Civil Bill Assessment Manual

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Part I - Aims And Objectives

This manual is intended to equip caseworkers with the tools and skills to be consistent in decision making especially in the application of discretion which forms such a large part of bill assessment for certificated civil work.

It provides details of the regulatory framework, sets out the appropriate guidance, applicable rules of court, practice directions and contractual changes, explaining their application and interpretation so far as they relate to an assessment undertaken by the Commission.

1. Introduction

1.1 The role of an assessor

1. The role of an assessor is to make a fair and reasonable assessment of the costs claimed. The assessment should generally follow the principles used the costs had been assessed by the Court, *(Reg105(1)* (except in respect of the approach to late submission).

2. 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.

3. 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.

4. It is important that consistency is achieved as far as is practicable. The guidance given in this manual should be taken into account and applied to the individual factors and circumstances of the particular case.

5. 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.

6. An assessor derives authority to assess costs in civil proceedings under Regulations 104-107 of the Civil Legal Aid (General) Regulations 1989 and Contract Rule 6.5 of the General Civil Contract.

7. The assessor must have due regard to the rules and regulations to be applied. These can be found in the Legal Aid Handbook 1998/99 and Volume 1 of the Legal Services Commission's Manual. Additionally attention must be had to relevant case law on the principles to be applied on assessment. The main cases are set out in Appendix F.

2. Basic Principles

2.1 Introduction

1. Certificates issued prior to 1 April 2000 are governed solely by the Legal Aid Act 1988 and the supporting regulations to that Act that relate to assessment (Regs104-107).

2. On the implementation of the Access to Justice Act (AJA) 1999, the Funding Code, the General Civil Contract and the relevant regulations to the AJA govern the assessment of certificates granted on or after 1 April 2000.

3. The starting point for the assessment of certificated work done on or after 1 April 2000 is governed by the General Civil Contract. The relevant contract Rule governing assessment is Rule 6.5. (It in turn refers back to the old assessment regulations).

4. Relevant contractual provision – Rule 6.5

"Subject to Rule 6.9 and 7.2 the procedures for the assessment of remuneration for Licensed Work other than representation in Specified Family Proceedings or Support Funding shall be the same as those contained in Regulations 48, 84, 104 to 107A, 108 to 110, 112, 113(1), (2) and (4)-(7), 119(1) and 122 of the Civil Legal Aid (General) Regulations 1989 and prior authority may be applied for and granted in the same way as that set out in Regulations 59 to 63 thereof."

5. The reference in this Rule (and Rules 6.3 and 6.6) to the Civil Legal Aid (General) Regulations 1989 is to those regulations as amended by the Civil Legal Aid (General) (Amendment) Regulations 2000, the Access to Justice Act 1999 (Commencement No. 3, the Transitional Provisions and Savings) Order 2000 and the Funding Order 2000 (and any subsequent amendments).

6. The references to Regulation 104 and 107A of the Civil Legal Aid (General) Regulations, the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 and the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 means these regulations as amended by and subject to the Commencement No. 3 Order.

7. Regulation 105 and 106 will be amended to adjust the Commission's assessment limits.

2.2 The Criteria for Assessment

General

1. Under Regulations 104, 105 and 106A of the Civil Legal Aid (General) Regulations 1989 the Commission has the power to assess legal aid only costs incurred under public funding certificates in certain specific circumstances.

   (a) All work done in the Magistrates Court: Reg 104(1) – see 2.2.5

   (b) All work done where proceedings are not issued: Reg 105(2) – see 2.2.6 (b).

   (c) All work done where the total costs incurred do not exceed £2,500 (the mandatory assessment limit) Reg 105(2)(A). (This was £1,000 prior to 1 July 2003. Prior to July 2003 there was a discretionary assessment limit between £500 to £1,000. In such cases, the solicitor could choose whether the Commission or Court assessed the bill.)

   (d) Exceptional circumstances: Reg 105(3)(c) and (d)

   (e) Where agreed costs have been paid in 1994 certificates and the legal aid only costs do not exceed £2,500 (Reg 106A)

   N.B. The Commission does not assess costs where the costs exceed £2,500 nor where there are orders for costs between the parties (inter partes costs).

Calculating the total costs

2. When considering the limits imposed by Regulation 105 and 106A the total amount of the costs calculated is the total profit costs and disbursements (including those of previous firms), plus all counsel's fees (including those paid under the Family Graduated Fee Scheme). The total is exclusive of VAT Regulation 105(13).

3. The cumulative totals are for each set of separate proceedings and different totals should be used for separate proceedings For example, ancillary relief proceedings in matrimonial cases; enforcement proceedings or pre-action discovery work are each subject to a separate limit to that of the related proceedings because they are actually separate proceedings.

4. Sometimes claims may be submitted which marginally exceed the limits from solicitors who expect their costs to be assessed below the limit imposed on the Regulations. Such claims should be rejected as the limit on assessment is a limit on the costs as claimed not assessed. It is in any event inappropriate for a claimant to claim costs that he does not believe he will get on assessment.

Magistrates' Courts

5. Any bill in respect of proceedings in the Magistrates or Family Proceedings Courts, regardless of whether proceedings have been issued or not, or the amount of the claim, **must** be assessed by the Commission. There is no option for assessment by the court (regulation 104). This includes civil non-family work in the Magistrates' too (Regulation 104 as amended). Specified family proceedings, as defined by the Community Legal Service (Funding Order) 2000 are paid in accordance with Contract Rules 6.2 – 6.4.

County or Higher Courts

6. In the higher court different assessment limits apply.

   (a) Proceedings not issued

   Any bill in respect of proposed proceedings in the county or Higher Courts where the retainer of an funded client's solicitor is determined before proceedings are actually begun, **must** be assessed. There is no limit on the amount of the claim and there is no option for assessment by the court (regulation 105(2)).

   Example:

   Where a certificate is issued to pursue a claim for damages limited to counsel's opinion, the opinion is unfavourable and the certificate is discharged.

   (b) Proceedings issued but the costs are under £2,500.00

   Any bill for proceedings in the county or higher courts, where proceedings have been issued and the total amount of the claim does not exceed £2,500, **must** be assessed. There is no option to assessment by the court (regulation 105(2)(a)).

   (c) Proceedings issued and the costs are over £2,500.00

   All other claims in the county or higher courts where proceedings have been issued and the total of the costs exceeds £2,500 must be submitted to court for assessment (unless special circumstances can be shown – see (g)).

   (d) Agreed costs cases – pre prescribed rates

   If the certificate was issued prior to 25 February 1994, and the solicitors agree and recover their costs in full from the other side, making no claim from the fund whatsoever, these costs are to be assessed by the Commission. These are known as "adjustment purposes only" claims and these are closed on processing the details of the agreed costs and recouping outstanding payments on account

(e) Assessment where inter partes costs are agreed and paid – post prescribed rates

In respect of certificates issued on or after 25 February 1994 then where inter partes costs have been agreed and recovered the solicitor may claim his Legal Aid only costs from the fund. Regardless of the amount of the inter partes costs if the total of those costs claimed is up to £2,500 then they must be assessed, if they are over £2,500 they must be assessed by the court. (Regulation 106A).

(f) Special circumstances

If proceedings have been issued and the costs exceed £2,500 the solicitor may request assessment where there are special circumstances that mean assessment by the court would be against the interests of the funded client or would increase the amount payable from the fund (regulation 105(3)(a)). Any claims submitted for assessment under this regulation should be referred to a senior caseworker.

Example 1:

Where an assisted Plaintiff has realised they have a poor case and have let the case lie, they may seek assessment on the basis that to do otherwise would wake up the Defendant who could seek an order for costs. It should be borne in mind the courts can assess. Certainly if it is likely that the Plaintiff would have to discontinue the proceedings, it should be suggested that the court should be approached for assessment once the certificate has been discharged. To do otherwise would deprive a non-assisted party of their rights to recover the costs from discontinuance. In this situation it would be very rare for special circumstances to be shown.

Example 2:

Likewise, where a solicitor has made a mistake in relation to assessment by the court, for example, he has attempted to agree part only of the inter partes costs in a certificate that pre-dates the concession made in Regulation 106A for prescribed rate cases. The solicitor may argue that to re-assess through the court would in fact increase the amount payable from the fund and so assessment by the Commission would be appropriate. This exception should be used with caution and should not be exercised to rectify a mistake by solicitors. However, the cost to public funds of detailed assessment should be considered and the decision taken appropriately. Head Office guidance may be sought in difficult cases.

Example 3:

Where the costs involved are just over the assessment limit and the claimant seeks to say "you always knock a bit off so it is likely to run in at less than the limits after assessment and to assess through the court would cost more". Our response should be that the solicitor should not be making a claim for costs they do not expect to receive and so, if they expect to receive below the limit then they should claim below it. This scenario would not constitute exceptional circumstances.

Example 4:

A further example of exceptional circumstances may be where solicitors are negotiating a structured settlement and have agreed costs for work done up to a certain point and have an order for costs in their favour. The proceedings may continue and take some considerable time to complete the work under the certificate The solicitors have no ability to retain their agreed costs as these will need to be paid into the fund. It has been suggested that if the solicitors have an order for costs they could assess their costs and claim an interim bill but this would increase the amount payable from the fund as Regulation 119 prohibits these costs from forming part of the statutory charge. Due to the costs involved in assessment by the court. An assessment by the Commission may be appropriate.

(g) Costs recovery bills

Where after payment of a final bill and or the discharge of the certificate enforcement proceedings take place and the solicitors pursue recovery of inter partes costs with authority from the regional office, such costs can be assessed by the under Regulation 105(3)(b). If however it is the Debt Recovery Unit that have instructed the solicitors in respect of the enforcement proceedings, the bill should be transferred directly to the Debt Recovery Unit for payment as soon as it is received by the area office.

(h) Protective writs

For the purposes of regulation 105 the issue, but not service, of a protective writ does constitute the issue of proceedings.

Judicial Review proceedings

7. Certificates issued for Judicial Review proceedings cause a unique problem. In the first instance all certificates are likely to be limited to an application for permission. This means they must first apply to the Divisional Court for the right to pursue judicial review proceedings. If a oral or written application for permission has been made this does constitute proceedings even if it is unsuccessful **(R V. Darlington Borough Council, ex p. The Association of Darlington Taxi Owners).** If the costs exceed the regulation 105 limit then the claim must be assessed by the court. If neither a oral or written application was made then the claim, no matter its amount, must be assessed by the Commission because no proceedings have been issued.

Costs Between the Parties

8. Where an funded client is successful in proceedings there may well be an order for the other side to pay part or all of their costs. Costs payable by the other side are known as inter partes costs or costs between the parties. An order for costs will take one of two forms. Either it will be a fixed order or an undetermined order.

   (a) Fixed orders

   If the order is fixed, then the amount of the costs to be paid will be determined when the order is made, and will be specified in the order. E.g. “A pay the costs of B in the sum of £250” or “costs assessed at £250”, “costs fixed at £250”. Bills for assessment where there is a fixed order for costs can be accepted, and if those costs have not yet been recovered then the solicitors must also submit form "Costs 1/Claim 1", as appropriate, and a copy of the order for costs.

   If the order is worded “respondent to pay the petitioner’s costs in this application limited to £250....” the bill must be assessed by the court. The receiving party is only entitled to £250 if the bill is assessed by the court at that or a higher sum.

   (b) Undetermined orders

   The other alternative is that the order will be undetermined. For instance, "...the respondent to pay the petitioners costs, to be taxed if not agreed..." or A to pay 20% of B’s costs. In these circumstances any bill received for assessment **must** be rejected as only the court can determine those undetermined costs through the assessment process if the parties have not agreed the costs between themselves.

Discharge/ Revocation

9. Different issues arise on discharge or revocation of a certificate.

   (a) Assessment before conclusion of the proceedings

   Where there is no discharge or revocation of the certificate there cannot be an assessment of costs until the conclusion of the cause or matter even if there is an order for costs and assessment of costs in an interlocutory application.

   (b) Undischarged certificates with no order for assessment

   If on receipt of a claim the certificate is undischarged and there is no order for assessment the claim should only be assessed if the certificate is ready for discharge on non-contentious grounds, i.e. the case is concluded or the funded client consents to the discharge. There is no need to issue a formal notice of discharge, but an assessment can be made.

   If, however, there is no discharge and the only likely grounds for discharge are contentious, i.e. unfavourable counsel's opinion or the solicitor is without instructions, the show cause procedure should be implemented and the claim returned to the solicitor with instructions to resubmit the claim when the discharge certificate has been issued.

Magistrates’ Court cases transferred up

10. Family cases started in the Magistrates’ courts may be subsequently transferred to the higher courts. If so costs may be assessed by both the Commission and the Courts. The costs of all the work done in the Magistrates Court must be assessed by the Commission. If the case is transferred up and the costs in the higher court do not exceed £2,500, then they too can be assessed by the Commission. However, if the costs in the higher court exceed £2,500, they must be assessed by the court. If the solicitor requests so, it is acceptable to assess the Magistrates’ Court element on transfer to the higher court rather than wait until conclusion of the proceedings in the higher court. The solicitor can also choose to await the outcome of the county court proceedings before seeking assessment without penalty.

11. Be aware of any substantial payments on account which exceed the claim for assessment as they will probably be in respect of costs incurred in the higher court. When paying the assessed costs, consideration should be made whether previous payments on account should be recouped – see 10.15. An adjustment will need to be made to ensure those payments on account that relate to the higher court are not recouped.

Matrimonial/Family proceedings

12. In matrimonial or family proceedings the costs of the entire proceedings may not be assessed until the main suit and all ancillary applications are concluded. [CPR 47.1]

2.3 The exercise of discretion and the reasonableness test

The approach to assessment

1. Assessment takes place on the basis of determining 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.

2. 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.

3. 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.

4. Many of the basic principles governing assessments are contained in the Civil Procedure Rules introduced in April 1999 which provide the general framework for dealing with costs, including the courts discretion in the making of costs orders, the form and process of detailed assessment, and the basis, and criteria for quantification of costs.

5. Regulation 105 of the Civil Legal Aid (General) Regulations 1989 details the basis on which the Commission will determine costs. This has been recently amended.

Regulation 105(1) now states:

"(1) In this regulation and regulation 106A, "assessment" means an assessment of costs by the Area Director and payable under a certificate in accordance with this regulation and regulation 107A.";

Regulation 107A(2) states:

"Costs to which this regulation applies shall be determined on the standard basis subject to:

(a) The Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 in proceedings to which those regulations apply.

(b) The Legal aid in Family Proceedings (Remuneration) Regulations 1991 in proceedings to which those regulations apply."

CPR 44.4(2) states that:

"where the amount of costs is to be assessed on the standard basis, the court will:-

(c) only allow costs which are proportionate to the matters in issue; and

(d) resolve any doubts whether costs were reasonably incurred or reasonable and proportionate in favour of the paying party".

Where no rate is prescribed

6. The Law Society in the past issued an annual "expense of time" survey for each local court area. These were surveys which reflected the local agreement between District Judges and local Law Society branches as to the appropriate rate for each category of fee earner in the particular court where the litigation was conducted. They either stated the rate for fee earners of different status or alternatively set a composite rate. Some areas did not operate this form of agreement. In 2001 however, a fuller survey was conducted by the Court Service. The Supreme Court Costs Office now recommends allowable rates for use by each court circuit in England and Wales for four grades of fee earner. The rates are set out in Appendix F.

7. The locally chargeable rate should be considered when determining the expense rate chargeable for local solicitors. In Re: Ajankul [28 October 1991: unreported FD – paragraph N141 Butterworth's Costs Service] the rate to be used is the rate appropriate to the locality in which the solicitor's office is based provided it was reasonable for the client to instruct that solicitor. Case law *(Truscott v. Truscott: Sheffield Forgemasters)* clarified that sometimes a court should allow the higher rates of out of town practitioners working in local courts if in the interests of the client. Caseworkers should bear in mind what is the appropriate rate by reference to local court practice and be aware that the rate applicable for non-local practitioners may be different.

The Exercise of Discretion

8. 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, wh*ich would indeed be contrary to the best interests of justice".

The approach to work done

9. 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.

10. 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 led 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 Practice Rules only those costs that are proportional to the amount in issue may be incurred by solicitors (see CPR 44.4(2)).

11. 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.*

12. 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. When a bill is assessed by the court it will have a rather more complex document - the Bill of Costs - which sets out in a narrative form full details of the work done. 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.

2.4 Considering the work done - the scope of the funding certificate - how important is it on assessment

1. The funding certificate, and any amendments, are conclusive as to what work the solicitor/counsel have been authorised to do. On assessment (save where representation is pursuant to a separate contract for representation) it is the **only** authority under which solicitor and counsel may be paid.

2. Even where a certificate covers the proceedings up to and including trial, it will bear a limitation to that effect. Subsequent work, e.g. as to implementation/enforcement, is only covered to the extent specified.

3. The certificate may, however, be limited as to steps in the proceedings, particular parties or to certain work, e.g. obtaining an opinion from counsel. If it is limited, payment will not be made out of the Community Legal Service Fund for work done outside the limitation, unless the area office has granted an amendment. Solicitors should be aware that work done outside of the certificate cannot be paid for by the funded client or any one else on the client's behalf (Regulation 64 of the Civil Legal Aid (General) Regulations 1989 and s.22(2)5 Access to Justice Act 1999) save in the limited exceptions set out in ***Littaur v Steggles Palmer*** **[1986] 1 WLR 287**.

4. A certificate limited to counsel's opinion or to preparation of papers for and obtaining counsel's opinion will cover the costs of preparatory work reasonably necessary to refer the matter to counsel and a pre-opinion conference with counsel (if reasonably necessary) but will only cover one written opinion from counsel and will only cover settling pleadings where this is specified.

5. Even with a full certificate a solicitor may seek an authority if he wants to be sure of payment of specific costs.

6. The certificate can only cover one action, cause or matter, apart from the specific exceptions set out in regulation 46.

7. The certificate will cover only one funded client. Joint certificates cannot be issued. In the case of a minor or a person under disability although *a litigation friend or child's guardian* may be named in the certificate the funded client will be the minor or person under disability.

8. The certificate will specify both an individual nominated solicitor and a firm of solicitors. If there is a change of firm (even if the same individual solicitor continues to be nominated), an amendment of the certificate should be applied for to amend the name of the conducting firm.

9. The nominated solicitor can entrust the conduct of the case to a partner of his or to a competent or responsible representative of his who is either employed in his office or otherwise under his immediate supervision (Civil Legal Aid (General) Regulations 1989, reg. 65(2)).

10. The nominated solicitor must at all times hold a valid practising certificate if his (or the firm's) profit costs are to be paid out of the Community Legal Service Fund (otherwise only disbursements, including any counsel's fees, will be paid in respect of any uncertificated period).

11. The Commission's computer system CIS determines the individual proceedings within each action, cause or matter. Each certificate issued will set out for each of the proceedings a scope limitation for the work authorised to be understanding as well as a costs limitation on the costs to be incurred in respect of such work authorised.

12. It is essential that both solicitor and counsel ensure the certificate covers all the work that needs to be done for the funded client. All certificates contain a limitation and it is particularly important to ensure the work to be done is within the limitation, if payment is to be made. The General Terms of the General Civil Contract (para 32) oblige the solicitor to check the certificates issued.

13. Generally if the wording is incorrect or not in accordance with the needs of the funded client, it will affect:

    (a) solicitor and counsel, who will not get paid for work outside scope;

    (b) the funded client who might not be covered all that is necessary and who may become vulnerable to a personal claim for costs by the other party;

    (c) a successful opposing party who might not be able to claim costs against the Community Legal Service Fund (Section 11 applications).

14. On assessment regard must be had to the scope of the certificate. Where work is unauthorised or falls outside the cover provided all such costs including counsel's fees/expert fees and other disbursements will be disallowed.

15. Payment will not be made out of the fund for any work done in advance of the date of the certificate except:

    (a) under legal advice and assistance/legal help or for work done immediately prior to the issue of an emergency certificate at a time when no application for an emergency certificate could be made because the appropriate area office was closed (Civil Legal Aid (General) Regulations 1989, reg. 103(6)); or

    (b) under a non-means, non-merits tested, "free", Children Act certificate, if the application is submitted within three working days of self-certification. (Civil Legal Aid (General) Regulations 1989, reg. 12A(3)).

    (Note that the certificate or any amendment cannot be pre-dated to a date before its issue).

Work claimed pre- or post-legal aid

(c) Work done before the grant of the funding certificate or after its discharge or revocation will generally be disallowed as the work falls outside of the scope of the certificate. There are limited exceptions to this rule:

Pre certificate work

i) For some (non-means, non-merits) care proceedings and work in relation to secure accommodation orders/solicitors are able to self certify the grant of funding. As long as the solicitor submits the application forms within 3 working days, the pre-certificate will be deemed to be included within the scope of the certificate. The certificate is dated on the date of receipt so work can be claimed for up to three days before its date. This does not however include work done before the date on which the application forms were signed.

Post certificate work

ii) The retainer between a funded client, their solicitor and counsel determines upon receipt of a notice of revocation or the notice of discharge of a certificate. The retainer will determine immediately or, if an appeal has been brought which has been dismissed, it will determine after receipt of the notice of the dismissed appeal. If proceedings have been issued, the solicitor's retainer does not determine until he has served the appropriate notice under Regulation 83 of the Civil Legal Aid (General) Regulations 1989. Therefore the solicitor will be entitled to be paid for lodging and serving the appropriate notice, once the certificate has been revoked or discharged.

Any work reasonably done by the solicitor and/or counsel pending the dismissal of the appeal in order to protect the interests of the client should be allowed. This must relate to the proceedings rather than the appeal itself.

If the appeal is successful, the discharge or revocation may be rescinded and therefore work done in the intervening period will be remunerated as if the discharge/revocation never happened. If the appeal is unsuccessful the discharge/revocation period cannot generally be paid for and only the work done in relation to the exceptions above will be allowed.

Where proceedings have not been issued the solicitor is not obliged to serve such notices. Indeed, the retainer may in fact have determined before the application for discharge was applied for.

Forum

16. Where a certificate specifies the forum for proceedings then that forum must be used. Certificates covering private law proceedings under the Children Act 1989 may contain a condition as to the court in which proceedings are to be commenced. Where a certificate is silent proceedings may be taken either in a Family Proceedings Court, county court or the High Court.

17. Where the funding certificate specifies proceedings in a county court it will not, unless amended, cover proceedings after a transfer to the High Court. If the funded client wishes to transfer the proceedings to the High Court then an application for an amendment must be made to the area office. If an application for transfer is made by any other party, or by the court's own motion, an application for the amendment of the certificate should be made immediately after the order transferring the proceedings. In the absence of an amendment the certificate will not cover any subsequent work.

18. No amendment is required on a transfer of proceedings from a county court to the High Court where the certificate does not specify a particular court. Nor is an amendment required where the certificate specifies proceedings in the High Court and the proceedings are transferred down to a county court.

Pre-CIS Cost Conditions

19. Where certificates were issued on/after 14 September 1992 the information supplied in the application form/amendment applications provided the basis of the (then Board's) control of cases in civil non-matrimonial non-family matters.

20. Cases were designated to one of three categories on the basis of the actual or expected costs and disbursements in the proceedings exclusive of VAT:

    (a) Cases costing less than £2,500;

    (b) Cases costing from £2,500 up to £7,500;

    (c) Cases where costs are £7,500 or more.

21. A costs condition was attached to all certificates where costs fell within the first or second categories above: namely that the solicitor shall report to the area office using the application for amendment of legal aid certificate form if profit costs, disbursements and counsel's fees exceed £2,500 or £7,500 as appropriate. Cases in the third category included an appropriate condition as to costs and were allocated to senior staff. The stated costs figure applies to any related or legally linked certificates held by the funded client or persons covering the proceedings and that the costs figure and costs were to be apportioned, e.g. where there are two related/legally linked certificates and a costs figure of £2,500, then a total of £2,500 is available between the two certificates.

22. A costs condition is a request pursuant to regulation 70(1) of the Civil Legal Aid (General) Regulations 1989. The sanction for a failure to report is that action may be taken by the Commission under regulation 102 to defer the solicitor's profit costs and/ or refer the solicitor's conduct to the Solicitors Disciplinary Tribunal. The condition places the funded client in the same position as a fee-paying client, in that if the stated costs limit is exceeded and not subsequently extended, then the solicitor may not obtain payment. This is akin to the situation where a fee-paying client authorises a solicitor to incur costs only to a stated amount.

23. Solicitors are expected to check certificates on receipt for any costs condition and to apply for an amendment to the costs figure when the amount in any condition is being approach (although that limit can be increased even though it has been exceeded).

24. If there has been no report, the solicitor's profit costs (excluding disbursements and counsel's fees) may only be deferred where the limit has been exceeded and not extended *and* it is considered that, had there been a report to the area office, the limit would *not* have been increased *and* the certificate would have been discharged. In the event of a deferment the disbursements and counsel's fees will be paid but the solicitor will only receive his profit costs for the balance of the specified limit.

25. The condition has no relevance on assessment where the costs incurred in excess of the costs condition may be justified as reasonably incurred costs in relation to the proceedings. On receipt of claims for payment, regional offices must check the condition and consider whether a regulation 102 deferment would be appropriate. Assessment will take place in the usual way. On an assessment where the costs condition has been exceeded and you consider that, had the solicitor reported at an earlier stage, the certificate would have been discharged then by implication you are saying that the subsequent costs were unreasonably incurred in respect of the funding position and should be disallowed.

26. The decision to defer may be delegated and made by authorised area office staff. The decision can, at the solicitor's request, be reviewed by the Funding Review Committee [or Costs Committee] on whose behalf the delegated decision has been made. [Contract Rule 1.14].

Amendments to Regulation 102.

27. In December 2002 Regulation 102 was amended to empower the Commission to defer costs against other monies due to the firm. Consequently, deferment can take place even after the solicitors bill has been paid.

Costs Limitations

28. On introduction of the CIS computer system in 1997 costs limitations were imposed on the initial grant of funding. The Commission's power to impose costs limitations came directly from Section 15(4) of the Legal Aid Act 1988. Amendments to Regulations 107(A) and (B) to determine issues of application were effective from 6 May 1999. The amendments affect all assessments conducted after that date. Regulation 107A (3) (c) states assessment must be conducted in accordance with any conditions or limitations on the relevant certificate, whether as to the work authorised under the certificate, the maximum costs payable or otherwise

29. A costs limitation is binding on assessment either by the Court or the Commission. Irrespective of the sum of costs on the assessment certificate the fund's liability does not exceed the final costs limitation imposed.

30. A limitation on representation to a specified costs limit is a limitation on representation. Section 15(4) of the Legal Aid Act 1988 is wide enough to encompass a financial limitation as well as a "scope limitation", R v Legal Aid Board ex parte David Burrows (CA: 12 February 2001).

31. Costs limitations are imposed on certificates issued under the 1999 Act by the express authority of C33 of the Funding Code Procedures. A costs limitation is imposed for the work authorised under each ABWOR/certificate issued in any case, including matrimonial/family cases.

32. The limitation is a true limitation rather than merely a condition requiring a report once a certain level of costs has been reached. In other words, solicitors only have cover to carry out work up to the costs limitation imposed. The limitation limits the costs to be incurred under the approval/certificate to a figure including disbursements and any counsel's fees but excluding VAT. The limitation imposed on the final version of a certificate is the relevant limitation for assessment.

How do they differ from a costs condition?

33. A costs condition was a reporting mechanism which required solicitors to report when the costs condition limit was reached, so the case could be reviewed. In contrast, a costs limitation only provides funding to the solicitor to carry out work to the financial limit imposed. Work cannot be paid for from the fund where it is either outside the scope of the certificate or in excess of the final costs limitation.

How do solicitors calculate whether their costs are within the financial limit?

34. A costs limitation restricts the costs to be incurred under a certificate to the specified figure which includes profit costs, disbursements and counsel's fees (excluding the VAT due on both costs and disbursements).

35. The profit costs figure should be calculated by reference to the relevant remuneration hourly rate, plus uplift, if appropriate. If the circumstances of the case are such that an uplift or enhancement is likely to be claimed this figure should be added to the profit costs. Solicitors should have sufficient knowledge of the case and assessment of similar cases to identify items of work that would be enhanceable and the level of enhancement recoverable. Solicitors should not attempt to claim a blanket rate of enhancement across all bills, either when calculating their costs or when applying for an increase in the costs limitation.

36. The limitation does not include the costs of assessment nor disbursements related to those costs.

What happens on assessment?

37. Costs are assessed in the usual way, by either the court or the Commission. Following an assessment of the costs due and payable from the fund, costs that exceed the final costs limitation imposed will be disallowed. It should be noted that the Commission will not pay in excess of the costs limitation notwithstanding receipt of a legal aid assessment certificate which has failed to take into account the costs limitation and/or the provisions of Regulations 107(A) and (B).

Does the limitation affect recovery of costs between the parties?

38. Regulation 107B places it beyond doubt that the indemnity principle does not apply to costs limitation. A costs limitation on a certificate protects the client and the fund. It does not however, inhibit costs recovery between the parties. A successful funded client may recover costs from the paying party in excess of the final costs limitation imposed.

What happens if costs are disallowed where counsel's fees and other disbursements have been incurred?

39. It is primarily the solicitor who is responsible for monitoring the total costs under the certificate and for ensuring that the costs are kept within the financial limitation imposed.

40. In general, if the total of counsel's fees and the solicitor's costs exceed the costs limitation, counsel will be paid in full and the shortfall will be borne entirely by the conducting solicitor.

41. The exception to this is where counsel's fees alone exceed the costs limitation on the certificate and counsel has been sent a copy of the certificate or amendment bearing the relevant costs limitation. In those circumstances, counsel will only be paid the sum due under the costs limitation. Any remaining shortfall in counsel's fees will be a matter between counsel and the conducting solicitor, and will not concern the Commission further. If counsel had no knowledge of the limitation the solicitor will be obliged to indemnify counsel for his/her loss. However, this should be rare because solicitors are under an obligation to send counsel a copy of the certificate and any amendments to it.

42. Regulation 107(A) does not make any specific provision for experts' fees or other disbursements. Expert's fees and other disbursements are solely a matter between the expert or other service provider and the solicitor. Even if the total amount due to the solicitor is reduced as a result of the costs limitation, the expert or other service provider will be able to recover from the solicitor such fees as have been contractually agreed between them. It is not a matter that concerns the Commission or affects the amount allowed on assessment.

43. An example of the position regarding counsel's fees is set out below (all figures are exclusive of VAT):

A certificate bears a costs limitation of £2,500.

On assessment, the solicitor's bill, as allowed, is £4,000 which consists of £1,000 counsel's fees and £3,000 profit costs and other disbursements.

Under the costs limitation the maximum payable from the fund is £2,500. The payment made would be £1,000 to counsel and the balance of £1,500 to the solicitor covering both profit costs and disbursements.

If however, counsel's fees alone were £3,000 and the solicitor's profit costs and other disbursements £5,000, counsel would be paid £2,500 and the solicitor nothing. Additionally, counsel could seek an indemnity for his loss of £500 if he had not been given notice of the costs limitation imposed.

Where counsel had such notice he would receive the £2,500 due under the limitation but would not be entitled to claim further sums from the solicitor.

44. It is important that the solicitor is aware of the running totals of costs and disbursements, including counsel's fees and that counsel is made aware of the costs limitation figure.

How does the costs limitation work when the certificate is transferred to another solicitor?

45. One of the first tasks of an incoming solicitor must be to consider the costs actually incurred to date and, where necessary, to apply for an increase in the costs limitation. It is good practice for the outgoing solicitor promptly to provide the incoming solicitor with details of costs incurred.

46. It is essential that incoming solicitors are aware of the costs position so they can determine whether the cost benefit aspect of the Funding Code Criteria continue to be satisfied and what steps they will need to take for their client. The imposition of the costs limitation does not itself increase the burden of a solicitor taking over a funding certificate. It does however reinforce best practice.

What if the certificate contains multiple proceedings?

47. Because of the way the Commission's CIS computer system works, a certificate covering more than one set of proceedings will have more than one costs limitation imposed. It is not intended that the limitations are to be cumulative. There should be only one applicable costs limitation for all the work authorised by the certificate. Accordingly, the applicable costs limit is the highest of the limitations specified.

48. Solicitors do not need to apportion their costs between the proceedings covered by each limitation and need only apply for an amendment when the total costs for the work to be done under the whole of the certificate are likely to exceed the highest limitation. Solicitors should apply for an amendment on the basis of the total costs under the whole of the certificate to date and should ask for each costs figure to be amended to the new costs limit requested.

What happens if I have an old certificate which initially had a costs condition but now has a costs limitation?

49. Where a certificate was issued prior to the start date for CIS, on its first amendment (replacement certificate) post CIS the amended certificate will, in all cases, replace the costs condition with a costs limitation. The costs condition remains effective for the work done up to the date of the replacement certificate. If no costs condition existed, the replacement certificate will impose a costs limitation.

50. Costs limitations are not imposed retrospectively. They do not cover costs for any period where a costs condition was in force. The costs limitation is imposed to cover future work to be undertaken from the date it is imposed, and so the costs "clock" starts afresh.

51. For example, if a costs condition of £3,000 was already in force it would cease at the date of the replacement certificate imposing a costs limitation. Costs in excess of £3,000 may have been incurred and these will need to be justified on assessment. If a costs limitation of £2,500 was imposed the costs start to run again from the date of the replacement certificate. In these transitional cases, solicitors are required to apportion costs in any costs claim in order to distinguish between the period when any costs condition was imposed and the period following the imposition of the costs limitation(s). These should be shown by separate parts of the claim for costs.

When should I apply for an amendment?

52. Amendments to certificates are issued in the form of a replacement certificate which will show the amended scope, including any new costs limitation imposed. The amended costs limitation will set a new maximum for the costs to be incurred. Solicitors do not need to apportion costs for the period between each costs limitation imposed. The costs limitation is a final costs figure and the limitation imposed on the final version of the certificate will be the relevant limitation on assessment.

53. An amendment should be applied for when the future work to be done is likely to exceed the costs limitation imposed. Any decision to amend must be based on whether it is justifiable. Regional offices will, when considering amendment requests for future work, make a decision as to the reasonable level of costs to be incurred for that work in relation to the scope of the certificate. Whilst it is not correct to say any amendment to the costs limitation will not operate retrospectively, an increase will not be granted merely because the existing limitation has been exceeded. Any decision to amend retrospectively must be exceptional and made before discharge or costs assessment when the certificate will be final. Regional offices will exercise their discretion on the facts of each case where the circumstances justify it. A retrospective amendment is more likely to be granted where costs were incurred by events outside of the solicitor's control. In any event all requests for extension should be made in a timely manner. If a solicitor exceeds the limitation by reason other than the circumstances of the case or the request for amendment is made many months later or on preparation of the bill of costs, the amendment is less likely to be granted.

54. Some examples of when it may be reasonable for costs limitation to be amended retrospectively are:

    (a) Urgent injunction work requiring weekend work when the regional office is closed: or

    (b) during the final hearing or up to five days prior to its commencement;

        i) unexpected witnesses appear;

        ii) issues which were thought to be agreed turn out not to be agreed;

        iii) witnesses take longer than estimated to give their evidence;

        iv) large amounts of unexpected new evidence are received from the opponent;

        v) it becomes clear the hearing will last for longer than estimated.

2.5 Who is a fee earner

1. It is only possible to pay for work done by a fee earner. The most obvious examples of a fee-earner under the regulations are solicitors, employed barristers, legal executives or any clerk that regularly does work for which it is appropriate to make a charge to the client. In truth the classification of fee earner does not so much depend on the individual's status or qualifications but the actual task being undertaken and the competency of the person doing it. If the task is not that of a fee-earner it is not remunerated under the regulations because it is, correctly, part of the firm's overheads. If the task is a fee earner's but not undertaken competently, this is dealt with when the work is assessed. An element of reasonableness is the time taken in performing a task. A fee earner does not have to spend all his time doing fee earning work, the test is the actual work done and whether it appropriate to charge the client.

2. In *Smith Graham (Solicitors) v Lord Chancellor's Department [1999] QBD (unreported)* the court determined that a fee earner did not have to be an employee of the solicitors. The firm obtained prior authority to instruct an agent to attend at council offices to examine expense claim forms with a local councillor charged with deception in relation to expense claims. On assessment, the work was allowed as a disbursement as the agent was an independent contractor. On appeal, the solicitors argued that the time merited an enhanced rate as part of the firm's profit costs. The agent was a retired police officer who was often instructed by the firm. The judge held that the work undertaken by the agent did constitute fee earning work in the circumstances of this case but declined to allow an enhanced rate. She determined that whether a solicitor could claim work undertaken by an enquiry agent as preparation depended on the individual circumstances of each case.

2.6 Overheads/Administration/Non-chargeable costs

1. The basic principle is that, subject to any express exceptions, payment will not be made for time spent on purely administrative matters. Paragraph 1 of the guidance to contract rule 1.10 states that payment will only be made "*for work directly involved in the provision of contracted legal services to the client*". Thus office overheads (i.e. the costs of actually running the firm) are not recoverable under the contract.

2. A solicitor's secretary is not generally a fee earner, and the expense of his or her time forms part of the solicitor's overheads of running the firm. If, for example, a solicitor's secretary has taken or made general telephone calls for which a claim has been made, these cannot normally be allowed. However, some people who undertake secretarial duties may also regularly undertake a fee earning work, for example drafting letters of instruction to experts and sitting behind counsel. Payment can be made for such fee earning work where it advances the case.

3. Photocopying in-house is generally an overhead expense as are the costs of postage, stationery, faxes, typing and the actual cost of telephone calls. A fee earner's time spent in preparing a fax may be remunerated as preparation. Additionally, the costs of opening and setting up files, maintaining time costing records etc are all administrative costs.

4. Other examples of overheads include staffing expenses, the cost of maintaining premises, taxes and administrative expenses. Proof reading to check the accuracy of documents should generally be treated as an overhead. There is a difference between proof reading to check the typing of a document and re reading to consider its content, which would be chargeable.

Time Spent

2.7 Recorded and unrecorded time - time recording

1. All time spent by a fee earner should ideally be recorded on the file. Estimates are not generally allowed and, if in any doubt, the file should be considered. It is solicitor's practice to keep reasonably comprehensive records of time spent and more particularly how that time was spent. There are exceptions where unrecorded time may be allowed if the assessor is satisfied that it was impracticable to record the time taken. However this should only be considered in relation to short periods of time and any substantial period of time should be recorded.

2. There are basically two forms of time recording. One centralised, the other on the file.

3. The first, centralised, form of time recording seldom provides adequate information to assess costs. In a growing number of cases it will be computerised and a computer printout can be produced for each client showing who did work, when the work was done, the time taken and, usually, the broad category of such work - e.g. attendance, considering documents, letters etc. Such a record may be useful but are only helpful if:

(a) Letters and telephone calls are usually charged on a time basis and not on an item basis;

(b) there is a reflection of publicly funded rates of pay. In any event, the time recorded would need to be evidenced by some other means ;

(c) sufficient information is given to judge what was the work done or whether that work done was reasonable.

4. However computerised records are becoming increasingly sophisticated and may well in future provide more help to the assessor.

5. The main information to assess costs is the claim form and information from the file.

   Primarily such information will be of two types:

   (a) Letters;

   (b) 'Attendance Notes' of work done, attendances on the client and others and telephone attendances.

   (c) Documents.

6. The above need to be viewed in two ways. The first is that it is the basic information upon which the claim can be arithmetically assessed. Letters are in general remunerated on an 'item' basis as are the majority of telephone calls. Time spent on more complex letters and telephone attendances as well as on personal attendances, drafting documents and preparation should be recorded on attendance notes. The total time so recorded is calculated by reference to the hourly rate.

7. That is an overly simplified view of the assessment process. The assessor has to exercise a discretion as to the reasonableness of the work done and the amount claimed. The contents of the letters and attendance records are secondly, the vital information in exercising this discretion. It is only by reading the file through, initially quite quickly, that the assessor can make a judgment as to the weight and complexity of the case and the particular problems with which the solicitor had to deal. In all but the smallest claims this is the first step to assessment.

8. It is good practice for a solicitor to record and prepare attendance notes for all of the time he spends in attendance and preparation. Whilst it is not an obligation the position may be summarised by ‘if you do not record, you are unlikely to be paid’. Bills may well be submitted where preparation time especially is claimed as "general", "estimated" or "various”. These claims should generally be disallowed if they are not recorded, or backed up by an attendance note. The absence of recorded time for any substantial amount, would be allowed only in a most unusual case – see 2.7.7.

9. In **Johnson v. Reed 1992 AII ER 169** the court stated:

"Claims for unrecorded time are likely to be viewed with very considerable care on taxation and it would only be in an unusual case that any substantial allowance be made...".

