sorts of reasons; for some English is not their first language, some have a learning disability, some have a hearing or visual impairment. They all deserve to have their appeal dealt with fairly.

It is sometimes necessary to treat some people more equal than others: it is sometimes necessary to treat some people differently from others in order to meet their particular needs. This topic may sometimes be referred to as equal treatment, but in reality 'fair' treatment is our ultimate goal.

The Commission aims to treat everyone fairly regardless of his or her background. To do this, we need first to recognise that we all make assumptions about people we meet based on stereotypes. Acting on stereotype assumptions is likely to leave an appellant feeling that he or she has not had their appeal dealt with fairly or, where there is a hearing, not received a fair hearing. Moreover it is likely to prejudice the appellant and may lead to a discriminatory decision. To avoid this we need to challenge our own stereotypes and prejudices, and those of others around us, and to recognise and respond to our clients' diverse needs.

Every member of the Review Panel must be vigilant in ensuring that people are treated fairly. We are all responsible for ensuring that we do not act on stereotypes and our own prejudices, that we challenge prejudice in others and that we are considerate to the needs of others.

CONFLICTS OF INTEREST

When will a conflict of interest arise?

A Conflict of Interest is likely to arise where you are asked to review a matter:

- in which you or your firm are instructed or have advised; or
- in which you or your firm have a financial interest; or
- where the appellant is someone with whom you have anything more than a passing friendship or relationship; or
- where the appellant is someone that you have employed in the recent past; or
- where you are involved with the appellant in any other way (e.g. in a voluntary capacity or because you were previously employed by them); or
- where you or your firm stand to gain direct benefit from the appeal outcome.

What should you do?

Your decision must be – and must be seen to be – an objective one.

It is your responsibility to be aware of the possibility, in any case, of there being a conflict of interest and when identified to declare this. If you have a conflict of interest you must withdraw from dealing with that particular appeal. You should immediately return the papers to the regional office and confirm, in writing, that there is a conflict and the reasons for that conflict.

If there is a committee hearing and it comes to light that one of the committee members has a conflict of interest then that member must withdraw from the meeting while the case is considered and must not return to the meeting until requested to do so by the other committee members. The minutes of any meeting should record the name of any member who has declared a conflict of interest with details of the matters in respect of which the conflict has arisen.

The review agenda should be sent to you a week or more before the meeting to allow time for preparation. Although the regional office will attempt to avoid including agenda items in which you may be involved professionally this is not always possible. Accordingly, having read the agenda you should be alert to the possibility of it including reviews in which you or your firm may be involved.

If you recognise such a case, you should stop reading the papers immediately and return the papers to the Commission. The Guide to the Professional Conduct of Solicitors confirms (in relation to Area Committees - but the same principles apply to the Review panel):

> *"A solicitor member of an Area Legal Aid Committee may act (or continue to act) for the applicant in a case coming before that Committee, provided he or she declares an interest in the case and withdraws from the adjudication.*
>
> *Where a solicitor has adjudicated on an application submitted to a Legal Aid Committee, he or she must not act or continue to act for the opponent of the applicant. Even if the solicitor does not remember the details of the case, it would be undesirable for the solicitor to act. Adjudication by a member of a Legal Aid Committee should not inhibit the solicitor's partners or other members of the firm dealing with the matter."*

REMUNERATION OF REVIEW PANEL MEMBERS

How will you be paid?

Review Panel members are paid through the Commission's payroll department and payments are normally made on the 25th of each month. As review panel members are "Office Holders" as defined in the relevant revenue law, the Commission is required to pay basic rate income tax and NI contributions on all payments to review panel members. If you are an existing review panel member then you should already have completed the necessary forms to go onto the Commission's payroll – if not then please request those forms from your regional appeals administrator.

Being on the Commission's payroll does not mean that you are employee of the Commission. You remain an independent office holder. Payment through our payroll department is only necessary because of our income tax and NI obligations.

What are the rates of pay?

Assessors and Adjudicators are paid at the same rate as Chairs were paid for attending at committee hearings. The rate from April 2006 is £336 per day although, as appeals are now dealt with on an ad hoc basis and often from the assessors / Adjudicators own offices, the Commission has decided that that daily rate should apply as follows:

For Legal Appeals: One daily payment for dealing with 20 average legal appeals.

For Costs Appeals: One daily payment for dealing with 20 average costs appeals (crime or civil).

For CCA appeals: One payment for dealing with one normal CCA appeal (20 – 40 files).

Obviously adjustments will have to be made where the appeals in a batch are either unusually complex / large (in which case you will be expected to do less than 20) or unusually simple (in which case you may be asked to do a few more than 20. The appeals administrator in the regional office will liaise with the internal reviewer (who prepares the appeals papers) to ensure that appeals are distributed to you on as fair a basis as possible, with proper account being taken of size and complexity.

If the appeal proceeds to a hearing before a committee then the panel members will be paid under the old committee rates, namely:

DEALING WITH A REVIEW

Introducing the new procedure

Our anticipation, when making the October 2006 changes to the appeals procedures, was that you would be able to consider appeals at your own offices as and when they came in (typically in batches from the regional office). This means that you can deal with the appeals in a flexible fashion and that you no longer need to waste time travelling to and from the Commission's offices (though arrangements may be able to be made if you need to deal with the appeals in the regional office).

However, there is some flexibility here. On some occasions there may be sufficient quantity of appeals to justify you coming to the office or the quantity of paperwork may be such (for instance where original files need to be available) that it is impractical for you to deal with the appeal at your own office.

That said, our anticipation and aim is that the vast majority of appeals can be dealt with at the your own office.

Ultimately we see a time when appeal documents can be scanned onto the computer, emailed to you and, within a few days, you could email back your decision. This would save time and trees!

The process

As a regional office receives an appeal it will, first and foremost, undertake a formal and detailed internal review of the original decision. This may lead to changes to the original decision and any such changes will be raised with the appellant – giving them the chance to withdraw the appeal if appropriate.

If it is evident to the internal reviewer that information is missing then he will try to get that information from the appellant – obviously however it is for the appellant to provide the information that supports their appeal.

If, after internal review, the appeal is to continue then the internal reviewer will prepare the appeal bundle and report. This will then be sent to the Appeals Administrator who will decide which Assessor or Adjudicated is best suited to dealing with the appeal. The administrator will then copy the papers, finalise the bundle and then send the papers to you (either as a single appeal if urgent or, more likely in a in a batch of 5, 10 or 20 appeals).

Once you receive the pack of appeals papers you will typically have 14 days to consider them, come to your decision, write up your decision (with detailed reasons) and send it back to the administrator. You can do this by post, fax or preferably by email.

When considering an appeal you must also consider whether it is an appeal that should properly be dealt with at an oral hearing or by a three-member committee. These types of appeal should only come up in truly exceptional circumstances and more guidance on when these occur is given below. If you consider that either is necessary then you should notify the administrator who will make the necessary arrangements.

New information

By the time an appeal reaches you the appellant should have provided all of the relevant and necessary information. Most appeals will have been brought by quality assured contracted suppliers (solicitors) and therefore there is little excuse for them not to have provided all of the necessary information either in the original claim / application or in their appeal request. Where the appeal is brought by the client the internal reviewer will take such steps as are necessary to gather additional information before the appeal gets to you. You should remember however that it is the appellant's role to make their appeal – it is not for the Commission or you to make that appeal.

If however you cannot determine the appeal without more information then you have a number of options:

- If you need additional Guidance then you should contact the administrator or internal reviewer who can provide you with the relevant guidance manuals etc;
- If you need additional information from the appellant then you should telephone the appellant directly (this should be the norm where the appeal is being brought by or through solicitors in which case you can talk to the solicitor) or, if this is not possible, you can raise the issues with the administrator who can contact the appellant for the additional information;
- If you need more information from the Commission then you can contact the internal reviewer.

In any case, you should ensure that you keep a detailed attendance note of who you contacted and conversations that you had.

Writing up your decision

A "Recommendation & Reasons" sheet should accompany each appeal report. If you propose sending your decision to the Commission by email, an electronic version of this sheet is available. You should use this to record your decision and the reasons for it. It would also help us if, when you consider that the Director's original decision was wrong, you explain why that was the case. This will assist us in identifying where additional training and guidance needs to be given or where system changes may be necessary.

Likewise, if there is an obvious error on the part of the solicitor, you should highlight it so that they do not repeat that error in future.

Once you have written up your decision it should be returned to the administrator who will convert it into a decision letter. We suggest that you keep your own notes / working for at least 6 months just in case the appellant seeks to challenge or, better still, return your notes and papers to us so that we can keep them just in case there is a subsequent judicial review challenge.

WHEN TO ALLOW AN ORAL HEARING

The background

The key to this new appeals structure is that most appeals should not need an oral hearing for determination. Let's take a moment to consider why this might be.

When an individual client makes an application for legal aid, he doesn't do it alone. Instead he does it through a quality assured firm of solicitors which holds a specific contract with be Commission to deliver legal aid services in the particular area of law in which the client's case sits. In simple terms, the client completes his application form with the assistance of experts, not just in law but also in legal aid.

Similarly those same expert solicitors prepare a claim for costs.

The key to achieving a grant of legal aid is to satisfy the test set out in the Funding Code. If these tests are satisfied then, subject to it not being so expensive a case that it cannot be afforded, the Commission is obliged to grant legal aid. Thus any application for legal aid, completed by or with the assistance of a specialist legal aid solicitor, must address each individual test in the relevant Funding Code criteria. The legal aid application forms are designed to assist this approach.

If a solicitor or client fails to address each individual Funding Code criterion then he is not supplying sufficient information for the Commission to make a funding decision. Obviously it goes without saying that each statement made in the application for legal aid should be sufficiently supported with explanation or documentation.

As set out above, upon receipt of an application, a Commission caseworker will review the application in light of the relevant Funding Code criteria and, if those criteria are satisfied, will grant legal aid. If there is insufficient information then the caseworker will contact the solicitor for more information. If that information still isn't forthcoming then the application will be rejected as incomplete.

However if there is sufficient information but it is clear from that information that the Funding Code criteria are not satisfied then legal aid will be refused. In these circumstances the applicant has a right to seek a review of that decision.