10. In **Bush v. Bower Cotton & Bower [1993] 4 ALL ER 741** Brooke J said:

    "Work properly and reasonably done in furthering the client's interests may reasonably include the preparation of attendance and file notes recording what has been done".

11. If an assessor is in any doubt about time, that doubt must operate against the solicitor whose bill is being assessed. It should be noted that the proper recording of time spent is only the first step. The solicitor is required to provide adequate evidence that work was properly and reasonably done. If the solicitor fails to do so, the work should not be allowed. The assessor must be satisfied that it was reasonable to spend time on the particular item of work and that the time charged is reasonable.

12. Even where preparation has been fully recorded with many entries with exact timings on precise dates, this does not mean that all the recorded time must be allowed. It must still have been reasonable to undertake the item of work claimed and the amount of time spent reasonable. Assessments of all time spent must be made with this in mind.

13. The assessor must consider whether the attendance note contains sufficient information to justify the time spent or whether there is other supporting evidence on file of the work done. Where the attendance note does not justify the time spent the claim must be reduced to the amount of time, if any, justified by the evidence on the file (e.g. a statement of the client's instructions). As well as looking carefully at individual attendance notes it is important to look at the total time claimed for advising on particular issues or considering or preparing particular documents in order that any duplication of work can be identified and an assessment made of the overall time spent.

14. Standardised attendance notes, without any confirmation or reference to specific instructions obtained from or advice given to the client are not satisfactory evidence of the reasonableness of the work done for any but the briefest of attendances. If standardised attendance notes are used they should reflect the particular circumstances of the attendance. Handwritten notes are allowed provided the assessor can identify what they relate to. There is no requirement that attendance notes should be typed up. If they are, then a reasonable time, may be allowed for time spent dictating an attendance note where it is reasonably lengthy and detailed.

15. In particular, any individual attendance note for providing advice or taking instruction over two units (12 minutes) should contain some detail showing the instructions taken or the advice given or how the case was progressed. This does not mean that every word of the advice given as to the law and procedure needs to be recorded – often advice on a particular procedure will be relatively standard, but one would expect to see some reflection in the attendance note of the personal circumstances of the client and the advice given on the case. The longer the attendance claimed, the more detail would be expected. In the absence of either such detail or of other appropriate supporting evidence it would normally be appropriate to reduce the attendance allowed to two units (12 minutes).

16. Appropriate supporting evidence could include:

    (a) Handwritten notes of the interview with the client.

    (b) Documentation prepared in the course of or as a result of the interview. For example, an attendance on a witness to take a statement could be evidenced by the presence of the statement on a file.

    (c) Letter confirming the advice given to the client on an attendance.

2.8 Preparation

1. This item, sometimes, misleadingly referred to as 'documents', may well contain most of the work that has been necessary to prepare for the trial of an action. The relationship of some work to 'documents' is tenuous although most of the work done will in the end result in the production of the main court documents (the statements of case/pleadings), instructions to counsel, briefs and bundles of documents. It is in reality part of the general preparation of a case which will include:

    (a) drafting of court documents;

    (b) consideration of statements or documents served by the other party;

    (c) instructions to counsel to advise in writing and/or at a conference;

    (d) consideration of documentary evidence;

    (e) general consideration from time to time of the strategy or tactics required to bring the action to court;

    (f) consideration of or making offers to settle/payments in to court;

    (g) reconsideration of the court documents, evidence and other factors in order to prepare for trial;

    (h) brief to counsel and instructing expert witnesses and holding conferences;

    (i) Identifying documents for and drafting the index to court bundles and checking made up bundles to ensure accuracy.

NB: This is not a definitive list

2. There is inevitably a potentiality for overlap between this and work done in relation to disclosure. The latter should include only the work which is necessary to prepare lists of documents, produce those documents, obtain documents from the other party and, if necessary, make or defend any applications for specific or further disclosure. This may include some consideration of the documents produced by each party and their relationship with each other.

3. In any but the simplest cases there will be need from time to time to re-examine the core documents to consider their effect on the case. The numbers can vary from a mere handful to warehouses full - though few of the latter will arise in publicly funded cases.

4. The times spent should be recorded. An attendance note should show the time spent in preparation of any particular documents. A judgment has to be made - without the advantage of hindsight - whether that time was reasonably spent. It must be remembered that until he has read the documents the solicitor will not know the significance and in any but the simplest cases the limited reading at the discovery stage is not likely to be sufficient. A competent solicitor will read the documents and put those which are relevant or helpful to his case in a separate folder so that they (or copies) can be readily accessed. In larger cases he may well prepare an index. It is becoming increasingly common to 'scan' such documents on to a computer file which has considerable advantages in terms of ease of access and in particular ease in finding and comparing relevant passages. Whilst the work of scanning is, of course, not fee earner's work, the selection of documents to be scanned is.

5. The difficulty is determining which documents are relevant. It is accepted that a brief, and quick, perusal of the documents may be necessary in order to identify which documents are relevant. Having done that, the sufficiently competent and experienced solicitor should be able to identify the key issues and only consider in more detail those documents which are most relevant. It would not be reasonable to allow the solicitor to have carte blanche to consider in detail all documents regardless of whether or not they are relevant. On the other hand, it must be acknowledged that some amount of time is required to briefly peruse the documents to ascertain which are relevant and which are not, and some payment should be allowed for doing that.

6. More care needs to be taken with regard to repeated consideration of documents. The degree to which this will be justified depends entirely on the complexity of the issues. In small to medium cases re-examination of the papers should be necessary primarily on reviewing the case prior to briefing counsel or instructing him to advise on evidence and again when trial bundles have to be prepared in conjunction with the other parties. The time spent on both these will inevitably be considerably less if the solicitor has at an earlier stage separated the most relevant documents that are likely to be of use in court. Where this has not been done time spent in reading through all the documents may not be reasonably spent.

7. If in doubt the assessor must have sight of attendance notes and copies of the documents concerned or at the very least full details of the type of documents concerned and the number of pages involved. With the 'run-of-the-mill' smaller cases it will be fairly easy for the caseworker to determine what is reasonable without necessarily having sight of the solicitor's file of papers, but with the larger more complex claims especially investigating negligence claims where proceedings are not issued, sight of the paper-work and a full description of the documents involved from the solicitor will be essential.

8. **Point of principle CLA6** states:

   "Where claims for costs are made for perusal of unusual or substantial papers and the assessor/area committee is minded to disallow those costs in whole or in part it will normally be necessary for the papers in question to be considered".

9. As a very rough guide it takes approximately 2 minutes per A4 page to read the most simple prepared document in order to consider its contents and significance. Time taken will depend on the quality and layout of the document e.g. whether handwritten or typed, single or double spaced, large or small font etc. Documents of greater complexity may take a longer time either to read, compare with other documents or prepare e.g. it may take 20 minutes or more to read a complex medical report although this will depend on the skill and knowledge of the fee-earner reading it. For some less experienced staff more time may be taken whilst a senior practitioner who specialises in medical negligence would take less. It will not always be reasonable for the proper conduct of the case to read every page of every document in detail.

10. There are cases where detailed examination of previous records is essential in order to progress the case properly. For example, in building disputes there will be many documents vital to the case like the contract, specification documents; plans; correspondence between the owner, architect and builder, architect's instructions, minutes of site meetings, time sheets, invoices, delivery notes and many others. Another example of where very careful consideration of the records is likely to be justified is that of medical negligence.

11. **Point of principle CLA7** deals with documents in medical negligence cases but may also be relevant to other cases where a large number of documents are involved.

    Point of Principle CLA 7 states:

    "It is reasonable in medical negligence cases for the funded client's solicitors to consider in detail copies of the medical records relevant to the issues in the case."

12. This is subject to two qualifications.

    (a) Firstly, although the solicitor must have a general knowledge of what is in the medical records it is not uncommon for the records to be supplied to the plaintiff's medical expert who then takes on the responsibility of examining and often indexing the records. It would not be reasonable for both the solicitor and the expert to be paid for detailed examination of the notes.

    (b) Secondly it is increasingly common for firms handing a significant amount of clinical negligence work to employ (usually) nurses for this (and other) tasks. It will be a question of fact in each case whether the work being done by such staff is being done by a fee-earner - and therefore directly chargeable at the prescribed hourly rate - or by a non fee-earner whose costs must be subsumed in the general overheads of the practice. See **Point of Principle CLA 12:**

    'Work carried out by an in-house medico-legal assistant will generally be fee earning work. The hourly rate and mark-up applicable will be what is appropriate in all the circumstances having regard to the nature of the work carried out and the special skills and qualifications possessed by the person concerned'

13. In funded cases assessed under the Civil Remuneration Regulations, this option is not possible as all work done is charged at a prescribed hourly flat rate.

14. The length and content of the court documents together with the statements of witnesses should be considered particularly if lengthy attendances are claimed. To consider the reasonableness of the time spent preparing documents it will normally take 6-12 minutes preparation to consider and dictate each page of a straightforward document. More complex documents take longer. Any lengthy attendances must be supported by a file note, or letter confirming the advice given. Time spent attending on the client may not correlate with the length of the statement prepared, but for longer attendances an assessor would expect to see more detailed justification. There are circumstances which may effect the length of the attendance, e.g. language difficulties, mental health problems, other disability or the complexity of the case. These should be clearly identified by the solicitor when justifying the additional time spent.

2.9 Letters, Calls and E-mails

1. Where the rate is not prescribed by regulations, letters are usually charged per item at 1/10th of the hourly rate thus treating each letter written as taking 6 minutes (10% of an hour).

2. Where the rate is prescribed, the regulations set out prescribed sums for each routine letter written - and under the Legal Aid in Family Proceeding (Remuneration) Regulations 1991 for letters received also.

3. Generally, it may not be reasonable to allow even an item charge for letters which have been written by a secretary or other non fee earner without any specific action by the fee earner

Example:

Secretary makes an appointment and writes to confirm it, no work has been done by a fee earner.

4. The assessing officer has discretion to allow a higher charge based on the time spent to write or consider a letter received where a significantly longer time than six minutes was spent in so doing.

5. Both the Civil and Family Remuneration Regulations differentiate between routine letters and those which are not. This must again be subject to the qualification that the six minute allowance is an average, some letters - e.g. reminders - will take very much less time, others somewhat more. To make a letter 'non routine' the time spent must (a) be outside the range of an average charge (as a bench mark it may be reasonable to expect the time taken to exceed 10 minutes before allowing a 'time charge') and (b) justified by the need to pay particular attention to an incoming letter or time in drafting a letter. The assessor should check that the letter has not been charged both as a routine letter and also as a time charge.

6. The assessor may still reduce the time claimed (e.g. to the standard rate) if the content or length of the letter does not seem to justify more. As a rough guide it would be unusual to allow more than the standard rate for a letter which was not more than one page long unless the content of the letter was substantial enough to be likely to take additional preparation time.

7. Where a letter is produced to a standard format using modern technology, then the routine letter rate should be used for each letter (e.g. where details are inserted into a standard format by the use of a computer/word processor). Where a number of letters, using fundamentally the same text, are produced on the same file then individual routine letters should be allowed. Time spent inputting information to a word processed document/computer package to generate a letter is not preparation by a fee earner but is akin to typing and is an overhead. To that extent the fee earner gains the benefit of modern technology and is not expected to dictate or substantially redraft the text of the letter each time it is used. Whilst standard letters may be modified to reflect the individual circumstances of each client this will generally be undertaken within the average time allowance for a routine letter.

8. Letters are subject to costs assessment in the usual way and where a number of separate letters are produced to deal with matters which could reasonably, conveniently and appropriately have been dealt with in a single letter, then the costs of the additional subsequent letters should be disallowed on assessment. This also applies to client care letters.

9. When considering the solicitor's claim, the assessor should look at the nature of the proceedings and time spent with the client and/or witness(es) to see if the numbers of letters claimed are reasonable. If a large number of letters have been written, but there is no information on the face of the claim to justify the number claimed, the assessor should look at the file.

10. It is good practice to provide covering letters when sending out documents e.g. to court. Sending the document alone may be insufficient explanation to the recipient and retaining only the document on file is insufficient proof of sending. Such covering letters may therefore be allowed at the routine rate.

    NB: Some costs draftsmen will charge both but deduct the item charge from the timed charge. This is incorrect.

11. In respect of routine telephone calls, similar principles applies. Any telephone call made or received by a fee earner is charged – either at the prescribed rate or, where there is no such rate at 10% of the hourly rate.

12. In ***Bwanaoga v. Bwanaoga*** **[1979] 1 ALL ER 105** it was said:

    'it is not possible to justify by reason or logic a method of charging for time spent on telephone conversations, which would otherwise have necessitated interviews. Different method of charging for the interviews which have been saved. In those circumstances…a practice should now be adopted of recording the time spent by fee earners on telephone calls relating to preparations for trial and such time should be aggregated and allowed on taxation and the hourly rate. It must be emphasised that distinction must be drawn between telephone calls which represent interviews whereby material progress is made and routine calls which should be charged as in the past. Furthermore records must be kept of calls falling into the first class so that time spent and the content of the conversation can be considered.

13. Both the Civil and Family Remuneration Regulations differentiate between routine telephone calls and those which are not. The appropriate test would still appear to be that set out in *Bwanaoga* i.e. that the call took the place of an interview and led to material progress being made. It is not just a question of the length of the conversation.

14. In relation to long calls the practice is that any call over ten minutes or more in length may be claimed as a timed attendance, but not also as a telephone call. Again, only fee earners can claim for telephone call.

15. Reading of the correspondence and records of telephone attendances is essential to enable the assessor to gain a view of the reasonableness of the work done both narrowly in terms of the letters or telephone calls themselves and also generally in considering the overall work done.

16. Phone calls in particular can cause difficulties. There is no general rule on what can and cannot be claimed other than the overriding principle of reasonableness. It should first of all have been reasonable for the fee earner to make that call (as opposed to a non fee earner) (e.g. administrative calls) and secondly only those calls which progress the client's case should be allowed. It should be noted, however, that the converse is true - where a call has been undertaken by a non-fee earner which is properly fee earner work it may be charged for.

17. Not every telephone attendance made or letter written has to be allowed. The test of reasonableness applies to all work done. Telephone calls (or letters) to obtain information which should reasonably have been obtained at an earlier interview should not be allowed. Similarly, items caused by a reasonable complaint of the client about the failure to supply information or reply to letters etc. should not be allowed. The distinction here is oversight. If the solicitor is calling to obtain further information as a result of his consideration of the documents prepared following the interview, or if some other event occurs where the solicitor needs to discuss a point with the client, this may be appropriate.

(a) Administrative telephone calls

These are generally calls made by secretaries arranging appointments, and organising attendances by counsel or experts. Such calls would not normally be attributable to a fee earner, should be undertaken by a non fee earner and therefore are generally not allowable. However, in more complex cases it may be more appropriate for the fee earner to undertake these calls if, in the long run, this would result in a saving of costs. Where it is necessary to outline details or specific factors of the case to counsel, the expert or the interpreter. Likewise, if the fee earner needs to discuss the qualifications of the lawyer available to ensure the right one is booked. If calls of such details are undertaken by a secretary it would be fee earner work.

(b) Abortive telephone calls

Where a fee earner telephones unsuccessfully (i.e. rings an unanswered number repeatedly) to contact someone, it would not normally be reasonable to allow the item charge. A preparation charge may however, be made for recording the abortive attempts and if it was necessary to renew the file to prepare for the call. Where, however, the fee earner actually gets through to the number but the person is unavailable, or where a message is left on an answerphone, these may reasonably be allowed as routine calls as there has been a proper attempt to progress the case.

If you are in any doubt as to letters and calls, you must have sight of the attendance and correspondence bundle. Good practice would be to annotate each letter and attendance note with a small cross or tick in the bottom corner to show what you have allowed or disallowed. If the time claimed is reduced, you should make a note of the time you allow as reasonable.

Faxes/E-mails

18. Where an e-mail or fax is sent instead of a letter then it can be allowed as a letter on normal principles. A printout of the e-mail or fax must be kept on file. No separate claim can be made for sending a hard copy e.g. of a letter sent by e-mail or fax as no extra preparation time is involved. The assessor may in his or her discretion allow an actual time charge for preparation which properly amount to attendances provided that the time taken has been recorded.

19. The assessor also has a discretion to allow an e-mail or fax sent to the client or others where satisfied that, had e-mails or faxes not been sent, the number of communications which it would have been reasonable to allow would have been substantially greater than the number actually claimed. Evidence of e-mail or fax communication must be retained on file.

20. Internal e-mail communication within a firm should be treated as an overhead. Routine e-mails or faxes received are not claimable as separate items. The same principle applies where the same e-mail or fax is copied to more than one recipient, i.e. only one item may be claimed for.

Formatted documents

21. The time spent in the mechanical preparation of documents (i.e. time spent by a clerk/typist preparing documents and the printing/binding of the same). Such costs involved are considered to be part of office overheads and should form part of the fee earner's hourly rate, whether discretionary or fixed by regulation. The solicitor can claim the time spent considering and dictating new documents, subject to the reasonableness test.

22. Fee earners must prepare master bundles for disclosure to the court and often for counsel. Fee earners should identify the documents for the master bundle and draft the index to the bundle. This is fee earner work and should be allowed B v. B [1994] 1 FLR 323. It is the making up or copying of any additional bundles that is not. It may be reasonable for fee earners, where the bundles are above average size, to check that the copies have been properly collated and reproduced.

2.10 Attendances on the client and others

1. Attendance records will - or should - show not only the time spent but also what was done and in the case of an actual attendance, what was discussed.

2. The first question must be - Was it reasonable to do the work recorded in the attendance note? To make this judgment it is necessary to have a clear view of the nature and complexities of the case and the client. It is clearly reasonable to interview a witness once. It might be possible to obtain a statement merely by writing to the potential witness, but the solicitor will usually wish to probe the information given and to get some view of the likely impression that witness might make on the court. Sometimes it may be necessary to see the witness a second time to go through the statement prepared by the solicitor and get it signed though this should be less common. Further attendances to ask additional questions should only be allowed if there is good reason for them not being asked at the earlier interview(s). Such a reason might be the need to comment on a witness statement produced by the other party but see also 2.9.17. The assessor should always ask - would a letter (or telephone call) have been sufficient? If so, the costs should be reduced to the cost of a letter or call.

   Cross-reference: see sections 2.7 - (recorded/unrecorded time) if there are doubts on the time spent.

3. It should be noted that if the funded client is requiring the proceedings to be conducted in such a way as to incur unjustifiable expense to the fund, the solicitor is under a duty to report this to the Commission (Regulations 67 and 70 Civil Legal Aid (General) Regulations 1989) who may consider withdrawing funding. Where a solicitor fails to do this when it was reasonable to expect him to have done so, subsequent costs may have been unreasonably incurred. Only a proper study of the solicitor's file will reveal this.

   Point of principle CLA 3 states:

   "If a solicitor fails to report a significant change, which is known to him, in either the circumstances of the funded client or the case, costs subsequently incurred may be considered not to have been reasonably incurred and may be disallowed".

4. If in doubt you must have sight of attendance notes or other relevant documents to determine the circumstances and if the documentation does not provide adequate information or does not exist at all then the costs should be disallowed.

5. In exceptional cases, it may be appropriate to allow for the attendance of more than one fee earner on a client e.g. a fraud case where preparation work has been divided between more than one fee earner due to the volume of papers and complexity of the case. However, the solicitor must provide justification as to why the use of more than one fee earner was reasonable. If a solicitor charges for attendance on another fee earner within the firm, then the purpose of that attendance must be considered and the costs should only be allowed if it would have been chargeable to a private client and the attendance advances the case.

2.11 File Reviews

1. Files will often exhibit general claims for attendance of the following nature e.g. "*reviewing file*" or "*perusing and considering file*" or "*considering next steps*". Subject to the specific provisions for file review, as a general principle suppliers would be expected to be reasonably familiar with their files (on the basis that they should only undertake such amount of work as is within their competence) and should not be allowed to claim for general re-reading and consideration of the file, every time an action is taken. In order for such claims to be reasonable there must be some specific circumstances justifying the time in the particular case e.g reviewing the file prior to an attendance on the client. This should be noted on the file. Such claims should generally be linked to a specific action.

2. Equally it has been some considerable time (usually at least a month) since any action has been taken on the file due to no fault of the supplier then again it may be reasonable for that supplier to claim for some time refreshing his or her mind as to the salient points. It should be borne in mind that the time allowed would generally be limited, in that re-reading a file with which one is already familiar even after an absence of several months – will only involve picking out the key areas and will not involve having to read every letter and document on the file. Equally, such attendance notes should be linked to some particular development or need to take further action on the file.

3. Extra time incurred that arises from conduct of the file changing from one fee earner to another within the firm is not allowable. Such changes occur through the firm's own administrative arrangements and a private client, for example, would be unwilling to pay for the cost of a new fee earner familiarizing him or herself with the file because the firm had chosen to transfer the matter. Likewise claims for discussions within the firm of a case in terms of advice given by one fee earner to another are not allowable, as this is an overhead. It is expected that fee earners will be given cases that are within their competence and the cost of training/supervising staff in relation to that work is not generally allowable.

2.12 Attending Court

1. Generally solicitors will send a representative to attend on the client and to note the proceedings at a hearing where counsel is instructed. The time spent must be assessed for reasonableness in the usual way.

2. The court has the power to adjourn cases where issues have been agreed without attendance by the solicitor. Assessors should consider the reasonableness of a solicitor's attendance at court in circumstances where an adjournment could have been sought in advance but should also be aware of local practice.

2.13 Advocacy

1. The higher advocacy rate applies where a fee earner acts as the advocate. It covers time spent in court whilst the case is actually being heard, not adjournments or other waiting time

2.14 The Use of Solicitor Agents

1. If travelling is over a long distance i.e., round trips of greater than 4 - 5 hours or more, assessors will consider whether it would have been more reasonable and cost effective to instruct enquiry or local solicitor agents. If the event was for a fairly simple matter, like taking witness statements or run of the mill court applications, the amount of time should be reduced to a reasonable level that would cover the fees claimed by an enquiry agent or solicitor practising within working distance of the event i.e., in the region of a 1 hour round trip. The amount of time which may be reasonable will depend on the location of the event being claimed. In rural areas, greater times may be reasonable or if the solicitor experienced difficulty in locating a local agent able to undertake the work. In rural areas, where the case is conducted in London, some work may be done by agent e.g. issuing and lodging papers. If a solicitor conducting a case outside London instructs London agents, then London rates apply. If a London firm conducts a case elsewhere, national rates will apply.

2. The solicitor may claim, because of the specialised nature of the case, his close personal understanding of the matter or the nature of his client, it was more reasonable for him to attend rather than instructing enquiry or local solicitor agents, which whilst saving on travelling time, would have meant the event being handled less effectively and at greater cost to the fund. Also if the claim is reduced to allow for the use of agents you should make a notional allowance for time that would have been spent briefing the agents and considering any reports or correspondence.

3. Where another solicitor or solicitors firm are instructed they stand in the shoes of the conducting solicitors and their costs form part of the conducting solicitor's profit costs. They are not claimable as disbursements nor can any claim be made on account of solicitors agents fees. If agents are instructed, London rates are payable where the agent is based within the Commission's London region.

4. Counsel cannot be a solicitor's agent. Some solicitors, particularly in family cases in the magistrates' court, employ barristers as an agent in order to circumvent Regulation 59 of the Civil Legal Aid (General) Regulations 1989. Solicitors may indicate that the reason they manage their work this way is because that prior commitments and the distance of the court make instruction of counsel desirable where there are insufficient numbers of local solicitors to use as agents. Solicitors may of course continue to instruct counsel where necessary in the course of litigation but they must do so in accordance with the regulations. Counsel's fees must be paid under the family graduated fee scheme and/or after the application of the maximum fee principle. Solicitors should be told that the practice of instructing counsel as a solicitor agent must stop immediately, failing which the regional office will consider referral to the firm's contract manager.

5. The use of counsel either to avoid the application of the maximum fee principle is simply designed to maximise recovery for the solicitor. As such, it is in breach of the standard terms of the General Civil Contract to act reasonably and in good faith. If the practice persists, you should notify your contract manager of the firms concerned.

6. The position on assessment is:

   (a) *Barristers in Independent Practice*

   Where barristers in independent private practice are instructed to attend a hearing, they must deliver a fee note. Their charges are barristers' fees and any rates prescribed by regulation must apply. In a family case, where the certificate was issued before 30 April 2001, the rates for counsel's fees are prescribed by the schedules to the Legal Aid in Family Proceedings (Remuneration) Proceedings 1991 except in relation to work done in the Magistrates Court.

In both family cases, which are dealt with in the Magistrates court, and civil non-family cases, counsel's fees are not prescribed and thus are the subject of negotiation between the solicitor and counsel's clerks. In these cases, it is possible to renegotiate counsels fees at an hourly rate equivalent to that prescribed for work done by the solicitor. Agreeing to work at the solicitor's rate does not make counsel an agent of the solicitor.

It should be remembered, however, that

i) If a family certificate was issued on or after 1 May 2001 counsel's fees must be calculated in accordance with the family graduated fee scheme, irrespective of the venue.

ii) In prescribed family cases in the magistrates' court, whilst no rate is prescribed (*certificates issued prior to 1 May 2001 only*) the use of counsel must be authorised by the certificate. If authority is not granted, has not been applied for or the assessor considers the case did not justify the use of counsel; the maximum fee principle must be applied.

iii) Where the civil non-family work is done within the magistrates court it is paid as if it was family work: See regulation 9 (2) of the Civil Legal Aid (General)(Amendment) Regulations 2000 and thus the above should be applied.

(b) Barristers Employed within a Solicitor's Practice

There are a small number of barristers who are employees of a Solicitor firm. As they are not barristers in independent practice they are to be treated as fee earners of the solicitors. Any such, employed barristers can be instructed as agents by another firm, just as solicitors employed in the same firm as the barristers could be. Employed barristers, as they are treated as fee earners, show their charges as part of the profit costs of the solicitor's firm and the relevant rate for the solicitor is applied. If the employed barrister is instructed as an agent of another firm their costs will be charged as profit costs of the instructing firm and charged in the appropriate prescribed rate.

2.15 Travel time by the solicitor

Generally

1. The assessor has discretion to allow what is reasonable. In the absence of unusual circumstances where there is doubt as to the reasonableness of the amount of time claimed the assessor should allow an average amount of time which it would be reasonable to expect the solicitor to take to travel between the two places concerned. Whether it was reasonable to travel by public transport or car should be considered in the context of reasonable convenience and the saving on the claim for travelling time that may have resulted.

2. The use of taxi travel may well be reasonable in that although the disbursement claim will be higher, the travelling time would be substantially less that than incurred as a result of travelling by public transport or it is reasonable in the circumstances e.g. where heavy bundles have to be transported. However, if the travelling time is not less than the time it would have taken on public transport then the extra time should not be allowed. If it was not reasonable in comparison, the disbursement should be reduced to the equivalent of that which would have been incurred using public transport.

3. Where travelling time is incurred other than in attending court (or a conference) a decision will need to be made whether it was reasonable for the solicitor to travel or whether the work could be done in some less expensive way. The first consideration must be the comparative costs of possible methods.

Example:

A statement needs to be taken from a potential witness. The witness lives some 50 miles from the solicitor's office. The alternatives are:

(a) the solicitor to interview the witness;

(b) a junior fee earner to do so;

(c) instruct an inquiry agent; or

(d) instruct a local solicitor as agent;

4. If a solicitor is to interview a witness it will entail travelling time and expenses. Similar, but lower, costs will be incurred by a junior fee earner although the solicitor may well have to spend time with that fee earner briefing him as to the nature of the case, the questions to ask, and he may also need to 'debrief' that fee earner. If an inquiry agent or local solicitor is instructed this will involve telephone calls to check that he is available and to agree a fee, writing letters to instruct him, to acknowledge the report, pay his fee and also payment of that fee. These items have to be balanced. (See section4.15.6.)

5. Even if it may be more economical to instruct an agent there may be other factors which make it reasonable for the solicitor himself to interview the witness. It should be emphasised that it will depend on a balance of distance, cost and the importance of the interview. It might be justified if the witness was 50 miles away but not if it also includes an overnight stay and a flight.

Example:

In the example given above the witness is a vital witness. He was the only eye witness to the accident. Liability is strongly in issue. It may be that the whole case will turn on how the court views his evidence. It would therefore be reasonable for the solicitor to make an assessment of the credit-worthiness of the witness himself and not rely on others.

6. It is unlikely to be justified in any event for the solicitor to travel to attend on a client at a significant distance, involving a one way travelling time of more than two hours in the absence of exceptional circumstances, for example where the solicitor is already engaged on a matter and the client having been living locally has moved further away. Even where a longer time could be apportioned between a number of clients on a particular occasion, this will not justify a longer travelling time because it will not necessarily always be possible to apportion in the same way on all occasions.

7. The reason for accepting instructions and or making the journey when the client is at a distance should be noted and kept on the file. By comparing the total number of hearings with the total time spent in travel and waiting in respect of those hearings an indication of average time spent in travel on a particular journey and average waiting can be ascertained. The amount allowed in respect of reasonable travel should reflect the full cost and time spent on each journey.

Travel to funded client

8. The solicitor will have to travel to court and, for example to conferences with counsel. Normally the funded client will be expected to attend the solicitors offices. However, there may be circumstances where the solicitor has to travel to the client, for instance, because the funded client is house bound or may be being detained in prison or in hospital. Travelling time and disbursements may be reimbursed in these circumstances.

2.16 Waiting

1. Most waiting will occur on attendances at court, and the solicitor will have very little control over the length of time involved.

2. Few solicitors will want to waste precious time 'waiting around', however, it is important to ensure that the solicitor has not been unreasonably cautious in assessing the time that he needs to arrive at court. He should arrange to arrive at court about half an hour before a case is timed to start (perhaps rather more if he is certain that it will start on time) or before any pre trial conference. More than that will seldom be reasonable. Care should be taken wherever possible to see that the time was in fact spent in waiting and not in dealing with some other hearing, application or working on another matter. Attendance notes should be carefully checked with this in mind.

3. It is common practice to utilise waiting time at court to take further instructions from the client, have conferences with counsel, or enter into pre-hearing negotiations with other parties. Where time is spent in this way it should be treated as attendance rather than waiting time. In most cases it is reasonable to expect the solicitor and/or barrister to be fully prepared or briefed before the hearing. Sometimes, it may be more convenient for the solicitor or barrister to arrange a conference at court prior to a hearing than at their offices or chambers at a different time. Where further documents or evidence are served at the last minute it may be a legitimate use of the time available to take further instructions. Time spent in this way may then be claimed as attendance or conference time. The solicitor must provide evidence - usually in the form of an attendance note - that the work done was an attendance which advanced the case.

4. Court times are fixed. If the parties arrive early it may be reasonable to use that time for conferences, however, in most cases any time waiting after the due time to go into court will be more difficult to justify as anything other than waiting time, unless the Judge directs that the parties spend time considering settlement/other issues. If the parties are still in discussion at the time of the hearing, it may be reasonable for the discussions or negotiations to continue if the case is not immediately called on. It will however be rare for there to be no waiting time at all. The luncheon adjournment is not included in waiting time unless further instructions, attendances or conferences are taking place.

5. If the solicitor does not provide evidence to support the use of waiting time as attendance time: to take further instructions or have a conference with counsel, then it should be allowed at the waiting rate. Where waiting time is used for other things, you should be sure that the time is not being claimed twice i.e., once as waiting time and also as attendance time.

2.17 Disbursements and other issues

Generally

1. These are sums paid out by the solicitor in connection with the conduct of the **particular** case (as opposed to payment made for a product or service which could benefit any case). They are discussed in more detail in Section 3.

2. The variety of disbursements that can be incurred is enormous. It must have been reasonable to incur each and every disbursement and each disbursement must be reasonable in its amount. Common disbursements are process server's fees, expert's reports, medical reports, travelling expenses, etc.

Guardians ad Litem

3. It should be noted that the professional fees and disbursements of a professional court appointed guardian ad litem are **not** a solicitor's disbursement nor should they be accepted as expert's fees. They should be disallowed entirely, as remuneration can be directly obtained from the local guardian panel.

Legal Research

4. A solicitor is expected to be able to deal with everyday cases without the need to do a great deal of legal research. However, time spent in researching a novel, developing or unusual point of law or the impact of new legislation to the particular case may be allowed in exceptional cases (*Perry and Alexander v The Lord Chancellor [1994])*. There must be something in the particular case that raises it above the norm in order to justify legal research on this ground. Familiarisation with new law is not exceptional. The solicitor may reasonably claim some time to check how case law applies to their case. The extent of time may reflect the complexity of the case. Where a claim for research is made, the assessor would expect to see evidence of the research on file, e.g. copies of case reports etc and some assessment of the effect of the law on the case. A generalised attendance note not backed up by this evidence will be disallowed.

5. Any research claimed in relation to Human Rights Act 1998 issues should be considered in the context of whether at the time the work was done, it could still be said to an unusual or novel point of law. Such instances will arise less often with the passage of time as the case law grows more comprehensive. The fact that human rights issues are raised will not necessarily mean of itself that the point of law is novel or unusual. It will be a matter of judgment in each case whether the issues are genuinely unusual or novel.

2.18 Contractual File Reviews

1. File review is chargeable provided it meets the criteria set out in Contract Rule 1.15. Not every case file must be reviewed and file review arrangements must be justifiable. Subject to the above, supervision is not generally chargeable unless, in any particular case, it would be chargeable subject to usual principles. While there must be a supervisor for every file, the extent of supervision will vary depending on, amongst other things, the experience of the caseworker. As such, compliance is part of good practice management.

2. File reviews may be claimable in two alternate ways but only <u>one</u> claim must be made for each review:

   (a) Rule 1.15 allows claim to be made for file reviews carried out under LAFQAS/Specialist Quality Mark at a fixed rate of £18.71 plus VAT per review. Claims for file review under this heading should not appear as part of the claim for costs on the individual file concerned. The total claim for all file reviews carried out in accordance with this rule must be reported annually as a separate report form in October or November in each year. The Account Manager will check this one line claim. If it is considered that the number of file reviews claimed is well beyond those required by the Quality Mark Standard, then the number may be reduced.

(b) Alternatively, Rule 1.15 provides that the time spent reviewing the file can be claimed as part of the costs of the individual matter, where the file review takes place at a stage in the proceedings at which the file would normally be reviewed and that the work done as part of the review was reasonable having regard to the needs of the case. There may be several points in the case where developments occur such that it is necessary to review the case. Where such a review takes place and is properly recorded, then the time spent may be claimed as part of the costs of the case.

3. Prior Authorities And The Assessment Of Disbursements

3.1 General

1. "Disbursements" means "*traveling and witness expenses and other out of pocket expenses properly incurred [by a fee earner] which would be properly chargeable to a client*. Disbursements are assessed on the basis of determining whether they were reasonably incurred and are reasonable in amount subject to any prior authority granted. "*Reasonable means what is reasonable for the proper conduct of the case*".

2. The test is based on the reasonably competent fee earner at the time, the disbursement was incurred. Hindsight should not be used although if an unfavorable report is obtained from an expert, then it may well be unreasonable for the solicitor to commission a further report from the same type of expert simply in the hope of changing the result. Further, where costs are incurred because the supplier chooses the wrong type of expert then these costs will be disallowed.

3. In deciding whether the amount sought is reasonable regard must be had to all the circumstances including the purpose of the disbursement in the context of the particular case (that is, having regard to the justification/need for it as against the value/importance of the case), the particular service involved, the extent to which there is a choice of alternative service providers and whether all elements of the service are justified in the particular case/at the particular time.

4. If a disbursement is abnormally large by reason of the distance of the court or the client or both from your office payment may be limited to what would otherwise be reasonable, having regard to all the circumstances.

3.2 With or without prior authority

1. In considering whether it was reasonable to incur a disbursement you should first ascertain whether prior authority to incur the costs has been granted under regulation 61 of the Civil Legal Aid (General) Regulations 1989. If authority was granted it will state the maximum fee payable. The reasonableness of the disbursement and the amount claimed (as long as it does not exceed the authority) cannot then be questioned on assessment unless the purpose for which the authority was granted has failed before the costs are incurred.

2. If authority was not sought or the amount claimed exceeds any authority, then the assessor has complete discretion in deciding the reasonableness of the act and, where authorities were given, the amount in excess of the authority given.

Point of principle CLA19 states:

"An authority given under Regulations 59, 60 or 61 of the Civil Legal Aid (General) Regulations 1989 does not place a ceiling on the fees that can be claimed in respect of the disbursement so authorised. On assessment further consideration may be given to any additional sums claimed."

3. There is no need for a solicitor to seek a general authority. If he does not do so - or if one is refused, he can still do the work and incur the costs at his own risk. It will be for the assessor to conclude whether the disbursement was reasonably incurred and whether the amount was also reasonable.

4. Where the certificate is amended to authorise the step - the act of incurring the expense cannot be challenged, but the reasonability of the particular expert or the amount involved can be considered.

3.3 Expert's fees

1. In the majority of instances solicitors will seek prior authority to incur expert expenses. e.g., the obtaining of reports or the attendance on conferences or at trial. Where authority has not been sought or has been refused and the solicitor still instructs an expert the assessing officer must determine whether it was reasonable to employ such an expert and whether the costs involved are reasonable bearing in mind the circumstances of the case and the type, grade and experience of the expert.

2. So far as the fee is concerned the issues will be:

   (a) was the level of qualification of the expert appropriate for the function instructed in the particular case?, e.g., should a medical consultant have been used when the individuals general practitioner could have provided a report or a Harley Street surgeon of National repute used when a local expert would have done. If in doubt, reduce the level of appropriate expert;

   (b) is the level of remuneration broadly in line with the normal charges for such work in that profession for an expert of the appropriate level of qualification.

3. If the fee is felt to be excessive then the only course will be to reduce it to what is deemed to be a reasonable fee and leave it to the solicitor to appeal and provide evidence as to the normal level of fees - or any particular grounds for exceeding it.

   Contained within Appendix xx is a list of the guidance on hourly rates and usual bill bands for a variety of experts. They do not represent "ceilings" or "floors" and are merely an aid to decision making and not a substitute for it.

4. Be aware that many limitations on certificates will include obtaining an expert report of one kind or another especially those relating to medical negligence. Such Limitations will not generally prescribe any limit on the fees which will be at the assessor's discretion.

5. Increasingly medical experts are refusing to agree to appear to give evidence unless a cancellation fee is agreed to cover the eventuality of the case being settled or adjourned. The question will be whether the solicitor has acted reasonably in agreeing to the principle or the level of such cancellation fees. It is clear that an expert may not be able to make full use of the time 'saved' by cancellation. On the other hand the setting of a cancellation fee in advance cannot reflect the loss that the expert will in fact incur. It would be reasonable for solicitors to at least seek to agree that the expert should be compensated for any loss of income that may be caused by cancellation rather than a specific cancellation fee. The correspondence with the expert should be examined to see whether any such attempt was made before any compensatory fee or cancellation fee is allowed.

   Point of Principle CLA20 states:

   “Where expert’s fees are reduced on an assessment and the reduction is not accepted, reasons for the reduction must be given on application.”

6. The general practice of not allowing the expert a fee for the time set aside has been considered by the courts. In Reynolds v Merton (unreported 24 February 1986) the special circumstances of the case justified it. In Martin v Holland and Barrett (No 11 of 2001) a cancellation fee of £1,000 was upheld by reduction of counsel’s brief fee from £3,500 to £1,150.

3.4 Agent's fees

1. Where an agent (either solicitor or enquiry) undertakes work which is otherwise fee earner work, this must be claimed as part of the conducting solicitor’s costs and not as a disbursement. i.e., attending on witnesses to take statements or, because of the distance involved, attending on hearings. If solicitors are instructed outside of England and Wales, details of the instruction should be set out in the claim but the charge will be a disbursement. Non-fee earner enquiry agent work such as serving documents, tracing witnesses or surveillance work should be claimed as a disbursement.

2. Non fee earner enquiry work will involve the service of process, including a subpoena or witness summons, tracing witnesses, taking statements, surveillance work etc. The relevant questions will be:

   (a) was the work done by the agent reasonable in the light of the solicitor's knowledge at the time of instruction;

   (b) is the charge a reasonable one.

3. One particular amount to consider is the charge for the enquiry agent's travelling time and expenses. It will seldom be reasonable to instruct an enquiry agent except in the locality where the work is being done. An exception might be where a number of witnesses are to be interviewed in different towns. It may then be more efficient for one enquiry agent to interview all rather than divide the work among separate agents.

3.5 Interpreters

1. The fees charged by interpreters vary. They depend on market forces and, in general, the files charged for interpreting in more obscure languages are higher than in more common languages. In a publicly funded case, just as in a privately funded case, a solicitor should aim to secure value for money when instructing any third party. This may, sometimes, involve obtaining competitive quotes where it is possible to do so. The fees charged by a competent interpreter should not be any higher merely because they are on the National Register of Public Service Interpreters (NRPSI). However, registered interpreters are expected to maintain a good knowledge of public service procedures, relevant legislation and specialist terminology. This should mean provision of a higher quality service and therefore it may be reasonable to instruct a registered interpreter at a slightly higher hourly rate. Prior authorities should not be refused solely on the basis that it would be less expensive to engage a non registered interpreter.

2. If a client does not have an adequate command of English, it may be necessary for the pleadings on the proceedings to be translated into his or her native language. There is however European Convention on Human Rights case law to the effect that there is no automatic right for the defendant or respondent to receive written translations of all the documents in the proceedings (*Kamasinski v Austria [1991] 13 EHRR 66, Howard v Sweden [1988] Application No. 14106/88).* The onus may therefore be necessary as part of case preparation when acting for a respondent/defendant to identify and facilitate the translation of the necessary documents.

3.6 Solicitor's travelling expenses

1. Generally, the questions that will arise are:

   (a) was there a reasonable need for the journey;

   (b) was the appropriate form of transport used.

2. Most travel will be to court, to counsel for a conference, to take statements from witnesses, to inspect the scene of the incident or to see the client. All these have been dealt with elsewhere when considering the time spent.

3. These expenses are generally to be allowed at the actual expense or at a specified mileage rate. Whether it was reasonable to travel by car rather than public transport should be considered in the context of reasonable convenience and the saving of the claim for travelling time that may have resulted. The question of mode of travel depends on comparative costs, taking into account the fares incurred and the time saved by use of the more expensive mode of transport.

4. Solicitors' practices within the 10 mile radius of the SCCO in London usually include an item for general travelling expenses in their overheads when calculating their expense rate. In other areas it would not be justified to allow expenses if it is the practice of the local courts not to allow them.

5. A cautious approach should be adopted towards granting prior authorities for travel as, if travelling expenses are authorised in advance, this endorses the necessity of making whatever journey is involved. Prior authority cannot generally be granted for travelling time as this is an item that must be justified on assessment. In exceptional circumstances, prior authority may be granted to cover travel time at an appropriate hourly rate e.g. where an expert at a distance has been instructed because of a particular specialism and no more local expert is available, but subject to the proviso that it only applies to reasonable travel time to be determined by the assessor at the conclusion of the case.

6. The cost of travel by air may only be allowed if there is no reasonable alternative and the class of fare is reasonable in all the circumstances, or if the air travel is more economical taking into account the time saved. This applies equally to travel on internal and international flights. If the assessor determines that it was unreasonable to use air travel, the appropriate rate for travel by an alternative means of public transport should be allowed. Cheap air fare offers should be used where possible, however, the more money spent on an air ticket, the greater degree of flexibility is purchased in terms of late booking facilities, flight availability and refund on cancellation.

7. The assessors should allow what is reasonable in the circumstances, bearing in mind that the most economical fare might not always be appropriate. It would be usual to expect alternative quotes to be sought to identify the most competitive route.

8. Invoices/receipts should always be produced in support of claims for travel expenses. Where travel disbursements are claimed, a dated breakdown must be provided in support. Claims for up to £10 will not normally require substantiation by provision of a receipt or disbursement voucher, but should be justified on file. All expenses of £10 or more (excluding mileage) must be substantiated by the relevant disbursement voucher or an explanation why it is not available on the claim or on file. If prior authority has been obtained to cover the expense, then the voucher and a copy of the authority must be available but there is no need to justify why the expense was incurred, unless the amount exceeds the prior authority given.

The Congestion Charge

9. The congestion charge for drivers in central London is effective from Monday 17 February 2003. Drivers of private cars will have to pay £5.00 per day if they drive in the charging zone during charging hours (7.00am - 6.30pm Monday - Friday excluding Public Holidays).

10. The charge is triggered by the first journey in the charging zone on a particular day; the number of journeys in/out of the zone does not affect the amount due. A map of the charging zone and further information can be found on the Transport for London website www.transportforlondon.gov.uk. The charge can be paid at retail outlets, such as newsagents and petrol stations, or by electronic methods including e-mail and text message.

11. A receipt will be issued for all 'over the counter' payments. For electronic payments a receipt number is issued automatically. If required, a printed receipt must be requested by e-mail or post. Payment can be made in advance (up to 90 days) or on a weekly/monthly basis, but there is no discount for paying this way.

12. A surcharge will be levied if payment is made on the day between 10-midnight and a penalty fine if not paid at all.

Impact on Suppliers

13. There are a number of courts within the charging zone which suppliers visit on a regular basis. The charge will be triggered by any journey in the zone using a private car but not by the use of public transport or taxis.

14. If the solicitor's office is outside the zone, and they assist a client or attend a hearing at a court inside the zone, or if the supplier's office is inside the zone and they go to a court either inside or outside the zone, the charge may potentially be payable. Any other travel justified for the proper conduct of the case within Contract rules and guidance (e.g. visiting a client at home) could also possibly trigger the charge.

When should the Charge be claimed as a disbursement? – Interim Guidance

Suppliers based inside the charging zone

15. Generally, if a solicitor uses a private car to travel to/from his office inside the zone (or vice versa), the daily charge will be triggered by his normal journey to/from work. The charge should not then be claimed on work done in relation to a client.

16. Fee-earners who are based at a solicitors office inside the charging zone may not ordinarily claim the congestion charge. The congestion charge is considered to be an overhead for suppliers located inside the charging zone and in most cases where the fee earner drives to work the charge will be incurred on this journey.

17. The only exception to this is where the fee-earner has driven into the zone outside the charging hours specifically for the purpose of a case either to attend on the client or to transfer large files to a hearing. Wherever the charge is incurred, we will assess the reasonableness of the claim.

Suppliers based outside the charging zone

18. Fee-earners who are based at a solicitor’s office outside the charging zone may claim the congestion charge as a disbursement, subject to the considerations outlined below as to its reasonableness.

Reasonableness

19. Solicitors should use the most economical form of transport, considering both the cost of travelling time and expenses. The additional cost of the congestion charge should be considered when deciding the reasonableness of travel by car. As public transport and taxis are widely available within the zone, it is the solicitor's responsibility to note on the file the reasons why private transport was used.

20. Since there is no charge for additional travel on the same day, the charge should be claimed as a disbursement if it has been triggered **only** as a result of the work on the particular case. Where several journeys are made on the same day, the supplier must ensure that a claim for the congestion charge has not been duplicated on more than one file. It is not necessary to apportion the charge between clients as it will be triggered by the first incidence of travel and should be credited to the first client attended.

21. The fund will only be responsible for the charge itself and will not pay any surcharge or penalty levied for late payment.

What evidence should be retained on file?

22. A receipt is only required for any individual disbursement exceeding £10 so it is not necessary to retain the receipt on file.

23. If the charge is claimed on a particular file, suppliers should ensure that the addresses of the supplier's office, location visited and times of travel are clearly recorded on the file so that auditors can confirm that travel claimed is within the zone and reasonably charged to the fund. In addition, the solicitor should confirm that the charge was not triggered by their own travel to work or any other travel within the zone on that same day.

Checklist:

(a) Is the journey justified from the evidence available on the file?

(b) Is the address of the solicitor's office or the destination within the charging zone?

(c) Are the date and times for which the charge has been claimed clearly stated on the file?

(d) Has justification been provided for not using public transport/taxi or is it evident from the circumstances of the case?

(e) Is it clear from the file that the only reason the charge was triggered was a journey which was necessary for the proper conduct of the case and that no personal/other travel occurred on the same day?

(f) Is there any evidence that the charge has been duplicated on more than one file for the same day?

3.7 Funded Client's travelling expenses

1. In a detailed assessment under Part 47 of the CPR there is no provision for payment of a funded client's travelling expenses unless they are required to attend court as a witness of fact.

2. *R v Legal Aid Board ex parte Ecclestone* says that the Commission does have power to grant prior authority for a funded client's travel expenses to see an expert, where the report is essential for the proper conduct of the proceedings, and the funded client cannot afford the expense involved in travelling to the expert. The implications of the judgement affect both applications for prior authority made under Regulation 61 of the Civil Legal Aid (General) Regulations 1989 and costs assessment.

3. Prior authority applications will normally be made under Regulation 61(2)(d) i.e. performing an act which is either unusual in its nature or involves unusually large expenditure. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns a personal expense of the funded client may arguably make the expense unusual in its nature.

4. The judgment concerned an application for a prior authority under a civil legal aid certificate.

5. The solicitor is not, of course, obliged to seek a prior authority. Such expenses may be recoverable on taxation or assessment as a disbursement provided that they have been reasonably incurred and are reasonable in amount. If the expense is allowed as a disbursement on assessment and the client recovers or preserves money or property as a result of the proceedings, then it will serve to increase the funded client's statutory charge liability. These type of expenses will generally not be recoverable inter partes, but may, in future, be recoverable on a legal aid assessment.

6. In assessing costs claims in civil legal aid cases, the following guidance should be applied:

Funded Client's travel costs to attend experts

7. Following the judgment, a funded client may be entitled to recover his or her travel expenses in connection with attending a medical or other expert. In his judgment, Mr Justice Sedley determined that the client must be "impecunious" and that the expense must be necessary "in order to make or keep the case viable". When considering an application for prior authority in connection with such expenses the following criteria should be applied:

   (a) It must be demonstrated that the expenditure is necessary to keep the proceedings viable. In other words the test is that the litigation would not be able to continue or would fail unless this expense is met;

(b) The funded client must establish that he or she does not have the resources to meet the expense. The fact that a litigant is in receipt of social security benefits or legal aid does not automatically satisfy the test of "impecuniosity". The funded client should provide a full breakdown of weekly income and outgoings, together with capital resources, to demonstrate that he or she cannot afford to meet the particular expense. A relatively small expense is unlikely to justify the grant of a prior authority and should not generally be allowed on assessment unless the client is impecunious. This test will be more difficult to satisfy where the amount is small, although each case should be determined according to its individual circumstances;

(c) If the expert is based locally, then it would not generally be reasonable for the funded client to seek financial assistance from the Commission to attend the appointment. This is akin to a visit to the funded client's own solicitor's office. An application for prior authority or payment should generally be refused in these circumstances unless the funded client can demonstrate that he or she is impecunious and that the proceedings would otherwise fail;

(d) If the expert is based some distance from the client's home and the court where the case would be dealt with, justification should be provided as to why a local expert should not or could not be instructed. The solicitor should set out the steps which had been taken to identify an appropriate local expert e.g. by reference to the Law Society Directory of Experts. It would not generally be reasonable to instruct a distant expert simply to avoid delay if adequate expertise is available locally;

(e) The test should be based on the nature of the expertise available. It may be appropriate to instruct an expert outside of the local area if he or she has specific expertise which is unavailable locally or a limitation period is approaching and the funded client could not be seen promptly locally (provided that the funded client and his or her solicitors were not responsible for the delay in instructing an expert). The nearest expert with appropriate expertise should be used e.g. it is not necessarily justified to use a London expert in a Manchester case if an appropriate expert is available in Liverpool;

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

(g) The applicant must provide a full breakdown of the proposed expense;

(h) Any available alternative sources of funding should be considered.

8. Before granting an application for prior authority the area office should take into account all the above criteria when determining whether it is necessary for the proper conduct of the proceedings to incur the expense. If the authority is refused written reasons must be provided for the decision (Regulation 62 of the Civil Legal Aid (General) Regulations 1989).

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

10. Where an funded client is required to submit to a medical examination at the request of the other side, it is normal for those expenses to be borne by the party requesting the examination. In those circumstances, the expense is generally settled in advance and would not usually form part of the funded client's costs. If the expense had not already been paid by the opposing party, it should be claimed as an inter partes item in the bill. Prior authority should be refused.

11. Regional offices should also note the existing guidance in point of principle CLA 19 to the effect that costs in excess of any prior authority may nonetheless be allowed on costs assessment/taxation.

3.8 Funded clients' travel costs to attend Court/witness statements

1. The position has not been affected by the judgment in **R v. Legal Aid Board ex parte Eccleston**.

2. Any person attending Court, whether as a party, or as a witness called or reasonably intended to be called to give evidence, is entitled to recover their expenses as to:

   (a) loss of income;

   (b) travel;

   (c) hotel expenses;

   (d) subsistence.

3. A solicitor may pay these expenses on behalf of his or her client and then include the payments in the solicitor's bill of costs as they would generally be recoverable as a disbursement. Receipts should be produced where relevant.

4. The usual principles as to reasonableness apply. If it was unreasonable for the client to attend the hearing in furtherance of his or her case e.g. because the hearing was an interlocutory hearing where the client's presence was not strictly necessary, then the disbursements would not normally be allowed.

5. The expenses must also be reasonable as to amount and could be expected to fall within the following categories:

   (a) Loss of income: only actual losses are claimable, therefore if the client is still paid while attending Court, no notional loss of income is claimable.

   (b) Travel costs:

      i) Travel by car at the appropriate mileage rate: 36 pence per mile to 2 April 2002, to 45 pence per mile thereafter);

ii) Reasonable public transport costs: this will cover travel by the most economical and direct method. It would not generally be reasonable to allow a first class fare. Travel by coach may often be more economical than travel by rail;

iii) Hotel expenses: accommodation charges vary considerably across the country and it is difficult to give guidelines on specific amounts. It would be reasonable for accommodation to be of an adequate, but not luxurious standard;

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

Travel/overnight expenses

6. The cost of overnight accommodation should only be allowed if the assessor is satisfied that an attendance at a distance is justified and that the need for an overnight stay is justified.

7. Even if it reasonable for a solicitor at a distance to accept instructions, that does not necessarily mean that it would be unreasonable to use a local agent at some stage in the case.

8. The assessor should consider limiting the disbursements allowed if they are abnormally large due to distance of the solicitor from the client. The starting point is that the assessment should be conducted on the basis of the amount which it would be reasonable to allow a local solicitor unless in the circumstances it is reasonable to do otherwise.

9. It would generally be exceptional for a solicitor to have to say away overnight. This would either involve so much travelling that it would be unreasonable to undertake the travel and attendance in a single day or such a long attendance that travel and attendance in a single day would be unreasonable.

10. The “Guide to Allowances” currently suggests an overnight allowance of £59.90 for expert and professional witnesses saying in inner London and £54.55 elsewhere.

3.9 Transcripts

1. Following a final hearing it may be necessary for the solicitor to obtain a transcript of the hearing either to advise on appeal or in order to pursue an appeal.

3.10 Computer aided transcripts

1. Selective use of computer aided transcripts (CAT) technology in trials has become more common. In general, this issue arises in relation to the more complex criminal trial proceedings in the Crown Court but can also use in the trial of long or complex civil claims too.

2. Initially, the Commission's view was that CAT systems, presented as the hire of the equipment or hardware by solicitors, were an office overhead rather than a disbursement and therefore fell outside of the costs of representation. The position taken was that it was a question of improvement to court facilities and therefore within the remit of the Lord Chancellor's Department rather than the Commission.

3. Subsequently, the way in which CAT systems are implemented has changed, which in turn has led the Commission to review its position. We are now also seeing situations where the court itself offers to provide the service, i.e. the court installs the service and makes the use of the system available for the parties. The court then charges the parties for its use allowing them to have a contemporaneous transcript, with all the facilities for editing and note making that the system offers, together with a hard copy transcript at the end of each day.

4. In this way the use of the CAT system fits more closely with the concept of "disbursement" than previously. There is no clear definition of disbursement though Section 67 of the Solicitors Act 1974 implicitly defines it by stating that it is an out of pocket expense in connection with a case that the client can be expected to pay. The distinction between a disbursement and an office overhead is crucial. An office overhead is expenditure on an item that is capable of being used on any case e.g. purchase/hire of computer equipment or fax machines, purchase of pens, paper, etc. A true disbursement is expenditure which is only capable of being used in relation to the case under consideration and is therefore an item that a client would be expected to pay. The use of the facility of a live transcription service for the duration of a trial, where the equipment is located in and provided by the court, may therefore fall within the definition of a disbursement.

5. Whilst it may fit within the definition of transcripts or recordings, it is still an act that is either unusual in its nature or involves an unusually large expenditure and prior authority should be sought.

6. If the CAT authority is presented in this way, the Commission may be legally able to authorise this expenditure. Despite this, some Costs Committees have been unwilling to authorise the expenditure as they are not convinced it is reasonable or justifiable in the individual case or because they are not convinced that time is saved by all parties in the use of the system. There are arguments either way.

7. The Commission has made proposals to the Lord Chancellor's Department for the use of grant/loans under or a change in the prior authority rules to refer specifically to CAT systems. No considered decisions has yet been taken.

8. The Commission's current position is that if the expenditure can be a disbursement all parties, including the court and unassisted parties, should share in the costs of the system pro-rata. There are related issues, however, which fall outside of the Commission's capacity to pay:

   (a) Training on the system – whether this is for solicitor or counsel it would always be an overhead.

(b) Judicial training – this would be an area for the Lord Chancellor's Department.

(c) Judge's connection costs – the Court Service must bear this cost.

Similar considerations apply where prior authority is sought to cover the cost of computer re-imaging or to use other computer aids for litigation. The purchase of computer equipment and staff training constitutes an overhead, rather than a true disbursement, as such expenditure is capable of being used on other cases.

3.11 In-house photocopying

May the solicitor charge for petty disbursements such as faxing and photocopying?

1. S. 4.16(5) of the Costs Practice Direction to CPR Part 43 states that the costs of making of copies of documents will not generally be allowed. Exceptionally, in unusual circumstances, or the photocopying is of large amounts of documents, such costs may be allowable. Where a transaction is likely to involve substantial telephone work, faxing or photocopying, it should be made clear to the client if such items are to be charged in addition to any indication of costs.

The other side has requested that the solicitors copy a large number of documents. Does the Law Society have a recommended rate for photocopying charges?

2. There are no Law Society guidelines for photocopying charges. There is a prescribed charge. There is a prescribed fee in the County Court which can be used as a guideline, as can the current commercial rate; that is, what is charged in the high street for photocopying. The court will, if given evidence of commercial photocopying charges, take this into account on assessment when deciding what is a reasonable charge.

3. Generally there is no allowance for photocopying as it is considered part of office overheads and not fee earner work. The exception is if there are "...unusual circumstances..." or the documents "... are unusually numerous...". There is no guidance on determining these factors, but it is considered unlikely that such a situation will arise on the average bill for assessment by the Commission. However, in the large cases concerning investigation of negligence etc., the situation may arise and the guidance in *Lowdes* may be followed.

3.12 Sorting Pagination and the use of Medico/Legal Assistants

1. By nature, clinical negligence cases are often particularly complex and expensive. The Commission considers that clients and taxpayers are best served where assistance and representation is delivered by contracted solicitors with expertise in the specialist field. This reflects the arrangements affected by the Legal Aid (Prescribed Panels) Regulations 1999, which, from 1 February 1999, made legal aid in new clinical negligence cases exclusive to specialist franchisees.

2. Questions are often raised whether :

   (a) the medico legal assistant can be described as a fee earner

   (b) the work undertaken by the medico-legal assistant is fee earner work, and

   (c) if so, when should competence or dispatch be rewarded by enhancement.

3. Point of Principle CLA 12 states that work carried out by an in-house medico-legal assistant will generally be fee earning work. CLA 12 states:

   "Work carried out by an in-house medico-legal assistant will generally be fee-earning work. The hourly rate and mark up applicable will be what is appropriate in all the circumstances having regard to the nature of the work carried out and the special skills and qualifications possessed by the person concerned".

4. It does seem clear that in respect of assessments *prior* to the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 all of the matters referred to in CLA 12 are relevant. In assessments after the Regulations came into effect, the second part of CLA 12 is not relevant because the hourly rate is prescribed by the Regulations and there is no such thing as a mark up. An enhanced rate and a mark up are generally recognised to be different things.

5. CLA 12 states the principle that a medico-legal assistant can be a fee earner and it is a matter for the assessor on each occasion when work is undertaken to consider whether the medico-legal assistant is experienced enough to be a fee earner and, if so, to look at the work undertaken and decide whether this is fee earner work. In post 1994 cases the prescribed rate applies but the assessor will need to ensure that the medico-legal assistant's work is not duplicated by that done by other fee earners.

   What do Medico-legal Assistants actually do?

6. Each individual undertakes various work but it can include reading medical records for the following purposes:-

   (a) to assess the standard/or conditions of treatment concerned against the standard/or condition of treatment of the reasonably competent doctor;

   (b) to screen the case on medical evidence, understand and analyse it and possibly provide a preliminary review on merits;

   (c) to decide whether the case justifies further money being spent such as the substantial cost of preparing it for an expert and the expert's fee;

   (d) to analyse the expert's report, discuss it with the client and advise on the prospects of success litigation, from a medico-legal viewpoint;

   (e) to enable an understanding of the doctor's notes prescribing drugs, the nurse's notes on administering them and co-relating them with the drug records;

(f) attending conferences with leading/junior Counsel and contributing by questioning the medical experts.

7. The system that has been employed by solicitors in recent years has been for the main fee earner and the medico-legal assistant to effectively "co-work" a claim. This usually involves a Partner, Assistant Solicitor or legal executive and the medico-legal assistant. This does, of course, provide a "Rolls Royce" service to the client. The question on assessment will be whether it was reasonable to conduct the case with multiple fee earners and to ensure duplication of work is not paid for .

8. If the medico-legal assistant is experienced or is an expert then they should be requesting medical notes, analysing the same and preparing the letter of instruction to the expert. It would only then be necessary for the main fee earner to look at the letter on a general basis to ensure that the questions raised of the expert are the relevant legal issues to establish negligence. This would only take a fairly short time in each case. Checking the notes to ensure that the medico-legal assistant has correctly identified the issues is a duplication of work.

9. Where such a method is not used each fee earner in the chain, will spend time which the other fee earner has already spent even if it is only so that each fee earner fully understands all of the issues. It simply is not necessary for two or three fee earners in one particular case to have all of the issues at their fingertips. As long as one person with experience and knowledge is doing the relevant work then it is not necessary or reasonable for the public purse to pay for duplicated work.

10. There could be aspects of the medico-legal assistant's or a medical record clerk's work that is not fee earner work. If it is clear that the medical records clerk is experienced and applying that expertise then a medical records clerk can be a fee earner. However, it will depend on the task being undertaken. Simply putting medical notes into date order is not fee earner's work. It is work that does not require any particular skill and could easily be undertaken by a secretary. In those circumstances the medical records clerk's work would simply be form part of the overheads of the firm.

11. The assessor must firstly decide whether the medical records clerk is experienced enough to be described as a fee earner and secondly whether the work being undertaken is fee earner's work.

12. On the latter point, Mr Justice Brooke in the case of Brush v Bower Cotton & Bower wherein he states:

"My assessors have looked very carefully at the time spent in relation to this claim. To a large part, the work can properly be described as clerical work and, to that extent, I do not allow the claim. On the other hand, there are features of the work that has been done which would be properly charged by a fee earner at an appropriate rate. To the extent that the work was fee earner's work, in my judgment it ought to be allowed".

13. This is of great assistance because it shows that the medical records clerk's time may be divided into fee earner's time and non-fee earner's time. A description of the work set out in the Judgment is as follows:-

    "Mr Kemp described to me the work which Mrs H did which this item covered. It was in large part searching through the 45' of shelf space of files which the case generated to find documents as and when required for which Mrs H from her extensive knowledge of the case knew where to look, photocopying and placing with the copies into ring binders and paginating them".

14. It therefore seems clear that a judgment will have to be made in each case as to whether the medical records clerk was spending time that required some degree of expertise. As has already been indicated, work that involves putting sheets of paper into date order, and then paginating them, would not normally be described as fee earner's work. Where it is clear that a particular page from a medical record is part of a particular category or where a page is not particularly clear then, once again, it would not be a fee earner's work to sort into categories or seek clearer pages.

15. On the other hand if the category of the notes is not clear it may well be fee earner work to sort the notes into categories because some expertise is being used. However, it will be up to the solicitor in each case to give details of the expertise of the clerk and how long was taken on that task. No other fee earner would then be able to claim for this work.

Medical notes

16. Some of these notes are very difficult to read and contain a great deal of complex information requiring much consideration time. If the main fee earner says that he or she has spent a certain time considering the notes and preparing a letter of instruction to the expert then this may be reasonably spent. Having said that, if the practice is for the first fee earner to look at the notes, analyse them and then prepare a report that is then passed on to the second fee earner who will then go through the report. analyse the notes and undertake some further task, this is clearly duplication of work and not all of the time spent should be allowed. Only one person should be analysing the medical notes. Either that person is a fee earner in a Solicitor's office doing legal work or not.

3.13 Plans/Photographs

1. Authority may be sought to cover the preparation of a plan or photographs of either the injuries or property in connection with the proceedings.

2. Four sets of photographs will usually suffice, (one set for the witness, one for the judge and one for each advocate).

3.14 Other Disbursements

Mediation

1. The Costs Appeals Committee allowed an appeal on 26 October 1998 and certified the following:

Point of Principle CLA 23:

"Work carried out by legal representatives in advising on, preparing for and, where appropriate, attending a mediation hearing can in principle be allowable on assessment in a non family case. In such cases an appropriate share of the reasonable costs of the mediation may also be claimed as a disbursement under the certificate."

2. This decision is a change from the previous position under which whilst preparation for mediation could be claimed under a certificate, attendance at a mediation hearing could not. The effect of the decision is that both preparation and attendance can be covered, subject always to the work being reasonable in the circumstances of the case.

3. The legal issue before the Committee was as to the meaning of the concept "representation" as defined in Section 2(4) of the Legal Aid Act 1988. The Committee took the view that this concept must be interpreted according to the circumstances which apply today, not those which applied when the Act was originally passed. As a result of the Woolf reforms, the Family Law Act and numerous local initiatives, mediation is now becoming one of the normal "tools" of a litigation solicitor, so it was decided that work in relation to a mediation hearing is work usually done by a legal representative. Usual in this context means "within the range of possible options" rather than "common". It is therefore within the meaning of representation and in principle covered by civil legal aid.

4. The Costs Appeals Committee decision applies **only** to non family cases. There will be no significant impact on family cases for the reasons given below.

Impact On Non Family Cases – Who is a Mediator?

5. There is no universally accepted definition or quality standard for non family mediation. However most mediators (who may themselves be lawyers - provided they are not representing the parties to the mediation) are affiliated to one of the main mediation groups such as CEDR (Centre for Dispute Resolution), ADR Group and Mediation UK. As a starting point regional offices should only regard it as reasonable to make payments in relation to mediation if either the mediator is affiliated to one of those organisations or if the mediation is part of a recognised well established mediation scheme i.e. the Central London County Court Mediation, the Bristol Law Society Mediation Scheme, the Court of Appeal Mediation Initiative and the NHS Mediation Scheme. Regional offices should contact Head Office is they become aware of mediation groups or schemes which it is said should also be recognised for this purpose.

What Type of Work can be covered?

6. In principle, and subject always to an assessment of what is reasonable, work by a lawyer in preparing for, attending at and thereafter advising on a mediation hearing may be covered. Any reasonable waiting time and travel time and costs can be claimed in the normal way. Preparation and attendance at a mediation hearing shall be paid at the preparation rate. Since they are not part of the formal court process, the advocacy rate does not apply to mediation hearings.

How Much Preparation and Attendance Time Should be Allowed?

7. Preparation time will depend on the nature of the case, but will usually be very limited as the lawyer should already be fully acquainted with the case Some time to review the issues and to reflect on how mediation may address them could be justified, but it is very unlikely to exceed two hours.

8. Attendance time will depend on the nature of the mediation. Many non-family mediation hearings have a fixed time limit which acts as a useful incentive to reach agreement within the time available. The normal limit under the Central London County Court Scheme is three hours. A substantially longer hearing than this is unlikely to be justified, except in a substantial High Court case.

9. Solicitors should not incur mediation costs unless the total costs of preparation, attendance and the mediator's fees/ costs are proportionate to the size of claim and a private client would choose to incur the expenditure.

What Should be Paid Towards Mediator Fees and Costs of the Mediation?

10. In private mediations it is almost always the practice for the parties to agree to share the costs of the mediation. Therefore in a mediation involving two parties, only half the costs of the mediation should be paid under one party's legal aid certificate. If there were three parties only a third of the costs should be paid, and so on.

11. Some mediation schemes involve costs other than the mediator's fees, such as a charge for hiring the room. Although in principle an appropriate contribution towards such costs could be claimed, it will seldom be justified. The mediator's fee will normally include a sum for overheads. Only exceptionally would a separate accommodation fee be justified. In many mediation schemes the accommodation is provided free of charge, for example by the court in the Central London County Court Scheme. If accommodation is not provided free, it might be reasonable to expect mediation to take place in the offices of either party's solicitors.

What level of mediator fees should be regarded as reasonable?

12. In some established mediation schemes the mediator provides his or her services free of charge or for little cost. Mediators make no charge in the Court of Appeal Mediation Scheme; in the Central London County Court the mediation fee is only £50, i.e. £25 per party; in the Bristol scheme it is £100, i.e. £50 per party. There is a strong element of pro bono service in these fees, which should not therefore be regarded as the normal rate for the service.

13. More detailed guidance will follow as to appropriate rates to charge. Some commercial mediators purport to charge very high hourly rates, often in the region of £150 per hour and sometimes as high as £250 per hour. Even though such hourly rates for the mediation hearing may well be fixed at a level which reflects the amount of preparation work required by the mediator, such rates would not be justified in a legal aid case.

14. As a starting point, and subject to any further guidance, area offices should begin by assuming that a mediator should be paid no more than a solicitor would be paid under the regulations to prepare for and attend the mediation hearing. As a further check on the reasonableness of the fee, one would expect a mediator's fee to be significantly less than what would be considered a reasonable brief fee for junior counsel at the hearing of the action.

15. As well as ensuring that mediator fees are reasonable in absolute terms, they must also be reasonable in the light of the size and importance of the case. The private client test should be applied, namely asking whether a reasonable client paying privately might be prepared to incur his or her share of the mediator's fees in order to improve the chances of obtaining an early and fair settlement of the case.

16. Note that, although solicitors can be mediators (and it might be justifiable for the fees of a solicitor mediator to be higher than a non-solicitor mediator) a solicitor mediator must be neutral and cannot represent any party to the dispute. Fees payable to a mediator can only be claimed as a disbursement. The rates prescribed for paying lawyers under legal aid regulations cannot be applied directly but may be a useful guideline as suggested above.

What Is the impact on family mediation?

17. The Point of Principle will have little direct impact on family cases. Mediation in family cases will continue to be dealt with under the pilot scheme in Part IIIA of the Act. For this purpose the definition of family cases is that contained in section 13A(2) of the Act.

18. Mediation practice in family cases is different to that in non-family. In family cases it is invariably the practice of mediators to conduct the mediation with the clients <u>alone</u>. Lawyers are <u>not</u> allowed to attend. This approach is approved by the major groups dealing with family mediation.

Who is a "Mediator" in Family Cases?

19. For the purpose of Part IIIA of the Act, a mediator is defined as a person who is contracted with the Commission to provide mediation services (see definition in section 43 of the Act). This is important because it means that only contracted mediators recognised for the purpose can perform intake assessments for the purpose of section 29 of the Family Law Act 1996 (section 15(3F) to (3I) of the Legal Aid Act 1988) and mediators under Part IIIA who will be paid directly by the Commission.

All mediators working in mediation services contracted to the Legal Services Commission to provide family mediation services are required to have trained with a training body approved by the United Kingdom College of Family Mediation. These are:

(a) National Family Mediation;

(b) Family Mediation Association;

(c) Solicitors Family Law Association;

(d) Law Wise;

(e) Law Group.

What Sums should be paid to Lawyers?

20. It would not be appropriate to grant a prior authority **or** to allow lawyer's costs for **attending** of a family mediation. Family mediators do not allow legal representatives to attend on mediation. It is strongly arguable that established practice in family mediation is such that attending mediation in a family case would be outside Section 2(4) of the Act. In any event it would be unreasonable.

21. This does not prevent the cost of preparation (before the mediation) or advice (in advance or subsequent to the mediation) being allowed. What is clear however is that the preparation will be limited to the amount of time that it is reasonable to allow the lawyer to advise their client on the mediation process. Advisers may also be asked to assist or advise the funded client subsequently or to give legal effect to a settlement arrived at through mediation.

What Fees should be paid to Mediators?

22. Where a mediator is operating under contract with the Commission, his or her fees should be dealt with exclusively through the contract and in no circumstances should they be paid as a disbursement under a legal aid certificate or Legal Help.

3.15 VAT

1. This section deals with general issues of Value Added Tax ("VAT") as it effects the Commission and claims made by its suppliers for work done. VAT is a complex tax so this overview is very limited in scope. A full guide has been published by the Law Society and can be accessed at their website www.lawsociety.org.uk following the "Tax Law" and "Law Society VAT Guide" links.

2. VAT is a tax on consumer expenditure collected in the United Kingdom on all business transactions. It is collected whenever there is a supply of goods or services by a taxable person as part of their business. The provision of legal advice, assistance and representation is a supply of services. Most solicitors are individuals running a business for profit either alone or in partnership with others.

3. When a VAT registered solicitor is preparing a bill to his client, VAT **must** be added to the value of the supply when the solicitor's bill is calculated. For example, a bill for £100 must have the VAT (of £17.50) added making the total the client is due to pay £117.50.

4. All services (whether Legal Help, Help at Court or Legal Representation) provided by the solicitor in a publicly funded case are supplied to the client. As they are supplied to the client, the client is the recipient of the service. It is the client's status that is relevant, particularly important if the client resides overseas or where the proceedings have arisen during the course of the client' s business (see 20 onwards).

5. For the purposes of VAT law, anything, which is not a supply of goods but is done for a consideration (payment) is a supply of services (Value Added Tax 1994, Section 5(2)). Whilst there must be a link between the service and the payment for those services, the payment itself does not have to come from the recipient. In publicly funded cases, the fact that the Commission pays the solicitor does not alter the relationship between the client and the solicitor for VAT purposes.

6. VAT is generally added to the work done by the solicitor, which is fairly straight forward. There are however a number of more complex issues which need to be borne in mind when calculating the exact value of the supply.

Disbursements and expenses.

7. Those items identified by solicitors as disbursements and expenses are not always the same as those that HM Customs and Excise classify as disbursements for VAT purposes. The correct treatment depends on whether the item of expenditure is

   (a) a costs incurred by the solicitor in the course of making a supply; or

   (b) a disbursement incurred by the solicitor as the client's agent.

   which is then charged to the client.

Costs Incurred

8. Any item incurred by a solicitor in the course of making his own supply must be included in the value of the supply when VAT is calculated *(Rowe and Maw v Customs & Excise Commissioners [1975] STC 340*).

9. The question to ask is whether or not the expenses incurred were an integral part of the provision of legal advice to the client. Examples of such expenses are; the solicitor's travelling expenses; postage; telephone charges; and interpreter's fees. CPR PD 44 confirms this approach.

10. If a solicitor has to go to court to represent the client the supply he makes is not just the provision of advocacy and advice but includes his travel time together with the incidental travelling expenses.

11. As a general rule, travelling expenses incurred by a solicitor in the performance of his client's instructions are not VAT disbursements and must be included as part of the solicitor's overall charge.

12. *Row & Maw* claimed that rail fares incurred by them in the course of carrying out their client's instructions did not represent a taxable supply of services for VAT purposes since the payment by the client of the sum demanded was not consideration for the supply but rather reimbursement of sums incurred by the solicitor's as agents on the client's behalf. The Court held that the expenditure was on the services supplied to the solicitors rather than to the client and so the charge made by the solicitor was part of the total consideration for all the services supplied to the client and cannot be divided for the purposes of calculating VAT.

13. If a travel expense includes VAT, the VAT should not be claimed or calculated twice. The VAT should be never be double charged – merely accounted for.

14. If the client does not speak English sufficiently to provide instructions themselves, then the use of an interpreter is an integral part of the supply as it is necessary for the interpretation to be provided before any legal advice can be given.

True Disbursements

15. Disbursements for the purposes of VAT are those where amounts are paid to third parties by the solicitor as the agent of their client. There are a number of conditions that must be satisfied before a disbursement may be treated as such

[Custom and Excise Notice 700]:

- the solicitor acted as an agent for his client when paying the third party;
- the client actually received and used the goods or services provided by the third party to the solicitor;
- the client was responsible for paying the third party;
- the client authorised the solicitor to make payment on his behalf;
- the client knew that the goods or services would be provided by a third party;
- the solicitor's outlay must be separately itemised when invoicing the client;
- the solicitor must recover only the exact amount paid to the third party;
- the goods or services paid for must be clearly additional to the supplies made by the solicitor to their client.

16. **All** of these conditions must be satisfied before a payment can be treated as a disbursement for VAT purposes.

    The following can be treated as disbursements provided the guidelines set out above are adhered to:

- company registration fees;
- company search fees;
- land registry postal search and registration fees;
- land charges postal search and registration fees;
- court fees;
- witness fees;
- sheriff agent fees;
- fees for medical or police reports;
- oath fees paid to another solicitor or Commission for Oaths

How should VAT disbursements be treated?

17. The solicitors have two options. The first would be to pass on the cost of the disbursement to the client as a VAT inclusive amount (if taxable) and excluded from calculating any VAT due on the main supply of legal services to the client. The solicitor cannot reclaim the input tax on the supply.

18. Unless that invoice for the disbursement is addressed directly to the client, the client is also prevented from reclaiming input tax as he does not hold a valid VAT invoice.

19. Generally it is only advantageous to use this method of treating a disbursement if no VAT is chargeable on the supply by the third party where the client is not entitled to reclaim the VAT. This generally happens in publicly funded bills except where the client can reclaim. Those circumstances are limited to where the proceedings were brought in the course of the client's business.

20. Alternatively, services can be treated as supplied to and by the solicitor under Section 47(3) of the Value Added Tax Act 1994. The solicitor can then reclaim the related input tax (subject to the normal rules) and must charge VAT on the onward supply if appropriate. If a solicitor supplies goods as an agent and issues an invoice in his own name, he must account for VAT as if he were the seller.

How should solicitors claim VAT ?

21. Page 6 of the CLSCLAIM1 and pages 4 and 7 of the CLSCLAIM2 contain boxes for suppliers to detail disbursements incurred. The first box described as "*disbursements subject to VAT*" covers those costs incurred which are truly part of the solicitors integral service. These must be entered here with VAT amounts even if no VAT has been charged e.g. travel expenses and interpreters fees. This box should also be used for disbursements which are "*true disbursements*" where VAT has been charged e.g. experts reports. The second box described as "*disbursements not subject to VAT*" is for those items which would not form part of the integral supply "*true disbursements"* e.g. court fees, search fees and also expert reports where no VAT is paid because the expert is not VAT registered.

Counsel's fees

22. A concessionary treatment for counsel's fees was agreed when VAT was first introduced in April 1973. The solicitor may treat counsel's advice as supplied directly to the client and the settlement of the fee as a disbursement. Counsel's VAT invoice may be amended by the name and address of the client and inserting per before the agent's own name and address. The fee note from counsel can be recognised as a valid VAT invoice in the hands of the client.

Legal services supplied to overseas clients?

23. With the exception to charging VAT where the person supplying services does so in the course of a business registered for VAT is where the supply to a client who resides overseas. It should be noted however that suppliers in relation to land are always chargeable.

24. Following the introduction of the VAT (Place of Supply of Services) Order 1992 in January 1993 services are not "*zero-rated"* but rather deemed to be supplied in the country where the client resides and is thus outside of scope of United Kingdom VAT where it is always chargeable. The exception to this general rule is the supply of legal services relating to land.

25. In legally aided cases involving ownership and related issues of United Kingdom property, VAT must therefore be charged irrespective of the client's place of residence. Examples include possession proceedings, landlord/tenant cases or declaration of ownership claims. It will not include services relating to land on the administration of a deceased estate or where the services relating to land are incidental to a much larger transaction.

What is an "overseas client"?

26. These are of two types: clients either resident or whose place of belonging is situated within other EU states and/or clients who reside/belong outside of the EU.

27. If an individual receives services for a non business purpose i.e. in their own personal capacity, they belong for VAT purposes where there have their "*usual place of residence"*.

28. Three factors determine "*usual place of residence*" these are established in a Tribunal decision of *US AA Limited (LON/92/19504)* as:

    (a) where the person actually lives irrespective of homes and other countries; or

    (b) where their family is; or

    (c) where their job is.