At this point it is useful to consider what you are being asked to review. You are being asked to review a decision on whether, based on the information contained within the application form (or supplied by the solicitor / client on subsequent request by the caseworker) or within the appeal documentation, the Funding Code criteria are satisfied. In truth, in order to review that decision, it should be unnecessary for you to have any more information than was before the caseworker.

The question you should be asking is - was the caseworker right based on the information he had?

Of course the review system doesn't limit you to just this information. Instead the client and solicitors are allowed to submit additional information and documentation in support of the application for review. These representations and documentation can directly address the reasons given by the caseworker for refusing legal aid in the first place. Most solicitors will assist their client to complete the application for review.

Thus you will be reconsidering an entirely paper based decision and will have the benefit of additional information submitted specifically to address the concerns of the original caseworker.

Should there be an attendance?

The answer to this question must, for most cases, be no.

A specialist solicitor should be able to explain, either in the original application or in the appeal application, how the client's case meets the Funding Code Criteria (or why costs in a particular claim should be allowed). This may not be possible for the client alone but then that is why applications for legal aid can only be made through specialist solicitors and not by the client directly.

The Funding Code sets out a series of legal tests, which typically require legal knowledge to address. Why should it be necessary for a client to have to come to a hearing to argue about issues that should have been set out in detail, in the original application, by his specialist legal aid solicitor?

Of course there are situations where the client doesn't have the benefit of legal assistance at the appeal stage, though it should be said from the outset that the we expect this to be the case in a small number of cases as most solicitors will assist their client to prepare the appeals documents.

The Client may not have legal assistance where, for instance, the legal aid certificate has been revoked or discharged although, where the solicitor is of the view that the revocation or discharge was inappropriate, he may still be assisting his client with the appeal.

Although assisting a client is this regard is not normally remunerated, most solicitors will see this small piece of assistance as part of the fabric of the legal aid scheme.

Of course this may not be the case where the solicitor and client have fallen out or where the certificate is being discharged on application or advice of the solicitor but where the client disagrees. In addition there may be circumstances where the certificate is revoked and, although the solicitor considers the revocation appropriate, the client does not.

If it becomes clear that the client is not being assisted by a solicitor to complete the application for appeal, then the Commission's internal reviewer will, in appropriate circumstances, contact the client to get the necessary missing information.

Even in these circumstances it shouldn't be necessary for there to be an oral hearing - or at least not in the traditional sense.

If you, despite the information in the appeal application, feel that you have insufficient information to make a proper determination then you can telephone the client or solicitor directly to get the missing information. In suggesting this, the Commission is mindful of the success that the court service had in their

recent telephone hearings pilot - success that has led to the approach taken in the pilot being rolled out as the court's normal approach across the country. If a telephone call won't work then you can always ask the Commission to write to the client seeking additional information (though, of course, it has to be remembered that the Commission is primarily a decision making rather than investigating body – and that the role of the Adjudicator is to adjudicate not investigate).

Of course there may be rare situations where, perhaps because of disability issues, written representations or phone calls are insufficient. In those cases it would still be appropriate for you to allow an attended hearing. The distinction though is that an oral hearing should never be allowed just because the appellant wants it - it should only be allowed where it is clear (despite the steps suggested above) that the appeal cannot be properly determined without an oral hearing.

The key questions

The test set down for allowing attendance in costs appeals is that there should be exceptional circumstances as to why an attended hearing should be necessary. The test for funding appeals is that it should be in the "interest of justice" to allow an attended hearing.

Given what is said above, oral hearings should be rare. Our view is that attended appeals should only be allowed where:

1. There are exceptional circumstances why the appeal cannot be made in writing (i.e. disability issues); and

2. The appeal cannot be properly concluded without an attended hearing (remembering first to consider the use of telephone or correspondence to get any necessary additional detail and also remembering that for some matters, even where there are exceptional circumstances why the appeal can't be made in writing, an attended hearing would not assist – for instance because the matter is excluded from funding in any event).

This two-limbed test should apply to both funding and costs appeals.

It is perhaps worth remembering that the Concise Oxford Dictionary defines “Exceptional” as:

> “(1) forming an exception (*exceptional circumstances*). (2) unusual: not typical.”

Before deciding to allow an attended hearing you must consider the tests set out above. If you allow an oral hearing then you have to explain, with detailed reasons, why the particular case is exceptional and why an oral hearing is necessary

WHEN TO REFER A MATTER TO A COMMITTEE

What the rules say

It is anticipated that recourse to a three-member panel of Assessors will be rare. Nevertheless, you have the discretion to refer an appeal to a panel of three where, in your opinion, the appeal is:

- For costs appeals: "of such complexity and/or value that it should not be considered by a single Assessor";
- For funding appeals: "of exceptional complexity or importance".

However, perhaps the first question you should ask is: what will two additional Assessors / Adjudicators add that I, using my skills and experience, cannot bring on my own?

Complexity

In determining whether the appeal is complex, regard should be had to the intricacy and obscurity of the disputed issues as against common areas of dispute and any unprecedented difficulties faced by the appellant in their attempt to comply with the Funding Code or contract. Is the subject matter of the appeal exceptionally (not just unusually) complex? Is the case of particularly high value? Is it a particularly high profile case? What is it about this appeal that sets it apart from every other appeal?

For the most part, we would expect cases of exceptional complexity or importance to be within the purview of the Commission's Special Cases Unit and thus, outside the work of that unit, we would not expect to see appeals which require consideration by a three member panel.

In considering the 'value' of the appeal in CCA matters, no regard is to be given to the level of extrapolation or the wider implications of any Assessment. Value is of importance where an individual item/file stands out as being significant because of its monetary worth and the issues contained therein are complex.

If you conclude that the appeal should be referred to a panel, you will also have to decide whether it should be conducted on the papers only or whether there are grounds for allowing an attended hearing (see above).

As you can see – we anticipate the use of three-member panels on rare occasions rather than regularly.

PROCEDURES FOR COMMITTEES AND ORAL HEARINGS

If you do decide that a matter should go to an oral hearing or indeed to a three member committee, the following guidance may help.

Quorum & Decisions

Three members of a committee will form a quorum, but where only 2 members are present they shall form a quorum for the purpose of dealing with any matters in which they are in agreement.

The decisions of committees are by a majority vote and, in the case of an equality of votes; the Chair of the meeting has a second or casting vote. (Any member forming part of a dissenting minority may ask that his or her name appear on the minutes as dissenting).

Appointment of the Chair

The Chair of the meeting will be selected by the Director from the list of those members best qualified to be Chairs.

Responsibilities of the Chair

The Chair has primary responsibility for the conduct of the meeting and for ensuring that the committee gives proper and adequate reasons for its decisions.

Committee Procedure

Except in so far as any committee is regulated by the requirements of the Legal Services Commission, any committee has the power to regulate its own procedure.

Minutes are kept of each committee meeting with the names of members present being recorded. The minutes usually consist of the agenda, the committee's decision and reasons for it and any other relevant note. The Chair is responsible for ensuring that minutes of the meeting are properly recorded and signed by him or her.

The role of the committee clerk

The committee clerk is there to help the committee conduct its business. As well as making arrangements for clients and their representatives who attend hearings, he or she will be able to provide information from the regional office file for the committee.

The committee clerk should not usually be the member of staff who made the original decision to refuse, although on occasions this may be unavoidable.

The clerk will keep a record of the meeting. This should include the time the individual appeal began and ended and as much as practicable about what was said. Any submissions (particularly new submissions not on the papers) made by the appellant should be recorded as well as any questions asked by the committee and the replies given. It will of course be essential to record the decisions taken and the reasons given by the committee.

The committee clerk may, when appropriate, advise the committee about decisions of previous committees and other matters of guidance issued by the Legal Services Commission but will not take part in the decision making process.

Hearings

At committee hearings the appellant may have been given permission to attend (as there is no automatic right of attendance). The committee may make directions as to the conduct of appeals. In a complex case, the Committee may for example decide that it wants one or both parties to submit further evidence

or to file skeleton arguments, in which case they may adjourn and direct accordingly.

Appellants must be afforded a fair and reasonable opportunity to present their case. Justice must not only be done but must be seen to be done. The appellant should leave the committee room feeling that he or she has had a fair hearing. The Chair should be courteous but firm.

Those appearing may not know how to proceed and will look to the Chair for guidance. The Chair of the committee should introduce himself or herself and the committee members by name.

Committee meetings are confidential in order to protect the interests of the publicly funded client. Therefore persons not engaged in the hearing (such as members of the press) will not be admitted. The appellant may waive such confidentiality and insist on an open hearing if they wish, but the Chair should advise them that this may be against their interests as potentially it means that details of their case will become available to their opponent.

Information for the hearing is provided solely for the purpose of properly disposing of such hearing. Where an appellant has given notice that he or she will attend or be represented but does not attend at the appointed time, the committee should put back consideration of the matter until either the person attends or until all other matters have been dealt with.

Requests for adjournment

The committee need only entertain requests for adjournments, which they consider reasonable. There may be some cases where wholly new issues are raised where an adjournment may be necessary in the interests of justice.

When a committee is considering a matter afresh they are not therefore confined to the issues raised or reasons given by the Regional Office when reaching their decision. However, where the issues raised by the committee

are substantially different to those raised by the Regional Office, then the committee will need to consider whether the appellant has been given a fair opportunity to address those issues. Where an appellant attends or is represented at the hearing, they can generally be given that opportunity at the hearing, as the person attending (especially if a solicitor) should be expected to be familiar with the file and the nature of the hearing and therefore be expected to deal with any issues that arise. If it felt it necessary, the Committee could grant a short adjournment, say half an hour or so, to allow the appellant to formulate his or her arguments on the new issues raised. Exceptionally, it may be necessary to adjourn the hearing altogether, for example where the appellant is required to provide further evidence.