It is the individual facts of the case that will determine the answer.

29. If services are received for business purposes they are treated as belonging where the individual or business has their only business establishment or other fixed establishment. A "*business establishment"* is the principal place where business run – the Head Office, Head Quarters or Central "*seat"*. A "*fixed establishment"* must be of a minimum size with human/technical resources permanently present for legal services to be made to it. This can be a branch of a company or some agent/third party through which the company carries on its business. If a person in business has no business or fixed establishment the place of belonging will be where their usual place of residence is.

30. A solicitor must prepare a bill in accordance with VAT Rules and the individual circumstances of the case. There will be cases where VAT is only chargeable for part of the case or not at all. If it is only chargeable for part of the life of the certificate the bill of costs and VAT will be apportioned accordingly.

31. For example where a funded client changes their residence during the life of their certificate, the work done needs to be apportioned to show the period when VAT was chargeable and when not.

Example

Mrs X started proceedings against Mr Y. At that time in August 1993, she was living in England. Due to harassment from Mr Y she left to visit the USA in December 1994. She married in February 1995 when her residence in the USA became permanent. The litigation settled in June 1996. In the bill of costs the period of August 1993 to December 1994 was calculated with VAT and the period December 1994 to June 1996 without. This reflects the relevant periods when Mrs X resided outside of the EU .

NB: "Usual" place of residence does not have to mean permanent residence although length of stay is a factor.

Business cases and payment of a third party's costs.

32. In business cases, VAT paid can be offset as "*input tax"* where the proceedings, relate to the business. Whilst such cases are no longer funded under the Access to Justice Act 1999, there are some old 1988 Act cases which have yet to be concluded or paid. If the business client wins the case and gets a costs order against the losing party, the paying losing party will pay net of VAT (i.e. not pay VAT) on the costs order. It remains the Commission's responsibility to pay VAT on the legal costs incurred.

4. Enhancement

4.1 Non Prescribed Hourly Rates

1. The basic remuneration is the hourly rate intended to cover the overheads of the firm and the costs of employing the particular fee earner. To that rate is added a 'mark up' for 'care and attention' basically intended to provide profit for the firm. Traditionally this basic mark up was calculated at 35% for attendances upon counsel and 50% for advocacy by the solicitor and all work done to prepare the case except travelling and waiting time which attracts no mark up at all.

2. The 50% mark up could be increased - and on occasions reduced - to take into account particular circumstances. The factors that may lead to the exercise of discretion to increase the mark up are those commonly called 'the pillars of wisdom'. The task of the assessor is to consider whether any one or more of these factors is present to an exceptional degree that would justify increasing the mark up for care and attention.

3. The amount of costs allowed had regard to all the relevant circumstances, and in particular to

   (a) the complexity of the item or the cause or matter in which it arises and the difficulty or novelty of the questions involved.

   [It is important to judge the degree of complexity against the norm or that type of case taking into account the level of seniority of the fee earner involved. A junior fee earner timeously conducting a moderately complicated case may well be entitled to some increased mark up whereas a senior partner would not. However this must be balanced against the time taken - if the junior fee earner takes a longer time than average to deal with the case no increase is justified].

   (b) the skill, specialised knowledge and responsibility required of. and the time and labour expended by, the solicitor or counsel.

   [Where the skill of the solicitor enables the case to be conducted with more expedition and/or less time spent than average this will merit some increase in the mark up. The converse is also true and there should either be a disallowance of work unreasonably done by a less skilled fee earner or a reduction in the mark up. In all cases it is important to take into account the level of fee earner (where this affects the hourly rate). It will not be unreasonable or a junior fee earner whose expense rate is, say, two thirds of that of senior partner to take rather longer in dealing with the case].

(c) the number and importance of the documents (however brief) prepared or perused.

[Care must be exercised not to allow the number and importance of the documents both in the time charged for perusals and preparation and also by an increased uplift to be double charged. However where there is very substantial documentation this will be an indication of the weight and complexity of the case which should be reflected in the allowance of mark up or enhancement].

(d) the place and circumstances in which the business involved is transacted.

[The place is relatively rarely of significance but the circumstances under which the work is done may well be. This can include the circumstances of the client which may led to greater responsibility or the solicitor (though care must be taken to ensure that this is not already reflected in the time taken,; e.g. language problems may well mean longer attendances but not necessarily an increase in the responsibility accepted by the solicitor.)]

(e) the importance of the cause or matter to the client.

[All cases are by their nature important to the client. For discretion to be exercised under this head the solicitor will have to demonstrate some unusual degree of importance, e.g. domestic violence, staving off insolvency, need to keep a business going while claim for compensation being made].

(f) where money or property is involved, its amount or value.

[The larger the claim the greater responsibility the solicitor may have to accept -however the size of the claim must be balanced by its complexity. A claim for quadriplegia will inevitable attract more responsibility than a debt claim for the same amount].

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter. but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question'.

[This is unlikely to be a significant factor in many cases to be assessed].

4. In practice while it is important that each item is looked at, the assessor will get a general view of:

(a) the complexity of the case;

(b) the speed and efficiency with which it was conducted;

(c) any exceptional factors relating to documentation, value or the importance of the matter to the client.

and make an overall assessment in the light of these factors.

5. Words from the judgement in ***Maltby v. Freeman*** **[1978] 2 ALL ER 913** may be helpful.

   'No professional man. or senior employee of a professional man, stops thinking about the day's problems the minute he lifts his coat and umbrella from the stand and sets out on the journey home. Ideas, often very valuable ideas, occur in the train or car home, or in his bath, or even while watching television. Yet nothing is ever put down on a time sheet, or can be put down on a time sheet, adequately to reflect this out of hours devotion of time.'

6. This must not be treated as an invitation to make some form of compensation for time which has not been recorded. It is a reflection of the increasing responsibility of the solicitor according to the size and complexity of a case which cannot solely be recognised in time spent.

7. This exercise can apply to the whole of the work done or to particular aspects of it. For example while a boundary dispute may not of itself involve any complexities there may have been an application for an injunction which meant the solicitor putting aside all other work, working 'unsociable hours' and taking on extra responsibility to ensure that the injunction was obtained - or avoided. This might well justify some increase in the mark up for that particular area of work only.

8. In addition it will often be appropriate to look separately at work done by way of advocacy - at an interlocutory hearing or at the trial - and the general preparation of the case. Where a solicitor carries out difficult and/or lengthy advocacy in circumstances in which it might well have been reasonable to instruct counsel it may be proper to allow a larger mark up than 35% or 50%. The work done generally to prepare the case for trial may not justify any increase over and above the basic 50% or if it does a different and quite possibly lower increase than that applied to the advocacy.

9. Unfortunately there is little authoritative comment on the way in which discretion to increase the mark up is to be exercised. Some comments from leading cases may help - but help only a little. In *Johnson and* ***ors v. Reed Corrugated Cases Ltd*** **[1992[1 ALL ER 169** the judge said

   'I am advised that the range for normal, i.e. non-exceptional, cases starts at 50%. which the [taxing officer] regarded, rightly in my view, as an appropriate figure for "run of the mill" cases. The figure increases above 50% so as to reflect a number of possible factors - including the complexity of the case, any particular need for special attention to be paid to it and any additional responsibilities which the solicitor may have undertaken towards the client, and others, depending on the circumstances - but only a small proportion of accident cases results in an allowance over 70%. To justify a figure of 100% or even one closely approaching 100% there must be some factor or combination of factors which means that the case approach the exceptional. A figure above 100% would seem to be appropriate only when the individual case, or cases of particular kind, can properly be regarded as exceptional, and such cases must be rare. I am aware that the figures cannot be precise, but equally in my view the need for consistency and fairness means that some limits, however elastic, should be recognised.'

10. That case was a personal injury matter. The judge also considered the mark up for attendance at a 'conference at which both parties were represented by leading counsel and final settlement was reached.' the solicitor was actively engaged in the process of negotiation although not face to face with the defendant's representatives, her knowledge of the issues and of the different plaintiffs enables her to play a vital part. The judge allowed a 65% uplift (as opposed to the basic 35% or such attendance).

11. Another important case was ***Loveday v. Renton & anor (No 2)*** **[1992] 3 ALL ER 184**. This case is important for making it clear that mark ups were not to be used to compensate for low expense rates. The expense rate should be properly calculated and the mark up applied to that rate on the general principles already discussed. It was also stressed that it was legitimate to look separately at different parts of the bill. In his judgement the judge said:

    'In my judgement it is clear that an uplift of at least 100% is justified. The question of causation which was tried was complex and difficult and could fairly be described as including elements of novelty even though there had been a previous similar action ... The solicitor was required to show an understanding of technical evidence which differed in degree, though not in kind, from that experienced in other cases involving scientific or medical disputes. The volume of documentation was very large indeed and required detailed consideration. the matter was important to the client, but not exceptionally so ... However the action was in effect being fought as a test case ... it would therefore ... be wrong to approach this litigation ... ignoring the existence of the other claimants and the very large sums at issue overall ... The Legal Aid Board was also treating this case as a test case ... [it] authorised the employment of four counsel including two leading counsel .. [they] were expecting the solicitors to conduct it as a test case and in the assessment of the solicitor's reasonable charges that factor should be taken into account ... The litigation was being conducted against a background of legitimate public interest and concern. The solicitor having the conduct of the case further deserves credit for the uninterrupted personal attention which he gave it ... I [allow] 125%.'

12. Further consideration was given in ***Brush and anor v. Bower Cotton & Bower (a firm)*** **[1993] 1 WLR 1328, [1993] 4 ALL ER 741**. Without wishing to differ from the approach in the *Johnson* case the judge said *'I do not think that at this very far end of the range much profit is to be gained by quibbling over the use of words, I certainly accept that, as one gets higher and higher above 75%, more and more it should be said that a case should be approaching the exceptional.'* Factors which the judge took into account are summarised in the judgement as

'there was a very large amount at stake in the claim and counterclaim, although the claim itself presented no particular difficulties. The counterclaim was for a very substantial amount. Litigation was of crucial importance to Mr Brush. It was a difficult case to argue and prepare and to plead ... not only on liability but also on quantum. It involved ... the perusal of a very large number of documents and it needed intense application over periods of time and very considerable command of the relevant facts by the solicitor who was responsible not only for the tactics in individual aspects of the whole of the work that he was doing trying to stave off his client's personal bankruptcy but also in relation to the strategy which should be adopted.'

For this aspect of the case an uplift of 90% was allowed.

13. On another aspect of the case the judge said:

...'this was not a particularly unusual piece of civil litigation. the job of the solicitor was to do his level best for his client, inheriting a situation in which a great deal of time had slipped by, the limitation period was past, and endeavouring to salvage a substantial claim for his client from being struck out. This involved very careful consideration of the issues as to which .. there was sufficient documentation available to show that a fair trial was still possible ... Added to that was the additional problem that this was running side by side with the BMT litigation Important matters were happening in both and [the solicitor] was having to keep a number of balls in the air at once to liaise with counsel and keep the client in his confidence.'

75% was allowed for this aspect of the case.

14. These cases were all very substantial and not the sort of case the costs of which are likely to be assessed. However the approach of the judges towards the question of uplift gives general guidance as to the way this issue should be addresses on any taxation or assessment.

15. Until 1999, the above was common practice. The current practice is for the charging rate to be agreed with the client under Solicitor Practice Rule 15. The rates currently allowed are in the guide to the Summary Assessment of Costs published by the Supreme Court Costs Office. These should be referred to in all non prescribed rates cases where the Commission is the assessing authority.

4.2 Costs Assessed Under The Civil Remuneration Regulations

1. As in all cases of enhancement it is for the solicitor to claim enhancement where he considers that it is justified, to indicate the level of enhancement sought and to justify both the need for enhancement and the level sought. It is not for the assessor assessing the bill to look for justifications for enhancement. S/he must judge the strength of the arguments put forward by the solicitor.

2. The code for the enhancement of bills where these regulations apply is contained within the regulations themselves (reg. 5). The Regulations provide for a fixed level of remuneration which may be increased by up to 100% in the county court or High Court and potentially by up to 200% in a High Court case. The Regulations provide a two stage process.

3. The first stage is a threshold test - whether any enhancement should be allowed.

4. The 'relevant authority' - the taxing officer or caseworker assessing the case - must be satisfied that

   (a) the work was done with exceptional competence, skill or expertise:

   (b) the work was done with exceptional dispatch; or

   (c) the case involved exceptional circumstances or complexity'.

5. While the wording is quite different from and indeed rather more straightforward than the ‘pillars of wisdom', the effect is very similar. The factors mentioned above with regard to increasing the mark up in the High Court and county court will all be relevant as will the approach indicated in the three cases referred to.

6. The only problem is the word 'exceptional'. Unfortunately it is a word which is capable of a range of meanings from 'just out of the ordinary' to 'special' or 'highly unusual'.

7. It is suggested (without any judicial authority) that the proper approach is to ask whether the case was significantly 'out of the ordinary' in any of the ways set out in the regulations. If so then it will be appropriate to go on to the second stage to consider the amount of any increase.

8. In point of principle CLA 21 the question was whether membership of the Law Society's Medical Negligence Panel was an exceptional circumstance (as membership of the Law Society's Children Act panel is under the Family Remuneration Regulations.

   'Membership of the Law Society's Medical Negligence Panel is not in itself an exceptional circumstance justifying payment of an enhanced rate under Regulation 5(1)(a) of the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994, but membership of the Panel may be a factor which contributes to a decision that enhanced rates are justified.'

9. The second stage has its own set of criteria, namely that the 'relevant authority' shall have regard to

   (a) the degree of responsibility accepted by the solicitor;

   (b) the care, speed and economy with which the case was prepared;

   (c) the novelty, weight and complexity of the case.

10. Once the decision is made to allow some enhancement the bill must be re-examined to see whether all or any of these factors apply and their extent.

11. It is in this context that the reference to 'exceptional' in ***Johnson v. Reed Corrugated Cases Ltd*** is relevant (although not that useful). Any enhancement that might be regarded as equivalent to a 100% mark up should only be allowed in rare cases.

12. It is clearly wrong to look at the total effect of hourly rate plus enhanced mark up and then to increase the rates by enhancement to meet this figure. The prescribed legal aid rate is the basis and any enhancement must be calculated by reference to that and nothing else. The question is not what percentage enhancement is required to equal 'commercial' rates with the appropriate uplift but what enhancement properly rewards the particular circumstances of the case treating the prescribed rate as adequate remuneration for the average case.

13. Since the introduction of the Civil Procedure Rules in 1999, solicitors have been discouraged from calculating their fees for assessment by reference to the 'A' and 'B' factors, and charging rates are now routinely expressed as a single, all-inclusive, figure. The amounts being allowed for the four grades of fee earner in courts throughout the country is collated annually by the Senior Costs Judge and is published in the various legal journals as a guide to practitioners and the judiciary dealing with costs.

14. On the other hand the regulations clearly contemplate not only enhancements of 100% but in exceptional circumstances in the High Court even 200%. This would tend to suggest that a direct comparison as set out above is simplistic and that a rather more generous approach should be adopted. It may well be that it is better to approach the question of enhancement in 5% or 10% steps increasing as more of the Reg. 5(3) factors is present and as one or more of them is particularly strong.

4.3 Enhancement In Proceedings Assessed Under The Family Remuneration Regulations

1. The Family Remuneration Regulations take a rather different approach to enhancement than that adopted by the Civil Remuneration Regulations.

2. The approach to enhancement is broadly the same whether the family proceedings are Care proceedings or not, however the actual calculation may be different because of the difference in the way that prescribed rates were applied before April 2002.

3. To deal first with the provisions as to enhancement. Reg. 3(4) (c) provides that the 'relevant authority' may allow a larger amount than the rates prescribed in the Regulations.

   'where it appears to him reasonable to do so having regard to -

   i) the exceptional competence with which the work was done; or

   ii) the exceptional expedition with which the work was done; or

   iii) any other exceptional circumstances of the case including, in the case of care proceedings, the fact that the solicitor was a member of the Law Society's Children Act panel.'

4. These provisions are similar to the threshold provisions of the Civil Remuneration Regulations. There are no separate factors as to how the 'larger amount' should be assessed.

5. The regulations have been considered by the High Court in some depth in the case of *Re Children Act (Taxation of Costs)* [1994] 2 FLR 934. This was a care case but much that is said is of assistance in the assessment of any Family costs and indeed can be drawn upon in the exercise of other provisions as to enhancement. This case dealt primarily with enhancement under Family Remuneration Regulation 3(4)(c)(iii). The factors in paragraph (4)(c)(i) and (ii) must also be considered.

6. In the first place the Judge said that legal definition could not be given to the expression 'exceptional' - the courts 'are well used to dealing with these words and taxing officers are well able to recognise exceptional circumstances.' there is therefore nothing in general to challenge the view set out above with regard to the same expression in the Civil Remuneration Regulations. However while declining either to set out an exhaustive list of exceptional circumstances or to restrict the discretion of the taxing officer in any particular case he made a number of specific comments as to what might or might not amount to exceptional circumstances.

7. The judge's detailed observations are effectively incorporated into the point of principle CLA 9 (amended) which is set out below.

8. The judge also recognised that the solicitor in that case was a member of the Law Society's Children Act panel by increasing the prescribed rate by approximately 20%. Such a large increase not relating to any specific circumstance of the case tends to support the view expressed above with regard to the Civil Remuneration Regulations that once exceptional circumstances are found the approach to enhancement can be rather more generous than strict comparison with 'mark up' rates would indicate.

9. The same case is also important for indicating the approach to exercising discretion to exceed the scale in Family cases. There had previously been suggestions in ***Freeman v. Freeman*** **[1995] 1 FCR 669** that once the taxing officer had decided to exercise discretion he '*was completely freed ... and it is his duty thereafter to assess what in all circumstances is a fair and reasonable fee'*. This comment had been used to argue that once discretion was exercised the taxing officer should automatically allow the 'commercial rate' for doing the work, i.e. the full expense rate plus an appropriate 'mark up'.

10. In *the Children Act* case the judge criticised not the ruling itself but the way it had been interpreted. The prescribed scale was one of the circumstances to be considered. The proper approach is to work out what should be allowed at the prescribed rates. Then to consider what larger sum might be allowed on a 'commercial' rate basis and then to decide at what point between those two figures the costs should be allowed. This approach was later followed by the Court of Appeal in the very different circumstances of the discretion to exceed the maxima prescribed by County Court Scale 1. It should therefore be taken as the proper approach to the exercise of discretion as to the amount of enhancement in any case in which there is a prescribed rate but an ability to allow a larger figure. Where between the two figures the proper amount to be allowed lies is still a matter which can only be decided by the assessor in the light of his/her judgement and experience. Clearly to allow the full 'commercial' rate would require a finding that the case was exceptional in a number of ways.

11. The question of enhancement in care proceedings where the solicitor is member of the Law Society's Children Act panel was further considered in point of principle CLA 8 (amended) -

    'Membership of the Law Society's Children Act Panel is itself an exceptional circumstance under Reg. 3(4)(c)(iii) of the Legal Aid in Family Proceedings (Remuneration) Regulations which gives a discretion to the assessing officer to allow a larger amount than that specified where it appears to him to be reasonable to do so in any Particular part of the bill of costs in question'.

12. As a general rule, where a solicitor appeared as an advocate, this is not an exceptional circumstance. Where, however, a Children Panel solicitor appeared as an advocate in care proceedings, this will be an exceptional circumstance. Whether this justifies of itself allowance of a 'larger amount' is a question for the exercise of discretion,. in consideration of all the circumstances of the case. An uplift in hourly rates or panel membership in cases lasting more than two days would normally be justified.

13. Further consideration was given in CLA 9 (amended)

    'When considering a claim for enhanced rates on the basis of Regulation 3(4)(c)(iii) Legal Aid in Family Proceedings) Regulations 1991 consideration should, when deciding if there are 'any other exceptional circumstances' of the case, be given to whether any of the following exist:

    (A) Factors which might raise an exceptional circumstance:

    i) innate difficulties of communication with the client, for example mental health problems, deal, speech-impaired or autistic clients, or clients requiring an interpreter (although attention should first be given as to whether this has been covered by longer than normal hours of attendance being claimed);

    ii) a conflict of detailed expert evidence (as opposed merely contested expert evidence) and/or proliferation of expert witnesses;

    iii) a hearing in excess of two days [conducted] without counsel;

    iv) conflict between the guardian ad litem and the child where the child instructs his own solicitor.

    (B) Factors which might but would not necessarily raise exceptional circumstances:

    i) detailed contested allegations of sexual or serious abuse;

    ii) a large number of parties with competing applications;

    iii) involvement of children with different needs'.

14. The transfer of the case to a care centre or from a care centre to the High Court is indicative of complexity and weight only and [are] not conclusive of exceptional circumstances. Where exceptional circumstances are said to arise there must be a factor, or combination of factors in the particular case which is exceptional or are unusual in care proceedings.

15. The factors set out above are a non-exhaustive list. They relate to circumstances of the case itself and not to claims for enhanced remuneration based on Regulations 3(4)(c)(i) and (ii) Legal Aid in Family Proceedings (Remuneration) Regulations 1991 with regard to the manner in which the work was done.

16. Where exceptional circumstances are sought to be established ad solicitors seek remuneration on the basis of the assessing officer's discretion pursuant to Regulation 3(4)(c) the solicitor must precisely identify the exceptional circumstances in respect of which enhancement is sought (see *Re Children Act 1989 (Taxation of Costs)* 2 FLR 934.'

Example:

(a) ***Freeman v. Freeman*** (above), enhancement was applied to solicitor's costs as follows: Interim directions hearing - £95 per hour = 50% increase;

(b) Six day final hearing - £95 per hour = 50% increase;

(c) Attendances on client and others at final hearing - £90 per hour = 50% increase;

(d) Other attendances on client - £84 per hour = 40% increase;

(e) Preparation of documents - £90 per hour = 50% increase;

(f) Other preparation - £72 per hour = 20% increase reflecting membership of children panel;

(g) Routine letters and calls - allowed at prescribed rate 'by their very nature these items are routine and are not in any way exceptional.

The percentage increases are approximate only.

17. When it is decided to exercise discretion in Care cases there are two possible approaches. One is to look first at the total costs in accordance with the prescribed rates then at the total costs at 'commercial rates' and then to assess a global figure between the two. That is the approach adopted in *Re Childrens Act Costs*. The other is to calculate the costs at a rate between the prescribed rates and 'commercial rates'. The first is more in accordance with authority although there can be nothing in principle against either method.

18. In non care cases within the Family Remuneration Regulations there are three alternatives. The first is to follow the global approach as above. The second is to calculate the costs at a rate other than the prescribed rate - but not exceeding the 'commercial rate' for the particular court - and to apply the prescribed 50% uplift. The third course is to vary the uplift whether on the basis of the prescribed rates or such other rate as may seem appropriate.

4.4 Enhancement Of Whole Or Part

1. Not only must the assessor decide whether a case merits enhancement s/he must decide whether that enhancement should apply to the whole of the case or to particular aspects of it. Again it may be helpful to consider the three main categories as above.

2. It is common for increases in mark up to be allowed on a relatively broad brush basis. Separate consideration will be given to each element in the bill, namely attendances at court, attendances at trial and at conferences and general preparation. Each may require a different mark up. However the most significant item will almost always be the preparation Item and frequently 'enhancement' will be given by increasing the percentage mark up on the whole of this. There will be cases (such as ***Brush v. Bower Cotton***) where the work can be divided between different sections of the action, the most common will be where there is an application for substantial interlocutory relief - such as an interlocutory injunction.

Civil Remuneration Regulations

3. The wording of this regulation is far from happy. The threshold test tends to suggest that it is 'the work' or 'the case' which has to be exceptional. However in Reg. 5(2)there is a reference to the threshold test as referring to 'any item or class of work'. From this it would appear that the main stress is on particular items or classes of work rather than the whole. However, the main item will inevitably be item 3 in the scale - 'all other preparation work' - and this can be approached as a single item or as a conglomerate of various 'classes' of work. It is therefore permissible.

   (a) to enhance the whole bill;

   (b) to give enhancement to the work within item 3 but not, e.g., for items 1 and 2;

   (c) to give enhancement to particular areas of work within items 1,2 and 3 or any of them;

   (d) to give enhancement on all or any attendances coming under items 4 or 5 whether or not there has been enhancement of any other items.

   It would be unusual to enhance item 6.

Enhancement under the Family Remuneration Regulations

4. The wording of the regulation refers to 'work' or 'case' and this would appear to indicate that the costs of the whole or any part of the 'work' may be enhanced. However in the *Re Childrens Act Costs* case there was a very distinct 'steer' towards enhancing individual items of work rather than the whole. See the example from ***Freeman v. Freeman*** (above) where although significant increases were allowed for attendances, there was no increase in the prescribed rate for routine letters and telephone calls.

Generally

5. It is the solicitor who will claim enhancement and indicate the level of enhancement claimed. Within the parameters set out above the caseworker will have to respond to the particular claim made by judging whether the statutory (or common law) requirements have been met.

4.5 Panel Membership and the Guaranteed Minimum Enhancement

1. These changes were brought into effect by amendments to the General Civil Contract Schedule (which sets the levels of remuneration subject to the amount authorised by regulation, and by the relevant amendment regulations namely the Community Legal Service (Funding) (Amendment) Order 2001, the Legal Advice and Assistance (Amendment) (No. 2) Regulations 2001 and the Legal Aid in Family Proceedings (Remuneration) (Amendment) Regulations 2001). The increase in remuneration only applies to firms with a General Civil Contract and the distinction between franchisees and provisional franchisees is removed for future work so that the increases apply to all qualifying work done on or after 2 April 2001 by a contracted firm.

2. The enhancement provisions within the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 were amended so that cases where enhancement was currently available namely in the County Court and High Court attract a guaranteed minimum enhancement of 15% across all work where that work is done by a fee-earner on the accredited specialist panel of the Solicitors Family Law Association (SFLA) or the Law Society’s Children Act Panel. Enhancement is not available for non-care cases in the magistrates’ court.

3. Solicitors who are members of the Law Society’s Family Law Panel did not initially get an automatic enhancement. The Law Society completed work on a second tier of membership for this Panel, The Family Law Panel – Advanced. From 8 April 2002 those who are on this higher tier of the Family Law Panel were entitled to the guaranteed minimum enhancement for work done on/after that date.

4. Assessors should only allow the increased hourly rate and minimum guaranteed enhancement in relation to work done by contracted solicitors on or after 2 April 2001. Work done before that date is claimed at the previous remuneration rate with written justification for any increase on the items which the solicitors claimed enhancement.

5. Fee-earners who are not on the eligible panels are able to claim enhancement under the existing provisions under the Legal Aid in Family Proceedings (Remuneration) Regulations 1991. Whilst there is no guarantee minimum, enhancement should be allowed where the circumstances of the case meets the statutory criteria. In such cases however letters, telephone calls, travel and waiting are likely to attract an enhancement exceptionally.

6. Where the guaranteed minimum enhancement of 15% has been claimed by a suitably accredited specialist, higher amounts of enhancement may be granted on discretion by the assessor if the case justifies it.

7. Where the fee-earner is a member of the accredited specialist panel of the SFLA the enhancement is applied to all work done in any family case. In contrast where the fee-earner is a member of the Law Society's Children Act Panel the enhancement is only available for work done under a certificate that includes proceedings relating to children. This means that if a certificate covers both children proceedings and ancillary relief all the work done will attract the minimum enhancement but this is not so if the certificate only covers ancillary relief. Proceedings relating to children are defined as "*proceedings within which the welfare of children is determined, including without limitation, proceedings under the Children Act 1989 or under the inherent jurisdiction of the High Court in relation to children"*.

8. The minimum guaranteed enhancement is not available for supervision or to work done by other fee-earners. Whilst such work is not subject to the guaranteed minimum enhancement it may attract enhancement on assessment in the normal way if the criteria in Regulation 3(4)(c) of the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 are satisfied. When preparing the bill for assessment the narrative must clearly state the fee-earner for whom the enhancement is claimed and the basis the enhancement under the amended regulations.

9. Where work is done before and after the change in approach to enhancement, different approaches apply and solicitors should reflect this when claiming costs. Enhancements on work done before the change is wholly discretionary. Work done after is subject to the guaranteed minimum (subject to the membership and work criteria) with greater discretionary amounts if justified. Solicitors should not seek to compound the enhancements (i.e. to add the guaranteed minimum to the enhancement amounts claimed for work done prior to its introduction). Whilst the guaranteed minimum is automatic, it is not a top up. Further enhancement must be justified by the particular circumstances of the case.

4.6 Enhancement in Clinical Negligence cases.

1. Regulation 5(2) which refers to "any item or class of work". The definition of "item" is clear. The definition of "class" is really dictated by the realities of the situation. To argue that a particular "class" of work means, in effect, that an enhanced rate applies to all areas of preparation, for example, is unrealistic because some preparation may justify an enhanced rate and some may not.

2. To bring the matter into focus, one has to consider the other parts of the Regulations and to ask oneself whether one can say that all preparation is a "class" of work which would require an enhanced rate when some of that preparation, for example, could have been done with exceptional competence, skill or expertise but some could not. The Regulations clearly anticipated that each item of work within a particular description would be assessed on an individual basis.

3. Solicitors can be members of the Law Society's Medical Negligence Panel. This is obviously a relevant matter although it is not specifically mentioned in the Regulations (in contrast to the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 which do make specific reference to the Law Society's Children Panel).

4. Specialisation is encouraged because it means that members of the public will be advised by persons who are skilled and experienced. To translate that into the proposition that all work undertaken by a Medical Negligence Panel member comes within the enhancement provisions in Regulation 5 must take matters too far.

5. In dealing with a claim for an enhanced rate due to the exceptional circumstances of the case, the assessor should look to see what makes the subject case exceptional as compared with other clinical negligence cases. After all, clinical negligence cases often involve the client in stress, pain, discomfort and complex medical procedures. There are often catastrophic consequences for the client. Practitioners in this field are well used to these things. What needs to be established is that some additional element to the particular item or class of work is unusual or out of the ordinary as compared with other clinical negligence cases.

6. It is difficult to set out any particular approach to be taken because each individual case has to be considered on its merits. However, where a medico-legal assistant has taken over the burden of analysis and instructing experts it takes the burden off the Solicitor dealing purely with legal matters and accordingly an enhanced rate in those circumstances is less likely in the event that Counsel is instructed. Where Counsel is not instructed then obviously the legal fee earner is more likely to pass the test of what is an enhanced rate under the Regulations.

7. In a case falling within the Regulation 5 criteria both fee earners may be entitled to an enhanced rate provided there is no duplication of tasks. It will depend on the nature of the work done and separate consideration will need to take place.

Point of Principle *CLA 21 Amended.*

Membership of the Law Society's Negligence Panel is not in itself an exceptional circumstances justifying payment of an enhanced rate under Regulation 5(1)(c) of the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994, but membership of the Panel may be a factor which contributes to a decision that enhanced rates are justified.

Factors which may indicate whether a clinical negligence case was conducted with exceptional competence, skill or expertise, so as to justify an enhancement under Regulation 5(1)(a) of the same Regulations, include: the extent to which the solicitor relied on his or her own expertise rather than counsel; and whether the solicitor him or herself has obtained the client's medical records, identified and assessed the relevant contents, and following that analysis, sent a detailed letter of instruction to the client's medical expert or experts.

Part II – Counsels Fees

5. Use Of Counsel

5.1 General

1. The claim for assessment may include a claim for counsel's fees. In calculating whether or not the amount claimed in the CLAIM1 or 2 exceeds the Commission's assessment limit, the amount of counsel's fees (net of any VAT) is included.

2. Counsel may be instructed to:

   (a) advise on the merits of the case - including whether any limitation on the funding certificate should be removed/amended;

   (b) settle court documents (pleadings);

   (c) advise on evidence, merits and quantum;

   (d) meet in conference - advising the funded client, their solicitor and others in person;

   (e) attending hearings to set as advocate;

   (f) advise on an appeal;

   (g) draft consent orders/draft orders, statements or other documentation within the proceedings;

   (h) settle interrogatories.

   NOTE: this is not an exclusive list of the ways in which counsel may be used during the course of a case.

5.2 Reasonableness of Instructing Counsel

1. Three questions may arise

   (a) was it reasonable to instruct counsel;

   (b) is the instruction within the scope of the certificate;

   (c) whether the amount of counsel's fees is reasonable.

2. General Regulation 59(1) says that 'where it appears to the funded client's solicitor that the proper conduct of the proceedings so requires he may instruct counsel'.

3. This places the responsibility for deciding whether or not to instruct counsel on the solicitor.The test is a subjective test whether "the conduct of the proceedings so require". Objectively, if the conduct of proceedings do not so require, the instruction could be challenged on assessment, though this is a rare challenge.

4. Even though solicitors have rights of audience in the county court, in magistrates' courts (Family Proceedings Court) and on hearings in private in the High Court counsel is often briefed to attend such hearings and deal with interlocutory work (as set out above) prior to and, sometimes, after the trial. It may well appear unreasonable for 'two lawyers' to be involved in a relatively small value or simple cases but, in practical terms it may be difficult to establish objectively that it was unreasonable to instruct counsel. Only counsel has rights of audience in open court in the High Court or in the upper Appeal Courts (Court of Appeal and House of Lords).

5. It will seldom be reasonable to disallow counsel's fees in principle if the work done was within the terms of the certificate and any necessary authorities were obtained. The reason for this is that counsel is not realistically able to refuse instructions (except in cases falling within the Family Graduated Fee Scheme) though there may perhaps be a few cases when any reasonable counsel would have returned the papers to the solicitors. If it is felt that counsel has been instructed too often the reduction should not be in counsel's fees, which would otherwise appear reasonable. The reduction should be in the solicitor's profit costs, under the provisions of the Remuneration Regulations, or by way of wasted costs. The basis of so doing would be to say that there was an over-reliance on counsel.

6. In such a situation it is important first to assess the comparative costs of instructing counsel, i.e. the fee charged plus the solicitor's charges for preparing instructions, correspondence with counsel and considering his advice or draft pleading.

Example:

Counsel may charge the recommended £75 for settling the particulars of claim. In addition the solicitor may have spent two hours in drawing instructions to counsel and considering his draft plus, say, two letters. The total cost might be in the order of £225.00. This would equate to about three of the solicitor's time. A competent solicitor should be able to draft any reasonably straightforward claim in significantly less time. That might well indicate that in terms of cost it was unreasonable to instruct counsel to do so.

7. Another factor which needs to be considered is the size and complexity of the case. If the size and complexity of the case would justify instructing counsel at the trial it **may** be reasonable for him to settle the pleadings upon which he will have to base his advocacy.

8. Each case must be viewed on its merits - assistance may be obtained by looking to see how often counsel was instructed. If, for example, he was instructed only to settle pleadings, to give an advice on merits quantum and evidence and to attend the final hearing it would be difficult to treat this as unreasonable. If, however, he had been instructed more frequently in a reasonably straightforward case that might well indicate lack of experience by the solicitor, and lead to a reduction of the solicitor's claim for costs.

5.3 Certificate for Counsel

1. Prior to the introduction of the Civil Procedure Rules, no fee could be paid to counsel attending in the High Court in chambers; in the county court on an interlocutory hearing or where multiple counsel where used unless the court certified the case as “fit for counsel”.

2. CPR 44.8.7 now provides that on detailed assessment the costs judge should have regard to any order of the court which expresses an opinion as to whether or not the hearing was fit for the attendance of one or more counsel. The court is unlikely to make an order unless:

   (a) expressly asked by the paying party;

   (b) more than one counsel appeared; or

   (c) the court wishes to record that the case was not fit for counsel.

3. The court will always express an opinion where more than one counsel appears. Assessors should ensure they have sight of such orders. If counsel’s fees are not to be allowed, there should be a notional assessment of the costs as if the solicitor had acted as advocate (as well as a disallowance of the counsel’s brief fees and the solicitor’s costs of his instruction). The Commission will follow this principle. If the court order expresses an opinion it will be considered on assessment.

5.4 Entitlement to instruct counsel

High Court and county court

1. There are specific restrictions on the use of counsel in the Regulations. In the High Court and county court, (in both civil and family proceedings) whatever the date of the certificate General Reg. 59(1) provides that unless there is specific authority in the certificate, or an authority has been given by the Regional Director, a Queen's Counsel or more than one counsel shall not be instructed.

2. No counsel's fees should be allowed in these circumstances unless the appropriate authority has been given. Strictly General Reg. 63(4) does permit such costs to be allowed on assessment but the authorities with regard to the instruction of a Queens Counsel or more than one counsel are clear that this loophole should not be used.

3. There is one, rare, exception to this rule and that is that where more than one counsel or a Queen's Counsel has been instructed without authority. The fee may be recoverable if and to the extent that it is allowed between the parties (General Regulation 63(3). This exception will not occur on a legal aid only assessment. ***Din v Wandsworth London Borough Council (No. 3) [1983] 1 WLR 1171; Robyn Hayley Hunt v East Dorset Health Authority [1992] 1 All ER 539*** **and Regulation 63(3).**

4. Even where authority is given to instruct more than one counsel or a Queen's Counsel the fees should not be allowed unless the solicitor has, in addition to obtaining the authority, obtained his client's informed consent. **Re Solicitors; Taxation of Costs [1982] 2 ALL ER 841**. The solicitor's file should therefore be checked to ensure that there is a letter to the client explaining the possible effect such instructions may have if not recovered inter partes and a written consent was received. A clear and unambiguous attendance note confirming the advice and the consent will suffice particularly if the consent has been confirmed in writing by the solicitor or the client.

5.5 Magistrates' Court

1. In any 'authorised summary proceedings' counsel may not be instructed unless authority is given in the legal aid certificate or by the Area Director (Gen. Reg. 59(1)(a). However the effect of this is limited by General Reg. 63(4), which states that despite the absence of prior authority where costs are incurred in instructing counsel 'payment in respect of those costs may still be allowed on taxation'.

2. There are three possible situations:

   (a) Prior authority granted- counsel's fees are to be allowed as for county court proceedings whether under the family remuneration regulations or the family graduated fee scheme.

   (b) No prior authority given but it is considered that it was reasonable to instruct counsel e.g. because of a point of law, evidential problem or it is considered to be a complex care case (for a magistrates court), fees are allowed as under (i);

   (c) No prior authority given, not deemed reasonable to instruct counsel, apply the Maximum Fee Principle - See 5.3;

5.6 Terms of the authority

1. It is also important to ensure that the instruction of counsel, where authority is required, is strictly in accordance with the terms of the authority given.

2. The following points should be noted:

   (a) Where an authority is given or the terms of a limitation allow the obtaining of counsel' opinion that authority/limitation covers one opinion only, see **Point of Principle CLA 1 (amended).**

   'A certificate bearing a limitation containing the words 'Limited to obtaining counsel's opinion' covers the obtaining of one opinion only (which may follow a conference). Work done by a solicitor to clarify a genuine ambiguity in the opinion itself could, however, be allowed. If at the time of receipt of counsel's written opinion, counsel is not in a position to advise on the settling of proceedings no further work can be carried out until the limitation is removed or amended to allow either a further written opinion from counsel or further work by the solicitor.

   (b) Authority to instruct a Queens Counsel does not cover a senior junior;

(c) An authority for 'briefing counsel' covers only:

i) attendance at the trial;

ii) a conference **after** delivery of the brief;

iii) preparation of a skeleton argument (certainly in an appeal or in the Court of Appeal and where reasonable in any court) **Din v. Wandsworth LBC (No 3)**

(d) An authority for 'instructing counsel' includes any instructions to or briefing of counsel after the date of the authority;

(e) an authority for 'instructing leading counsel alone' will cover work normally done by a junior such as settling court documents.

NB: These definitions are not exclusive and counsel's preparation may include drafting a chronology/ submissions/skeleton argument and draft orders.

5.7 Quantum of counsel's fees - General

1. Unfortunately this is an area where there is very little helpful guidance. The majority of the leading cases deal with very general principles only.

2. Counsel's fees in civil and family law cases are 'at large'. i.e. at the discretion of the taxing officer in all cases except those which fall within the prescribed rates in the Family Remuneration Regulations or the Family Graduated Fee Scheme (see 5.12 and 5.16). Much of the comments in case law will help in giving some guidance to the way in which counsel's fees are calculated even though that case law strictly applies only to family cases.

5.8 Cases Not Within the Family Remuneration Regulations or Family Graduated Fees

Interlocutory fees.

1. Interlocutory fees cover such work as drafting court documents, advising and drawing opinions and attending conferences. Payment of counsel for attending an interlocutory hearing or a trial is by way of Brief Fees and Refreshers.