Where the appellant does not attend the hearing and is not represented, then the committee should bear in mind that the appellant will not have had the opportunity to consider or make representations on any entirely new issues raised and it will more often be necessary for the committee to adjourn the matter in order to provide an opportunity for this to occur. It should be noted however that where a particular issue has been previously raised and addressed as part of the Regional Office assessment or the subsequent representations then the mere fact that the committee reaches a decision on that issue that is more adverse to the appellant will not give rise to the necessity for an adjournment. The committee is entitled to reach its own views on the arguments put forward and give its own reasons for its decisions. The test is whether the issues raised are substantially different and whether an adjournment is therefore necessary in fairness to the applicant'.

Where an adjournment is granted, the committee should consider giving directions as to the timetable for submitting any further representations or evidence.

Where a committee decides not to allow a request for an adjournment they should give reasons for their decision and then proceed to deal with the matter.

Time allowed for representations

No predetermined time limit should be placed on the time for oral representations. However, the Chair should indicate as soon as he or she is satisfied that the main arguments in support of a case have been put and should invite those presenting the case to close. In extreme circumstances, the Chair may have to call a halt to oral representation where the main arguments have been established.

PUBLIC LAW ISSUES

Judicial Review

The area of judicial review concerns the Review Panel in two ways: in relation to the conduct of reviews (either at hearing or on the papers only), and in relation to the decisions made.

Conduct of reviews

The decisions of Assessors, Adjudicators and Committees, being decisions made on behalf of a public authority and subject to administrative law, are judicially reviewable. In practice, this will normally only arise when you have made the final decision in a case and will normally be where, for example you refuse an application for a review of the Director's decision. But in principle any decision about the conduct of a review may be subject to an application for judicial review.

A decision of a public authority can be quashed by the court on judicial review if it is **illegal**, **unreasonable**, or procedurally **unfair**; or **does not comply** with EU or Human Rights Convention law.

Illegality

Obviously any decision of the Assessor / Adjudicator must be made in accordance with the law. You must not, for instance, purport to allow funding when the case is excluded from scope, or allow costs that are clearly not payable under the terms of the provider's contract or the relevant regulations.

Irrationality

The court cannot replace what a public body has done with what it would have done. But it can quash a decision that was not reached according to logical

principles, or was ‘Wednesbury unreasonable’ (see *Associated Provincial Picture Houses v Wednesbury Corporation* 1947 2 AER 680).

The Assessor, Adjudicator or Committee must:

- take relevant considerations into account,
- not take into account irrelevant considerations,
- not make a decision outside the range of responses open to a reasonable decision-maker.

In some cases the Adjudicator, Assessor or Committee will agree with the original decision, but it should take care not to fall into the trap of merely adopting the previous decision because it is an easy option, or because it seems to be roughly right.

Procedural Impropriety

A decision may be quashed on judicial review grounds if the decision maker has not followed the procedures that it has established for itself, or if those procedures are unfair. One possibility for challenge might arise if representations have been received from the opponent of an appellant and these were put before the Adjudicator, Assessor or Committee without the appellant having an opportunity to comment on them.

It is therefore the Commission's policy to allow clients to comment on representations made by the opponents or third parties, and you should ensure that this has been done. In the context of representations by the opponent, is worth remembering that it is not the your function to ‘try’ the factual, legal or evidential issues involved in the case for which funding is sought. Caution should therefore be used when considering opponents’ representations, although they may be very useful in directing yourself to those points (particularly as to merits and cost benefit) which the client or his or her legal advisers need to have addressed in their appeal papers.

If there is to be a hearing then it is important that the person affected by a decision has been given a fair hearing before the committee. Committees should give a full opportunity for representations to be made by the client or his or her legal advisers, so that they can be fully acquainted with all the relevant considerations before making their decision.

For the same reason, guidelines exist to ensure that you do not consider applications and appeals where you may have an interest in the outcome. Not every connection with one of the parties will mean that it is unfair for a particular individual to determine a review or appeal. The test of bias is whether a fair minded and informed observer, in possession of the facts, would conclude that there was a real possibility of bias. But where an assessor or adjudicator sits alone, the kind of connection that would make a decision vulnerable to challenge may be less than it would where the same person was a member of a panel.

Legitimate expectation

As a public body, if the Commission leads a person to believe that we will make a decision in their favour, when we lack the power to do so, we are generally bound by our statutory duty and not by the promise we made. This is because a public body may not be estopped from carrying out its responsibilities under statute.

This principle is limited by the doctrine of legitimate expectation. The courts will quash as unfair any attempt by a public body to act contrary to lawful representations it has made, when someone has relied on those representations, generally to their detriment. Whether a person can rely on a legitimate expectation will depend on whether the authority has acted fairly and reasonably, and the extent of any countervailing public interest.

As a public authority the Commission is required under s 6 Human Rights Act 1998 to comply with the Human Rights Convention. This duty applies to you as well.

The principles governing a fair trial appear in Article 6 of the Convention. The procedure by which decisions of the Commission are subject to review and appeal is not, by itself, compliant with Article 6. But the domestic courts have put it beyond doubt that an administrative decision, reached fairly and ultimately subject to judicial review by the courts, will be treated as compliant.

Inadequacy of reasons

An applicant or appellant will be able to attack a decision that was lawful, reasonable and otherwise reached fairly if the reasons given for it are inadequate. Writing full reasons can be tedious work, but you do not do it properly the review or appeal may well have to be carried out all over again.

Adequate reasons should:

- set out all the factors the Adjudicator, Assessor or Committee had regard to;
- explain why an unsuccessful appellant's arguments were not accepted;
- show how the decision follows from the application of relevant considerations to the facts.

It is not good enough for someone to design reasons, after a decision was reached, that could have been the reasons for that decision but were not.

DECISIONS AND REASONS

Public duty and public money

Your decisions affect both access to justice and payments for legal services from public money. Therefore you must make consistent, fair and justifiable decisions. It is important that the appellant understands the reasons why you have made you decision in his or her case.

Clients have a right to know why they are being refused or are losing legal aid or why their certificate is not being amended. Likewise solicitors are entitled to know exactly why their costs are being reduced. Sometimes, just receiving a full explanation of why a decision was made will lead the appellant to withdraw the appeal.

All of us working for the Commission (whether as employees or Office Holders) are public servants and we are accountable to our stakeholders. As an absolute minimum, those stakeholders can expect us to explain and justify our decisions. Try to put yourself in the position of the appellant – does your decision letter make sense and fully explain why you made the decision that you did?

The duty to give reasons

The duty to give reasons falls on you. It is not appropriate for you to give a general indication of you reasons and leave the regional office to formulate them in detail.

The quality of reasons is particularly important when you refuse funding or uphold the discharge or revocation of a certificate. It will also be particularly important in relation to cost appeals when the decision concerns a large sum or affects a large number of cases.

The discipline of having to provide clear and sufficient reasons for decisions helps to ensure that the decision is a good one.

Over recent years the responsibility to give detailed and reasoned decisions has been significantly increased by a number of judgements in judicial reviews against the Legal Aid Board and the Commission. The impact of the Human Rights Act, the increase in judicial review applications and the introduction of the judicial review protocol have all focused judges' minds on the requirement for public bodies to give proper reasons for their decisions when exercising a discretion.

Key principles for good decisions

There are a number of principles that should be borne in mind both when looking at the original caseworker / internal review decision and when constructing your own review decision and letter. They are:-

- It is rarely ever sufficient to say that you are upholding the original decision for the reasons given. This is especially so where there has been new information in the appeal papers. You must explain why you have reached the same decision as the original caseworker – despite the new information;

- If the decision was taken for more than one reason then all of the relevant reasons must be given. It is not sufficient to give just one reason when, in fact, there are several;

- The reasons for the decision must be proportionate to the issues in the case. The more complex the issues the more detailed the reasons;

- Reasons must be sufficiently informative so that the appellant understands why the decision was made. In technically complicated areas the reasons may not always be immediately understood by the client but they should always be susceptible to being understood by the client's solicitor;

- It must be clear that every relevant aspect of the case and all relevant information has been properly and fairly considered. It is desirable to differentiate between relevant and irrelevant information;

- The reasons should not only properly inform the appellant but also be readily apparent and apparently justifiable to any judge considering an application for judicial review.

- Where you are disagreeing with an opinion of counsel (which you are perfectly entitled to do), your reasons for doing so must be clear.

- Findings of contentious facts must be clearly stated with clear reasons. Where you do not accept factual contention made by the appellant, there must be a clear reason for not doing so.

- Similar considerations apply to conclusions of law. Where you disagree with the interpretation of the law by the appellant you must give clear and sufficient reasons for doing so. Where appropriate the factual conclusions from which the legal conclusions result should be clearly stated.

Grounds and Reasons

It is important to distinguish these two categories. The grounds for the decision will be based on the criteria in the Funding Code or Contract. The decision should then go on to give a reason or reasons as to why the particular case has failed the criteria or particular contract term.

Example

> "I have refused your application on the basis of Funding Code criterion 5.7.3. Although I accept that the prospects of success are good (60%-80%), I do not consider that the likely damages would exceed likely

> costs by a ratio of 2:1. I note that your solicitor has assessed your claim as worth £10,000, but my view is that this figure should be discounted by 50% in view of the fact that the defendant appears to have limited assets with which to meet a judgment."

The key is to ensure that you state both the ground upon which you are making your decision (e.g. the likely damages will not exceed the likely costs by 2:1) and then explain the reasons for coming to that conclusion (e.g. the claim is only actually worth £50,000 as the defendant doesn't have the assets to meet the judgement). You have to avoid stating just the ground for the decision without then giving a reason or reasons for it.

In relation to prospects of success and cost benefit, it will be very important to ensure that grounds are provided by reference to the appropriate criteria and that in addition sound reasons are given for departing from the assessment either of the client's legal representatives or the regional office. In some cases, the differences between "unclear" "borderline" or "poor" prospects of success may be determinative of the application and you will need to give reasons as to why one category or other has been applied.

Similar considerations apply to cost-benefit. Whatever the relevant ratio of likely damages to likely costs, these must be closely addressed with sound reasons for arriving at the relevant cost-benefit matrix. As you will be disagreeing with either the client or the Director, it is essential that detailed reasons are given for the assessment of both likely costs and likely damages.

Whenever the conduct of the client is the basis for a decision against him/her, particular care needs to be given to the reasons that must show not only that any excuse advanced by the client has been carefully considered but also clear reasons why that excuse has been rejected.

Decisions on Revocation / Discharge

If withdrawing funding under FP C53.1 (failure to co-operate) you must, giving reasons at each stage:

- Establish the requirement that the client has failed to provide information or documents or attend a meeting where required to do so under procedures or regulations;
- Find that there is no 'good cause' for such failure. If any excuse advanced by the client is rejected, the Adjudicator will need to say why.
- Decide that funding should not continue.
- State why revocation as opposed to discharge (or vice versa as the case may be) is appropriate.

If withdrawing funding under FP C53.2 (misrepresentation) you must, giving reasons at each stage,: -

- Establish the requirement that the client has made an untrue or misleading statement or failed to disclose a material fact (either when making an application or when supplying information under procedures or regulations). In merits cases, the fact that the court has not accepted a client's case or version of events will not be enough in itself to lead to revocation or discharge under this provision. In means cases, it should be noted that a fact may be material even where it ultimately would not have affected the eventual assessment –see R v Legal Aid Board *ex parte* Doran (the Times July 22 1996.). Material means something significant and capable of influencing the reasoning of a reasonable assessment officer (Assessor). However, the issue of whether or not the

fact would have affected the assessment is relevant to the issues set out below.

- Find that the client has failed to use reasonable care when doing so. If any excuse advanced by the client is rejected, you will need to say why. In particular, if the mis-statement or non disclosure is felt to have been dishonest you will need to state this and support the statement with reasons;

- Decide that funding should not continue. The main factors here are the size and extent of the non-disclosure found, whether the non- disclosure was deliberate or not and the effect (if any) on the assessment of merits or of means.

- State why revocation as opposed to discharge (or vice versa as the case may be) is appropriate. In the case of R v Legal Aid Services ex parte Bateman, (involving a revocation for non disclosure of financial assets under the Legal Aid Act 1988 regulations) Sir Justice Munby stated:

  ‘ The Committee…. had to do at least three things: (i) it had to give reasons which, implicitly if not explicitly, recognised that it had two separate discretions to consider (ii) it had to give reasons which, implicitly if not explicitly, explained why, if it decided on revocation, it had come to the conclusion that revocation was the appropriate sanction and why the lesser sanction of discharge was not adequate to meet the needs of the case and (iii) unless the case involved dishonesty or deliberate and deceitful concealment it had to identify the particular factors which justified a decision to revoke’.

Revocation will have serious consequences to the client. They will lose their cost protection and will be obliged to repay the publicly funded costs of the case (which impact the Commission too as the matter will be passed to our Debt Recovery Unity and often costly steps will be taken to recover the monies paid). Conversely, discharge may sometimes be no penalty at all

since even if the case is continuing the client can always re-apply for funding. The factors to be taken into account in deciding whether to revoke or discharge are therefore:

- The seriousness of the non-disclosure or misstatement.
- The importance of the case to the individual.
- Whether the non-disclosure or misstatement was deliberate or dishonest or innocent albeit negligent.
- Whether the applicant has personally benefited from the non-disclosure.
- Whether the non-disclosure would not have made any difference to the assessment of means or merits, in which case revocation will not usually be appropriate except in the most serious of cases.

Reasons where you do not make the final decision

Here the ground for the decision will be based on C62.1 i.e. that the Director either has, or has not as the case may be, acted in accordance with the Code, the Act or regulations, or made a decision, which no reasonable Director could have made. If you conclude that this is the case then it is vitally important that full reasons are given for your decision. This is equally as important where the application is being granted as for where it is being refused, since in the former case the Director will need to know precisely why the matter has been referred back in order to properly reconsider the matter. If this requirement is not met, you may find that you face a formal request by the Director for more detailed reasons.

If a review is being dealt with under FP C62.1 you will need to identify which provision of the Code, Act or regulations it is alleged is being not followed and give reasons for their own decision in relation to that issue. When interpreting

the relevant provision, you should have regard to the Funding Code Decision Making Guidance (see FP A9.1)

Where the relevant provision of the Code, Act or regulations is one which gives the Director a discretion, then you should not normally set aside any decision made within the terms of that discretion unless FP C62 applies i.e. the decision was one which no reasonable Director could have made.

When reaching a decision under FP C62.2 clear and detailed reasons must be given as to why the Director was justified in the decision or could not reasonably have reached it always bearing in mind that you cannot substitute your discretion for that of the Director. In order for the decision to be set aside, the Director must not merely have been wrong but irrational in the Wednesbury sense, having taken into account an irrelevant consideration or failed to take into account a relevant consideration or otherwise directed his/her mind to the wrong question. The reasons must clearly reflect those conclusions, as equally they must when you are satisfied that the Director has done none of those things and that his/her decision must be upheld.

Practice has shown that extra care should be taken on decisions to refuse an application as being for excluded services under FC 4.3. You must not fall into the trap of disagreeing with the Director's decision merely because you feel sympathy for the client or feel that the exclusions may lead to a difficult result in the individual case. In such an instance it will be in order for you to draw the client's attention to the possibility of an application to the Lord Chancellor for individual funding under section 6(8)(b) of the Act if the case raises issues of overwhelming importance to the client or significant wider public interest. Applications should be addressed in the first instance to the Special Cases Unit at the Commission's London Regional Office.

When you are exercising your jurisdiction under FP C62.1 and decide to uphold the Director's decision, then the grounds will tend to be standard i.e. that you did not consider that the Director acted improperly or unlawfully. You should

however go on and give reasons by reference to the points raised by the review.

Recommendations

In any case where you consider it appropriate to make recommendations, these should also be supported by detailed reasons as appropriate to the complexity of the case and sufficient to clearly identify to the client and the Director the basis upon which the recommendation is made.

Further Information

There is no formal requirement to give reasons where further information which emerges for the first time in the appeal is referred back to the Director under FP C63 without your having reached a decision. However good practice is that in those circumstances brief reasons should be given as to why the referral has been made. Those reasons should be directed to why you:-

(a) Regarded the further information as material;

(b) In the light of its materiality, you felt it appropriate not to reach a decision on the review.

Where in, in your view, the further information is such that you should nonetheless decide the review (whether for or against the client) full and proper reasons should be given which should include why the further information had not been referred back to the Director.

JURISDICTION & FUNCTION OF ADJUDICATORS

What does the Adjudicator review?

You have a wide jurisdiction, most importantly in relation to reviewing decisions by the Director to refuse or withdraw funding for Legal Representation on merits grounds. However you do not review decisions relating to emergency applications or certificates or relating to financial eligibility. You have the following jurisdictions:

Controlled Work

Where Controlled Legal Representation has been refused by the solicitor and the Director has upheld that refusal, there is a right of review to the Adjudicator (FP B5.2).

Licensed Work – Refusals

A review will lie against the decision of the Director to refuse an application for a certificate (FP C22). This may include cases where the initial refusal was by a solicitor acting under devolved powers and the Director has upheld that refusal (e.g. for specified proceedings in the magistrates' court or Help with Mediation). The right of review also applies where the Director has issued a certificate or an offer of funding but the client is dissatisfied with the terms, such as the description of the case, scope limitation or cost limitation. This will also apply where the application was for one level of service, but a different level was funded, for example if an application was made for Legal Representation but instead General Family Help was awarded.

As noted above, the right of review does not relate to emergency certificates or refusals on financial grounds.

Licensed Work – Exceptional Case Contracts

In general Licensed Work can only be carried out by providers who have a General Civil Contract. However the Special Cases Unit has discretion to fund

a non-contracted firm under an individual case contract if it appears necessary for the effective administration of justice to do so (FP C26.6). If the Special Cases Unit declines to do so there is a right of review to the Adjudicator.

Licensed Work – Amendments

Where a client is dissatisfied with the Director's decision to amend a certificate or refuse an application to amend, the client may ask for the decision to be reviewed by the Director and the Adjudicator (FP C40). As for refusals, the Adjudicator has no jurisdiction in relation to amendments of emergency certificates.

Licensed Work – Withdrawal of Funding

A decision by the Director to discharge or revoke a certificate can be reviewed by the Director and the Adjudicator (FC58). The Adjudicator has no jurisdiction to consider the revocation or discharge of emergency funding or the discharge of a certificate on financial grounds.

Criminal Cases

The Adjudicator has a limited jurisdiction to review certain decisions taken by the Director or contracted solicitor under the General Criminal Contract.

The review function

The Adjudicator has a review function. You may refer a case back to the Director for reconsideration but not grant funding yourself.

However in relation to certain issues, you can substitute your own decision for that of the Director. In relation to other issues, you can only interfere with the Director's decision if it is improper or unreasonable in the public law sense.

It is likely that in many cases the review will not be confined simply to the reason for the refusal of the application. Solicitors and clients will have to be aware that they need to address all issues in all cases.

When making decisions, you will, like the Commission, be bound by the Act, the regulations and the Funding Code. FP A.9.1 also requires those making decisions under the Code, (including the Adjudicator) to have regard to the Funding Code Guidance.

Issues the Adjudicator can determine

Under FP C61 and by virtue of C61.2, C64.1 and C64.2 the Adjudicator makes a final determination on the following issues:-

(i) the prospects of success.

(ii) whether a case has overwhelming importance to the client.

(iii) cost benefit for the client (excluding considerations of whether the case has a significant wider public interest).

(iv) whether a certificate should be discharged or revoked on the grounds of the conduct of the client under FP C53.

Where the Adjudicator makes a final determination of one of the above issues then the Director must grant, amend, reinstate etc as the case may be (FP C64) if satisfied that as a result of the determination the appropriate criteria are met. You should note however that the power to grant remains with the Director and not with the Adjudicator.

It should be noted that in determining the issues under C61.1, you should of course be determining them in accordance with the provisions of the Funding Code and will be bound by the criteria and must have regard to the Guidance. Any grant of funding outside the terms of the Code will be ultra vires. For example:

- an application for Legal Representation in a straightforward money claim (with no issues of public interest or overwhelming importance to the

client) has been refused by the Director on the basis that in his view, the ratio of costs to damages does not meet the cost benefit matrix set by criterion 5.7.3. The Adjudicator can re-determine the cost benefit issue (i.e. in effect re-determine what the prospects of success and likely damages and costs are in the case) but will still be bound by the matrix. Thus if, after the Adjudicator has reached different conclusions as to costs and prospects of success, the matrix test would still not be met, then the Adjudicator must uphold the Director's decision.