2. The only specific guidance as to the level of counsel's fees was that contained in the Scales of Interlocutory fees for personal injury and road accident cases agreed between the General Council of the Bar and (a) the Chief Taxing Master (for the High Court) and (b) the Association of District Judges (for the county court). There is no direct replacement in the Civil Procedure Rules.

3. While the scales were for guidance only, they were followed very closely unless there were strong reasons for exceeding the fees set out, particularly so in the county court. In the High Court the fact that more and more personal injury and road accident cases were heard in the county court meant that fewer High Court cases could be regarded as 'normal'.

4. The fees include the preparation time necessary to carry out the work in accordance with the Instructions to counsel. In general it may be reasonable to assume that fees for the smaller items of work include about one hour preparation and those for more complex work about two hours. While time is seldom a major factor in assessing counsel's fees if the assessor is satisfied that significantly longer time has reasonably been spent a larger fee may be allowed.

5. While these fees apply to personal injury and road accident cases they will provide a broad marker for the level of interlocutory fees in the general run of cases. However, they will seldom be appropriate in clinical negligence cases complex cases.

6. The fees prescribed by the Family Remuneration Regulations for interlocutory work and for the brief may be of some assistance in relatively simple cases not lasting more than about a day. These fees must not be considered or anything other than very general guidance.

5.9 Brief Fees

Fast track trials

1. Under CPR 46.1 the advocate in a fast track trial is paid a fixed amount for the costs of the trial. These are fixed by reference to the value of the claim.

Value	Amount of fixed costs the court can award
Up to £3,000	£350
£3,001 to £10,000	£500
more than £10,000	£750

2. If the advocate acts for more than one party only one award is made (CPR 46.4). The court cannot award more or less than these fixed costs unless it decides not to award any fast track costs or CPR 46.3 applies and the court awards an additional £250 in respect of the legal representative’s attendance. Further costs may be awarded if there is a separate trial of an issue. These additional costs cannot exceed 2/3rds of the amount of the claim. For other hearings the fee is at large and the guidance below applies.

In the Multi Track

3. The brief fee is intended to cover the preparation of the case for trial (or other hearing) travelling to court and any other work carried out on the first day of trial together with the first five hours of the trial. The brief fee includes:

   (a) All preparation for the trial;

   (b) Travelling time and expenses to the first day of the trial (except for junior counsel in Family Remuneration Regulation cases);

   (c) Overnight expenses for the first day of the trial;

(d) Waiting time on the first day;

(e) Negotiating, discussions with the solicitor and conferences at court on the first day.

4. The brief fee also includes, where relevant or appropriate, the preparation of a note of the judgement, transcribing such a note and submitting it to the judge for approval, revising it and providing any necessary copies; however an additional fee may be charged for attending on a later day when judgement is not given at the conclusion of the trial **(Practice Direction (Counsel fees: Note of Judgement) [1994] 1 ALL ER 96**.

5. The brief fee should reflect all the work that is necessary to ensure that the client is properly represented. This can include more than simply appearing in court. There may be meetings of counsel to agree strategy and tactics, meeting with experts, and preparation of final submissions. In publicly funded cases it is proper for counsel's clerk to reflect such work after the event in the brief fee. **Loveday v. Renton and anor (No 2) [1992] 3 ALL ER 184** - an important case in discussing the nature of brief fees at least in very complex actions.

6. The fact that counsel carries out work in preparation for the trial in anticipation of the delivery of a brief does not prevent the fee recognising such work (provided always that the work was done at a time when any necessary authority for the instruction of counsel had been given): **Loveday v. Renton** (above).

7. If the trial continues after five hours a refresher fee is allowed for each period of five hours.

5.10 Refresher Fees:

1. Refresher fees were dealt with in RSC Ord 62, App 2 Pt 1 para 2(2)(b) -

   'A refresher fee, the amount of which shall be in the discretion of the taxing officer shall be allowed to counsel either;

   (a) for each period of five hours (or part thereof) after the first, during which a trial or hearing is proceeding, or;

   (b) at the discretion of the assessing officer, in respect of any day after the first day, on which the attendance of counsel at the place of trial was necessary'.

   The period of five hours excludes the lunchtime adjournment **(Wright v. Bennett** [1947] KB 828).

2. Generally speaking the second alternative is applied only where counsel attends court but for reasons outside his control there is no hearing or the hearing is delayed, e.g. by the unavailability of the judge or the interposition of another case.

Example:

Trial listed for 10.30 on 1.11.97. Counsel leaves Chambers at 8.00, arrives at court at 9.00, has a conference with his client for 30 minutes. Waits one hour. Is then approached by counsel for the other party to negotiate. The judge is hearing a Domestic Violence case. Negotiations fail. The case comes on for its hearing at 2.30. The judge adjourns at 5.00. The case resumes at 10.30 and concludes at 12.00. Only a brief fee is payable.

3. If however the case started at 10.30 on the first day, continued till 1.00 p.m. but the trial did not resume till 10.30 on the following day because an urgent application to commit had to be heard first and counsel were not 'released' (i.e. told by the judge that they need not attend any more that day) counsel would be entitled to a brief fee for the first day and an appropriate refresher for the second day.

4. Where a case lasts only part of a second or subsequent day the refresher fee may be reduced although it is not appropriate to make a simple mathematical calculation of the ratio between the time spent and five hours (**Re. Mercury Model Aircraft Supplies Ltd** [1956] 1 WLR 1153).

5.11 Quantum

1. Guidance for junior counsel's brief fee for those hearings that last up to one hour and for those lasting up to one day can be found in the Guidance on Summary Assessment as published by the Supreme Court Costs Office. These may be used as a guide where junior counsel's fees are not prescribed. Time spent by counsel at a hearing will include conferences and negotiations at the door of the court as well as time spent in advocacy. Lawson v Tiger [1953] 1All ER 698.

2. Unfortunately there is little specific guidance as to the assessment of the proper brief fee. The points made in **Re H** are relevant as points of principle. '*There is ... no precise standard of measurement. The Taxing Master, employing his knowledge and experience, determines what he considers the right figure.*'

   It is largely a matter of experience and comparison of one case with another.

3. The fee paid to opposing counsel (if known) is a relevant but not determining factor (**Lord Chancellor v. Wright [1993] 4 ALL ER 74**). The fact that counsel had two cases at the same court on the same day should not entail the reduction of what would otherwise be a reasonable brief fee. Travelling time or expenses are not allowed in addition to the brief fee except in Family cases.

4. One should not place too much attention to the time element in assessing counsel's fees. However in approaching the relationship between the brief fee and the size of the refresher it can be helpful to have some regard to the time spent. In, say, a five day case the Brief fee might reflect 15 hours preparation in addition to the first five hours of the trial. Thus it could be said to cover 20 hours work. In such a case the relationship between the Brief and the Refresher fee might well be 4:1.

5. In assessing the preparation time account must be taken of the need for counsel to provide chronologies, skeleton arguments, written submissions as required or requested by the court. In ***F v. F*** Leading Counsel claimed to have spent 17 days in preparation and a Brief Fee of £18,000 was allowed for that and the first five hours. Refresher fees were allowed at £1000.

5.12 Family Remuneration Regulations (for certificates issued prior to 1 may 2001)

Prescribed Fees

1. Counsel's fees are prescribed in Part III of the Schedules to the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 (as amended) which came into effect in October 1991. The Family Graduated Fee Scheme (FGFS) replaced these prescribed fees for certificates issued on/after 1 May 2001. Certificates issued before that date are not effected by FGFS even if the certificate is amended to include other proceedings after 1 May 2001. If the case is a FGFS case but escapes – see 5.5 – counsel is paid in accordance with the family or civil remuneration regulations as appropriate.

2. There will usually be little difficulty in identifying the cases where the prescribed fees apply. The prescribed fees apply only to junior counsel. Where a Queen's Counsel carries out work, or appears without a junior, the fee is not determined by the prescribed rates;

3. Prescribed fees other than for the Brief are set out in items 14 and 15 of the regulations. These provide a standard fee with no maximum. Where enhancement is sought the position will broadly be the same as for brief fees except that there are only two questions to be asked:

   (a) is the standard fee reasonable;

   (b) if not by how much should it be increased or reduced.

4. The Brief fee is determined by the length of the hearing. Reg. 3(6) defines these periods as follows:

   (a) 'A one hour fee shall be allowed where the hearing lasts for one hour or less than one hour;

   (b) a half day fee shall be allowed where the hearing lasts or more than one hour and;

      i) begins and ends before the luncheon adjournment, or

      ii) begins after the luncheon adjournment and ends before 5.30 p.m.

   (c) a full day fee shall be allowed where the hearing lasts for more than one hour and;

      i) begins before and ends after the luncheon adjournment, or

      ii) begins after the luncheon adjournment and ends after 5.30 p.m.

(d) a more than full day fee [discretionary] shall be allowed where the hearing

i) begins before the luncheon adjournment and ends after 5.30 p.m. on the same day;

ii) begins on one day and continues into a subsequent day.'

5. The test is clearly only the length of the hearing itself. Time spent travelling or waiting, time spent on a conference or time spent negotiation does not affect the identification of the appropriate prescribed fee. Such factors (other than time spent travelling to court) are factors, which may justify the exercise of discretion at least to exceed the standard fee (though seldom of themselves to exceed the maximum). Thus is a case is not called on till 2.15 and finishes at 5.00 p.m. it will clearly be a half day case. However if it was listed for 10.00 am and counsel has utilised the morning in negotiations it may well be reasonable to allow the maximum fee for a half day - it would not be proper to allow either the standard or the maximum fee for a whole day.

5.13 Enhancement of counsel's fees

1. Subject to these points, the approach to assessing the fee is a threefold one.

(a) first the assessor must allow only the standard fee unless s/he considers unreasonable to do so;

(b) the assessor may then allow such lesser or greater fee as may be reasonable;

(c) however, if the fee is to be increased it may not be increased beyond any maximum fee prescribed unless the assessor considers that owing to the time and labour expended by counsel or to any other special circumstance of the case the maximum fee would not provide reasonable remuneration for some or all of the work to be allowed. In which case the fee to be allowed is at the discretion assessors.

2. The information leading to allowing a fee in excess of the prescribed rates will come from counsel's fee note and any accompanying information. Where a decrease is considered the information will come from the assessor's own reading of the case and his/her assessment of the reasonableness of the fee having regard to the nature of the case and the work done by counsel. It is common for counsel's clerks to claim the maximum fee in the majority of cases - leaving it to the assessor to reduce the fee.

3. It is now clear - **F v. F (Costs: Ancillary Relief) [1995] 2 FLR 702** - that where discretion is sought to exceed the standard rate full information must be given on the fee note. In that case it was said:

'[The district judge] was faced with counsel's fee notes which simply referred to work in the most general terms, for example, 'brief on hearing' and a fee. Such an approach is extremely unhelpful. If a taxing authority is faced with this situation, then he will have little alternative other than to allow the standard fee, which is applicable to the time spent on the hearing. If counsel is to be remunerated for time reasonably spent in preparation, then details of such preparation must be provided. If the time is substantial, then a concise explanation of the issues involved, the documents to be considered and the reasons why so much time was spent on preparation must be given.'

4. Similar guidance was given in the Practice Direction: Registrar's Direction: Matrimonial Causes (Costs) Rules 1988 [1988] 2 FLR 348, para 10.

   'Where the taxing officer is asked to exercise discretion in respect of any item to which [the Regulations] applies practitioners should include the justification in the bill. When considering whether the standard fee payable to counsel is appropriate, or by how much it (or the maximum fee) should be exceeded consideration such as the following (in addition to those set out [in the Regulations]) are relevant:

   (a) unusually long preparation time for the length of the hearing involved, e.g. where a case was settled after being fully prepared;

   (b) the time spent in negotiations immediately prior to the hearing;

   (c) unusually long waiting time at court.'

5. Putting this another way. On a standard basis the assessor, if in doubt as to the reasonableness of the charge, must decide against the counsel seeking payment. Without information as to the time spent and a reasonable justification for it the assessor cannot be satisfied and must allow solely the standard fee.

6. If the assessor considers it appropriate to allow a fee in excess of the maximum or in cases for which there is no prescribed fee (whether standard or maximum) the s/he must have regard to the Pillars of Wisdom. However 'all the relevant circumstances' includes the prescribed fees (where applicable) though where a fee is discretionary because it is taken out of the prescribed rates by coming within the criteria set out in the regulations or is stated ... to be discretionary then the prescribed rates will only be of assistance when the nature of the work concerned is not significantly beyond that work for which specific rates are prescribed. The more heavy and demanding the work the less will be the relevance of the prescribed rates. **(F v. F).**

7. Time spent is a relevant but not overriding factor. As was said in **Re H**

   'time is not as important a factor in the quantification of counsel's fees as it is for those of a solicitor. Historically this arises primarily from the higher proportion of overhead expenses borne by the average solicitor's practice. A solicitor bases his charges on an hourly rate plus mark up, whereas in exercising his discretion when assessing counsel's fees outside the scheduled rate the taxing authority will have in mind:

   counsel's seniority;

the weight of the case;

the involvement of counsel;

the 'going rate' for counsel's fees.

He will bear in mind the gravity of the case and the level of counsel's commitment. There are cases in which counsel will be totally immersed to the virtual exclusion of all else in order to discharge his duty properly to his client. However, although such a case may have some 'special circumstance' this does not necessarily mean that every item of counsel's work will of itself attract a fee higher than the standard or maximum fee. Each main item of counsel's fee must be examined and where a fee higher than the standard fee is claimed this must be justified and where a fee higher than the maximum fee is claimed then this also must be justified.'

8. Furthermore a mere recitation in the fee note of the time spent on preparation can be misleading.

   (a) First, any fee (other than that for conferences) must include some element of preparation time. If counsel is briefed for a day case the standard fee must be treated as including the amount of preparation which might be appropriate for a typical day case - probably of the order of four or five hours.

   (b) Secondly, there is seldom any supporting evidence available to enable the taxing authority to make a judgement as to the reasonableness of the time claimed as would be the case with regard to time spent by a solicitor.

   (c) Thirdly the time spent may include time spent on researching relatively routine matters of law or practice. In **Perry v. Lord Chancellor** (1994) Times 26 May HL it was said that counsel should be regarded as being fully up to date in the substantive and procedural law in the field(s) in which they practised. Time in researching law and procedure could only be taken into account in unusual cases or situations of infrequent occurrence.

9. Time is a factor but time alone is not determinative and an increased fee based solely on time spent must be viewed with caution.

10. The restrictions on allowing a fee in excess of the maximum fee include reference to 'any other special circumstance of the case'.

11. In Re H it was said that this expression is to be contrasted with the phrase 'exceptional circumstances' relating to solicitor's remuneration. 'In considering whether a circumstance is 'exceptional' the taxing officer should look for something that stands out as striking. "Special" is less rare than exceptional.'

5.14 Relationship between fees paid to a leader and junior

1. The general approach is to allow the junior one half of the leader's fee. However this is subject to the overriding test of reasonableness and where the junior plays a greater or lesser role in the trial than normal this should be reflected in the fee. Thus in **F v. F** (above) the judge indicated that a lower fee should be allowed when the junior did no more than take a 'noting brief', on the other hand where junior counsel did most of the preparation for trial a fee nearer two thirds might be appropriate.

5.15 Applying The Maximum Fee Principle

Authority for the maximum fee

1. The fact that there are no prescribed items for counsel's fees does not bar a solicitor from instructing counsel. Regulation 63(4) of the Civil Legal Aid (General) Regulations 1989 stipulates that:

   "The specific authority of the Area Office is required under Regulation 59(1)(a) of the Civil Legal Aid (General) Regulations 1989 for the instruction of counsel in authorised summary proceedings. Regulation 3 of the Civil legal Aid (General) Regulations 1989 defines authorised summary proceedings as proceedings in a Magistrates' Court for which Legal Aid is available by virtue of Part 1 of Schedule 2 to the Act. That schedule under Magistrates' Courts lists all proceedings under the Children Act. The Family Proceedings court is therefore considered part of the Magistrates' Court and any proceedings before the Family Proceedings court are summary proceedings and require authority for the use of counsel.

2. Where costs are incurred in instructing counsel ... without authority to do so having been given in the certificate ... payment of those costs may still be allowed on taxation" (and therefore assessment) – regulation 63(4).

3. You should, however, note that the instruction of counsel in the Magistrates' Court will rarely be justified. This means on assessment there will be three possibilities:

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

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

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

Calculating the maximum fee

4. This is a calculation by the assessor of the work that would have been incurred had the case been conducted by a single fee earner without recourse to counsel. In assessing the maximum fee it should be remembered that the usual rule for assessments still applies - that payment should only be made for work reasonably and necessarily done.

   (a) Stage one

   Assess the work reasonably and necessarily done by the solicitor excluding:

   i) all work arising out of the instruction of counsel, e.g. preparation of the brief, letters and telephone calls with counsel and chambers, etc.;

   ii) all work duplicated because of the instruction of counsel, e.g. the preparation of hearings attended by counsel, attendances at Court with counsel, including associated travel, waiting and expenses, conference with counsel and client, etc.

   Applying the relevant solicitor's rates to the work remaining after excluding (a) and (b) will give the first figure to be added into the maximum fee and the most that can be paid to the solicitors.

   (b) Stage two

   Assess the work undertaken by counsel as it may have been done by the solicitor had the case been conducted without counsel. This is not simply an addition of the work done by counsel. For instance the solicitor advocates may be more familiar with the case and may not be expected to spend as much further time as counsel preparing or attending upon the client.

   Included in this second stage should be the hearing time and waiting and travelling. However, consider whether the solicitors would have instructed agents or whether counsels waiting is inflated because he is less occupied with cases at the Court than local solicitors would have been. If you believe agents should/would have been instructed disallow travel time and expenses but include a notional allowance for instructing agents. If you include travel, the time should only be that which the solicitors would have incurred, not counsel.

Again, apply the relevant solicitor rates to the work of stage two which will give the second figure to be added into the maximum fee. It is important to remember that in these first two stages the assessment is concerned with the work that would have been done had the solicitor not instructed counsel but had conducted the case alone (instructing agents as appropriate). Counsel's times are only a guide to the assessment of the maximum fee. The assessor has a discretion in stage two to allow further work based upon what would have been reasonably and necessarily done by the solicitor. For example, counsel may sometimes not claim any preparation time, probably because they didn't think it necessary to indicate this time, you should not automatically exclude any preparation time but consider whether if the solicitor had undertaken the relevant item what reasonable preparation time he would have incurred and include that in the calculation.

The maximum fee is the total of the figures arrived under stage one and two. It is the most that can be paid out of the Legal Aid Fund to cover the costs/fees of solicitor and counsel.

(c) Stage three

Assess the reasonable fees of counsel as though the case had been undertaken in the county court. By deducting what you intend to allow to counsel (before VAT) from the maximum fee, you arrive at the amount available to pay the solicitors. The solicitors should be paid this amount or the figure arrived at in stage one **whichever is the lesser figure**. To pay the solicitors more than the stage one figure would be to pay them for work which counsel is already being paid.

Example:

London firm - care proceedings case:

solicitor’s fees assessed at:			£500.00	(A)
counsel's fees:	travel:	1hr 30mins x £28.75	£43.12	
	waiting:	30mins x £28.75	£14.37	
	prep:	1hr 30mins x £60.25	£90.37	
	conf:	45mins x £60.25	£45.19	
	adv:	30mins x £63.00	£31.50	
counsel's total:			£224.55	(B)
maximum fee:			£724.55	(A+ B)
counsel's fees assessed at:			£275.00	
remaining to solicitor:			£449.55	

If in the above example travelling had been 3 hours and waiting was 2 hours and preparation 2 hours, this would have led to a maximum fee of £840.94. Having deducted the fees assessed for counsel of £275.00, the remainder left for the solicitor would have been £565.94. However, you should not allow the solicitor more than he was originally assessed at, and only £500.00 should be allowed.

Family Graduated Fee Scheme

General

5.16 What is the Family Graduated Fee Scheme?

1. It is a scheme to provide a separate payment regime to pay counsel during the life of a case. It operates alongside the existing arrangements for paying solicitors' profit costs and disbursements. The full provisions of the scheme are set out in the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 (S.I. No. 1077 of 2001) (hereafter referred to as "the Order"). The scheme is currently under review following its first 18 months of operation. Subsequent updates to this manual will highlight any changes.

5.17 Purpose

1. It provides counsel with payment as work is done. In the majority of cases, it frees counsel from assessment of the costs at the end of the case. The amount paid is final and predictable. It provides certainty to both counsel and the funded client. It aids the Commission by increasing control of expenditure, and will inform the future development of contracting for publicly funded legal services.

5.18 Scope

1. The scheme applies to barristers in independent practice who undertake family work under funding certificates **granted on/after 1 May 2001**. If the certificate was granted before 1 May 2001, and is amended subsequently to cover further work or other family proceedings, the work done will continue to be paid under the relevant remuneration regulations in force before the introduction of the scheme—either *The Legal Aid in Family Proceedings (Remuneration) Regulations 1991* or the *Legal Aid in Civil Proceedings (Remuneration) Regulations 1991.*

2. It does not include the work of the solicitor conducting the case, nor an employed barrister, solicitor or other agents who undertake advocacy on behalf of the conducting solicitor. Such advocacy does not exactly match the role played by counsel in family work. The Lord Chancellor will conduct further consultation on how best to integrate other forms of advocacy into the scheme or to set comparable rates for comparable advocacy work. Until then work done by solicitors and their fee-earners (including employed barristers) will continue to be remunerated under the existing arrangements.

5.19 What work is included?

1. The scheme includes all family proceedings as defined in the Commission's Funding Code (See Article 2 of the Order and section 2.2 of the Funding Code). This is in fact wider in scope than the Legal Aid in Family Proceedings (Remuneration) Regulations 1991. The scope of the Funding Order is amended to exclude from the operation of the scheme proceedings issued on or after 1 November under the Inheritance (Provision for Family and Dependants) Act 1975 or the Trusts for Land and Appointment of Trustees Act 1996.

2. It also includes civil non-family work in the magistrates' court which is remunerated as family work (regulation 104 of the Civil Legal Aid (General) Regulations 1989 - as amended).

3. All work in the following venues is included:

   (a) magistrates' courts—(family proceedings court);

   (b) county courts;

   (c) High Court.

4. It does **not** however apply to:

   (a) appeals—carried out in either the Divisional Court (on appeal from the FPC), Court of Appeal, or House of Lords;

   (b) cases where the main hearing exceeds 10 days; or

   (c) where the case is the subject of a high costs case contract from the Commission's Special Cases Unit.

5. Whilst appeals are generally excluded, certain appeals are included. Interim appeals (i.e. interlocutory or not final) that are not heard in the levels of court in 10.4.4(a) are treated as a function within proceedings. Where there is a substantive appeal from a District Judge to a Circuit Judge or a High Court Judge this will be treated as the commencement of a new set of proceedings. Advice on the merits of such an appeal will be paid as a Function F1. Those appeals that are heard in the levels of court set out in 10.4.4(a) are excluded and thus remunerated under the existing arrangements for payment of counsel's fees.

5.20 The nature of the Graduated Fee Payment

1. Payments to counsel under this new scheme are essentially set fee payments. The order provides a range of base fees for different pieces of work. These fees are set according to the nature of the proceedings, the work to be done, whether junior or leading counsel are employed and venue. There are also a range of additional payments which may be added to the fee due, to reflect special features and complexity.

2. In terms of the number of possible payments the scheme is quite complex but the payments are, as far as possible, fixed, objective and ascertainable prior to the work being undertaken.

5.21 What happens in escaped cases?

Appeals

1. Appeal work in other levels of court, as defined by 10.4.4 above, is remunerated under the existing remuneration arrangements for payment. First instance work and appeals therefore will fall within the scheme where the certificate was granted **on or after 1 May 2001**. If a certificate covers both the main action and any appeal, counsel will be paid under this scheme for first instance work only.

Main hearing exceeding 10 days and not subject to a High Cost Case Contract

2. This escape is always retrospective because the case must actually have lasted for more than 10 days. The fact a case is listed for that length of time but ends earlier is not enough to escape the scheme. If the case does escape, the payments already made under the scheme will be deemed to be payments made on account and will later be recouped against counsel's final fees following detailed assessment. Requests for payment under this scheme after the main hearing will be rejected. Counsel will need to submit his fee notes with the solicitors' costs for detailed assessment and solicitors will report on costs in the usual way.

A high cost case contract is issued

3. A case may be identified as a high costs case either at the outset of a case or at some point after the certificate is granted. The Commission's Funding Code introduces new procedures and funding criteria for very high costs cases. An application, or an existing certificate in family proceedings, must be referred to the Special Cases Unit (SCU) where it appears:

   (a) the actual or likely costs under the certificate exceed £25,000; or

   (b) if the case were to proceed to a contested hearing, the likely costs under the certificate might exceed £75,000; or

   (c) the application relates to a multi-party action (MPA) or potential MPA.

   (Funding Code Procedure C23).

4. Since July 2003 procedures for funding high costs family cases have changed. Individual contracts for high cost cases need only be applied for where authority is sought to instruct leading or two junior counsel. In all other cases, despite fulfilling the Funding Code criteria, high costs case contracts will not be issued. Where leading counsel or two junior counsel are to be used, the approach set out below will be followed when the SCU are determining the remuneration under the contract. The SCU will decide, on referral, whether the case should be the subject of an individual contract. Such a contract would allow progression of the case on a stage-by-stage basis with an agreed price for each stage. Information packs for both solicitors and barristers on high costs cases can be found on the Commission's website at www.legalservices.gov.uk.

5. If a contract is issued, it will determine the remuneration to be paid. The case plan and the overall contract price will be based on the anticipated venue for the hearing and its length. The majority of cases falling within the remit of the Special Cases Unit have a main hearing that concludes in under ten days.

6. If initially the case is considered to have a time estimate of more than ten days it will be remunerated without reference to the Graduated Fee Scheme. The contract price will be set in advance on the basis of the estimated trial length, applying rates applicable to counsel in an ex post facto assessment. Further guidance on the rates will be produced by the Special Cases Unit and be the subject of a separate consultation exercise. If the time estimate is less than ten days the contract price will refer to the graduated fee scheme.

7. Where the initial estimate turns out to be incorrect, e.g. a case that was due to take less than eleven days concludes on the twelfth day or a case that it was thought would last twelve days settles on day two of the main hearing, the contract price will be adjusted. In the first example, the contract price will be renegotiated and counsel paid as if the graduated fee scheme had never applied. In the second example, counsel will be offered the choice between the graduated fee and the contract price for the actual activities within the case plan that have been undertaken.

8. For cases not involving multiple or leading counsel, where either no contract has been or will be issued, the Funding Order continues to apply. Counsel's costs in such high costs cases will be paid under the Family Graduated Fee Scheme unless the case escapes the scheme due to the length of the main hearing.

5.22 Funding Certificates

Generally

1. The scheme includes all levels of service applicable to family certificated work; Approved Family Help (Help with Mediation (HWM) and General Family Help (GFH), and Full Representation. As both HWM and GFH aim to resolve family disputes at an early stage, it is considered unlikely that counsel will be used, except in exceptional cases (see Family Guidance).

Prior Authorities

2. The existing requirement to obtain authority for counsel in proceedings in the Family Proceedings Court or where either Leading Counsel or multiple counsel are to be instructed will continue.

3. The use of counsel must be authorised by the certificate in three defined circumstances where:

   (a) the case is to be heard in the Family Proceedings Court; or

   (b) where Leading Counsel (a QC) is to be instructed; or

   (c) where more than one counsel is to be instructed.

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

   i) unusually complex evidential problems; or

   ii) novel or difficult points of law

   but not if the reason for instructing counsel is:

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

   ii) the personal circumstances or convenience of the solicitor where it would be more appropriate to instruct a solicitor agent.

5. If counsel is instructed without authority the solicitors' costs may be at risk (see 10.42). If authority has not been given in the certificate, the unauthorised costs involved in instructing counsel may be allowed on assessment or alternatively may be assessed on the basis that the solicitors undertook all the work with the amount allowed being shared between the solicitor and counsel (the maximum fee principle).

   This means that on assessment there will be three possibilities:

   (a) prior authority granted for the instruction of counsel-counsel's reasonable fees are assessed and the solicitors' fees are assessed separately;

   (b) no prior authority given but it is considered on assessment that the conduct of the case required the use of solicitor and counsel. For example, there was a difficult evidential problem or a query on a point of law. Again, counsels' fees are assessed as in (a);

   (c) no prior authority granted and on assessment it is not considered that the circumstances justified the use of both solicitor and counsel-the maximum fee principle should be applied. However, the “agreed fee” used in the maximum fee calculation will always be the family graduated fee paid to counsel.

   Where there is no inter partes taxation there is no discretion to allow unauthorised costs incurred in instructing counsel (

   Din v. Wandsworth London Borough Council (No.3)

   [1983] 1 W.L.R. 1171;

   Robyn Hayley Hunt v. East Dorset Health Authority

   [1992] 1 All E.R. 539 and Civil Legal Aid (General) Regulations 1989, Regulation 63 (3)).

5.23 Categories

Generally

1. All family work is divided into four categories for the purposes of determining the level of remuneration for particular proceedings. The four categories are:

   (a) family injunctions;

   (b) public law children;

   (c) private law children;

   (d) ancillary relief and all other family work.

   These categories are identical to the types of family case identified in the Funding Code.

2. Categories are important because different levels of fees are prescribed for each category. Each function must be claimed under one and only one category (see 10.14 below).

5.24 What does each category include?

1. Schedule 2 of the Order defines the general type of proceedings within each category. The text of the Order and the Commission's guidance on what generally falls within each category is set out below.

2. The wordings in Volume 3 of the Legal Services Commission Manual will be amended to identify the relevant category in this scheme for each CIS wording. Consequently, the wording for each proceeding on the face of the funding certificate will clearly identify which category of fee applies to assist both counsel and their instructing solicitor.

5.25 Family injunctions

1. Paragraph 1 of Schedule 2 defines these as:

   "Family proceedings (other than those for ancillary relief) for an injunction, committal order, or other order for the protection of a person (other than proceedings for the protection of children within paragraph 2)".

2. This category will include all proceedings for the protection of the person arising from a family relationship (commonly known as domestic violence proceedings). It will include any application for a non-molestation or occupation order under Part IV of the Family Law Act 1996, injunctive relief under the Protection from Harassment Act 1997 or personal protection injunctions based in tort (assault and trespass).

3. It does not include applications for a section 37 injunction made under the Matrimonial Causes Act 1973 (an avoidance of disposition order) nor section 40 of the Family Law Act 1996 (orders for maintenance or financial issues following an occupation order where the application is made after the making of the occupation order), as they are not free standing applications but rather made within or are incidental to ancillary relief proceedings.

5.26 Public law children

1. Paragraph 2 of Schedule 2 defines this category as:

   "Family proceedings under Parts III, IV or V of the Children Act 1989, adoption proceedings (including applications to free for adoption), procedings under the Child Abduction and Custody Act 1985 and other family proceedings within the inherent jurisdiction of the High Court concerning the welfare of children (other than proceedings for ancillary relief)".

2. This is a broad category which encompasses all "Special Children Act Proceedings", namely applications under the Children Act 1989 (care or supervision orders (s.31); a child assessment order (s.43); an emergency protection order ("EPO")(s.44); its discharge or extension (s.45)) either on behalf of the child, their parent or a child brought before the court for a secure accommodation order (s.25) who requires representation.

3. Other public law children cases include proceedings concerning the welfare of children including other proceedings under Parts IV & V of the Family Law Act 1996, adoption proceedings and proceedings under the inherent jurisdiction of the court.

4. This category will also include applications for residence contact etc. under the Children Act 1989 where these are either made within care proceedings or are "related proceedings". It does not cover such applications between individuals which are dealt with under 10.12 below.

5. Amendments to the Funding Order taking effect from 1 November 2003 expressly include Child Abduction Act cases, issued on or after that date, within this category.

5.27 Private law children

1. Paragraph 3 of Schedule 2 defines this category as:

   "Family proceedings between individuals concerning the welfare of children (other than those for ancillary relief or within paragraph 2)".

2. This category is for applications made between individuals in relation to the welfare of children (residence, contact, prohibited steps, parental responsibility etc.) other than those relating to applications for maintenance or other financial orders.

5.28 Ancillary relief and all other family work

1. Paragraph 4 of Schedule 2 defines this category as:

   "All other family proceedings not within paragraphs 1 to 3".

2. This category covers ancillary relief proceedings and all other family work not falling within categories 1–3. It specifically includes all applications for financial relief work whether within divorce or for children and other miscellaneous applications i.e. Human Embryology Act applications, or declarations of parentage.

5.29 Mixed categories

1. In family cases, the certificate will often either be issued to cover a number of proceedings or be subsequently amended to add or substitute proceedings during the life of the certificate.

2. When the continuing proceedings fall within more than one category, counsel must, for the purpose of payment under the scheme, choose under which single category they would wish to be paid for all the function work performed when making a claim for payment. Usually, counsel will claim at the category that pays the highest rate. For example, a residence/contract application (Cat 3) which subsequently involves allegations of abuse to a degree that the local authority issues care proceedings (Cat 2). At the point at which the certificate is amended to include the higher category 2 proceedings, counsel can claim all future function work (including work done under the Cat 3 proceedings) at the higher category 2 rate.

3. Where a function includes work from two categories but it falls within a single set of proceedings (as defined in Article 6(4) of the order) only one function fee will be paid—see 10.15 below.

Example:

It is common for public law and private law children proceedings to be heard together by the court e.g. care proceedings which, in the alternative, consider residence and contact applications. If there is a main hearing to determine all issues it will fall within two categories (public law children and private law children). Counsel may only claim one function fee for the main hearing (see below) but can choose which of the two categories to claim under. In practice, counsel will always choose the category with the highest rate, which in the example given, would be the public law children category.

5.30 What is a single set of proceedings?

1. For particular functions only one fee can be claimed per case. In order to determine what is or is not a 'case' for the purposes of determining appropriate claiming, (see 10.15.3 below), the Order defines what is to be treated as "a single set of proceedings".

2. A single set of proceedings is defined by Article 6(4) as:

"For the purposes of this Order, applications to the court constitute a single set of proceedings irrespective of whether they are made separately or together where they are:

(a) heard together or consecutively; and

(b) treated by the court as a single set of proceedings"

3. The purpose of this definition is to be able to ensure that claims for payment are made appropriately and cases are not presented in such a way as to maximise recovery or to alter existing court or administrative practices.

4. The definition covers separate statutory applications made either within the same proceedings, or in the alternative, and those cases where proceedings are issued separately but heard together or consecutively.

5. The functions are defined in 10.16 to 10.17 below on Functions. For each single set of proceedings payment will only be made once for Functions F1, F4 and F5. Functions F2 and F3, in contrast, may be paid for as often as they happen. This recognises that they are interim applications and may happen more or less frequently within different types of proceedings or due to the circumstances of the case. (Article 6(1)).

6. Where function work is done within a single set of proceedings, which covers a number of categories, only one function fee is due, rather than one function fee per category. (Article 6(2)).

7. Where counsel represents more than one party in a single set of proceedings, s/he is paid as if s/he represented a single party but may be able to claim a Special Issue Payment for representing more than one child (see 10.26).

8. Generally work undertaken in each of the four categories constitutes a single set of proceedings. For example, family injunctions usually proceed with a separate timetable of applications and hearings from other family work. The process starts generally with an urgent application for an ex parte order, leading up to a hearing to make a final injunction order. This would generally constitute a single set of proceedings.

9. Similarly, it is usual for the court to deal with residence and contact issues separately from financial issues in a divorce. Both aspects may be treated as a separate set of proceedings unless or until the court orders them to be heard together.

10. Sometimes simultaneous separate proceedings within a single category might become a single set of proceedings. For example, if there are contact issues relating to the children of the family the court is likely to deal with both children within the same timetable for the proceedings. Even if the arguments in favour or against contact orders are different for each child the whole procedure would result in the applications being treated as a single set of proceedings for the purposes of payment, rather than two.

11. A care case which hears, in the alternative, residence and contact will be one single set of proceedings if heard together or consecutively by the court. See 10.15.2.

5.31 Functions

What are functions?

1. For the purposes of payment, all work undertaken within a single set of family proceedings is broken down into five functions. The definition of what work each includes and guidance on the same is set out below.

5.32 The Functions

F1—Pre-litigation work and advisory or drafting work falling outside the other functions

1. Article 2 of the Order defines this function as:

"all work, other than conferences:

(a) which is carried out prior to the issue of proceedings; or

(b) which does not fall within Functions F2 to F5".

2. This function covers all pre issue work and any free standing post issue work which does not fall within any other function. For example, providing advice or drafting pleadings/affidavits after issue where no instructions have been received to do other function work.

3. The function includes all advisory work (whether written or oral), and any drafting work undertaken before the issue of the proceedings in the case or if proceedings have been issued that does not fall within any other function.

4. In appeals covered by the scheme, advice on the merits of the appeal will be a Function F1.

F2—Applications for injunctive relief or enforcement procedures

5. Article 2 of the Order defines this function as:

"all work carried out in connection with a hearing relating to injunctive relief or enforcement procedures, other than work which falls within function F5, including but not limited to preparation, advocacy, advising and drafting".

6. The function covers all work relevant to such hearings including incidental work and preparation e.g., advice, drafting and other work as well as the advocacy within the hearing itself.

Example:

An application for the protection of an individual under Part IV of the Family Law Act 1996 will fall within category 1 (family injunctions). The work done prior to issue, where counsel is instructed, will be paid as a Function 1. The work for the without notice hearing will be paid at the Function 2 rate within that category. The on notice hearing will paid at a Function 5 rate and any subsequent committal work as a Function 2 (enforcement of the order). NB: There is no Function 3 in category 1 proceedings.

7. A Section 37 injunction falls within category 4 (all other work) as an application within ancillary relief proceedings. Work done would be paid as a Function F2 application at the applicable rate for category 4 work.

8. Where preparation work for a hearing is carried out and the hearing does take place then the payment will cover all the preparatory work, as above, including the hearing units.

F3—Preliminary applications, interim applications and review hearings

9. Article 2 of the Order defines this function as:

   "all work carried out in connection with a hearing, other than work which falls within Function F2 or F5, including but not limited to preparation, advocacy, advising and drafting".

10. This function covers all other hearings other than those falling within F2 or the main hearing itself. Commonly, this will cover all directions hearings including the first appointment in an ancillary relief case (and the Financial Dispute Resolution hearing), interim or review hearings, the Case Management conference hearing and advocates meetings held under the Protocol for Judicial Case Management ("the Protocol") within care proceedings. It also applies to Pre-Hearing Review Hearingswhere paragraph 20 does not apply. All ancillary or incidental work relating to the application, e.g. schedules, chronologies, skeleton arguments, as well as the preparation involved, will be included in the fee.

11. There is no Function F3 in a family injunction case because the proceedings usually consist of a without notice hearing (paid as an F2) and subsequently an on notice hearing (paid as an F5). If committal proceedings occur they are enforcement proceedings (paid as an F2).

12. To reflect the importance, complexity and additional preparation required for the FDR in ancillary relief proceedings an increased payment in addition to the set F3 fee is paid. An additional sum of £150.00 is paid to Queens Counsel and £60.00 to junior counsel. This additional sum is also paid if counsel attends the first appointment and it turns into the FDR.

    To reflect the same factors in relation to a Case Management Conference in care proceedings, an increased payment is made in addition to the F3 base fee. An additional sum of £82.50 is paid to junior counsel and £206.25 to Queen's Counsel.

F4—The Conference Fee

13. Article 2 of the Order defines this function as:

    "all work carried out in connection with a conference (including a telephone or video conference) other than any conference which takes place on the same day as a hearing for which payment is claimed under Function F5, including but not limited to preparation and advice".

14. Conferences are not generally separately remunerated within the scheme but it is accepted that there should be a separate payment for a single 'main' conference within the case, whenever that may take place. Only one conference function fee is payable in each single set of proceedings (Article 17(4)). This ‘main’ conference cannot, however, be held on the same day as the main hearing (Function 5) in the proceedings.

15. Counsel will need to designate which conference s/he seeks payment for. Ideally, it should be selected towards the end of the case when counsel will be able to choose the appropriate conference and any additional payments it may attract.

16. Where different counsel is subsequently instructed and the Function 4 payment has already been claimed, no further Function 4 payment can be made. This is so even in circumstances where the later conference was more substantial. Where one counsel has replaced another, counsel must make enquiries whether the Function 4 payment has been claimed from either the outgoing counsel or instructing solicitors.

17. Work in this function includes all preparatory work for the chosen conference, keeping a conference note on the issues discussed and work done with the solicitors and experts immediately after the conclusion of the conference. It can, however, include conferences on the same day as other hearing functions (F2 or F3).

18. Where pre issue work has been undertaken and counsel holds a conference, whether or not proceedings are subsequently issued counsel may claim a Function F4 payment in addition to the Function F1 payment.

F5—The Main Hearing

19. Article 2 of the Order defines this function as:

    “all work carried out in connection with the main hearing, including but not limited to preparation, advocacy, advising and drafting”.

20. The main hearing is defined as *the hearing at which the substantive issues are listed to be determined and are considered by the court*. It is essentially the hearing at which it is anticipated the proceedings will conclude within the first instance jurisdiction. The definition has been amended in care proceedings to include the Pre Hearing Review (“PHR”) but payment is only made at this rate where the same counsel attends both the PHR and the main hearing. The PHR is then paid as if it is the first day of the main hearing . All the days of the main hearing will then be paid at the F5 secondary hearing rate.

21. For example in care proceedings, the main hearing would be the hearing at which the court should determine whether or not a care order is made; in ancillary relief proceedings, where the court will determine the form of relief entitlement; in family injunctions the on notice hearing which will determine the form and continuation of the without notice injunction order made. The function includes all preparation or incidental work relating to the hearing so includes advices, and drafting of schedules, chronologies, skeleton arguments and draft orders.

5.33 Payment—the Graduated fee

The calculation of the graduated fee

1. Article 5 of the Order defines how the graduated fee is calculated. The text of that Article is set out below:

(1) *The amount of the graduated fee for counsel shall be the base fee or the hearing unit fee, as appropriate, in respect of the function for which the fee is claimed, which is specified in the Schedules to this Order as applicable to the category of proceedings and the counsel instructed, increased by any:*

(a) *settlement supplement ("SS") or additional payment;*

(b) *special issue payment ("SIP");*

(c) *court bundle payment ("CBP").*

so specified.

(2) *The total graduated fee, as set out in paragraph (1), shall be increased by 33% in respect of all work carried out while the proceedings are in the High Court.*

5.34 The Starting Point

1. Each function has a base fee or hearing unit, which is the primary amount counsel will get paid. The total fee due may in hearing units be multiplied to reflect time spent in court. Payments may then be increased by other additional sums, where the work done is within the criteria and rules for additional payments. The fees for each function are set out by category in Schedule 1 to the Order. The specific rules for the calculation of the hearing unit are set out in Article 8 of the Order.

5.35 The base fee in Functions F1 and F4

1. These are both non-hearing functions and, as such, have a set base fee according to the category of the proceedings. This is in contrast with the hearing units which have a base fee calculated by time spent—see 10.21.2.

Example:

The F1 payment for a family injunction is £60 for junior counsel and £150 for Queen's counsel.

The F4 payment in the same proceedings would be £50 for junior counsel and £125 for Queen's counsel.

Rules for F1 and F4

2. One base fee will be paid for all the work carried out in each of Functions F1 or F4. [Article 6(1)].

3. Special issue payments can be claimed. Settlement supplement payments are not paid, unless settlement occurs within Function 1 in an ancillary relief case. Counsel must choose which conference undertaken is to be treated as the main conference.

5.36 Functions F2 and F3

1. These are hearing units and the graduated fee is calculated on the time spent at court. Travel time and expenses are paid separately (see IPs at 10.28).

Hearing Units for Functions F2 & F3

2. One hearing unit is paid for each period of time of two and a half hours (or less) during which the hearing continues (Article 8(2)(a)). The period starts at the time the hearing is listed to begin (unless the court specifically directs counsel to attend earlier) and ends when the hearing concludes or at 5.00 p.m., whichever is earlier. The time spent at the luncheon adjournment is discounted (Article 8(2)(b)). No discount is made for periods when the hearing is adjourned if it is still continuing e.g. for negotiations between the parties, or whilst an order is being drafted. The hearing will end when the judge makes an order or approves any negotiated consent order.

3. Where a case goes past 5.00 p.m. but concludes that same day, the time spent from 5.00 p.m. will be paid as an extra one half hearing unit. (Article 8(2)(c)).

Example 1:

A case is listed for 10.30 but, due to the hearing of other applications, the hearing does not start until 11.30. It runs on until 12.45 when the lunchtime adjournment starts. The case is due to recommence at 2.00 but does not start again until 2.15 because the judge hears a family injunction application first. The case finally concludes at 3.55.

The time spent before lunch (10.30 to 12.45) is 2 hours 15 minutes. The lunchtime adjournment is 1 hour 15 minutes (because the court sits again at 2.00 p.m. even though the judge hears an urgent application first). The period following lunch is 1 hour 55 minutes. The total time at court is 5 hours 25 minutes. The lunchtime period of 1 hour 15 minutes must be deducted so only 4 hours 10 minutes is claimable time. This is two hearing units.

Example 2:

If, amending the example above, the post-lunch period ran from 2.15 (because the case was not due to recommence until 2.15) to 5.15, when the Judge signed the draft order, the total time spent at court would be 6 hours 45 minutes. The lunchtime period now of 1 hour and 30 minutes is deducted so the claimable time is 5 hours 15 minutes. The total claim would be for 2½ hearing units.

This will be claimed as follows:

(a) 10.30 to 12.45 & 2.15 to 5.00 is 5 hours. This is 2 hearing units.

(b) 5.00 to 5.15 p.m. is claimed separately as an extra half hearing unit. This extra half unit would not be payable if the case had not concluded at that point.

4. An Advocates meeting held on any day before the date of the Case Management Conference or the Pre Hearing Review will be a separate function F3. Where the Advocates meeting is held on the day of the hearing itself, Article 8 of the Funding Order has been amended so that the hearing unit commences from the start of the Advocates meeting and finishes when the hearing itself concludes.

5. If a Function F2 or F3 hearing lasts for more than one day, the relevant multiples of the hearing unit are paid for the time spent on each day during which the hearing continues, but not for the time spent after 5 pm unless the case concludes on that day.

6. Although there is no specific payment for waiting time, as the time for calculating the hearing period commences from the time when the case is *listed* time spent waiting for the hearing to commence is included in the calculation provided it is incurred after the time listed for the start of a hearing. Moreover, while the court will generally indicate on the notice of listing that representatives should attend at least 10 minutes before the listed time, this is not the specific direction referred to in Article 8(2)(b)(i). Where however, after listing, the court provides a specific direction for earlier attendance in respect of that particular hearing time will run from the earlier time if counsel is able to establish that such a specific direction was made.

7. Special issue payments (see 10.26 to 10.30) can attach to Functions F2 and F3 but these are only claimable once per function. Whilst these may be applied for and certified any number of times, the special issue payment can only be claimed once. Counsel must select which hearing in Functions F2 and F3 the special issues are to be claimed for. Payment will be made for the special issues certified in relation to the chosen hearing. [Article 9(7)].

5.37 Function F5

1. As Function F5 is a hearing function the main hearing payment is also based on hearing units. Because it is the hearing to determine and conclude the case, the hearing unit is based on the number of days taken rather than smaller periods of time. One hearing unit is paid from the time the main hearing actually begins to 5 p.m. on that day (Article 8(3)(a)).

2. The first full day is paid as a primary hearing unit whilst all the other days are paid as secondary hearing units. This mirrors the existing system of brief fees and refreshers and the levels of payments reflect this (Article 8(3)(c)).

3. Where the hearing continues after 5 p.m. on any day of the main hearing and concludes on that day, the time spent after 5 p.m. will be paid as one half of the hearing unit (Article 8(3)(b)).

4. Where the court lists the case for the main hearing and starts to consider the case the first date is the primary hearing unit. All other days will be paid as secondary hearing units including later dates when the case is part-heard or adjourned to a later date. (Article 8(3)(c)(i) and (ii)). If the case is listed as a main hearing but for some reason is adjourned or postponed before the court has considered the substantive issues, the hearing will not be a function F5 but a function F3 e.g. on or before the due date it emerges a party has not been served correctly or the wrong hearing date was sent. For split hearings in care cases see 10.34.

5. Where, at the conclusion of the main hearing in care proceedings under the Protocol for Judicial Case Management, the judge directs written submissions on consequential orders or directions, payment of such additional work will be as a secondary hearing unit in function F5.

5.38 No Hearing in F2, F3 or F5

1. A "hearing" may take place by any method directed by the court e.g. by either video or telephone conference, without attendance at court. If the court directs an alternative method of hearing then a hearing will be deemed to have taken place in contrast to the situation where no hearing has taken place because the application is withdrawn.

2. Where preparatory work for **any** hearing (including an Advocates meeting) is carried out but no hearing actually takes place then one half of the relevant hearing unit fee, without any additional special issue payment, will be paid (Article 8(1)). A "no hearing" may happen for example where an application is discontinued or withdrawn, the case settles, or the funding certificate is revoked or discharged, or the hearing is otherwise abortive.

3. The same payment (i.e. one half of the relevant hearing unit fee) is made as compensation where counsel is prevented from representing the client at the main hearing by either of the following circumstances (Article 8(1)(b)):

   (a) where the counsel has had to withdraw from the proceedings with the permission of the court because of his or her professional code of conduct or to avoid embarrassment in the exercise of their profession; or

   (b) where counsel has been dismissed by the client.

   The half fee paid includes all preparation work, related advices and any drafting work undertaken.

4. The Commission expects the conducting solicitor to inform it of the reasons why any counsel instructed has been prevented from attending a hearing in the circumstances set out in Article 8(1)(b)(i) and (ii). The Commission may then have notice of any conduct issues that may be raised on later costs assessment, particularly as this may involve circumstances that would entitle the funded client to reopen the payments made to counsel (see Article 19 and 10.38 post).

5. Where a hearing actually takes place but is not conclusive and is adjourned part heard, the hearing fee applicable to the relative function is paid. When the hearing recommences a new hearing fee will be paid. In F2 and F3 this will be paid as a further F2 or F3 payment. This is in contrast to adjournments of the main hearing, see 10.22.4.

5.39 Payment to replacement counsel

1. In the situation where one counsel replaces another in an ongoing function (and not in circumstances where Article 8(1)(b) applies), e.g. in relation to a hearing function where one counsel has undertaken advice or drafting but is unable through prior commitments to make the hearing itself, the papers may be passed to another counsel to complete the function by doing the advocacy.

2. As this work is all part of the same function, both counsel will expect some payment. The Commission will make the function payment to the counsel who completed the function i.e. the counsel who did the advocacy and who is in a position to make a claim for payment. (Article 14).

3. No separate payment is made to the first counsel for wasted preparation. The matter of how exactly the fees will be apportioned is left to “arms length” discussions between counsels' clerks.

4. A claim cannot be accepted from the first counsel as s/he will be unable to certify that all the function work has been completed. Any application for payment by the first counsel will be rejected. Where it is discovered after the event that payment has been made incorrectly the erroneous sum will be recouped from the next payment due to counsel under the power provided by Article 19(8).

5. Where however different counsel perform different function work on the same case, each counsel will be entitled to claim payment at the permitted payment points (see 10.37 post). Only one F1 & F4 will be paid per single set of proceedings however regardless of the number of counsel involved (Article 17). A Function F5 be paid for each main hearing (where the certificate contains multiple sets of family proceedings).

5.40 Multiple Applicants

1. Where there are multiple parties, who are represented by one counsel and the court deals with the applications by hearing them together, only one fee is due. For example, if there are three children each making a Section 8 application under the Children Act 1989 and the court hears all the applications together and they are all represented by the same counsel, only one fee will be paid for the hearing rather than three. (Article 7). In this scenario, counsel will be entitled to a special issue payment for representing more than one child. [Article 9(1)(c)].

2. Where three applications are made in such circumstances the Commission will process one claim for payment but reject the others and link the files accordingly to prevent duplicate payment. If the statutory or contractual charge arises the single fee will need to be apportioned equally between the certificates involved.

5.41 Payment—Additional Sums

Special Issue Payments (SIPs)

Generally

1. The circumstances of a case may require payment to compensate for the extra work undertaken by counsel or to reflect its complexity. Such circumstances are referred to as "special issues". The criteria entitling counsel to an additional payment (a 'SIP') are that the proceedings involve one or more of the special issues set out below. Special issues (a) to (c) are simple questions of fact and do not depend on the exercise of judicial discretion. For example either the litigant was in person or s/he was not. In relation to (d) to (g) they must also be of substance and relevant to any of the issues before the court.

   (a) **Litigant in person**:

   This requires one party to be representing themselves.

   (b) **More than two parties**:

   This would commonly be seen in care cases. It would not include cases where the divorce involved a co-respondent as they play no part within subsequent proceedings i.e. ancillary relief or contact, or contact cases brought by grandparents who are acting in consort with the parents.

   (c) **Counsel representing more than one child**:

   Whilst such representation is paid as a single function fee, the special issue payment reflects the additional complexity involved.

   (d) **More than one expert**:

   This covers both experts appearing for cross-examination, or where reports have to be read.

   (e) **A relevant foreign element**.

   A forum conveniens issue, issues of foreign law or assets held abroad.

   (f) **Relevant assets not or may not be under exclusive control of any of the parties**.

   Company assets, trusts, pensions, partnership, insolvency issues.

   (g) **Conduct issues**:

   i) cases involving children—the conduct by virtue of which a child the subject of the litigation has, may have or might suffer very significant harm. This is aimed at significant incidences of really serious bodily or emotional harm e.g. rape, buggery, bestiality, repeated sexual/emotional, physical abuse or factitious illness syndrome. This test is higher than that contained within the Children Act 1989.

ii) ancillary relief cases—the intentional conduct of any party has or could or might significantly reduce the assets available for distribution by the court.

2. In the following examples, the SIP is paid as a percentage of the function base or single hearing unit fee.

Example 1:

Junior counsel does a Function 5 hearing in a family injunction case which lasts 3 hours and the respondent is acting in person. The primary hearing unit fee due is £320. The SIP is 5% (£16) and so the total claim will be for £336.

Example 2:

Junior Counsel has had a one-day main hearing in a care case involving two experts and there are three parties to the proceedings. The Function F5 primary hearing unit is £430 and the SIP for experts is 20% and for multiple parties 40%. Consequently, the base fee is multiplied by 60% (£258) to bring the total claim to £688. In an F2/F3 function it is the single hearing unit that is multiplied by the relevant SIP percentage.

3. SIPs may be paid once only for each function in any single set of proceedings so counsel must elect which F2, F3 or F4 s/he wishes the SIPs to attach to. With regard to functions F2 and F3, where more than one of these function hearings have taken place, whilst counsel may apply in each for the relevant SIPs to be verified, counsel must specify in respect of which single particular hearing in each function that SIP payments should be made.

Point of principle CLA 31

If a judge certifies the same special issue at more than one hearing in a single set of proceedings, Article 10(7) of the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 provides that only one Special Issue Payment (SIP) may be made. But a SIP may be made in respect of each different special issue certified, whether at the same hearing or at separate hearings. If different counsel represent the client at successive hearings and submit claims for the same SIP, the first claim to be received will be paid.

This confirms that where special issues have been verified by the court each may be payable once.

4. In relation to the main hearing SIPs are applied to both Primary and the Secondary hearing units, when appropriate.

5. When a hearing involves special issues it is the judge who will decide, following an application at the end of a hearing which SIPs are due for payment. If SIPs (a) to (c) arise they must be certified. SIPs (d) to (g) require the Judge to additionally determine whether the case involved those special issues and that they were of substance and relevant to any of the issues before the court.

6. The judge's decision is final except on a point of law although the decision is, of course, capable of judicial review.

7. Subject to the rules on when a SIP may be claimed, payment will only be made for those special issues certified by the Judge. Any claim requesting special issues payments must be supported by a copy of the certified SIPs.

8. In a non-hearing function, it is the Commission which will consider claims for SIP payments. Counsel will be required to set out the grounds for payment on the claim form submitted to the Commission, to include whether the issues were of sufficient relevance and substance to assist in the determination of an issue and whether the work was reasonably carried out. (Article 10(5) and (6)).

Examples:

Multiple parties 9(1)(b)

9. The fact a co-respondent or other party was cited in divorce proceedings would not trigger the more than two parties provision in an application for ancillary relief because they are not parties to that application.

10. In proceedings relating to children, e.g. if grandparents of a child or children together seek orders for either residence or contact, their opponents being the parents acting in consort, it cannot be said there are more than two parties so as to justify a SIP. If, however, the grandparents become involved in proceedings between the parents, creating a triangular contest, the more than two parties SIP will arise.

Experts: 9(1)(d)

11. This is most likely to arise in public law children cases but could also arise within an ancillary relief application. An example might be a party having been permitted to rely on the evidence of a valuer in respect of real or personal property where values are in contention and another expert concerning a pension. However. the fact a valuer has been employed to value the former matrimonial home where the amount has never been in issue should not contribute towards achieving a “more than one expert” special issue payment.

Foreign Element: 9(1)(e)

12. The fact the parties were married for romantic reasons at Gretna Green or on a beach in the Seychelles will not, in the normal course of events, of itself found a special issue payment for a foreign element. If, however, the law of the foreign jurisdiction becomes relevant e.g. on the validity of the marriage, a special issue payment will be justified where the point requiring consideration is of substance and relevant to any of the issues before the court.

Assets outside of the parties exclusive control: 9(1)(f)

13. In circumstances in which certain assets of the parties are not under their exclusive control (pensions, trusts, company assets, etc) or where third parties claim entitlement to or interest in assets that would otherwise be available for distribution it may be possible to justify a special issue payment but not if the assets in question, by being kept out of the equation, have no effect on the outcome.

Conduct Issues: 9(1)(g)(i) and (ii)

14. The test in Article 9(1)(g)(i) is deliberately framed to indicate harm or potential harm to child or children beyond the threshold provisions for a care order under the Children Act i.e. “very significant harm”. Examples may be of really serious physical emotional harm e.g. rape, buggery, bestiality, and repeated sexual, emotional or physical abuse over a long period of time.

15. The conduct provision may cover the commonplace scenario in financial provision proceedings where allegations are made that the other party has been a spendthrift or otherwise cavalier in disregard to the household fund. In order to obtain a special issue payment the dissipation must be serious and occasioned by deliberate conduct to the extent that it could or might significantly reduce the assets available for distribution.

5.42 Court Bundle Payments

1. The Order includes provision for payment to be made according to the size of the court bundle in each function. If the bundle comprises 176 to 350 a “CBP1” payment will be made and if 351 to 700 a “CBP2”.

2. Where the court bundle is 701 pages or more an additional fee may be payable, but the amount (calculated by reference to additional hours of preparation time) is at the discretion of the court in a hearing function.

3. In a non-hearing function it is the Commission's assessor who decides what number of hours should be paid for the time spent in preparation in excess of the norm—see 10.31.

4. The court bundle is not defined by the Funding Order. The Family Practice Direction: 10 March 2000 however prescribes the format of the bundle for the main hearing. It covers all family proceedings in the High Court or heard in the Royal Courts of Justice or cases of an estimate of more than ½ day in all care centres, family hearing centre and divorce county court.

5. The Practice Direction only covers preparation for the main hearing. For other family hearings, if there is a court bundle it should contain such documents as are reasonably necessary for that type of hearing; e.g., application, statements/affidavits, expert reports and other documents.

6. In the event there is no court bundle e.g. a hearing for which there is no court bundle, a non-hearing function or where no hearing took place, payment is made on the basis of the number of pages within counsel's brief.

5.43 Incidental items (IPs)

Generally

1. The fee paid may also include incidental items that counsel may have incurred. These are:

(a) *Audio tapes, Discs or Videotapes:* Where the case necessitates counsel listening to or viewing video/audio or other recorded evidence an incidental payment may be made. This payment is made only once per tape in each case and calculated at a fixed rate of £10.90 per 10 minutes for the running time of the tape (Article 13(a)).

(b) *Travel expenses:* Where it is reasonable for counsel to incur travel or hotel expenses an incidental payment may be made (Article 13(b)(ii) & (iii)). Payment for travel expenses is paid at a mileage rate of 45 pence per mile if counsel drives or at the cheapest second class train fare where available.

Whether it was reasonable to travel by car rather than public transport should be considered in the context of reasonable convenience and the savings of the claim for travelling expenses that may have resulted. The question of mode of travel depends on comparative costs, taking into account the fares incurred and the time saved by use of the more expensive mode of transport.

In proceedings issued before 1 November 2003, no payment may be made where the court is within 40 kilometres of Charing Cross or where there is a local bar within 40 kilometres of the court town unless the use of specialist counsel is required and no suitably qualified counsel are available from the local bar. If the local bar is small, where the members may not reasonably be expected to cover all the cases that are listed daily in the local courts, it may be reasonable to instruct counsel from further afield. Similarly, if the local bar is insufficiently specialist to deal with the particular case or if the instructing solicitors were unable to find counsel either available or prepared to accept a family graduated fee case, it would be reasonable to instruct counsel outside of the local bar. Counsel should be able to justify their instructions in the CLAIM 5 and should supply written reasons for instruction from their instructing solicitors.

Point of principle CLA 30

Where a solicitor shows that the conduct of proceedings required specialist counsel, and that no specialist barrister was available from chambers within 40 km of the town in which the proceedings took place, the Commission may pay counsel's travel expenses and costs if they were reasonably and necessarily incurred. Factors affecting the decision whether counsel's travel expenses may be allowed include: the complexity of the issues; the distance between counsel's chambers and the court where the proceedings took place; counsel's possession of particular expertise relevant to the case; the location of the solicitor and client; and the need for continuity, particularly if there has been an earlier meeting or conference between counsel and the lay client.

In proceedings issued on/after 1 November 2003, this travel restriction has been abolished. The test in Article 13 has been relaxed so that the travel expenses should have been reasonably and necessarily incurred. This test will look at the factors set out in point of principle CLA 30 in deciding whether counsel's fees were reasonably or necessarily incurred (save that the need to establish that there is no specialist in chambers within 40km no longer applies). Where counsel's chambers are in reasonably close proximity to the court in question it is unreasonable for counsel to recover travel expenses as they properly form part of counsel's overheads i.e the normal cost of travel to work. Consequently counsel practising within the four Inns of court would not be paid travel expenses en route to the High Court or central London court.

If distant counsel are instructed to attend, and it would have been reasonable to instruct counsel more locally, the travel costs incurred may be reduced to those that would have been incurred by the more local counsel.

(c) *Hotel expenses:* These will be paid at prescribed rates depending on the area where the hotel is situated. For a hotel within the area of the Commission's London regional office £85.25 is paid per night and where a hotel is outside of that area, £55.25 is paid per night.

(d) *Travel time:* will be paid at a fixed hourly rate of £13.60. The assessor has discretion to allow what is reasonable. In the absence of unusual circumstances where there is doubt as to the reasonableness of the amount of time claimed the assessor should allow an average amount of time which it would be reasonable to expect counsel to take to travel between the two places concerned. Whether it was reasonable to travel by public transport or car should be considered in the context of reasonable convenience and the saving on the claim for travelling time that may have resulted Article 13(b)(i).

The use of taxi travel may well be reasonable in that although the disbursement claim will be higher, the travelling time would be substantially less than incurred as a result of travelling by public transport (or) it is reasonable in the circumstances e.g. where heavy bundles have to be transported. However, if the travelling time is not less than the time it would have taken on public transport then the extra time should not be allowed. If it was not reasonable in comparison, the expenses should also be reduced to the equivalent of that which would have been incurred using public transport.

5.44 Settlement Supplement (SS)

1. Where settlement takes place during a hearing function, counsel dealing with the settlement will be entitled to a settlement supplement payment. This is paid as a percentage of the basic hearing unit fee or hearing unit fee. (Article 12(1) and (2)).

Example 1:

Junior counsel agrees a settlement in an ancillary relief case on the first day of a main hearing which was listed for four days. The Category 4 early settlement fee in Function 5 is 10% of the primary hearing unit of £305.00. An additional £30.50 is allowable.

Example 2:

Junior counsel agrees a settlement at the end of a Financial Dispute Resolution Hearing which took all day. The settlement was finally reached at 5.15 p.m. Two and a half hearing units are due under Function 3: category 4. The total hearing unit fee for that function would be £300 (2 1/2 times £120). The settlement fee at that function is 50% of the single hearing unit of £120 making a settlement supplement of £60 due. The additional payment for the Financial Dispute Resolution Hearing of £60 is added making the total payment £420.

2. The settlement payment is available in all hearing functions but not in functions F1 and F4 except in relation to proceedings for ancillary relief (if the case settles within the function F1).

3. In relation to a main hearing, the settlement supplement payment may only be paid where settlement occurs on the first day of a main hearing listed for two days or more. (Article 12(2)). A settlement supplement is not available in this function where the case is listed for less than two days and not in relation to any secondary hearing unit.

4. A settlement supplement can only be paid once in a single set of proceedings, and only when the settlement leads to the resolution of the case.

5. Counsel would usually be directly involved in reaching the settlement. If still instructed and the function is not yet complete when settlement occurs, counsel is entitled to a settlement fee. For example, where counsel's advice results in a negotiated settlement which finally concludes the proceedings. Counsel would be paid half the hearing unit fee for the preparatory work and would be entitled to a settlement supplement payment.

5.45 Post trial applications

1. Post trial applications will be paid at the appropriate function rate e.g., F2 or F3).

Examples:

Enforcement proceedings are paid under function F2. This includes committal proceedings in family injunction cases. Advice on appeal is a new function F1 preliminary to the appeal proceedings. The appeal is a separate set of proceedings to the first instance case. In a private law children case where the court has made a "final" order but sets a review for some months later, for a review of the Order, the review hearing will be paid as a F3.

5.46 Special Preparation Fee

Generally

1. Whilst the graduated fee is generally expected to be total payment for counsel's work supplemental amounts can be paid for additional work as defined by Article 16(2).

2. Article 16 applies where:

"(a) the proceedings to which the relevant certificate relates involve exceptionally complex issues of law or fact or was otherwise an exceptional case of its nature; or

(b) in public law children proceedings, in relation to work carried out within the secondary hearing unit of Function F5, where the main hearing is split so that a period of at least four months elapses between its commencement and the time at which it resumes;

such that it has been necessary for counsel to carry out work by way of preparation substantially in excess of the amount normally carried out for proceedings of the same type; or

(c) the court bundle comprises of more than 700 pages".

3. Payment for the extra hours spent by way of preparation will be at the scheme's prescribed hourly rate of £40.20 for Junior Counsel and £100.50 for Queens Counsel for the number of hours allowed as over and above the norm for a case of the same type (Article 16(3)).

5.47 Claiming for Special Preparation

1. In relation to Article 16(2)(a) in hearing Functions (F2, F3 & F5) the judge will decide following an application for a special preparation fee firstly, whether the special preparation fee is justified with reference to the criteria, and secondly what number of extra hours counsel should be paid. There will be no appeal against the decision of the hearing judge, in relation to the fee or the number of extra hours due, save on a point of law. (Article 16(5)).

2. The special preparation fee allowed is for substantial additional preparation. Counsel must therefore state what the normal preparation time would have been in order to justify the additional necessary and to establish that it is substantial. The judge indicates the number of additional hours rather than the fee to be paid for all preparation time.

3. In F1 and F4 counsel claiming a special preparation fee will submit their claim for payment to the Commission, supplying sufficient proof of the complexity of the relevant issues of law or fact and of the number of extra hours of preparation. The claim should identify what number of hours of preparation counsel would have normally undertaken as well as the extra number of hours involved. The Commission will decide what, if any, special preparation fee shall be paid. There is an appeal from this decision to the Commission's Costs Committee. (Article 16(4)).

4. Counsel who seek a special preparation fee under Article 16(2)(a)–(c) in a hearing function, must apply at the conclusion of the hearing.

5.48 Exceptional Complexity

1. For a payment under Article 16(a) the case must be exceptionally complex, not just "exceptional" and not just "complex" or so exceptional in some other ways that a payment is justified.

2. As new proceedings are introduced, or changes in the law occur, counsel should not assert that consideration of the issues is exceptionally complex requiring extensive research and preparation. Lawyers practising in a particular field are generally expected to have the appropriate expertise and cannot charge for the time spent in research.

   Perry v. The Lord Chancellor

   The Times 26.5.94 QBD.

5.49 Public Law Children Cases

1. In public law children cases a special preparation fee may be made for additional preparation in excess of the amount normally carried out, where the main hearing is split and more than four months elapses between the two hearings. Counsel must state what the normal preparation time would have been to justify the additional necessary and to establish that it was both necessary and substantial.

5.50 Court Bundles

1. For proceedings issued on or after 1 November the payment for a bundle in excess of 700 pages is the fixed payment for court bundle 2 plus an additional payment may be paid ~~is~~ at the discretion of the judge in a hearing function and the assessor in non-hearing functions. The calculation will be a multiple of hours at the set hourly rate (£100.50 for Queen's Counsel and £40.20 for Junior Counsel). For proceedings issued before 1 November 2003 the payment for these court bundles remain entirely at the discretion of the court.

5.51 Payment

Payment Points

1. Counsel may lodge a claim for payment for all work done at defined points in the case (Article 17(2)). In that claim counsel may apply for the payment of all work done up to that point where it has not previously been claimed for.

2. The payment points are:

   (a) when the proceedings to which the certificate relates are concluded;

   (b) when the certificate is discharged or revoked and any review by the Commission or the Funding Review Committee has been completed;

   (c) when counsel has completed all instructed work, up to and including Function 2 or Function 3 as appropriate. (Note: where both functions have been performed only one application for payment can be made);

   (d) when counsel has completed all instructed work in Function 5;

   (e) where three months have elapsed since counsel carried out work and s/he has not received any further instructions.

3. Requests for payment made outside of these payment points will be rejected.

4. The final claim for payment must be made within three months of the discharge/revocation of the certificate. If counsel fails to do so, his costs may be reduced (Article 17(6))—see 10.40 post.

5. All claims for additional payment must be made at the same time as the claim for the function payment. If not claimed any later claim will be rejected as the Commission has no power to pay them separately (Article 17(7)).

5.52 How to claim payment

1. From April 2003 it will not be necessary for the work that counsel has done in non-hearing functions (or where no hearing has taken place) to be verified by the solicitor. Counsel should be prepared to supply such documentation as the Commission may request to justify the work done. In all hearing functions work done and additional payments will continue to be verified by the judge, where a hearing takes place..

2. The General Civil Contract has been amended to reflect this new payment scheme. Category Specific Rule 7.2(b) obliges the solicitor to provide written confirmation of instructions, and such other information as is required for the purpose of making a claim for payment under the scheme, within seven working days. Where the solicitor delays in complying with that obligation, counsel should inform the Commission's contracting team at the relevant regional office.

3. The Commission has designed specific forms for counsel to claim a graduated fee and this form (CLS Claim 5) must be used whenever a claim is made by counsel under this order.

5.53 The Commission's Role on Assessment

The approach to assessment

1. The General Civil Contract governs payment of solicitors' costs for family work. Remuneration is explained fully in Section E of Volume 1 of the Legal Services Commission Manual.

2. Whilst Rule 6.5 of the Contract applies the regulations for assessment of costs, the Community Legal Service (Funding) Order 2000 deals with remuneration for contracted work. It prohibits the Commission from contracting at rates higher than those prescribed by the relevant regulations. Article 6 of the Order provides that whilst the contract sets remuneration and stipulates assessment in accordance with the existing regulations, the power is statutory rather than contractual.

3. The Commission will assess all fees due to counsel under this scheme whilst the conducting solicitors profit costs and disbursements will be assessed in the usual way, through assessment by either the Commission or the Court.

4. The assessor will consider the following matters:

   (a) whether counsel was instructed appropriately or used excessively;

   (b) whether the solicitor was over reliant on counsel;

(c) whether counsel acted in accordance with his or her instructions or the certificate;

(d) whether the correct fee was applied for;

(e) whether the criteria have been met for any additional payments;

(f) the reasonableness of any incidental expenses claimed.

5. This is not an exhaustive list of all considerations of the issue of what sums are properly and reasonably due to counsel under the Order for work carried out within the scope of the certificate. (Article 17(8)).

5.54 The solicitor's obligations on detailed assessment

1. Rule 7.2 of the General Civil Contract has been amended to state:

"In proceedings where remuneration of counsel is determined under the CLS (Funding) (Counsel in Family Proceedings) Order 2001 ("the Graduated Fee Order") the procedures for assessment of remuneration as set out in Rule 6.5 above take effect subject to the following:

(a) You must notify any counsel instructed in family proceedings, within fourteen days of:

i) those proceedings being finally settled or otherwise concluded, and

ii) receiving notice of final revocation or discharge of the relevant certificate (following any review by the Regional Director and Funding Review Committee), whichever is the sooner, that the proceedings have been settled or otherwise concluded, or as the case may be, that the certificate has been discharged or revoked.

(b) Where so requested, you must provide counsel with written confirmation that they were instructed to carry out the work in question, together with such other information as counsel may reasonably request for the purpose of applying for payment under the Graduated Fees Order. You must comply by sending the requested confirmation or information within seven working days of:

i) receipt by you of the request together with any necessary accompanying documentation (such as counsel's claim form) or (ii)

ii) receipt by you of any other information or documentation reasonably necessary for you to provide the confirmation or information (e.g. documentation required to show that a payment point has been reached such as notices of discharge of a certificate),

whichever is the later.

(c) You must include details (and attach confirmation) of all sums paid to counsel in the proceedings on any claim for costs you make on assessment or detailed assessment. Where counsel has carried out work in the proceedings to date that has not yet been paid, you must await the receipt of confirmation of payment before submitting your claim.

(d) On any assessment of costs, if it appears to us or to the court on assessment that counsel has been instructed either:

i) without any prior authority required under the Rules and where the use of counsel was not justified; or

ii) in any other circumstances where it was not necessary for counsel to be instructed,

but counsel's fees are paid or payable under the graduated fees scheme, your costs will be assessed as if counsel had not been instructed in the proceedings. Any sums paid or payable under the Graduated Fees Order shall be deducted from the amount so assessed when calculating your fees.

(e) Where the total sums payable on assessment exceed any cost limitation imposed by the Commission under the relevant certificate or contract, the costs payable to you shall not exceed the amount payable in accordance with that costs limitation less such sums as are paid or payable to counsel under the Graduated Fees Order.

(f) Without prejudice to your obligations under Regulation 112 of the Civil Legal Aid (General) Regulations 1989 (duty to inform counsel) you must inform counsel whenever counsel's fees are reduced under Article 19 of the Graduated Fees Order and any reasons for that deduction, and provide counsel with such information as he or she requires in order to pursue any review or appeal against the assessment allowed under this contract or under the Order".

2. This Rule sets out how graduated fee payments affect the final assessment of costs at the end of the case. The solicitor is obliged to notify counsel within 14 days of discharge or revocation so counsel may be aware of the date from which the time limit starts to run (see 10.40 below).

3. The solicitor is also obliged to provide details of sums paid to counsel on any claim made for assessment. The Commission notifies the solicitors of sums paid during the case, for the purposes of calculating the running total of costs, but the solicitor may seek further information from counsel if required. Solicitors must await payment of counsel's final claim before proceeding to assessment, so it is important for counsel to claim promptly after the conclusion of the case in order to minimise delay to the solicitor's costs assessment.

4. In cases where the statutory charge applies, or the client otherwise has a financial interest, payments to counsel under the Graduated Fees Order will form part of the client's liability. Therefore the client must be informed of payment to counsel and be given an opportunity to raise any objections on the assessment of costs. The Commission will provide the solicitor with details of payments to counsel in each case.

5. The Rule also sets out what happens where counsel has been instructed unnecessarily in the proceedings, has been instructed without prior authority, or where the total of the solicitor's fees and counsel's fees exceed a cost limitation on the certificate or contract. Whilst payments to counsel will continue to be governed by the Graduated Fees Order, such payments may be deducted from the sums that would otherwise be payable.

5.55 Time limits for submission

1. Sanctions for delay on solicitors' costs were implemented at the end of October 2000. Solicitors are subject to a three-month time limit for submitting costs claims under Regulation 105 of the Civil Legal Aid (General) Regulations 1989 (as amended).

2. Counsel will have three months from the discharge/revocation of the certificate to submit a final claim, if any. In order for this provision to work, the solicitor is obliged to serve counsel with notice of discharge or revocation of the funding certificate to ensure counsel is aware of the date from which the three months will run. Rule 7(2)(a) of the General Civil Contract obliges the solicitor to serve such notice within fourteen days.

3. In order to prevent unnecessary hardship to solicitors when complying with contract rule 7.2(c), counsel is requested to promptly submit all costs claims due under this scheme following the main hearing or conclusion of the case.

5.56 Sanctions for late submission

1. Where counsel fails to submit the claim in time they will be subject to a reduction in the amount allowed. A percentage deduction may be applied. Where however the fault for the delay lies with the solicitor the penalty should be deducted from the solicitors' costs rather than counsel. The fault could relate to either the solicitors failure to provide notice of discharge/revocation or failure to supply the verification documentation in good time.

2. Counsel may appeal to the Costs Committee against a decision made by the Regional Director and such an appeal shall be commenced within 21 days of the decision by giving notice in writing to the Costs Committee specifying the grounds of appeal.

3. Although claims may be submitted out of time, a fair balance has to be achieved between the interests of the Legal Services Commission in securing prompt submission of bills, those of the client who needs to be aware of the extent of their statutory charge liability, and those of the profession in not being deprived, merely due to late submission, of costs for work properly carried out.

4. It will, however, generally be reasonable to expect counsel to be aware of and to comply with the time limits, particularly as time limits already apply to the submission of bills for detailed assessment and in relation to solicitors' costs claims. Counsel will wish to obtain payment as soon as possible and should have access to appropriate support systems to monitor their cashflow.

5. There is no longer a requirement for the time limit to be extended. Where costs are submitted outside of the time limit, deductions will be immediately considered.

   The guideline deductions are:

- bills submitted up to 9 months late - 5%
- bills submitted between 9 and 18 months late - 10%
- bills submitted between 18 and 27 months late - 15%
- bills submitted between 27 and 36 months late - 20%
- bills submitted between 36 and 45 months late - 30%

Generally, it should be possible for late claims to be submitted within 48 months of the conclusion of the matter (i.e. up to 4 years out of time) but if the claim is submitted later, higher deductions may be applied.

6. The percentage reductions are a guide, so if counsel provides an explanation that justifies the delay, the regional office will consider what is the appropriate reduction in the circumstances. There may, for example, be circumstances where a bill submitted up to 3 months out of time has been delayed through no fault of the counsel and thus no deduction should be applied. Where circumstances are outside of the counsel’s control it is less likely that a penalty will be imposed.

   Regard will be had to what reasonable steps could have been taken to minimise delay. The factors below are indicators that it may be reasonable for some delay to have occurred. The regional office will evaluate what period of delay is reasonable and make a reduction in accordance with that decision. For example, counsel has a serious illness and is away from practice for three months but it is 15 months before the cost claim is submitted. When it was known counsel would be away for a considerable period, steps should have been taken to ensure their costs claims were assessed promptly. In the circumstances, it may have been reasonable for a delay of up to six months to be incurred. If so, a deduction of 5% would be made on the basis that the costs claim should have been submitted only six months out of time.

What is reasonable and proportionate in the circumstances?

This is a question of fact in every case. Regard will be had to the particular firm’s history of late claiming.

Reasonableness

Common examples of where it may be reasonable for some delay to have been incurred are:

(a) linked or related actions awaiting final disposal;

(b) the court has delayed in sending the final order;

(c) where the solicitor has failed to provide information or documentation;

Proportionality

In considering the deduction to be applied the size of the claim may be a relevant factor. If the costs claim is above average, i.e. over £2,500, it may be appropriate for a lesser deduction to be applied than that in the guidelines. In claims under £2500 the guideline deductions are considered to be proportionate and therefore it will be a case of considering the reasonableness of the reason for late submission when applying them.

7. Deductions are calculated on the total of the fee due. The deductions will be made from counsel unless the solicitor has been responsible for the delay.

8. It is anticipated that counsel may raise queries regarding apparent non-payment of claims where payment has in fact been made but counsel has not posted the payment in his or her accounts. It is reasonable to expect counsel to monitor the receipt of payments on a regular basis and therefore to be in a position to raise such queries promptly after having posted payments and checked remittance advises. Except in a small minority of cases, claims will be paid by the Commission within a maximum of four to six weeks of receipt of the fully completed claim forms. Counsel should therefore only make an enquiry of the regional office if payment is not received within two months of submission of the claim.

9. Before raising a query with the relevant regional office counsel should specifically check for payment and, if an enquiry of the regional office is appropriate, should confirm that all remittance advices since the submission of the original claim have been checked for the appropriate payment and a copy of the claim previously submitted together with any proof of receipt should be forwarded to the regional office. The process of counsel checking for payment and the inclusion of a copy of the claim (and any supporting documents available) will reduce unnecessary queries and assist the regional office in dealing with such queries as are received. Where counsel cannot provide proof of receipt of the claim by the regional office, the matter may be treated as a late claim.