- when considering whether the case is of 'overwhelming importance' to the client, the Adjudicator has only to consider whether the case will fall within the Funding Code definition of overwhelming importance, not whether the client subjectively would consider the case of overwhelming importance to him or her.

Other Issues

In relation to any issue which arises other than those under FP C61, the Adjudicator considers whether the Director's decision under review was improper or unreasonable in the sense that either:-

(i) The Director has not acted in accordance with the Code, the Act or regulations; or

(ii) The decision was one which no reasonable Director could have made.

Consequently the Adjudicator's jurisdiction is to be exercised using principles similar to those used in judicial review, the so-called Wednesbury principles. All Adjudicators will need to be familiar with them.

On a review of this type of issue the Adjudicator can do one of the following:-

(a) Confirm the Director's decision;

(b) Refer the matter back to the Director specifying the grounds upon which it is doing so. It can also make recommendations.

When considering issues under C62, the Adjudicator is not substituting his decision for that of the Director, and should not therefore allow a review simply because it would have reached a different conclusion from that of the Director. The Adjudicator should not set aside a decision which fell properly within the exercise of the Director's discretion in the absence of unlawfulness or irrationality.

When the matter is referred back to the Director, it is then a matter for him or her to decide whether or not to reverse the original decision and the Director's reconsideration is final.

Mixed issues

Many cases will raise both FP C61 and FP C62 issues. This may be because:-

(a) The Director's refusal reasons contain elements which fall under both FP C61 and FP C62.

(b) The reasons given do not concern FP C61 issues and the Adjudicator considers the Director's FP C62 decision to have been improper or unreasonable. In those circumstances, the Adjudicator should also determine any relevant FP C61 issues (which will always include prospects of success and cost benefit). If in the light of the determination the Adjudicator considers that the Funding Code criteria are not met, he can therefore refuse the review application and uphold the original decision although the reasons given will inevitably differ from those given by the Director.

(c) The reasons given by the Director relate to FP C61 issues and the Adjudicator disagrees with that decision but considers that other

issues arise which mean that funding ought not to be granted. An example would be where the Director has refused the application on prospects of success and the Adjudicator disagrees with this assessment but feels that the matter is out of scope. In those circumstances the Adjudicator may dismiss the review if the scope issue is clear-cut, but otherwise the appropriate course would be for the Adjudicator (having taken any representations it can on the issue of scope from the applicant or his representative) to allow the review but record its views on the scope issue when referring the matter back. The Director will then decide whether it is appropriate to grant funding.

By approaching the matter in this way the Adjudicator will avoid the possibility of further applications and reviews in the same case and ensure that as far as practicable, the applicant is given the opportunity to address all relevant issues on their review.

The CLS forms support this approach. The application form requires the solicitor to provide information to show that all relevant Funding Code Criteria are satisfied. The notice of the review sent to the applicant and their solicitor further advises them that the Adjudicator may raise issues not provided for in the refusal letter and that they should be prepared to address the Adjudicator on any relevant criteria if required.

Nevertheless, there will remain cases where an issue comes up for the first time on review and the Adjudicator feels that the applicant has genuinely not had the opportunity to address it or obtain any further information required. In those circumstances the Adjudicator may be obliged to adjourn the review.

Further Information

FP C63 provides that where, in the course of any appeal to the Adjudicator, further information comes to light which was not before the Director when the decision was made, the Adjudicator, if he considers that information to be

material to that decision, shall ensure that such information is referred to the Director.

This provision will not usually be relevant in relation to FP C61 issues, as you can simply take the information into account when determining the issue.

However in many cases where you are exercising your jurisdiction under FP C62, it may be that the Director has acted properly and reasonably on the basis of the information that was then available, but that the further information would be likely to have affected the decision had it been provided earlier. In those circumstances, you may, although you should not set aside the Director's decision under FP C62.3, refer the further information back to the Director under FP C63 so that he or she can reconsider the matter.

CRIMINAL CASES

The role of the Adjudicator under the Criminal Contract

Under Part B, Rule 5.12 of the General Criminal Contract Specification the client is entitled to seek a review of a decision by the Adjudicator in accordance with the guidance that supports that rule in the following circumstances:-

- Where the Director refuses to extend the relevant upper limit under Rule 2.9 in that part for any authorised level of service (i.e. Advice and Assistance or Advocacy Assistance).

- Where the contracted solicitor refuses to grant Advocacy Assistance under Rule 4.5 in that part.

- Where the solicitor withdraws Advocacy Assistance under Rule 4.11 in that part.

- Where the Legal Services Commission refuses to grant a Representation Order in proceedings prescribed under Section 12(2)(g) of the Access to Justice Act 1999 under Rule 5.7 in that part. Regulation 3 of the Criminal Defence Service (General) Regulations 2001 prescribes which proceedings fall within section 12(2)(g). The list includes civil fine default leading to a risk of imprisonment in the magistrates' court, applications for anti-social behaviour, sex offender or parenting orders under the Crime and Disorder Act 1998 (including applications to vary or discharge such orders and appeals to the Crown Court) and applications and appeals concerning football banning orders.

- Where work is undertaken within the Associated CLS class of work (public law/habeas corpus), the applicable rights of review are those set out in the General Civil Contract and the Funding Code Procedures.

Hearings before the Adjudicator are subject to the rules set out in Section 3 of Part D of the Funding Code Procedures.

Any application for a review under Rule 5.12 of the General Criminal Contract will be treated as a renewed application. An application to review must be made within 14 days of receipt of the decision on the relevant form which is submitted to the regional office. Prior to referral to the Adjudicator, the Director shall review the application. If it appears to the Director that the relevant criteria are satisfied, then the application may be granted immediately. If the Director considers that the application does not satisfy the criteria, then the Director shall refer it to the Adjudicator.

The decision of the Adjudicator should be final and the result will be notified to the client and to the solicitor. The Adjudicator must give reasons for his decisions. The Adjudicator has no power now to consider any refusal to grant a Representation Order by the courts. The relevant appeals process is by way of a renewed application to the court. The procedure is governed by the Criminal Defence Service (Representation Order Appeals) Regulations 2001.

It should be noted that there is no right of review where the solicitor refuses to grant Advocacy Assistance in respect of warrants for further detention, at an armed forces custody hearing, in respect of magistrates' court Advocacy Assistance by a court duty solicitor acting as such or by an own solicitor acting at an early hearing. The client may seek help from another solicitor (Part B, Rule 4.6).

COST APPEALS – GENERAL PRINCIPLES

Independent Costs Assessors are appointed to hear applications for a review of Regional Office decisions on the assessment of costs. They have both a civil and a criminal jurisdiction and this includes the assessment of costs for Controlled Work and for Licensed Work.

The role of an assessor

The role of an assessor is to make a fair and reasonable assessment of the costs claimed. All civil assessments by the Commission (including its Independent Costs Assessors) must be on the standard basis and allow only those costs which are proper, reasonable and proportionate (and where the firm has an LSC contract, only those costs which are claimable under the terms of that contract). The role of the costs assessors was clearly set out by Lord Denning in Storer v. Wright [1981] 1 ALL ER 1015, CA. He said:

> *"[The taxing officer] should disallow any item which is unreasonable in amount or which is unreasonably incurred, in short, whenever it is too high, he must tax it down. ... the only safeguard against abuse is the vigilance of the taxing master. He has a difficult task. With no one to oppose it he has to take much of the solicitor's word for granted, as to the work done. It would be easy for him to let everything through without question. But he must resist that easy course. He must be a watchdog. He must bark when there is anything that arouses his suspicions."*

The assessor has to judge what work was reasonably done, the reasonable time to be spent in relation to that work and what the reasonable remuneration should be. This judgment has to be made after considering the scope of the funding certificate, the relevant regulations, the terms of any costs order, and any relevant contractual rules, case law or practice directions.

An assessor should bear in mind the interests of all the Commission's stakeholders, i.e. the solicitor and counsel, the funded client, and the Community Legal Service Fund (in the sense that what is being spent is public money so the amount spent must reflect the concerns of all taxpayers).

It is important that consistency is achieved as far as is practicable. For this reason the Commission has produced detailed costs assessment guidance which is available to Commission staff, contracted suppliers and to Assessors. You should ensure that you are familiar with that guidance. The key documents are:

(a) The Civil Bills Assessment Manual;
(b) Appendix E to the General Civil Contract – Guidance on the Assessment of Controlled Work Costs;
(c) Appendix H to the General Criminal Contract – Costs Assessment Guidance; and
(d) The Criminal Bills Assessment Manual.

An assessor must assess all claims impartially and be able to justify any decision either to disallow costs or reject a claim in writing to either the solicitor or the funded client.

The Standard Basis

It is worth taking a moment to consider how the Civil Procedure Rules define the Standard Basis. CPR 44.4(2) states that where the amount of costs is to be assessed on the standard basis, the court will:-

- only allow costs which are proportionate to the matters in issue; and
- resolve any doubts whether costs were reasonably incurred or reasonable and proportionate in favour of the paying party.

This second limb is extremely important. It is often the case that Costs Committees have given the benefit of the doubt to the solicitor where, of course, the proper legal position is to give the benefit of doubt to the paying

party, namely the Commission. This situation may seem a little unfair until you remind yourself that the paying party is not the Commission but in fact the State – by extension meaning the tax paying public. That's you and me. Those seeking payment from the public purse, especially solicitors, counsel and experts, should be expected to be able to fully justify the costs that they are claiming – especially given the huge body of costs law and judicial direction in this area.

The approach to assessment

Assessment takes place on the basis of determining (in accordance with the provisions of the contract) the reasonableness of the work done and whether the time spent was reasonable having regard to the requirements of the contract, regulations and guidance (as applicable) and applying the correct remuneration rate for each item of work. Allowance is only made for work claimed where it is supported by appropriate evidence on the file. The onus is on the supplier to provide evidence on the file that the work was done. The assessor must then assess whether the time spent was reasonable. In other words, would a reasonably competent solicitor have undertaken the work, has the work actually been performed with reasonable competence and was the time taken to perform the work reasonable. Evidence of the work done should, ideally, be in the form of timed and dated attendance notes but, where relevant, may be evidenced by relevant documentation drafted or read.