5.57 Inappropriate Use of Counsel

1. Where counsel has been used inappropriately or excessively the solicitor will be sanctioned. This means that counsel will be paid but the solicitor put on notice that those sums, because they were inappropriate will be deducted at the point of payment of their final bill in the case. At that point (normally at the end of the detailed assessment proceedings) the Commission will have power to reduce the sums due to the solicitor by the inappropriate fee, subject to the solicitors' right of appeal.

2. Amendments have been proposed to the General Civil Contract, see specific Rule 7(2)(d), which authorises the approach above.

5.58 Where Counsel has been used without Authority

1. If the solicitor instructs counsel without authority in the example given in 10.7.3(a), there are two possibilities:

   (a) it is not complex and the use of counsel is unjustified; or

   (b) it is a complex case which would justify counsel but no application for authority was made, either at the outset or later in the case.

   In example (ii), counsel's fees may be paid. In (i) the “maximum fee principle” is applied to calculate the costs due as if the solicitor undertook all the work. Counsel still obtains payment but the graduated fee due is deducted from the adjusted total due to the solicitor. This will apply to magistrates' court work, as now, and Approved Family Help certificates. In order to undertake the maximum fee calculation, counsel will be expected to provide a breakdown of the time spent on the case.

2. Where Leading Counsel is instructed without authority counsels fees will be disallowed entirely.

3. If multiple counsel are instructed without authority, work done by the second counsel is outside the scope of the certificate and the fees and any associated costs will be disallowed.

4. Amendments have been proposed to the General Civil Contract, see specific Rule 7(2)(d) which authorises the approach above.

5.59 Costs Limitations

1. Counsel has a duty to check the limitations placed on the certificate both as to scope and costs to be incurred.

2. The amended Regulation 107A ensures that counsel is only penalised where counsel's fee itself exceeds the costs limitation imposed. In other circumstances, the excess is deducted from the conducting solicitor and ensures payment to both counsel and experts.

3. Where the total payable on assessment exceeds the costs limitation imposed on the relevant certificate or contract the costs paid to the solicitor will be the amount of the costs limitation less any sums due to counsel under this order: Rule 7(2)(e) of the General Civil Contract.

5.60 POA'S and Recoupment

1. As there are a number of potential payment points during the scheme, which ensure that counsel need not wait more than three months to make a claim for payment there are no payment on account provisions at all. Applications for either an annual payment on account or hardship payment will be rejected. (Article 17(10)).

2. Where the case escapes from the scheme because it is a high cost case or has lasted more than 10 days at the final hearing, counsel's costs will be assessed either under the contract by the Special Cases Unit or by the court alongside the solicitors' costs in the usual way.

3. As escape is retrospective, the fees paid under this scheme will be deemed to have been payments made on account. (Article 19(1)). When assessment of all the costs due under the certificate is concluded and the final bill is received, payments so made will be recouped in the usual way.

5.61 The Statutory Charge and Review of Payments

1. Estimating costs is made simpler in that the fees due to counsel are directly calculable from the work counsel is instructed to perform within the proceedings. Once counsel's fees have been assessed by the Commission a letter confirming the payment made will be sent to the solicitor. The solicitor is thus made aware of the fees actually paid to counsel. Nothing in the Order obliges counsel to inform the solicitor of any appeal from an assessment. The Commission will provide the solicitor with notification of the outcome of any costs appeal made by counsel under this scheme.

2. The Commission's notification to the solicitor of sums paid to counsel will enable the solicitor to inform his client of the sums incurred, and to calculate costs for the purpose of staying within the costs limitation imposed on the certificate.

3. Where the client has a financial interest they have a right on assessment of costs to object to the costs incurred under the certificate. This includes the fees paid to counsel. Nothing within the scheme overrides the client's existing right to make representations as to the use of counsel within the proceedings.

4. Consequently, whilst counsel may have received payments under this scheme they are capable of review within the detailed assessment of costs at the end of the case. The Costs Officer can re-open the payments already made if it is considered counsel has been used excessively, inappropriately, acted incompetently, improperly or the fees paid are excessive. The Commission will comply with any public funding assessment certificate received and recoup excess payments made under Article 19(5).

5. For the purposes of detailed assessment the solicitors' bill of costs must identify all work done by counsel as well as the sums paid by the Commission. The Costs Officer can then identify whether any payments made to counsel need to be reopened and adjust the public funding assessment certificate accordingly.

5.62 Balancing

1. The Commission balances the funded client's account on receipt of the solicitor's final bill. This will continue. Where the Court assesses the solicitor's claim for costs the solicitor's claim will generally arrive later than counsel's final claim for payment because of the time required for detailed assessment.

2. Counsel will need to submit the final claim under the scheme within three months of the conclusion of the case. (See 10.40 above). Where, however, the Commission is due to assess the costs of both solicitor and counsel, submission of the claims are subject to the same time limits. To avoid inappropriate balancing, solicitors will be asked in the claim form to identify the number of counsel and number of times they were used so the Commission can ensure all counsel's fees have been received before marking the solicitor's claim as the final bill.

3. Where the Commission balances the case and distributes money but thereafter receives a claim from counsel, it will be treated as a late claim without either “good reason” or “exceptional circumstances” and disallowed in full.

5.63 Appeals

1. Appeals can be made against the decision of the Legal Services Commission to the Costs Committee from decisions made regarding individual function fee payments or other assessment decisions, save where the decision is of the judge and is final (Article 18).

2. Counsel must submit any request for an appeal, on Form APP10 or in writing, giving reasons within 21 days of the decision made, or a later date the Regional Director considers justified (Article 18(1)).

3. In any appeal counsel has no right of attendance but may, if requested and at his/her own cost attend to make representations. Counsel should ensure any documentation or representation in support of the appeal is with the regional office 7 days before the listing of the costs appeal.

4. As in any costs appeal the Costs Committee may review the Commission's assessment and may uphold the decision made or, as they are looking it afresh assess a greater or lesser sum.

5. If counsel remains dissatisfied the next level of appeal is to obtain a point of principle of general importance from the Committee. This request must be made within 21 days of the Costs Committee's decision. The consideration of a point of principle will be put back to a Costs Committee of the Commission for consideration. There is no right of attendance.

6. The Costs Committee on consideration of the case will need to assess whether the result of the review raises a point of general importance to the profession. The purpose of this is to ensure that points of principle to be heard on appeal by the Costs Appeals Committee do not turn on the particular facts of a case but raise issues of principle which are likely to affect other assessments/determination in the future. Where most points of principle are likely to arise are in the interpretation of the regulations effective in costs assessment or governing their application on assessment. The Costs Committee will consider the issue on the papers without attendance by counsel who will usually make written representations.

7. Counsel should, when making submissions for the certification of a point of principle of general importance, provide the exact wording of the point of principle they wish to be certified.

8. The Costs Committee must, when certifying a point of principle of general importance, consider whether there are any existing points of principle in the Manual of Points of Principle relevant to the request for certification. The Costs Appeals Committee's decisions are binding on future costs assessment and are maintained in the Legal Services Commission Manual. Notification of all new decisions is given via Focus and publication in further updates of the Legal Services Commission Manual.

9. If the request is granted, a clear certified point of principle must be made at the date of the meeting. If no point is certified, reasons for refusal will be given which will state either or both limbs of the basis on which the point can be certified, i.e. is it a point of principle? If it turns on the individual facts of the case, it is likely that no principle has arisen. Is it of general importance? If it turns on the very particular facts and is unlikely to arise again (and even if it did would not be generally applicable) it is not of general importance.

10. Counsel will be notified of the result. If no certification is given, there is no further avenue of appeal except judicial review of the decision. If a point is certified, the letter notifying counsel will inform him/her that they must apply direct to the Policy and Legal Department within 21 days. Any appeal must be forwarded to: The Secretary of the Costs Appeals Committee, Policy and Legal Department, 85 Gray's Inn Road, London WC1X 8TX, (DX 328 LONDON/CHANCERY LANE), Telephone number 020 7759 0000.

Part III – Assessment Issues

6. Claims For Assessment By The Commission

6.1 Preparation Of A Bill

1. Bills drawn up by law costs draftsmen after 26 April 1999 is "work done" within the meaning of paragraph 18(3) of the Practice Direction to Part 41 of the Civil Procedure Rules (CPR) and payable even if the costs within the bill relate to work done before 26 April 1999. A law costs draftsman's fee may be paid, in accordance with the guidance below, for any bill drawn up for assessment by the commission on or after 26 April 1999 where it was reasonable to instruct a draftsman to draw the bill.

2. Whilst the draughtsmen may charge the solicitor at a percentage of the profit costs as drawn in the bill, the rate claimed for drafting the bill should not exceed the amount allowable, as set out below. In Family Cases, if the amount is set out as a fee, it should not exceed any prescribed allowance (see 6.1.4). In civil cases, a time should be given for drafting the bill to ensure the hourly rate does not exceed that allowable as preparation.

Civil non-family cases

3. In such cases, whilst there is no specific rate within the regulations, the work is considered to fall within item 3 of Schedule 1 to the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 as "all other preparation work including any work which was reasonably done arising out of or incidental to the proceedings". The hourly rate allowed will therefore be the relevant preparation rate for the conducting solicitor under item 3.

Family cases

4. Since 26 April 1999 the costs of preparing a bill are generally allowable. These costs are only to the maximum set by regulation (these allowances were considered to be the "reasonable costs" for preparing a bill. A *Local Authority v a Mother and Child (Court of Appeal: 20 December 2000).* There is no such allowance for prescribed family proceedings in the magistrates' court.

The statutory charge

5. Regulation 119(2) of the Civil Legal Aid (General) Regulations 1989 refers only to the costs associated with taxation. This regulation has been amended to put it beyond doubt that the costs of drawing and checking the bill are not part of the costs of the assessment process as they are incurred before the commencement of the assessment proceedings. Such work, and is associated costs thus fall within the costs of the main proceedings and are not exempt. Regional offices must continue to include the costs of preparing the bill for assessment when calculating the statutory charge.

Time taken

6. In the majority of cases that fall within the Commission's assessment limit an allowance of 30-60 minutes will be appropriate. Where a greater time is claimed, the solicitor should justify the additional time spent with reference to the circumstances of the individual case. It may be reasonable to make greater allowance where the amount of the costs reasonable to make greater allowance – up to 3 hours where the amount of the costs claim exceeds £2,000 or where the preparation is made more complex by the nature or circumstances of the case. The allowance for preparation is in addition to the time allowed for checking and signing in compliance with the regulations.

The rate

7. Under the schedules to the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 the fee allowable for preparing the bill was a scale allowance. Amendments made to those regulations in April 2001 changed the allowance figure to an hourly rate. This error was corrected by amending regulations effective from July 2001.

6.2 Costs Of Assessment

Generally

1. For all costs claims submitted on/after 18 March 2000 Regulation 16 of the Civil Legal Aid (General) (Amendment) Regulations 2000 applies. It replaces Regulation 113 of the Civil Legal Aid (General) Regulations 1989. It provides that detailed assessment proceedings are deemed to be proceedings to which the certificate relates (whether or not it has been revoked or discharged). The costs of assessment by the Court are therefore to be paid from the fund unless the Court orders otherwise. The conducting solicitor may prepare and attend on a detailed assessment where necessary without requiring any amendment to the certificate. In 1988 Act cases the Commission considered the scope of the certificate included work done to assess the costs of the substantive proceedings. The subsequent amendments clarify the position but are not a change in practice or policy.

2. Regulation 119 was also amended for 1988 cases to clarify the relationship between the costs of assessment proceedings and the statutory charge exemption (see also statutory charge guidance). Identical provisions are contained in Regulation 40 of the CLS (Financial) Regulations 2000 which applies to 1999 Act cases.

3. Essentially, whilst the costs of detailed assessment proceedings are excluded from the calculation of the statutory charge that exclusion does **not** include the costs of Law Costs Draftsman or the preparation of the bill. The reason for this is that the bill of costs is drawn up before the detailed assessment proceedings are commenced.

4. The crucial point for the application of the exemption is that the assessment proceedings have commenced. All work prior thereto e.g. the preparation of signing and checking the claim, whilst chargeable, is not exempt and will be treated as part of the substantive costs of the case payable under the statutory charge deficit, if applicable. The costs of work after commencement of the assessment, e.g. court fees, the costs of attendance on the detailed assessment, the time spent checking any provisional assessment or completing the legal aid assessment certificate, are exempt. Both in relation to detailed assessment proceedings and to costs assessed by the Commission, Law Costs Draftsmen's fees for drafting the bill or completing the Claim 1/2 will fall to be part of the statutory charge amount, if applicable and these costs will be part of the deficit to the fund.

5. Costs of making an appeal or attending on the appeal hearing are not chargeable as the solicitor has no right of attendance.

6. Assessors should, as far as possible check the legal aid assessment certificate to ensure the charge is not applied to work that is exempt. Solicitors should only include in Box C of the legal aid assessment certificate the costs of the assessment (the court fee, plus any amounts allowed by the Costs Judge for the attendance on the assessment and completion of the assessment certificate) as these are the exempt costs referred to in 6.2.4 above. Box C should not include the drafting/checking costs. These should be in Box B.

6.3 Late Submission

1. To reflect the fact that the courts now sanction those who delay in submitting bills of costs for detailed assessment, the Commission was given power to sanction those who delay in submitting costs claims to it for assessment in the amendments made to Regulation 105 of the Civil Legal Aid (General) Regulations by the Civil Legal Aid (General) (Amendment) Regulations 2000. This regulation was implemented for claims submitted on/after 31 October 2000. The later implementation of this regulation (it was effective 18 March 2000) recognized the volume of changes practitioners had to get to grips with during that period. The approach has been further amended by the Civil Legal Aid (General)(Amendment No.2) Regulations 2002 which went effective from 31 December 2002. The time limits remain unchanged but the approach to the penalties to be applied has been significantly altered.

   (a) It will generally be reasonable to expect solicitors to be aware of and to comply with the time limits which have been in force since 18 March 2000.

2. The regulations now provide for late claims as follows:

   (a) "105(3A) an application for an assessment under this regulation shall be made;

   (b) Where paragraph (2) applies within three months of the termination of the solicitor's retainer;

   (c) Where paragraph (2A) or (3) applies:

i) If the certificate is revoked or discharged, within three months of the termination of the solicitor's retainer;

ii) Otherwise, within the period specified by the CPR Rule 47.7 for the commencement of detailed assessment proceedings if the costs fall to be determined by way of detailed assessment".

REGULATION	TIME LIMIT APPLICABLE
Retainer determined before proceedings begun – costs must be assessed by LSC (Reg. 105(2))	Within three months of determination of the solicitor's retainer
Proceedings begun costs not more than £500 – costs must be assessed by LSC (Reg. 105(2A)) or	All other cases
Proceedings begun and costs not more than £1,000 – costs must be assessed by LSC (Reg. 105(3)(2)) or	If certificate revoked or discharged within three months of the termination of the retainer
Following direction/order for detailed assessment recovery costs are incurred (Reg. 105(3)(d))	Otherwise within the period CPR 47.7 would have specified.

3. For cases in a Magistrates' Court, Regulations 104(4) and (5) provide that:

(a) "104(4) - Paragraphs (3A) to (11) of Regulation 105 shall apply and Regulation 105A shall apply where costs are assessed by an Area Director under paragraph (1) as they apply to an assessment under that regulation; provided that the references to the time limit in Regulation 105(3A) shall be construed as references to;

i) the date three months after the termination of the solicitor's retainer, where the retainer is determined before proceedings are begun, or where the funded client's certificate is revoked or discharged; or

ii) otherwise, the date three months after the determination of the proceedings, whether in a Magistrates' Court or another court.

iii) Subject to paragraph (4) Regulations 105 to 110 shall not apply to costs in respect of proceedings in a Magistrates' Court to which this regulation applies".

4. Termination of retainer

   (a) Generally

   Professional conduct rules provide that the solicitor may terminate a retainer for good reason and upon reasonable notice. Examples of good reasons include where there is a serious breakdown in confidence or difficulty obtaining instructions. The retainer may also be determined by operation of law either by the client's or solicitors bankruptcy or mental incapacity. Reasonable notice is not defined and left to the solicitor to exercise discretion in the individual case. The Commission reasonably expects solicitors, when faced with a breakdown in confidence, possible breaches of practice rules, breaches of principles of conduct, or when without clear and prompt instructions, to write warning the client that if instructions are not provided or the situation rectified within 14 days, the retainer will terminate.

   (b) Revocation/discharge

   Regulation 4 of Community Legal Service (Costs) Regulations 2000 determines that where funding is withdrawn by revocation or discharge the solicitor's retainer under the certificate determines immediately, subject only to the solicitor complying with any procedures requiring the service of notice and/or any appeal against the decision to withdraw funding being concluded (Funding Code Procedures C.58).

5. The Commission's approach

   When calculating the period for cases where the certificate has been revoked or discharged, the Commission will add three months either from the date of discharge/revocation or from the date of the Funding Review Committee's decision to dismiss any appeal.

6. In cases where the solicitor has terminated the retainer, the Commission will calculate the three month period from the expiry date of the 14 day warning period, (rather than any later date or the date of discharge/revocation) unless the solicitor can provide information showing that the retainer determined on such a later date with an explanation for the same.

7. Where proceedings have begun

   Where regulations 105(2A) or (3) apply, proceedings have been started and the certificate has not been either revoked or discharged at the time the proceedings have concluded, the three month period runs as if CPR 47.7 applies, rather than the date of subsequent discharge.

8. CPR 47.7 provides the following:

SOURCE OF RIGHT TO DETAILED ASSESSMENT	TIME BY WHICH DETAILED ASSESSMENT PROCEEDINGS MUST BE COMMENCED
Judgment, direction, order, award or other determination	3 months after the date of the judgment but where detailed assessment is stayed pending an appeal, 3 months after the date of the order lifting the stay.
Discontinuance under Part 38	3 months after the date of service of notice of discontinuance under Rule 38.3 or 3 months after the date of the dismissal of any application to set the notice of discontinuance aside under Rule 38.4
Acceptance of an offer to settle or a payment into court under Part 36	3 months after the date when the right to the costs arose.

9. If the proceedings conclude with a formal order the time runs from the date of the final order rather than the date of any later discharge of the certificate. It is the order that is the power to obtain detailed assessment and as so is the trigger for the time limit referred to herein. If solicitors request discharge regional offices may enquire as to the existence of any court order when proceedings have been issued.

Penalties.

10. Regulation 105 of the Civil Legal Aid (General) Regulations 1989 has been amended by the deletion of paragraph (9). Paragraph (10) now reads as follows:

11. *"(10) Where a solicitor or counsel has failed to comply with the time limit in paragraph (3A), the costs shall be assessed and the Area Director shall consider what, if any, reduction is reasonable and proportionate in all the circumstances; provided that costs shall not be reduced unless the solicitor or counsel has been allowed a reasonable opportunity to show cause in writing why the costs should not be reduced".*

12. Although claims may be submitted out of time a fair balance has to be achieved between the interests of the Community Legal Service in securing prompt submission of bills and those of the profession who should not be deprived, merely due to late submission, of costs for work properly carried out. The amended regulations require the reduction applied to be reasonable and proportionate in all the circumstances.

13. There is no longer any need for the time limit to be extended. When claims are submitted by solicitors and they are outside of the time limit, the costs should be assessed immediately and a deduction imposed if it is reasonable to do so. Costs will no longer be nil assessed for submission without an extension of time or where there appears to be no good reason. Where there is a reasonable explanation for the delay, the assessor should consider the appropriate deduction in the light of that explanation.

14. Deductions will be imposed to a maximum of :

    (a) 5% for bills submitted up to 9 months out of time;

    (b) 10% for bills submitted between 9 – 18 months out of time;

    (c) 15% for bills submitted between 18 – 27 months out of time;

    (d) 20% for bills submitted between 27 - 36 months out of time;

    (e) 30% for bills submitted between 36 – 45 months out of time;

15. Generally, it should be possible for late claims to be submitted within 48 months of the conclusion of the matter (i.e. up to 4 years out of time) but if the claim is submitted later, higher deductions should be applied.

16. Whilst the percentage reductions are a guide to late submissions, where the solicitor explains any delay for the submission, the regional office should consider whether or not the standard percentage is a reasonable and proportionate reduction to be applied in all the circumstances. There may, for example, be circumstances where a bill submitted up to 3 months out of time has been delayed through no fault of the solicitor and thus a reduction should not be applied.

17. What is reasonable and proportionate in the circumstances, is a question of fact in every case. Regard should be had to the particular firm's history of late claiming.

18. Common examples of where it may be reasonable for some delay to have been incurred by the firm are:

    (a) linked or related actions awaiting final disposal;

    (b) where conveyancing or other work by the conducting solicitor is necessary to implement an ancillary relief order;

    (c) the court has delayed in sending the final order;

    (d) counsel has failed to submit a fee note despite reasonable steps by the solicitor to obtain the same;

    (e) delays in drafting the bill by the Law Costs Draftsman despite reasonable steps by the solicitor to ensure the bill is submitted within time;

    (f) where the solicitor chooses to await the conclusion of a case transferred from the Magistrates' to the County Court before completing assessment;

(g) intervention or insolvency (but it remains the solicitor's duty to collate and prepare bills), illness or injury to conducting solicitor;

(h) damage to files through office fire or flood;

19. Deductions are based on the solicitor's profit costs. The deductions will have or be made from the solicitor unless counsel has been responsible for the delay. Counsel's fees are preserved provided he or she has not caused or contributed to the delay. In any case where the maximum fee principle applies, the late claim deduction is applied after assessment of the reasonable costs and counsel's fees are paid from the balance then due.

20. Where costs are disallowed in full, the solicitor is still bound to discharge any experts fees that had been incurred.

21. It should be noted that counsel is subject to late claim provisions in the family graduated fee scheme.

Queries

22. Many queries over apparent non-payment of claims which are raised with the regional office may arise from cases where payment has in fact been made but solicitors have not posted the payment. It is reasonable to expect solicitors to monitor the receipt of payments on a regular basis and therefore to be in a position to raise such queries promptly after having posted payments and checked remittance advises. Except in a small minority of cases, civil bills are paid by the Commission within a maximum of 4 to 6 weeks of receipt of the claim for costs. The solicitor should therefore only make an enquiry of the regional office if payment is not received within two months of submission of the claim.

23. Before raising a query with the relevant regional office the solicitor should specifically check for payment and, if an enquiry of the regional office is appropriate, should confirm that all remittance advices since the submission of the original claim have been checked for the appropriate payment and a copy of the claim previously submitted together with any proof of receipt should be forwarded to the regional office. The process of the solicitor checking for payment and the inclusion of a copy of the claim (and any supporting documents available) will reduce unnecessary queries and assist the regional offices in dealing with such queries as are received. Where the solicitor cannot provide proof of receipt of the claim by the regional office the matter may be treated as a late claim (see above).

6.4 Wasted Costs

1. General

(a) Where the court considers a legal representative has by act or omission behaved improperly, unreasonably or negligently they may make a wasted costs order which will either disallow that representatives costs or order that representative to meet the costs of another party. The order will specify the amount to be paid or disallowed. The court is then obliged to serve a notice of such an order on the Legal Services Commission. Orders can be made both against solicitors and counsel.

2. Procedure On Receipt Of Order

(a) Where an order has been made and received prior to receipt of a bill for assessment, it should held on the file and the file marked accordingly. Also if the file is not available a memo should be flagged up on the computer system's memo pad facility. Once the bill is received, if the solicitors have included the costs in the claim, it should be reduced and the remainder of the claim assessed in the normal way. If no further reductions are made in the bill, there will be no right of appeal, which will only arise if the claim is reduced beyond the amounts disallowed by the wasted costs order.

(b) If the order is received after assessment of the claim, if the claim did not account for the order, these sums will have to be recouped and the solicitor/counsel informed accordingly.

3. Wasted Cost Orders On Assessment – CPR 44.14

(a) CPR 44.14 contains the court's power to make an order to disallow all or part of the costs to be assessed or to order the party at fault or their legal representative to pay any wasted costs (CPR 44.14(2)). This power may be exercised where:

i) a party or his legal representative, in connection with an assessment fails to comply with a rule, practice direction or court order; or

ii) it appears to the court that the conduct of the party or legal representative before or during the proceeding which gave rise to the assessment proceedings was unreasonable or improper.

(b) Before making an order the court will give the party or representative an opportunity to attend a hearing to provide reasons why no order should be made.

(c) Paragraph 18.2 in the Practice Direction to CPR44 indicates that conduct includes steps which are calculated to prevent or inhibit the court from furthering the "overriding objective".

(d) The provisions within the CPR are without prejudice to the existing provisions in Section 51 of the Supreme Court Act 1981 to disallow costs occasioned by an act or omission. Although the regulations are not specific on this point, in following the same principles as the court, an assessment by the Commission may consider disallowing costs. The assessor should write to the solicitor outlining the grounds on which costs have been disallowed and provide the solicitor opportunity to explain why no reduction should be made through the provisional assessment process.

6.5 The funded client's rights

1. Regulation 105(A) of the Civil Legal Aid (General) Regulations 1989 confers certain rights on the funded client who has a financial interest in the assessment of their solicitor's costs. It also imposes certain obligations on the solicitor.

2. A funded client has a financial interest if he/she has any contribution or if the statutory charge will apply to his/her case. If the question of the statutory charge may arise but has been undetermined, or if an assessment or reassessment of means is pending, then for the purposes of Regulation 105(A), it should be assumed that the funded client has a financial interest.

3. Revocation of a certificate does not give the funded client a financial interest because once a certificate is revoked they are deemed never to have been an funded client. The regulation only applies to funded clients. Whilst revocation does not, strictly, give the funded client a financial interest they do nevertheless have a financial interest in a sense because they are liable for the costs allowed. In the light of the Human Rights Act 1988, the client should have sight of the bill. Solicitors must serve them with a copy of the bill. Solicitors will be asked to confirm that notice has been given in such circumstances.

4. The rights given to a funded client are that on any assessment, review or appeal she/he can make written representations to the regional office or to a Costs Committee within 21 days of being notified of his/her rights.

The solicitor's obligations

5. The obligations imposed on the solicitor are threefold:

   (a) To supply the funded client with a copy of the bill of costs.

   (b) To inform the funded client or their financial interest and their right to make written representations.

   (c) To endorse on the bill whether or not the funded client has a financial interest, has been supplied with a copy of the bill and informed of their right to make written representations.

6. In the event that the statutory charge applies, or if any part of the contribution needs to be refunded, payment will be made to the solicitors but no balancing of the funded client's account will take place until the outcome of any costs appeal is known. The amount due after a provisional assessment by the commission would be paid to the solicitors and, depending on the outcome of any appeal, the regional office may pay the additional sum or recoup as appropriate.

7. The following is a suggested form of the endorsement:

   "I certify that a copy of the attached bill has been provided to the funded client, pursuant to Regulation 105A of the Civil Legal Aid (General) Regulations 1989, with an explanation of his/her financial interest in the assessment of the bill and his/her right to make written representation on the bill and thereafter on any subsequent review to the costs committee or appeals to the Legal Services Commission's Costs Appeals Committee. I confirm that either 21 days have passed since the copy bill was provided to the funded client or the funded client has confirmed in writing (copy attached) the he/she will not be making any objections to the bill".

8. The regulation requires that the endorsement be on the bill, however, where the claim is to be assessed by the Commission it can also be by way of a covering letter with the costs claim.

   Procedure upon receipt of written representations

9. If written representations are received from the funded client in respect of their solicitor's bill, a copy of the representations will be sent to the conducting solicitor prior to the assessment requesting comments within 21 days. The bill will not be processed until the time limit expires. If the bill is received without any comments, where representations have been made known, comments should be requested unless the solicitor says he/she has none to make. Representations by a funded client may:

   (a) relate to the conduct of the case, i.e. that costs had been wasted or that work was not reasonably done; or

   (b) state that there is any inaccuracy in the bill, e.g. that work claimed was not actually undertaken.

10. Often a funded client will generally be unhappy because they do not understand what work the solicitor has done or they do not understand the costs process. Sometimes a complaint may in fact amount to negligence which is not a matter just for assessment. Regional offices may advise the funded client of their right to complain to the Office of the Supervision of Solicitors. In other cases, it may be that the funded client thought the solicitor took a long time to deal with (what the funded client thinks is) a simple matter. Whilst assessors are unable to specifically address vague "moans and groans" representations will result in careful scrutiny of the bill to ensure that the work done was reasonably necessary and carried out reasonably economically. Specific and valid representations can lead to specific items of work being reduced or disallowed in their entirety or, where the solicitor's conduct has been unreasonable, to a reduction in the care and conduct element, or, where care and conduct is not available, to a reduction in the scale rate.

11. Following assessment, the outcome will be confirmed to the funded client. They will be notified of their continuing rights on an appeal where the bill has been reduced and at the same time (if representations directly led to a reduction in the claim) the solicitors will be informed that written representations made by the funded client were taken into account in assessing the bill and a copy of those representations is attached.

12. If the solicitors go on to appeal to the costs committee, the funded client has similar rights but only if representations were made before the provisional assessment and the representations affected it. It is recognised that whilst there is no specific entitlement for the legal representative to attend on an appeal they are allowed to do so. The funded client must also be given an opportunity to attend, if they so wish.

6.6 The Timing of Payment

1. Subject to our receipt of all necessary information and payments in connection with a claim for certificated work (and provided obligations have been met in respect of the claim and the case to which it relates) any payment due under the Contract will be made no later than six weeks after the relevant date. Normally, payment will be included in one of the regular BACS settlements, the dates of which are published in Focus.

2. Subject to 6.6.4 below, the relevant date is (a) where a bill or claim has been assessed by a court, 30 days after compliance and receipt of all necessary information and payments, as required by contract rule 6.10; and (b) for any other bill or claim (including claims for payments on account) either the date on which we have assessed it or otherwise passed it for payment, or the date of compliance and receipt of all necessary information and payments, as required (whichever is later) where there is an appeal against an assessment, the date of the appeal decision is the date of the assessment for these purposes.

3. “*All necessary information*” comprises all information that the Commission requires to enable it to perform its functions under the Act. This may include correct and properly completed forms, information to enable it to assess the bill or claim, information to enable a decision to be made as to whether the statutory charge on property recovered or preserved applies, or whether there should be a reassessment of the client’s means, information necessary to demonstrate that the Contract and regulations have been complied with and responses to all reasonable queries.

4. “*All necessary payments*” means any payments that, under the Contract the solicitor is obliged to make in respect of the case and may include payment to the Commission of property recovered or preserved for the client.

5. If the solicitor has failed to comply with these obligations in respect of the bill or claim or the case to which it relates (e.g. if there has been a failure to report forthwith the recovery or preservation of property) the relevant date is 14 days after all necessary steps to protect our (and the client’s) position have been completed (e.g. if we have a statutory charge on property recovered, 14 days after we have received confirmation that it has been protected by registration).

6. The Commissions published performance standards for making payments are not altered by this and we will continue to aim to meet them.

7. The Appeals Procedure

7.1 Introduction

1. Contract Rule 6.5 applies regulation 105 to any assessments made by the Commission under the General Civil Contract for Licensed Work. Contract Rule 6.3 similarly applies. Regulation 105 so far as it relates to the solicitors rights of review from an assessment.

2. Consequently, whether under the contract or otherwise the appeal procedure is as set out in Regulation 105 of the Civil Legal Aid (General) Regulations 1989 (as amended).

7.2 Stage 1, appeal to costs committee

1. In the first instance the solicitor or counsel has the right to make written representations to costs committee within 21 days of receipt of the provisional assessment. The Committee can then review the assessment and either confirm, increase or decrease the original assessment (regulation 105(4)).

   Caseworker to reconsider in first instance.

2. In practice the solicitor will submit written representations and the case will first be reconsidered by a caseworker. If additional information is provided, or the caseworker simply considers the original assessment harsh, they should allow further amounts by way of an adjustment, and inform the solicitor in writing accordingly. The solicitor/counsel should be informed that their appeal to the Costs Committee continues (unless of course the claim has been allowed in full) and the reconsideration would allow them to consider whether or not to withdraw it.

3. Alternatively, if the caseworker is not prepared to allow further sums, then the case should be prepared to go before the costs committee. The Costs Committee determines the costs by a “de novo” review after consideration of the original claim submitted, any further submissions made by the solicitors in writing and any oral representations made by the solicitor or the funded client at the committee meeting. Essentially, the “de novo” review is looking at the bill of costs afresh to determine the sums due to the solicitors. On the review the Costs Committee may confirm, increase or decrease the amount allowed.

4. Costs Committees must, in all cases, give reasons for their decisions. Where standard reasons would not be appropriate, the costs committee should give specific reasons for its decision in the particular case and if necessary refer to the relevant regulations, principles governing the assessment of costs and existing points of principle. The appellant should be informed of the result of the appeal and copies sent to the funded client, if appropriate.

   Right of attendance.

5. The regulations only refer to written representations. Solicitors/counsel may attend on reviews, at their own expense, provided that they have requested their attendance be permitted when making the application for the review and have submitted written representations.

6. The funded client has a right of attendance only if they have a financial interest and representations were made prior to the provisional assessment which affected the assessment.

7. Neither the solicitor nor the funded client have a right of attendance on stages 2 and 3 of the appeals procedure as those stages do not relate to the individual circumstances of the claim but rather the general principles involved.

7.3 Stage 2, certifying a point of principle of general importance

1. If a solicitor/counsel is not satisfied with the decision of the costs committee on review then the second stage of the appeal procedure is for the solicitors to apply in writing within 21 days to a freshly constituted committee to certify a point of principle of general importance (regulation 105(5)). The Regional Office will prepare the case for appeal and attend before the costs committee.

2. The Costs Committee on consideration of the case will need to assess whether the result of the review raises a point of general importance to the profession. The purpose of this is to ensure that points of principle to be heard on appeal by the Costs Appeals Committee do not turn on the particular facts of a case but raise issues of principle which are likely to effect other assessments/determinations in the future. Where most points of principles are likely to arise are in the interpretation of the regulations effective in costs assessment or governing their application on assessment. The Costs Committee will consider the issue on the papers without attendance by the solicitors who will usually make written representations.

3. Solicitors should, when making submissions for the certification of a point of principle of general importance, be asked to provide the exact wording of the point of principle they wish to be certified.

4. The Costs Committee must, when certifying a point of principle of general importance, consider whether there are any existing points of principle in the Manual of Points of Principle relevant to the request for certification. The Costs Appeals Committee's decisions are binding on the Commission for costs assessments and are maintained in the Manual of Points of Principle of General Importance. The points of principle specifically referred to this manual are not a definitive list. The Point of Principle Manual should be referred to on a regular basis. Notification's given on all new decisions as they are published to regional office staff and Costs Committee members and externally through the Law Society Gazette.

5. If the request is granted, a clear certified point of principle must be made at the date of the meeting. If no point is certified reasons for refusal must be given which should state either or both limbs of the basis on which the point can be certified, i.e. is it a point of principle? If it turns on the individual facts of the case, it is likely that no principle is arisen. Is it of general importance? If it turns on the very particular facts and is unlikely to arise again (and even if it did would not be generally applicable) it is not of general importance.

6. The appellant should be notified of the result. If no certification is given, there is no further avenue of appeal open to the solicitor except judicial review of the decision. If a point is certified the Policy and Legal Department of Head Office should be provided with a copy of the letter to the solicitor and the costs committee’s agenda item for both the review and the request for certification. The solicitor can then proceed to the third stage of the appeals procedure, if he applies to do so.

7.4 Stage 3, the Costs Appeals Committee

1. The final stage is an appeal to the Costs Appeal Committee of the Legal Services Commission. The Costs Appeals Committee is serviced by the Policy and Legal Department at Head Office.

2. The letter notifying the appellant that an Costs Committee has certified a point of principle must inform them they must apply direct to the Policy and Legal Department within 21 days.

3. The Costs Appeals Committee can reverse, affirm or amend the Costs Committee’s decision under the review of the costs assessment. The Costs Appeals Committee’s decision will interpret the relevant regulations and its application by the regional office on assessment. If considered necessary the Costs Appeals Committee will formulate a point of principle.

7.5 Solicitor’s responsibility to Counsel.

1. After each stage of the appeal the solicitor is obliged to inform counsel if appropriate, i.e., where counsel’s fee has been disallowed/reduced on the assessment, in writing within seven days of the result of the appeal. Counsel has the right to pursue an appeal in person.

8. Bills Assessed By The Court

8.1 The Process

The Courts Role in Determining Costs

1. Prior to the introduction of the Civil Procedure Rules the court determined a cost liability with direct reference to a party's success in the proceedings. The principle of costs was that costs followed the event i.e. the winner generally obtained an order for payment of their costs from the losing party. An exception to this rule was matrimonial cases where costs did not generally follow the event, although costs orders against parties to reflect unreasonable were increasing.

2. The introduction of the Civil Procedure Rules (CPR) on 26 April 1999 introduced an entirely new way of looking at costs. Parts 43-48 of the CPR contain rules on costs, which are aimed at enabling courts to deal with costs *"justly"*.

3. The court retained it's discretion to determine whether costs were payable by one party to another, the amount of those costs and when they became payable. Whilst the general rule of costs following the event remains in force the courts now have power to make different costs orders so that the success of a party in proceedings is only one of a number of factors to be taken into account.

4. CPR 44.3 (4) provides that the court can have regard to all the circumstances including:

   (a) the conduct of all the parties;

   (b) whether a party has succeeded on part of his case (even if not wholly successful);

   (c) any payment into court or admissible offer to settle made by a party, which is drawn to the court's attention.

5. The court when making an order between the parties can either make a summary assessment of the costs (not in publicly funded cases) or order a detailed assessment of the costs by the Costs Officer. Detailed assessment was a new procedure to replace taxation of costs. This is referred to below.

6. CPR 44.3 (6) enabled the court to make a number of different types of costs order. The variations are:

   (a) a proportion of another parties costs;

   (b) a fixed amount in respect of another parties costs;

   (c) costs from or until a certain date;

   (d) costs of particular issue;

   (e) costs relating to particular steps;

(f) costs relating to a distinct part of proceedings;

(g) interest on costs from or until a certain date (including a date prior to judgment).

7. CPR 44.4 determines the basis on which costs were to be assessed by the court. Costs generally continue to be assessed on either the "standard basis" or "indemnity" basis.

8. Public funding costs were always assessed on the standard basis. That basis was revised so that proportionality now comes into consideration for costs incurred on or after 26 April 1999. CPR 44.4 (2) states that:

"where the amount of costs is to be assessed on the standard basis, the court will:-

(a) only allow costs which are proportionate to the matters in issue; and

(b) resolve any doubts whether costs were reasonably incurred or reasonable and proportionate in favour of the paying party".

9. Costs will still be assessed by the court on the standard basis in accordance with Regulation 107A of the Civil Legal Aid (General) Regulations 1989 but costs will be limited to a level that is proportionate to the matters in issue, taking into account all the circumstances.

10. Where the Commission has responsibility for assessing costs, it will assess on the same principles as if the court had undertaken the assessment. Therefore the Commission must take into account whether the costs were proportionate to the matters in issue.

11. The factors to be taken into account in order to decide whether costs were reasonably incurred, proportionate, or reasonable in amount are set out in CPR 44.5 (3). The additional factors are:-

(a) "the conduct of all the parties, including in particular

i) conduct before, as well as during, the proceedings; and

ii) the efforts made, if any, before and during the proceedings in order to try and resolve the dispute;

(b) the amount of value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised

(e) the skill, efforts, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done."

12. The reference to conduct includes conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocols. Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue and the manner in which a party has pursued or defended his case or a part thereof and if a successful claimant has exaggerated his claim.

13. The amount of value of any money or property involved is based on proportionality and to a certain extent is similar to the cost benefit test. For money claims where the amount recovered is less than the costs claimed, the solicitor's bill and supporting file of papers should be carefully scrutinised to determine whether the proceedings were conducted in a way which was proportionate to the amount in stake.

14. An assessment of proportionality is more difficult when undertaken in cases where the benefit is not purely financial. The guidance on the application of the legal aid merits test for non-money cases does provide a general reference point. For instance, if the case is of great significance to the parties, this may weigh against the requirement for costs to be proportionate.

15. The remaining factors in the list are those which were already applied by the courts on detailed assessment.

16. The notes to CPR 44.4 state that if proportionality is in issue, the proportionality of the costs as a whole should be the subject of a preliminary judgment as to whether the appropriate level of fee earner or counsel had been employed, whether offers to settle had been made, unnecessary experts instructed and other matters in CPR 44.5(3) taken into account. If disproportionate as a whole, the assessor should consider the costs items by item applying a sensible standard of necessary to what it was, or was not necessary to do.