The art (and it is more an art than a science) of quantifying costs is to make a reasonable judgment as to the reasonableness of:

(a) the work done;
(b) the time taken;
(c) the hourly rate charged (except where the hourly rates are prescribed by regulation);
(d) any enhancement claimed; and
(e) proportionality.

The judgment made includes whether the work should be allowed at any enhanced rate claimed or, on the other hand, whether there should be a reduction under the terms of the remuneration regulations or after receipt of an order for wasted costs. In order to make this judgment it may be necessary to carefully review the file, the records of time taken and the correspondence.

The approach to work done

The assessor is not to take into account hindsight but is to try to view the question of what is reasonable from the perspective of the average competent solicitor doing his best for his client at the particular time when the work was done.

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

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

Example 1:
Personal injury case involving spinal injury. Orthopaedic surgeon gives a view as to prognosis and as to possible pre existing injury. He indicates than an MRI scan (costing some £600) might affect his view. Solicitor arranges such a scan without obtaining authority from the Commission. It does not alter the surgeon's view. In such a case it would be reasonable to obtain the scan as it reinforces the expert's view and would support his evidence if cross-examined. Indeed it might well facilitate a settlement and thus save costs.

Example 2:

Road accident case, liability in dispute. Plaintiff has two good independent eye witnesses who gave statements to police supporting his case. He has details of a possible third witness who is now in Australia. Solicitors instruct agents to trace him and take a statement at considerable cost. This would probably be unreasonable. A sensible solicitor would wait until disclosure of the defendant's witness statements before deciding whether any additional evidence was needed.

This does not mean, however, that the assessor must allow the costs of everything that the solicitor does. The assessor has to exercise an independent judgment. The fact that an expert report was not used may justify a careful examination of the situation to decide whether it was reasonable to instruct the expert. The fact that a solicitor made an application to the court which was unsuccessful may lead the assessor to ask whether it was reasonable to have made the application. Solicitors can be expected to have some regard to the value of the case and the potential proportionate benefit to the client when undertaking any particular step. In a claim for, say, £4000 it may be regarded as unreasonable to spend, say, half that sum on expert evidence without careful consideration of whether the case could succeed without it or whether cheaper evidence might be available. Since the introduction of the Civil Procedure Rules only those costs that are proportional to the amount in issue may be incurred by solicitors (see CPR 44.4(2)).

Determining reasonableness will involve in general terms taking into account all the relevant circumstances. The assessor must have regard to his or her duty to the fund Storer v Wright [1981] 2 WLR 209.

The next step is to consider the amount of time spent and whether such time was reasonable in all the circumstances of the case. The materials available to you will be the Claim form and, where requested, the solicitor's file. The amount of time reasonably spent must be considered having regard to the information set out in the claim form and any documentation submitted with it, or on request.

The Exercise of Discretion

At the heart of the task of an assessor is the decision as to whether the solicitor was reasonable in carrying out particular items of work and, if so, whether the time spent by him, or the amount expended, on such work was reasonable. If the assessor is in doubt about any particular item of work his/her duty is to disallow or reduce the time spent or costs incurred.

The exercise of discretion and the reasonableness test was discussed in the case of Francis v. Francis & Dickerson [1955] 3 ALL ER which was quoted in the case of Brush v. Bower Cotton & Bower:

> *"Where a solicitor bona fide acting in what he considers the best interests of his client has incurred expenditure which, unless allowed on legal aid taxation, will fall on him personally, it would be wrong for the court to be astute in seeking reasons to disallow the items, and in particular care must be taken not to be affected by what is colloquially termed "hindsight". Indeed, there is authority for saying that as regards such honestly incurred expenditure (assuming there is nothing that can fairly be termed unwarrantable or excessive about it) the taxing officer on a "common fund" taxation should take a "liberal view".... In no matter is this more important than when dealing with expenditure on enquiries, for otherwise a tendency towards "payments by results" might creep in, which would indeed be contrary to the best interests of justice".*

The test for the exercise of reasonableness is what is usually known as the 'solicitor's armchair test'.

> *'When considering whether or not an item in a bill is [reasonable] the correct viewpoint to be adopted by the taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of a lay client ... It is wrong for a taxing officer to adopt an attitude akin to a revenue official called on to*

apply rigorously some of those Income Tax rules as to expenses which have been judicially described as "jealously restricted" and "notoriously rigid and narrow in their operation"

This means first of all the taxing officer is not to use hindsight. For example, the fact that e.g. instructing a particular expert in the end did not prove any benefit to the client's case is not relevant. The question to be asked is whether, in the light of the solicitor's knowledge at the time instructions were given, the expert might reasonably have provided evidence useful for the client's case.

Secondly the test to be adopted is that of the 'sensible' solicitor. That might be more usefully rephrased as the 'average competent' solicitor. It should not be either the standard of the inexperienced trainee nor that of the highly specialised solicitor with many years of experience.

Thirdly it should be remembered that the solicitor's duty is not to keep costs down unreasonably but to take all reasonable steps to advance his/her client's case. In the Francis v. Francis and Dickerson case the judge went on to say 'the lay client should be deemed a man of means adequate to bear the expense of litigation out of his own pocket - and by 'adequate' I mean neither 'barely adequate' nor 'super abundant'. ... a solicitor [has not] any implied authority to take steps which are extravagant or overcautious.'

This implies some degree of 'cost benefit analysis' by the solicitor who has to consider the justification of any particular step by the potential cost to his client on the assumption that he is a fee paying client of 'adequate' but only adequate means.

Further these comments should not be taken as an invitation to accept all that a solicitor does or all the time that he takes as automatically reasonable. The standard basis of costs requires that the assessor should disallow anything here he has doubts whether the work done or the costs charged were reasonable.

CONTROLLED WORK

The basis of assessment

The costs of Legal Help, Help at Court and Controlled Legal Representation provided under the Commission's General Civil Contract are determined by the Regional Office. Contract Specification Rules 2.14 - 2.19 set out the basis and procedures for assessments of costs and review. Members of the Cost Committee will be expected to be familiar with the provision of the General Civil Contract Specification. The following should be noted:

(i) A review lies to the Assessor in relation to any decision of the Director as to the assessment of the cost of Controlled Work (Specification Rule 2.16). The Assessor has power to confirm, increase or decrease the amount assessed and may direct that its decision shall apply to any other claims for assessment raising the same or substantially the same issue in relation to that supplier. Thus, if the supplier is appealing a number of assessments, then the Assessor may be able to deal with the review in relation to one or more sample assessments and direct that their decision shall apply in relation to the same issues where they appear in some or all of the other outstanding assessments.

Some key contract terms

As all work (whether Controlled or Licensed) undertaken by contracted suppliers is conducted under the terms of their contract with the Commission, it is necessary to consider some of the most relevant contract terms. Some of the most important are:

Standard Terms - Clause 3.4:

In performing contract work you must comply with:

- Relevant legislation

- Points of Principle
- The Contract
- The SQM

Standard Terms - Clause 3.5:

"You must demonstrate to our reasonable satisfaction that you are complying, and have at all times while this contract has been in force complied with, the provisions of this Clause 3. You must demonstrate this when you are being audited by our representatives and at such other times as we may require."

Standard Terms - Clause 12.4:

We are entitled to assess all of your claims and the amount we will pay is the amount allowed on assessment.

Civil Contract Specification - Rule 1.8:

"Where you have carried out Contract Work on behalf of a client, you will promptly furnish such information or documents in relation to that Contract Work as the relevant RD may require for the purpose of exercising his or her functions under any legislation, or under the contract."

Civil Contract Specification - Rule 1.10:

"Save as otherwise provided by this Contract, payment will not be made under this Contract for the time you spend on purely administrative matters".

Civil Contract Specification - Rule 2.5:

"Controlled Work shall only be carried out on behalf of a client who has been assessed as financially eligible in accordance with regulations and any Guidance thereon."

"Subject to Guidance satisfactory evidence in support of a client's information as to their means must be provided to you before you assess financial eligibility"

"The evidence (or a copy thereof) must be retained on the file".

Civil Contract Specification - Rule 2.14:

"You may only claim for work for work that has been actually and reasonably done and disbursements actually and reasonably incurred in accordance with the provisions of the contract and that is supported by appropriate evidence on the file at the time of the claim"

Civil Contract Specification - Rule 2.18:

"Any assessment made by the Director under Rule 2.14, any appeal considered by the Assessor under Rule 2.16 and any application considered by the Costs Appeals Committee under Rule 2.17 shall take place on the basis of determining, on the Standard Basis, whether work was actually and reasonably done…"

LICENSED WORK

The basis of assessment

The procedures for reviews of assessments of costs in other levels of service including Legal Representation under funding certificates, remain those set out in the Civil Legal Aid (General) Regulations 1989 (as amended in April 2000). This is because the Community Legal Service (Funding) Order 2000 and Section 6 of the General Civil Contract Specification save the relevant assessment provisions.

The detailed provisions for different types of funding under this heading are set out below:

Costs in Specified Family Proceedings.
These are all family proceedings in Magistrates' Court, save for proceedings under the Children Act 1989 or under Part IV of the Family Law 1986.

The costs are determined in accordance with Rules 6.2 and 6.3 of the General Civil Contract Specification. These rules apply the remuneration rates set out in Schedule 2 (b) and Schedule 2A (b) of Legal Aid in Family Proceedings Regulations 1991. They also apply the review and appeal provisions of paragraphs (4) to (8) inclusive of Regulation 105 of the Civil Legal Aid (General) Regulations 1989.

Costs Of Licensed Work Other than representation in Specified Family Proceedings or Support Funding.
Licensed work under the General Civil Contract comprises work (other than Controlled Work) in the Family, Immigration, Mental Health, Clinical Negligence or Personal Injury categories.

Rule 6.5 of the General Civil Contract Specification applies the relevant assessment and review provisions of the Civil Legal Aid (General) Regulations 1989 including Regulations 104 to 107A.

The Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 and the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 determine the remuneration rates.

Support Funding

The costs of support funding granted in personal injury cases will be assessed by the Director in accordance with the General Civil Contract Schedule and any terms in the application form and certificate (see Specification Rule 6.7). Subject to this the rights of review and appeal are the same as those for Specified Family Proceedings.

ASSESSMENTS UNDER THE GENERAL CRIMINAL CONTRACT

The basis of assessment

A solicitor dissatisfied with any decision of the Director as to the assessment of costs of contract work may make written representations to the Assessor by way of an appeal (Part C, Rule 1.11 Contract Specification). The Assessor shall re-determine the assessment whether by confirming, increasing or decreasing the amount assessed. The basis of assessment is set out in Part C, Rule 1.13 of the Contract Specification. The Assessor may direct that its decision shall apply to any other of the solicitor's claims, which raise the same, or substantially the same issue, provided always that no such decision shall apply retrospectively to any completed assessments, which the solicitor has not appealed within the time limit.

It should be noted that where the solicitor is appealing a number of assessments, then you may be asked to deal with the appeal in relation to one or more sample assessments and to direct that its decision shall apply in relation to some or all of the outstanding assessments. This prevents a large number of appeals which raise substantively the same issue from coming before you and reduces the administration to both the solicitor and to the Commission.

Crime: Applications for Prior Authorities

The Assessor also has power to deal with prior authority applications. Prior authority applications, which are refused or partially refused by the regional office, are automatically referred to the Assessor.

The procedure for applying for prior authority in criminal cases under the General Criminal Contract remains largely the same as the procedure under the Legal Aid Act 1988. Applications in proceedings in the magistrates' court and certain High Court proceedings are governed by the General Criminal

Contract. Applications in the Crown Court are governed by regulations made under the Access to Justice Act 1999 (and, until April 2007, such applications will continue to proceed to a Costs Committee pending amendment of those Regulations).

Crown Court

Applications for prior authority for Crown Court proceedings are made on form CRIMAPP7 and are not covered by the Criminal Contract. The authority for the Commission to continue to determine these applications is contained in the CDS Regulations and, as stated above, these will continue to be determined by Costs Committees until the Regulations are amended.

Magistrates' Court/High Court

Part B, Rule 5.2 of the General Criminal Contract Specification sets out the types of costs which may be authorised following an application for prior authority. A prior authority may be sought when it is considered necessary for the proper conduct of criminal proceedings falling within the scope of the Contract in the magistrates' court or High Court for costs to be incurred under a representation order, by taking any of the following steps:

- Obtaining a written report or opinion of one or more experts;
- Employing a person to provide a written report or opinion (otherwise than as an expert);
- Obtaining transcripts of tape recordings of any proceedings, including police questioning of suspects;
- In magistrates' courts only, where a representation order provides for the services of Solicitor and Counsel, instructing a Queen's Counsel alone without junior Counsel; or
- Performing an act which is either unusual in its nature or involves unusually large expenditure.

The High Court proceedings in which prior authority may be sought are:

- Representation against the grant of a voluntary bill of indictment;
- Representation in proceedings to quash an acquittal under the Criminal Procedure and Investigations Act 1996;
- Representation in proceedings under RSC Order 115 in Schedule 1 to the Civil Procedure Rules 1998 for confiscation or forfeiture;
- Representation in the High Court on an appeal by way of case stated;
- High Court bail proceedings.

A prior authority cannot be granted under this Contract Rule for work in the Associated CLS Class. This is governed by the relevant CLS provisions.

It is the solicitor's responsibility to ensure that the relevant information is submitted to enable requests for prior authorities to be properly considered. Applications before the Assessor (or Costs Committee) especially those which are poorly prepared or incomplete are likely to be refused because the Assessor / committee is unable to establish whether it is reasonable to incur the expenditure requested. This is particularly important in cases where the application is made close to trial and where refusal may cause an adjournment. In certain cases the committee may consider writing to the court explaining the Commission's reasons for refusal. The completion of the Commission's application form is only one requirement of an application. Rarely, if ever, will a completed form by itself provide sufficient information and accompanying explanation or documentation will be just as important. Examples (which are not exhaustive) of what may be required to enable the Assessor (or Costs Committee) to establish the reasonableness of a request are:

- A signed statement from the client or a summary of the defence case clearly showing the nature of the defence or mitigation, so as to show how the report will possibly assist the case;

- A detailed opinion from the advocate, identifying the need for the report and the way in which it will materially assist the case;

- The relevant prosecution evidence;

- A minimum of two quotations from proposed experts or a cogent explanation for their absence;

- If an application is made close to trial, a clear explanation as to why it could not have been made at an earlier stage;

- Where an application is made after any plea and directions hearing, the solicitor should provide a copy of the judge's questionnaire and give details of any directions or observations made by the judge. If the judge has doubt on the need for the expert, then cogent reasons need to be given in support of the application for prior authority.

- Details of approaches made to the prosecution with a view to agreeing forensic evidence and/or reducing or defining the issues with details of the results. If no such approaches have been made, a cogent explanation as to why not.

In cases of very substantial proposed expenditure you may be minded to authorise a preliminary report at a lower cost before considering the expenditure of further costs. It is therefore essential that applications are made in good time before the trial and usually at the latest immediately following the plea and directions hearing.

Authority will be:

- *Granted* if the assessing officer is satisfied that the proper conduct of the proceedings so requires and it is reasonable in the circumstances.

- *Refused* where the application is for tendering expert evidence or the reports in question have been/could be ordered by the court in its consideration of a disposal under the Mental Health Act/probation order with treatment and would thus be payable out of Central Funds.

- *Refused* for photocopying done in-house which is an office overhead (*R v Zemb, 1985)*, unless the circumstances are unusual, or the documents to be copied unusually numerous in relation to the nature of the case, i.e. 500 pages or more.

- *Refused* where the application is for a conference with counsel or to obtain counsel's written opinion (unless counsel is instructed as an expert, rather than as counsel).

- *Refused* where the application is for travelling expenses to attend at a distant court. This is a matter for the determination of costs.

The effect of failure to obtain or refusal of authority for expenditure is that:

- The solicitor's costs may still be allowed on the determination of costs. This is also the case if the amount of an authority is exceeded.

- The solicitor can obtain payment other than out of the fund for experts' fees or bespeaking transcripts where an application for authority has been refused.

Guidance on prior authorities can be found in the Guidance to Rule 5.2, Part B of the General Criminal Contract Specification. In addition, the Criminal Bills Assessment Manual provides prior authorities and is used by regional offices when determining applications.

POINTS OF PRINCIPLE OF GENERAL IMPORTANCE

The new procedure

After 9th October 2006 (save in civil Licensed work where the procedure remains unchanged until April 2007), there is a new system for applying for points of principle of general importance.

Rather than having to seek permission from a Costs Committee (or indeed now an Assessor) applications for certification of Points of Principle of General Importance can be made at any time during the costs appeals process. Applications can be made by the appellant, the Director or even the Assessor.

This means that if you, as an Assessor, are unclear on the meaning or interpretation of a particular provision and your uncertainly isn't resolved by reviewing the relevant guidance or seeking advice from the Commission's lawyers, you can also adjourn an appeal and seek certification of a Point of Principle. If you want to seek a Point of Principle you must notify the relevant Director and set out the exact wording of the Point of Principle that you want certified. If the Director or Appellant are seeking certification of a Point of Principle, you will be notified and likely asked to adjourn the appeal pending the outcome of the application. Whether you adjourn your considerations is a matter for you and you must only do so where it is reasonable to do so. The Point of Principle procedure must not be allowed to be used as a mechanism for delaying appeals.

The Commission's legal director will initially consider applications for Points of Principle and, if she considers it appropriate for them to proceed, they will be put to the Costs Appeals Committee. If she does not consider it appropriate for a matter to proceed then her decision to refuse permission will be verified by the chair to the Costs Appeals Committee.

What are Points of Principle

Points of Principle ("POPs"), whilst often overlooked, are extremely important for all suppliers working under LSC contracts - not least because clause 3.4 of the Contract Standard Terms makes them binding on all contract work. In essence, POPs are statements which seek to clarify a costs assessment principle or interpret a contractual assessment provision.

Most points of principle are likely to arise in the interpretation and application of the regulations, the Funding Code, the General Civil Contract or the General Criminal Contract which affect the assessment of costs. If an application turns only on the facts of the case it is unlikely that any principle has arisen. If an application turns on very particular facts which are unlikely to arise again (and even if they did, they would not be generally applicable) it would be unlikely to be of general importance.

Current POPs can be found both on the LSC website and in Volume 1 of the LSC Manual. Anyone making an application for a new POP could do worse than review those already certified, as they are a good guide as to how suggested POPs should be worded.

A common error is to phrase the POP as a question to be answered rather than as a statement to be certified. When an application for certification of a POP is made, you should ensure that you set out the exact wording of the POP that you want the committee to certify.

Applications that still go to Committee

As mentioned above, applications for Points of Principle in civil Licensed work still go to the Costs Committee. This is a residual position and will only be the case until April 2007 when the relevant provisions will be amended.

Procedure before the Costs Committee

On determining the application the Costs Committee will consider whether the results of the review raises a point of general importance to the profession. This is a threshold requirement, comparable to the requirement for a point of law of public importance, to be certified for an appeal, which ensures that cases heard on appeal by the Costs Appeals Committee do not turn on their particular facts but raise issues of principle which are likely to affect other determinations in the future.

If the Costs Committee grants an application to certify a point of principle of general importance the clear point of principle must be certified by the Committee at the meeting. The solicitor or counsel may then within 21 days of receipt of that certification appeal in writing to the Legal Services Commission Cost Appeals Committee.

If the Costs Committee refuses the application brief reasons must be given. These must refer to one or both limbs of the basis on which a point can be certified, i.e. a) point of principle and/or b) general importance.

Cost Appeals Committee

Decisions of the Legal Services Commission's Cost Appeals Committee are binding on the Commission for costs assessment purpose. The decisions are publicised in Focus and on the Commissions website. They will also appear in the updates to volumes 2 and 4 of the LSC manual (for civil and criminal cases respectively).