17. Paragraphs 11.1 and 11.2 of CPR PD 44 give a guide to the courts general approach.

    "In applying the test of proportionality the court will have regard to rule 1.1(2)(c). the relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

    In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in issue".

18. The majority of the costs claims assessed by the Commission will be modest and costs may well equal the claim. It is likely that costs may in some cases exceed the amount in issue. Regard should be had to the cost limitations imposed. The use of costs limitations is considered to be a useful tool in ensuring proportionality but even if a solicitor has not exceeded, the limitation imposed, the Commission may consider on assessment whether the costs are proportionate.

19. In family cases, costs should in the main be proportionate to the matrimonial assets but there will be some cases which are so complex that they are not.

20. In non family claims, it may be possible to distinguish the lower value fast track claims from the higher value, more complex multi track claims when considering whether costs are reasonable and proportionate.

21. *In* ***Jefferson v National Freight Carriers Plc [2001] All ER 411***, the Lord Chief Justice endorsed the words of Judge Alton in the lower court *"... In modern litigation with the emphasis on proportionality, it is necessary for the parties to make an assessment at the outset of the likely value of the claim, its importance and complexity and then to plan in advance the necessary work ... the overall time which it would be necessary and appropriate to spend on the various stages .. whilst it was not unusual for costs to exceed the amount in issue, it was, in the context of modern litigation .. one reason for seeking to curb the amount of work done and the cost by reference to the need for proportionality".*

22. In straight forward low cost cases, solicitors may be expected to make this assessment and maintain costs at a reasonable and proportionate level.

23. ***Lownds v Secretary for Home Department (CA: 21.3.02)*****.** In this case the court suggested there should be a two-stage approach a global approach and an item by item approach. The global approach will indicate whether the sum claimed is or appears to be disproportionate having particular regard to the CPR 44.5. (3) considerations.

24. If the costs as a whole are not considered disproportionate, according to that test, then all that is normally required is that each item should have been reasonably incurred and the cost of that item reasonable. If the costs as a whole are considered to be disproportionate then the court will seek to be satisfied that the work in relation to each item was necessary and the cost reasonable.

25. If the global costs are disproportionately high, no more should be recovered than what would have been recoverable item by item if the litigation had been conducted proportionately.

8.2 Summary Assessment

1. At the end conclusion of any hearing in the fast track or lasting under one day, the court can either summarily assess the costs of that hearing or order detailed assessment. The general rule is that the court should summarily assess. At the hearing each party should prepare a statement of the costs incurred (following the precedent in form N260) to enable the court to make a summary assessment.

2. Paragraph 13.9 of the Practice Direction to CPR 44 (CPR PD 44) indicates that the court will not make a summary assessment of the costs of a public funded party where the costs order is made in their favour. It may however assess the cost of the paying party. An assessor will see orders for summary costs payable to a funded client which should be noted for recovery purposes.

3. CPR 44.17 and paragraph 13.10 of CPR PD 44 state that whilst the funded client may be ordered to pay costs and the costs of the receiving party are summarily assessed, that is not a determination of the funded client's liability to pay those costs. An application under Section 11 of the Access to Justice Act 1999 must still be made. If a summary order of costs is made against the funded client and the receiving party asserts this to be an order capable of set off (between the parties) or to be an order for payment by the Commission, this is not so.

4. If the order is not by consent, but made following an order for costs the Judge will ensure the costs are not disproportionate or unreasonable even if the individual items of the schedule are not challenged. However, in absence of objections by the paying party the Judge will consider the costs to be proportionate and reasonable and only intervene if satisfied that the costs are so disproportionate it is just to intervene.

8.3 Default Costs Certificates

1. In the process of a detailed assessment (relating to an order for costs between the parties) the paying party (and any other party) is served with the bill of costs and is given an opportunity to dispute any item of costs by serving points of dispute. (CPR47.9.)

2. If no points of dispute are served, or the 21 day period for service has expired, the party with the benefit of the costs order (the receiving party) may apply for a default costs certificate. The default costs certificate is effectively an order to pay the bill as drawn. No assessment takes place.(CPR 47.11).

3. Paragraph 37.5 of CPR PD 47 confirms that the default costs certificate (which will be for sums due from the paying party) does not prevent, govern or affect any detailed assessment of the same costs which are payable from the Community Legal Service Fund. Essentially, whilst it governs what can be recovered from the paying party there should still be an assessment of the costs due from the fund (both of the costs between the parties and legal aid only costs at prescribed rates) in the event that the default costs certificate is not satisfied.

4. Where a default costs certificate has been obtained but the between the parties costs have not been recovered, the fixed costs and court fee should be added into Box C on the LSC assessment certificates legal aid only costs.

8.4 The Courts Sanctions

1. CPR 47.7 contains time limits for the commencement of detailed assessment proceedings. If proceedings, are not started within this time limit, or in accordance with any court direction, the court can sanction the receiving party.

2. CPR 47.8 allows the court, on application by the paying party, to make an "unless" order so that if the detailed assessment proceedings are not commenced within the time specified in that order, all or part of the costs will be disallowed.

3. If the costs are payable out of public funds CPR 47.8.4 deems the Commission to be the paying party and it can make this application. It should do so in any case where either the client or any counsel instructed complains of delay on the solicitor's part in submitting the bill for detailed assessment. Attempts should first be made to identify the reasons for the delay. Assessors should write to the solicitors to enquire, placing the firm on notice that in the event of non reply or unsatisfactory response the Commission may make an application to order commencement of the detailed assessment. Regional offices should seek the advice of the Policy and Legal Department before making the 47.8 application.

4. If the paying party does not make any such application and there has been delay, the court may, of its own instigation, disallow statutory interest on costs.

8.5 Interim Certificates

1. During the course of long, complex assessments of costs the court may issue an interim certificate against a paying party in order to assist the solicitor's cash flow. The interim certificate is an order to the paying party to pay such sum as the court thinks fit on account of the costs CPR 44.3(8). Generally, these orders will only be made in cases where there is an order for costs between the parties and the Commission would not be expected to pay these costs. However in very large legal aid only bills the court may order an interim payment and the Commission will pay on account in accordance with that order and await the final costs certificate in due course.

9. Agreed Costs

Note:

How these are dealt with will depend on the date of the issue of legal aid. New regulations came into force on 25 February 1994, certificates issued prior to that date will be dealt with under the old regime and those issued on or after under the new régime.

9.1 Pre-prescribed Rates

1. The regulations relevant to certificates issued prior to 25 February 1994 are Regulations 105(3)(b) and 106 of the Civil Legal Aid (General) Regulations 1989. If the funded client's solicitor and counsel are prepared to accept the agreed costs between the parties in full and final settlement of the claim for costs. 105(3)(b) allows the Commission to assess costs where:

   "...the case of an funded client [...] has been settled after the commencement of proceedings without any direction as to costs on terms that include provision for an agreed sum in respect of costs to be paid to the funded client which the solicitor and counsel (if any) is willing to accept in full satisfaction of the work done...".

2. Regulation 106 confirms the Commission's authority to deal with agreed costs cases which arise under regulation 105(3)(b). The regulations under the old régime only allow for an all or nothing situation, i.e. solicitors must accept the inter-partes costs in full and final satisfaction of all their costs and make no claim from the fund whatsoever, or the whole of the costs must be taxed, the costs between the parties paid into the fund and everything claimed from the fund.

3. When under the old régime solicitors are prepared to accept costs between the parties in full and final settlement of their claim, they should report to the area office and retain the recovered costs until details of all payments on account made to all solicitors and counsel have been provided, before distributing the funds. This is because all the payments on account, whether to solicitor or counsel, will be recouped automatically from the final conducting solicitor through the fortnightly settlement run. Once they have this information they can distribute the costs accordingly.

4. If solicitors try to reimburse the Commission directly for outstanding payments on account, any such remittances received should be returned.

5. Since the introduction of prescribed rates solicitors and taxing officers have mistakenly believed that the concession in Regulation 106a (inserted in 1994 for prescribed rates cases) can be used in pre 25.2.94 cases where the parties have only agreed part of the costs. This is incorrect as it only relates to certificates issued on/after 25 February 1994. However, where the bill has gone through detailed assessment the Commission is obliged to pay the bill in accordance with the detailed assessment certificate. Consideration should be had to a deferment of the solicitor's profit costs under Regulation 102 if the result of the breach of Regulation 106 is a loss to the fund.

6. An article in Focus 24 alerted solicitors to the Commission's position. The text of this note is set out below.

*"Regulation 106 remains applicable to all certificates issued prior to 25 February 1994. An agreement of costs between the parties is not possible unless the agreement is accepted in full and final settlement of **all** the solicitor's costs under the legal aid certificate, i.e. that there is to be no claim against the Community Legal Service Fund.*

*The concession in Regulation 106A of the Civil Legal Aid (General) Regulations 1989 is effective from 25 February 1994 and relates **only** to certificates issued on or after that date. The solicitors are able to agree their costs between the parties (whether in whole or in part) and then obtain a detailed assessment or assessment of the legal aid only costs in such cases.*

*Unfortunately, it would appear that many solicitors are increasingly agreeing costs between the parties and then proceeding to tax the legal aid element only, despite the fact that the certificate may have been issued prior to 25 February 1994 and thus is a certificate to which the concession in Regulation 106A does **not** apply.*

If parties submit a bill in relation to a certificate issued prior to 25 February 1994, having purported to agree the inter partes element, the court should inform them that there will have to be a detailed assessment of the whole bill. A full taxing fee will be payable if a taxing certificate is to be issued.

However, if parties do succeed in getting a bill taxed inappropriately, this will constitute a breach of Regulation 106. If the fund has suffered a loss as a result of the breach, the Commission should consider deferment of the solicitor's profit costs or a referral of the matter to the Solicitors' Disciplinary Tribunal under Regulation 102."

9.2 Post Prescribed Rates

General

1. Under the new régime, Regulation 106 Civil Legal Aid (General) Regulations 1989 is revoked and replaced by a new Regulation 106A. This sets up a procedure for claiming the legal aid only costs where the costs between the parties have been agreed and paid. If the costs between the parties have been agreed and paid, solicitors will be entitled to apply for assessment of the legal aid only costs or detailed assessment if they exceed the assessment limit. This limit is regardless of the amount of the agreed and paid costs between the parties.

Solicitor agrees costs between the parties, and they are paid, but wishes to claim legal aid only costs

2. Provided that the agreed costs between the parties are have been paid in full, then the legal aid only costs can be claimed and the claim for these costs will be assessed accordingly. In essence, the Fund will pay the legal aid only costs, although in the majority of cases it is anticipated that the statutory charge will apply to those costs, i.e. if damages have been awarded.

Note:

If the costs between the parties are agreed but are not paid, this procedure cannot be used and procedures set out below will have to be followed.

If costs between the parties cannot be agreed (or are agreed but <u>*not*</u> *paid)*

3. In such cases, the funded client's solicitor will have to get their bill assessed by the court. The detailed assessment will be of the costs between the parties at the market rate the costs between the parties at the prescribed rate (i.e. the same work but at the rate fixed by regulation) and the legal aid only costs at the prescribed rate.

9.3 Legal Aid Only Assessments

1. There will be two types of legal aid only costs to be considered:

   (a) Items in respect of which there is no order between the parties.

   Examples:

   i) correspondence with the Legal Services Commission;

   ii) counsel's opinions obtained for the benefit of the Legal Services Commission;

   iii) costs of a summons where the funded client was not allowed costs;

   iv) costs of, say, a second medical opinion from a medical expert in the same discipline as the original expert and subsequently relied on may render the costs of the original report irrecoverable between the parties. The first report may be allowed against the fund, if reasonable.

   (b) Items which are covered by an order between the parties, but for which the paying party will not accept (full) responsibility.

   Examples:

   i) allegedly excessive attendances on a client (for example, if he or she was over talkative or kept phoning up every day);

   ii) expert's fees where an element of the expert's fees claimed is not accepted.

2. This second type of costs will be considerably harder to justify and more information will be required to justify it. The solicitor will need to state:

   (a) the amount claimed from the paying party in respect of each item concerned;

   (b) the amount agreed and paid;

   (c) the equivalent cost of the short fall calculated at prescribed rates;

(d) the solicitor will need to satisfy the Commission/Taxing Officer by reference to correspondence or otherwise that the paying party refused to accept the particular item wholly or in part and justify the reasonableness of making a claim against the Commission for these costs (paragraph 25 of the Practice Direction 4 of 1994 refers).

3. Information as set out in (i) to (iv) above is what the court will seek on a detailed assessment of such costs and we should only seek the same information that the court would seek.

9.4 CIS

1. It will not be necessary for any money relating to the agreed costs to be paid into the Community Legal Service Fund. If the legal aid only claim is to be assessed, it will be dealt with in the normal way by the area office and if any reduction is made to the claim, the normal appeals procedure will apply.

2. If the legal only claim is to be assessed by the court, the solicitor should send the bill to the courts for the legal aid only costs for provisional detailed assessment. The usual detailed assessment procedures will apply. When the assessment certificate has been received from the court, the solicitor should send the assessment certificate and the form CLAIM 2 to the regional office and the Commission will pay the legal aid only costs as assessed. The solicitor should:

   (a) retain the agreed and paid costs between the parties and sufficient damages to cover the claim for legal aid only costs. The balance of the damages can be released to the client, provided the solicitor gives an undertaking for the amount of the legal aid only costs.

   (b) send to the area office a form CLAIM 2 and sufficient monies from the client's damages to cover the legal aid only costs.

9.5 Refunds

1. If a bill has been provisionally assessed, the refund is based on the amount paid to the solicitor and the "assessed amount" retained for 21 days pending receipt of an appeal. If no appeal is received, the additional refund will be paid to the funded client automatically.

9.6 Interest on costs

Legal Aid Act 1988 Cases - What is Interest on Costs?

1. The Judgments Act 1838 gave a statutory right to interest on High Court judgments and orders. Once judgment is obtained, interest runs automatically and is recoverable from the opponent. Section 18 of that Act provides that interest also runs on any orders for costs.

2. Statutory interest on costs only arises where there is a court order for the payment of costs. If, for example, an action is settled on payment of an agreed sum for damages and costs, but the court order disposing of the action makes no order for costs between the parties, interest on costs does not arise.

3. Although the Judgments Act applied directly only to the High Court, interest provisions have been produced in the County Court under section 74 of the County Courts Act 1984. The County Courts (Interest on Judgment Debts) Order 1991 came into force on 1st July 1991 and applied to certain judgments and orders in the County Court made after that date.

4. There are few exemptions, the most important of which concerns county court proceedings where interest runs on any judgments or orders for payment of a sum of more than £5000. In any County Court case where the total amount of the judgment, including both damages and costs, turns out to be £5000 or more, statutory interest automatically becomes payable on both the damages and the costs.

Who does Interest on Costs Belong to in a Non-Legal Aid Case?

5. In the absence of legal aid, interest on costs prima facie belongs to the client. It is payable to the client just like any other order between the parties. Some of the implications of this were considered in **Hunt v Douglas Roofing [1988] 2 All ER 823.** The rule could work unfairly to solicitors as an earlier case of **K v K** illustrated. Nevertheless, the House of Lords upheld the Incipitur Rule so that interest on costs can be recovered by the client whether or not the client has paid the solicitor. Such a conclusion is possible because interest on costs arises automatically under statute, so that normal contractual principles of restitution cannot be directly applied.

6. The solution is for solicitor and client to enter into an agreement as to the treatment of interest on costs, ensuring that the interest is paid to whoever has been waiting for their money. Such an agreement was recommended by Lord Ackner and is now commonly entered into in contentious business agreements between solicitors and clients.

Position under Legal Aid Act 1988 and Regulations

7. As explained below, interest on legal aid costs is always payable into the Community Legal Service Fund. **Hunt v Douglas** case was not concerned with legal aid and therefore one must look to the Act and Regulations and relevant authorities to decide how the grant of legal aid affects entitlement to interest on costs.

8. Where a legal aid certificate is issued, the primary obligation to pay the solicitor falls on the Commission rather than the client (section 15(6) Legal Aid Act 1988) and solicitors can receive payment from no other source (Regulation 64 of the General Regulations). Therefore regarding payment of costs the Commission steps into the position of the client. Section 16(5) of the Act then goes on to provide as follows:

   "Any sums recovered by virtue of an order or agreement for costs made in favour of a legally funded client with respect to the proceedings shall be paid to the Commission".

9. Interest on costs is plainly recovered by virtue of an order for costs and therefore is always payable to the Commission. Further, there is nothing in the Act or Regulations allowing the Commission to pay out interest on costs to the solicitor, except as described below.

10. Part XI of the General Regulations sets out what sums are paid into and out of the Fund. Dealing first with the position prior to the Regulation changes which brought into effect prescribed rates in civil cases (i.e. certificates issued before 25 February 1994), Regulations 87(1)(a) and 90(1) read with section 16(5) of the Act mean that interest on costs must be paid to the Commission via the solicitor. Nothing in the Regulations allows interest to be paid out to the solicitor and Regulation 92 allows the Commission to retain "any sum paid under an order or agreement for costs made in the funded client's favour ....". Again the view taken is that this covers any interest on costs.

11. For cases under the prescribed rates regime, Regulation 92(1)(d) as amended provides that where costs are recovered in full, together with interest on costs, the Commission must pay to the solicitor any interest in excess of interest on costs at the prescribed rate. In other words, the Commission retains interest on costs determined at prescribed rates, but any excess costs (the market rate differential) or interest thereon which has been recovered must go to the solicitor. See also Regulation 107B(4) inserted by the Civil Legal Aid (General) (Amendment) Regulations 1994.

Relevant authorities

12. The only authority directly on the point of the Commission's entitlement to interest on costs is the unreported County Court decision of **Clifford v The Law Society (12 May 1975, Mayor's and City of London Court).** The facts were that legal aid had been granted to a Mr Pullen for a personal injuries claim. After an appeal to the Court of Appeal Mr Pullen was ultimately successful, and Messrs Clifford & Co. accepted an agreed sum in full satisfaction of their costs. In addition the defendants paid £65 interest on costs which was paid into the Community Legal Service Fund. No payment on account had been made to the solicitor during the proceedings, so that there was no deficiency on the funded client's account with the Fund. In the proceedings against The Law Society, the solicitors claimed they, not The Law Society, were entitled to the £65. At the hearing before Judge Leonard, The Law Society was represented by Leading Counsel and in giving judgment Judge Leonard concluded that as between The Law Society and the solicitors, The Law Society was entitled to the interest. This decision confirmed Leading Counsel's advice as to the entitlement to interest on costs in legal aid cases and the view taken is that that advice still holds good under the Legal Aid Act 1988.

13. Another reported case not directly in point reinforces the argument. In **The Debtor v The Law Society (Times, 21 February 1981)** the court considered whether a bankrupt could rely on a costs order made in his favour in legal aid proceedings as an argument for staving off bankruptcy proceedings. He could not, because the costs order "belongs" to the Commission, not to the funded client or his solicitor. If the costs belong to the Commission so must the interest. Note that this case is sometimes cited as direct authority for propositions on interest on costs. It is not directly concerned with interest on costs but is a helpful and persuasive case.

14. The arguments based on the Act, Regulations and the authorities in favour of the Commission retaining interest on costs are overwhelming. Solicitors sometimes assert that it is unfair that the Commission should retain interest on costs where it is the solicitor who has been kept waiting for payment. That argument would not arise where the Commission has made payments on account, and one can only say that the system for statutory interest sometimes produces surprising results. An advantage of publicly funded work is that costs will always ultimately be paid, but the disadvantage is that a solicitor cannot take steps to arrange for interest on costs to be paid to him or her.

Effect on interest on costs on the legally aided client

15. Although the Commission retains interest on costs, the client must be given credit for all interest on costs received when calculating the amount of the statutory charge or deciding whether contributions can be refunded

16. Section 16(4) provides that where the total contribution paid by a person exceeds the "net liability of the Commission on his account" the excess must be repaid to him. Similarly the statutory charge applies where the total contribution is less than the net liability of the Commission on his account (section 16(6)). The concept is defined in section 16(9) as including all sums paid or payable on behalf of the funded client "being sums not recouped by the Commission by sums which are recoverable by virtue or an order or agreement for costs made in his favour with respect to those proceedings ...". This is the section which ensures that credit is given for costs between the parties recovered, and the view taken is that clearly any interest on costs is also recoverable "by virtue of an order ... for costs".

17. It follows that the funded client must be given credit for interest on costs recovered when determining the amount of the statutory charge and the amount of contribution to be refunded, if any.

18. The net effect is that interest on costs goes to the benefit of the client so long as there is a deficit on his account with the Commission. Insofar as there is a credit, that credit is retained to the general benefit of the Community Legal Service Fund.

Prescribed rates cases

19. Special care will be needed in prescribed rates cases because costs between the parties that are recovered in excess of those allowed at prescribed rates are payable to the solicitor. Interest on prescribed rates costs is retained by the Commission with any balance of interest on costs being paid to the solicitor. Only the interest on costs actually retained by the Commission in prescribed rate cases is credited when determining the liability under the statutory charge or a refund of contributions.

20. In a case where there are inter partes pre-certificate costs, interest on those costs will belong to the client in the normal way, subject to any agreement between the client and the solicitor. If there is any shortfall in interest on costs, the sums recovered should be apportioned between the funded client and the Commission in accordance with Regulation 103(4).

Recovery of Interest on Costs

21. The Commission would expect a solicitor acting under a legal aid certificate to recover interest on costs in the same circumstances and to the same extent as if he were acting for the client privately.

22. In any case where interest on costs is not recovered, the Commission may take enforcement action in its own name through the Debt Recovery Unit under Regulation 91 of the General Regulations.

23. Note also that the principles as to interest on costs apply even where costs are agreed and there is to be no net claim on the Fund. In such cases there may be a notional assessment under Regulation 106 but, even if the solicitor has agreed the costs he requires from the other side, interest on costs should still be recovered and paid separately into the Fund.

Access to Justice Act cases – Interest on Costs

24. Section 10(7) of the Access to Justice Act preserves the principle of a first charge on property recovered. The monies recovered must be paid into the fund Regulation 20(1)(b)(3) Community Legal Service (Costs) Regulations 2000 and Regulation 22 (see 3.46.2) provides for sums to be retained or distributed. These provisions ensure the position on the interest on costs remains the same.

25. Contract Rule 6.8 provides that solicitors may retain the element of costs recovered under an agreement or order which exceeds the amount paid or payable to them. Where interest has been received on those costs, they may retain the proportion of the interest which equates to the proportion of the total costs recovered.

Calculating interest due to the Commission

26. In the event that costs have been assessed, the determination should identify the costs between the parties at both market rates and prescribed rates. The interest due on the costs between the parties at the prescribed rate can be calculated directly.

27. Where a case has been settled and where there is no determination by assessment i.e. the parties agree the costs to be paid between the parties, the interest on those costs should be apportioned between the Legal Services Commission and the solicitor.

28. Solicitors may be asked to recost the time spent at prescribed rates to identify an exact figure for interest. This will be preferable if few payments on account were made.

29. If payment on accounts have been made this can may be accepted as up to 75% of the solicitors costs and disbursements. One method of calculating the prescribed rate amount on which interest could be to gross up the payment on account figure to 100% and find the appropriate percentage for apportionment on a pro rata basis.

10. Payments On Account

10.1 What is a Payment on Account?

1. A payment on account is a payment on account of work already done under a certificate to ease solicitors/counsel with cash flow. The payments made on account are always recouped when the final bill is received.

10.2 The different types of Payment on Account for Solicitors

1. There are 6 different payment categories which Solicitors can claim under and they are as follows; -

   (a) Disbursements

   (b) 12 monthly periodical payment

   (c) 6 monthly payment (franchised payment)

   (d) No payment received (only on certificate post 1 April 1996)

   (e) Change of solicitor

   (f) Hardship

10.3 The different types of Payment on Account for Counsel

1. There are three different types of payment categories which Counsel can claim under and they are as follows:-

   (a) 12 monthly periodical payment

   (b) No payment received.

   (c) Hardship.

10.4 What Regulations govern Payments on Account

1. Regulation 101(1)(a) provides for payment on account of disbursements.

2. Regulation 100(1) & (2) respectively, provide for the annual payments on account for both Profit costs and Counsels' fees. Regulation 101(2)(a) provides for payment on account to Counsel where no payment received and 6 months have lapsed since the event that gave rise to Detailed Assessment.

3. The franchised payments on account were provided under the franchise contract

4. Regulation 101(3), provides payment on account when 6 months has passed since an event which gave rise to the right for detailed assessment and Solicitor's have not received payment.

5. Regulation 100(6) provides for payment on account of profit costs when there is no change of solicitors.

6. Regulation 101(2)(b) covers payments claimed under hardship.

10.5 Counsel's claims and the FGF scheme

1. Counsel may only claim for payment on account in any of their selected categories if the Family certificate was issued prior to the 1st of May 2001. All applications made by counsel for Family proceedings certificates issued after this date must be rejected. The reason for rejection would be " This case was issued following the implementation of the Family Graduated Scheme and any applications for payment can only be made under that scheme".

10.6 Disbursements

1. Any solicitor who has carried out work under a certificate may make a claim for a disbursement.

2. A disbursement can be claimed at any point in a case as long as a final bill has not been received. A disbursement could be a court fee, travel expenses, process server's fees, medical report, experts report etc.

3. A claim for a disbursement can still be made even if the certificate has been discharged- regulation 101(1).

10.7 12 Monthly Periodical Payment

1. This scheme was designed prior to franchising and now only effects old cases where the solicitors do not or did not hold a franchise when the certificate was granted.

2. A claim for 75% of the Profit costs incurred may be paid by way of the 12 monthly periodical payment scheme. The first payment can be made 12 months (the anniversary date) after the initial certificate was issued (either emergency or substantive). Further applications for payment can be made at 24 months and 36months from the date of issue. The solicitors can make their claim during the 2 months prior to and 4 months after anniversary dates- regulation 100(4).

3. An application for profit costs under this scheme can only be made if the certificate is live and no final payment has been made. Only allowing the solicitors 75% of profit costs takes into consideration any possible reduction that may be made on detailed assessment and also ensures the Solicitors report back to us with their final claim.

4. Whilst most payments are at the requested level of 75%, regulation 100(5) makes it clear that this is a maximum claim and that payment is discretionary. Should you consider a lower % or different figure than that requested by the solicitor would be appropriate you may allow that. If in doubt discuss with a senior caseworker or raise the issue with the Policy & Legal Department at Head Office.

10.8 Franchised Payments on Account

1. This scheme was designed to allow for more regular payments on account where the solicitors firm holds a franchise in the category under which the certificate has been granted. The payments on account criteria are not as strict as the 12 monthly periodical payments on account scheme.

2. A Franchise payment on account can be made every 6 months throughout the duration of the certificate. The Solicitors cannot make a claim when the certificate has been revoked/discharged, a final bill paid or if the certificate was issued more than 3 months before the firm got their franchise in the relevant category. The claim for payment can be made up to 2 months after the 6-month anniversary. Only Solicitors who hold a franchise in the category of work for which the certificate was issued may claim a franchise payment on account.

10.9 No Payment Received Solicitors

NB: This only applies to cases issued after the 1st of April 1996

1. Where an event has taken place which gives rise to the right to have the costs detailed assessed e.g.; discharge or the case has concluded, and six months has passed the solicitor may make a claim for 75% of the costs incurred to date. This is on the basis that the detailed assessment process should take less than 6 months unless problems arise. The category enables solicitors to claim on account of their costs if there is a delay in that process. Regulation 101(3) only allows this payment to be made where the detailed assessment proceedings have actually been started and it has been more than 6 months since that date.

10.10 Change of Solicitor

1. When a certificate has been transferred a Solicitor is entitled to claim 75% of their profit costs to date along with any disbursements they have claimed if it is unlikely that the case will conclude, and detailed assessment take place, within 6 months of the transfer of instructions- regulation 100(6).

10.11 Hardship Payment to Solicitors

1. Regulation 101(1) allows solicitors to claim for a payment on account (note: it is not restricted to 75%) if the proceedings have been ongoing for more than a year, its un likely any order for detailed assessment will be made in the next 12 months and the delay will cause the solicitor’s firm hardship. This is a discretionary payment based on financial hardship. The solicitors will need to submit relevant bank statements and financial correspondence proving hardship and such applications should be dealt with by senior caseworkers. Any firm that proves financial hardship is placed on the hardship register.

10.12 12 Monthly Periodical Payment Counsel

1. This Scheme enables Counsel to claim for 75% of their fees in the same way that Solicitors do. Note: It is not applicable to counsel s fees in family cases where the certificate was issued on or after 1 May 2001.

2. A claim for 75% Profit costs by way of the 12 monthly periodical payment scheme can be made 12 months after the initial certificate was issued (either emergency or substantive)- the anniversary date. Further applications for payment can be made at 24 months and 36months from the anniversary. Counsel can produce their claim 2 months prior and 4 months after the 12-month anniversary. An application for Counsel's fees can only be made if the certificate is live and no final payment has been made. The idea of only allowing the counsel 75% of their fees takes into consideration any possible reduction that may be made on assessment.

10.13 No Payment received Counsel

1. Counsel may claim this in any case (that is not a family graduated fee case) unlike solicitors who are limited to certificate issued after the 1st April 1996.

2. Where an event has taken place which gives rise to the right for assessment e.g.; discharge or if the case has concluded, and six months has passed Counsel may make a claim for 75% of their fees incurred to date. This is on the basis that the detailed assessment process should take up to 6 months unless problems arise. The category enables Counsel to claim for fees if there are delays in the detailed assessment process.

10.14 Hardship Payment to Counsel

1. This provision is similar to those for solicitors. Under regulations 101(b) counsel must prove financial hardship and submit relevant bank statements and financial correspondence proving the same. Such applications will be dealt with by a senior caseworker. Any counsel that proves financial hardship is placed on the local hardship register.

10.15 Payments on account and interim bills

1. Generally, the position is that payments on account are only recouped on receipt of the final bill when regulation 100 (8) of the civil legal aid (general) regulations 1989 comes into play. That regulation provides:

   "where, after detailed assessment or assessment, payments made under this regulation (100) are found to exceed the final costs of the case, the solicitor or counsel (if any) shall, on demand, repay the balance due to the fund and, where the total costs exceed any payment made under this regulation, the balance shall be paid from the fund."

2. A problem has been identified where an interim bill for most of the costs of the case is presented for payment, the only further claim is likely be a relatively small bill and substantial payments on account have been made. An example would be where a payment on account has been made for £110,000. The case concludes and costs are ordered but enforcement work is ongoing. The solicitor has the costs of the substantive proceedings assessed by the court at £100,000 and submits an interim bill to the Commission. The solicitor estimates there is a further bill to come of approximately £1000. In this example the interim bill and the likely future costs are less than the payment on account outstanding. If we only ever recoup on the final bill, this would mean that the fund would pay the solicitor £100,000, on top of the payment on account already made of £110,000, even though the final costs will not exceed £101,000. On receipt of the final bill a recoupment of £109,000 would need to be made. The Commission does not consider this to be the correct approach.

3. In such circumstances, payments on account should be recouped against the interim bill. This is so even where the POA is smaller than the interim bill; it should apply in all cases where it is known that the POA and interim bill are both substantial relative to the likely final bill still to come. If Regional Offices do not have the necessary information to make this decision, appropriate enquiries should be made as to; the future work to be done, estimates of the costs of that work, and when the final bill is likely to be received.

4. Regional offices should make sure however that the payments being recouped are <u>only</u> those that relate to work done and assessed within the interim bill. It would not be right to recoup payments on account made for work done after the period covered by the interim bill.

5. By processing the interim bill and netting off the payment on account in these circumstances, the Commission is discharging its liability to pay under section 6 (2) (a) by translating the payment on account into a final payment to the full extent of the interim bill. Money is not being demanded back so regulation 100 (8) does not come into play. The argument for not paying the interim bill in full is that to do so we would be paying twice for the same work, which the regulations do not say we have to do. Indeed it would not be proper for the Commission to pay twice for the same work under section 6 (2) (a).

6. Section 6(2)(a) provides that:

   "(2) subject to regulations, there shall be paid out of the fund-

   (a) such sums as are, by virtue of any provision of or made under this Act, due from the Board in respect of remuneration and expenses properly incurred in connection with the provision, under this Act, of advice, assistance, mediation or representation;"

7. Payments on account should not be recouped against <u>all</u> interim bills. Regional offices should make sure that:

   (a) the payments on account and the interim bill are both substantial when compared with the likely further costs to be billed and

(b) The recoupment only occurs in respect of that part of the POA covered by the period of the interim bill.

8. An example of when it would not be appropriate to recoup the payments on account is where family injunction proceedings have concluded and those costs have been assessed, but the certificate remains in force in relation to children issues and ancillary relief. In this situation it is clear that the ongoing proceedings cover the majority the work to be undertaken under the certificate. Consequently, any later bill is likely to exceed the amount of the interim bill now due for payment.

9. If the only bill received under the certificate is the final bill then recoupment takes place under regulation 100(8).

10.16 POAs and costs limitations

1. When a payment on account is made the costs limitation on the certificate should be checked. Whilst the limitation may be extended (it is the final limitation on assessment that 'bites') the solicitors should be advised to amend the costs limitation and limit the payment made so that it does not exceed the costs limitation although it may of course be over 75% of the limitation amount. Any retrospective amendment will need to be justified by the solicitors.

2. The payment on account is discretionary and the 75% a maximum. Where the claim is made because there are delays in detailed assessment, payment should not be above 75% of the costs limitation as at the point of assessment the certificate should be final and the fund's exposure should be limited to 75% of the limitation.

3. If a hardship payment is applied for regulation 101 does not restrict the amount of payment to 75% so the appropriate payment depends on the balance of the solicitor's hardship and protecting the fund.

Appendices

APPENDIX A

COSTS IN NON CONTENTIOUS WORK

1. There are two issues

   (a) is the work covered by the Legal Aid Certificate

   (b) what rates are to be applied.

What work is covered

2. It is clear that where conveyancing work is necessary to give effect to an order of the court such costs will be covered by the certificate: ***Re: Trust affecting 26 Clarendon Villas, Hove, Copeland v. Houlton*** **[1955] 3 ALL ER 178**.

3. That case was one which was compromised on terms that the Plaintiff would convey property to the Defendant on certain conditions and that 'the documents necessary to carry out the foregoing terms shall be in such form as counsel for the plaintiff and the defendant shall agree and in default of agreement as the judge may direct.' Construing the terms of the order in the light of the predecessor of s.2(4)(a) and (b) of the Legal Aid Act 1988 the court held that the conveyancing work was properly charged against the Fund.

4. While few matrimonial orders would now include specific directions as to the preparation of the conveyancing documents there can be no doubt that where there is an order for transfer of a property between parties the funded clients' solicitor(s) are entitled to claim the costs of such conveyancing - which will include costs relating to the redemption of a mortgage - from the Fund.

5. However there are two areas which are less certain.

   The first relates to the legal costs of obtaining a mortgage to 'pay off' the other party. Thus an order may be made that 'upon payment by the Respondent to the Petitioner of £xxxx the Petitioner do transfer to the Respondent all that his legal and beneficial interest in [whiteacre].' The better view would appear to be that the costs of raising the 'purchase price' is not covered by the certificate and must be funded by the respondent.

6. The other situation is where the order is not one for transfer between the parties but for sale of the property and distribution of the net proceeds of sale. On such an order there will commonly be estate agents commission to be paid as well as the solicitor's conveyancing costs. If as is commonly the case the order refers to the distribution of the '*net proceeds of sale*' the order appears to be making provision for the payment of the costs (legal and estate agents) out of the proceeds of sale and not out of the Legal Aid Fund. Such an order should be regarded as excluding the costs of sale from the costs that can be recovered from the Board.

What rates should be applied to conveyancing work?

7. The most common circumstances for a claim to be made for payment of non-contentious costs will arise in family proceedings. Family Remuneration Reg. 3(2)(d) requires that rule 8(2) of the Matrimonial Causes (Costs) Rules 1988 shall determine the amounts to be allowed where the cost incurred relate to the kind of work to which that rule applies.

8. Rule 8(2) of the Matrimonial Causes (Costs) Rules 1988 provides:

   'Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated (in the absence of agreement to the contrary) by any general orders for the time being in force under the Solicitor's Act 1974, the amount of such costs to be allowed on taxation in respect of the like contentious business shall be the same notwithstanding anything in Schedule 1 [of those Rules]'

9. A similar position arises with regard to non contentious work in civil proceedings. The Civil Remuneration Regulations, Reg. 4(b) apply RSC Ord 62 r.17 of which para (2) applies the general order to such work.

10. The relevant general order is The Solicitor's (Non Contentious Business) Remuneration Order 1994. This relates to business carried on after 1 November 1994 although the difference between that Order and its predecessor are not significant for the present purpose.

    The relevant article of the order is

    A solicitor's costs shall be such sum as may be fair and reasonable to both solicitor and entitled person having regard to all the circumstances of the case and in particular to:

    (a) *The complexity of the matter or the difficulty or novelty of the questions raised;*

    (b) *the skill, labour, specialised knowledge and responsibility involved;*

    (c) *the time spent on the business;*

    (d) *the number and importance of the documents prepared or perused, without regard to length;*

    (e) *the place where and the circumstances in which the business or any part thereof is transacted;*

    (f) *the amount or value of any money or property involved;*

    (g) *whether any land involved is registered land;*

    (h) *the importance of the matter to the client;*

    (i) *the approval (express or implied) of the entitled person ... to:*

    i) *the solicitor undertaking all or any part of the work giving rise to the costs; or*

> *ii) the amount of the costs'.*

11. The circumstances differ only slightly from those which are to be applied in the High Court and county court in the determination of costs. However there are two significant differences.

12. In the first place the 'standard' basis of costs does not apply and in its place there is the formula: the 'costs shall be such sum as may be fair and reasonable to both solicitor and entitled person having regard to all the circumstances'. The assessor has to make a fair and reasonable judgement without regard to or benefit from any 'onus of proof'.

13. Secondly while the wording of the list of circumstances may only differ slightly it is clear from the authorities that in non-contentious business the time spent is here merely one of the factors and not a particularly significant one. More significant will be the value of the transaction, any particular complexities and the degree of responsibility on the solicitor. Guidance is given in ***Property and Reversionary Investment Corporation Limited v. Secretary of State for the Environment [1975]*** **2 ALL ER 436** and ***Maltby v. D.J. Freeman & Co*** **[1978] 2 ALL ER 913**. Consideration should be given to each factor set out and an appropriate allowance made in respect of each of them. It is not sufficient simply to rely on the time spent and the value of the property involved. The application of a percentage 'mark up' may be the most satisfactory method for calculating the value element. It follows therefore that the mark-up should be related to the value of the property, not simply a 50% increase as might be appropriate for contentious costs.

14. There are two additional and somewhat counterbalancing factors. First conveyancing under an order of the court may well not be between 'a willing seller and a willing buyer' and may mean more work. Secondly, particularly where the property is jointly owned, as is typically the case, the degree of responsibility may be somewhat less that where the solicitor is acting for the purchaser of a property in which s/he has had no previous interest.

15. It will be proper therefore to have regard to the normal charges of a solicitor for conveyancing work. In so far as an hourly rate is relevant regard must be had not to the prescribed rates but to the normal rates charged for conveyancing work in the particular area.

APPENDIX B

The Exercise of Discretion

1. 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.

2. However when considering a reduction it will be helpful to bear in mind the discussion of the exercise of discretion in legal aid cases in ***Francis v. Francis and Dickerson*** **[1956] P 87, [1955] 3 ALL ER 836** .

3. First there was a discussion of the role of the legal representative when acting under a certificate:

   'the primary and, so long as the case is conducted reasonably within the ambit of the civil aid certificate, the only duty of a solicitor ... is to his client. Not only is that the general intent of [the Act] but [s.31(1)(a) states that]... the solicitor's "relationship" with (which naturally includes "his duties" to) his client remain unaffected by the fact that the client is an funded client ... the funded client, his solicitor and counsel have the same freedom in the conduct of an assisted case and are entitled to the benefit of the same relationships, as in a similar matter where the lay-client is not an funded client.'

   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"

   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 ... "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 [legal aid] 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'

4. 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.

5. 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 tyro nor that of the highly specialised solicitor with many years of experience.

6. 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.'

7. 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.

8. 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 where he has doubts whether the work done or the costs charged was reasonable. As Lord Denning said in ***Storer v. Wright*** **[1981] 1 ALL ER 1015, CA.**

   [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.