Applicants (who can include a Director or Assessor) may appear and be represented before the Cost Appeals Committee with the agreement of the Committee. Where the Committee allows one party to the appeal to be represented they should also grant that option to the other.

ASSESSORS AND FRAUDULENT CLAIMS

In rare cases, you may conclude that the costs, or an element of the costs, of the cases under review have been recorded for work that has not been in fact been carried out and has therefore been fraudulently claimed. There must be clear evidence before such a conclusion is reached, but if you decide that fraud has been involved, it is your duty to deal with it and to go on and assess the files. Any wrongfully claimed costs should be disallowed.

You should openly and clearly state your conclusions, and should give your reasons for coming to those conclusions. However, the appellate firm should be told of your views and be given an opportunity to address the issue. In some circumstances it may be necessary to adjourn in the interests of fairness or direct that the matter be referred to a three-member panel and that attendance of the supplier be allowed.

APPENDIX 1

Human rights

The Human Rights Act 1998, which came into effect on 2nd October 2000, incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into domestic law. Section 6 makes it unlawful for a public authority to act in a way that is incompatible with a Convention right, unless it cannot do otherwise because of primary or secondary legislation that is incompatible. This means that if someone believes the State is in breach of his or her Convention rights they no longer need to apply to Strasbourg for a remedy, but can bring proceedings in the courts here. The Act requires legislation to be interpreted in a way compatible with Convention Rights. If a court finds that primary legislation is incompatible, it must apply the non-compliant legislation but may make a declaration of incompatibility. A court can, however, quash or declare invalid secondary legislation incompatible with a Convention Right unless prevented from doing so by the primary legislation.

A summary of the principal Convention Rights, and further guidance on their application to CLS Funding is contained in Chapter 6 of Part C of the Guidance in Volume 3 of the LSC Manual.

For committee purposes the most relevant part of the ECHR is Article 6. This guarantees the right to a fair trial in civil or criminal cases. Article 6 may be directly relevant to decision making under the Funding Code.

The cases of Airey v Ireland [1979] 2EHRR 305 and Aerts v Belgium [2000] EHRR 50 show that Article 6 can sometimes carry with it an obligation on the State to provide legal aid if that is the only way in which individuals will get a fair hearing in determination of their civil rights. Article 13 of the Convention, to which the Human Rights Act 1998 seeks to give effect, provides that persons whose Convention Rights are violated must have an effective remedy.

However, Article 6 creates no general obligation to provide civil legal aid, as cases such as Airey expressly recognise. This is in sharp contrast to the position in criminal cases where Article 6(3) creates a general obligation on the State to provide criminal legal aid for persons who do not have sufficient means to pay for legal assistance, where the interests of justice so require. Further, a number of cases have recognised that States are entitled to place reasonable restrictions on the availability of legal aid in civil proceedings. Examples include requiring minimum prospects of success as a condition of funding (see X v UK [1980] 21 DR 95, Webb v UK [1983] 22 DR 133, Thaw v UK [1996] 22 EHRR CD 101). Certain types of case may be legitimately excluded from the scope of civil legal aid (see Winer v UK [10 July 1986], Munro v UK [1987] 52 DR 158, Stewart-Brady v UK (1997) 24 EHRR CD 39]).

The Adjudicator is, of course, bound in his decision-making by the provisions of the Access to Justice Act, the Lord Chancellor's directions and the Funding Code criteria. Any further challenge to the compatibility of the scheme with the ECHR would be a matter for determination by the court in separate judicial review proceedings. However, subject to this the Adjudicator is, as a public body, obliged to take the ECHR into account when making his decisions. The Funding Code itself provides the mechanisms by which this should happen. In particular: -

(a) the criteria seek to ensure that individuals have the opportunity of a fair hearing in the determination of their civil rights for cases that have sufficient merit and priority to justify public funding.

(b) cases against public authorities that raise significant human rights issues are a priority under the Code. Significant human rights issues are expressly recognised in the criteria for claims against public authorities, whether in the form of judicial review or claims for damages (see Criteria Sections 7 and 8). They allow funding even if prospects of success are only borderline. The same approach applies to immigration cases under Section 13 of the Code.

(c) in applying cost benefit criteria in the Code, whether in the form of the private client test or a general cost benefit test, weight should be given to significant human rights issues raised in the case.

For the purposes of the Lord Chancellor's directions on scope and the criteria in the Funding Code, the human rights issues raised must be “significant”. Many applicants and their solicitors will allege that a case involves human rights issues, particularly as the 1998 Act continues to bed in. Further guidance on this issue is contained in paragraph 6.5 of Part C of the Funding Code Decision Making Guidance. In summary:-

(a) The ECHR issues must be material to the case i.e. an important part of the case and likely to make a difference as to its outcome. However, a human rights issue may be material even if it merely reinforces domestic law, e.g. Article 5 issues in an action for false imprisonment.

(b) If the argument that there has been a breach of human rights has poor prospects of success then the case itself does not raise significant human rights issues.

(c) The human rights issues must flow from the case itself, not from the funding decision. The case cannot be said to raise significant human rights issues for the purposes of the Funding Code merely on the grounds that if public funding were not provided there might be some arguable breach of Article 6. Such arguments are relevant only before the court in the context of a judicial review of the funding decision. A case that raises significant human rights issues may be refused under cost benefit criteria. The criteria in Section 7 and 8 of the Code require the benefits of the proceedings to justify likely cost. Although this is a less stringent test than under the General Funding Code, the mere fact that the case raises human rights issues does not mean there is no limit to the amount of public funding which can be provided. Common sense must be applied. The issue is whether the benefits flowing from the proceedings are sufficiently worthwhile that they justify the expenditure of public funds.

The decision making process

You may face arguments that your own and the Commission's decision making process, either in terms of an application for funding or a decision on costs, does not in itself comply with Article 6. As stated above, whilst this must be a matter for the courts, and cannot be a question for determination by you, the Commission's view on these matters is set out below.

In order for Article 6 to apply to the Commission's internal decision making (including decisions by committees) then the decision making process would need to be a "determination" of a person's "civil rights and obligations" under that Article.

There is no clear law on whether a decision to provide funding to a person amounts to a determination of civil rights and obligations as it is more in the nature of a public rather than a private law right. However, European Commission case law suggests that only the determinations of private rights are affected, not public entitlements such as non-contributory welfare benefits. Civil funding appears to fall into this latter category.

In terms of the determination of costs, the General Civil and Criminal Contracts and regulations set out the procedures for costs to be of determined through an assessment and any appeal to an Independent Costs Assessor and the Cost Appeals Committee. The firm’s ‘civil right’ is for those procedures to be properly followed, and for the costs to be paid (or credited under the contract against monthly payments) once this has happened. At that point, if the assessed costs are not paid, or if the assessment process itself has not complied with the applicable provisions of the regulations or contract then the solicitor will have a remedy through the courts - which are of course Article 6 compliant. This applies whether or not the payment is due by virtue of regulations or a contract with the Commission.

In any event, the Commission has of course sought to create a fair and rational structure for its decision making processes. It is central to the Access to Justice Act that the Commission is responsible for managing limited public resources to best effect. For that reason, final decisions on funding cases must rest with the Commission rather than any entirely independent body. Managing a budget implies taking ultimate responsibility for how that budget is spent. However, within that context, Review Panel members are independent members of the legal profession and are obliged to scrutinise the Commission's decision in an impartial manner. The appointment or dismissal of Review Panel Members is in the hands of the Regional Panel Chairs and Annual General Meeting. The requirement to give reasons for their decisions.

It is also worth bearing in mind that the decisions of the Assessors/ Adjudicators and of the Commission are challengeable by way of judicial review. The authorities of Bryan v United Kingdom (1996) 21 EHRR 342 and R v Secretary of State for Environment, Transport and the Regions ex parte Alconbury (2001) 2 WLR 1389 suggest that the availability of a judicial review remedy at the end of a decision making process will itself in many circumstances render the overall procedure Article 6 compliant. This is because the person aggrieved by the decision is given access to a court.

APPENDIX 2

Determining applications for funding certificates to take judicial review proceedings

Judicial review cases are a priority under the Funding Code. However, the section of the Code (section 7) which sets out the criteria for Public Law cases covers a wider range of cases than those generally covered by the judicial review procedure set out in Order 53 (RSC) (preserved by Rule 50CPR). Adjudicators called upon to review applications for funding for judicial review should acquaint themselves with the provisions of Order 53 (and commentary thereon) and the section of "The Funding Code - Decision Making Guidance" (section 16) which addresses the scope of section 7 of the Funding Code.

The basis upon which judicial review can be granted has been described as a vast topic and a detailed analysis is beyond the scope of this manual. You will need to look carefully at Funding Code Criteria and Guidance but may find it helpful to approach you considerations of merits on judicial review applications by asking the following ten questions:

- is there a sufficiently identifiable decision that is susceptible to judicial review?
- does the applicant have a "sufficient interest" in the matter to which the application relates?
- is the proposed respondent one against whom judicial review lies?
- has the applicant sufficiently identified the grounds upon which the respondent's decision can be impugned, for example:
    - breach of the Human Rights Act.
    - want or excess of jurisdiction.
    - an error on the face of the record.
    - failure to comply with rules of natural justice.
    - the "Wednesbury" principle.

- has the applicant produced cogent reasons why the decision can be impugned on the alleged ground?
- does the case involve matters of public (as opposed to private) law?
- is the judicial review being sought promptly after the decision (i.e. as soon as practicable) and in any event within three months of the date when grounds for the application first arose, or is it a case where the court is likely to entertain the application despite the delay?
- has the client exhausted all proper and reasonable avenues to reverse the decision (such as any internal appeal procedures) before making the application?
- does the application show an appreciation of the purpose of judicial review, namely that it is concerned with reviewing not the merits of the decision but the fairness of the decision making process itself. As was said in North Wales Police v Evans (1982) All ER 141, "It is important to remember in every case that the purpose (of the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subject and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question".
- have all reasonable attempts been made to resolve the case through ADR? See for example Frank Cowl v Plymouth City Council, CA, 14 December 2001, TLR 8 January 2002.