



Legal Aid  
Agency

# **Costs Assessment Guidance: for use with the 2018 Standard Civil Contracts**

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1	September 2018	Initial Publication
2	July 2020	Amendments to s.14 and s.15 to reflect changes to the LAA's assessment limits. Amendments to paragraphs 4.10 and 5.29A of Appendix 1 to clarify circumstances in which a level 2 fixed fee may be paid and to reflect temporary changes regarding claims for payments on account.
3	January 2021	Amendments as a result of the UK exiting the EU.
4	February 2021	Amendments to extend the temporary changes regarding claims for payments on account.

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## Part A: All Contract Work

### 1. General Principles

This version of the Costs Assessment Guidance is for use in conjunction with the 2018 Standard Civil Contract

In this section, the following expressions have the following meanings:

***“the Contract”*** means the 2018 Standard Civil Contract.

***“the Specification”*** means the 2018 Standard Civil Contract Specification

***“The Act”*** or ***“LASPO”*** means the Legal Aid Sentencing and Punishment of Offenders Act 2012

***“Costs Regulations”*** means the Civil Legal Aid (Costs) Regulations 2013

***“Procedure Regulations”*** means the Civil Legal Aid (Procedure) Regulations 2012

***“Merits Regulations”*** means the Civil Legal Aid (Merits Criteria) Regulations 2013

***“Remuneration Regulations”*** means the Civil Legal Aid (Remuneration) Regulations 2013.

***“Financial Regulations”*** means the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013

***“Statutory Charge Regulations”*** means the Civil Legal Aid (Statutory Charge) Regulations 2013

***“the Director”*** means the Director of Legal Aid Casework as designated by the Lord Chancellor under Section 4 of LASPO.

***“Standard Fee”*** and ***“Graduated Fee”*** have the definitions as set out in the Specification.

#### Introduction

***“CCMS”*** means the LAA’s online Client and Costs Management System

This guidance applies from 1 September 2018 to civil matters and cases governed by the 2018 Standard Civil Contract. It is also relevant to any cases run under an Individual Case Contract.

This guidance relates primarily to services payable at hourly rates under the terms of the Specification, including any notional assessment of the costs of a case or matter paid as a Standard or Graduated Fee, and is the Guidance/Contract Guide referred to in Paragraph 6.9 of the Specification. The rules concerning Standard and Graduated Fees under controlled work are set out in Section 4 of the Specification. The guidance does not apply to work carried out under previous Contract Specifications. Previous guidance continues to apply to such cases.

Prior authorities have an important role in cost assessment. Our guidance on authorities can be found in the “Narrative and guidance: public funding” document at:

<http://www.justice.gov.uk/legal-aid/funding>

## Basic Framework

- 1.1. The Lord Chancellor through the Legal Aid Agency (“the Agency”) is obliged to pay remuneration for civil cases properly due in accordance with the Remuneration Regulations 2013 and his/her contracted obligations.
- 1.2. Work is remunerated according to time spent by a fee earner at the relevant hourly rate. The rates are set by the Lord Chancellor in the Remuneration Regulations. The rates in the Remuneration Regulations cover all civil matters or cases commenced under the Contract save for those that become subject to an Individual Case Contract with the Lord Chancellor.

## The approach to assessment

- 1.3. Many of the basic principles governing assessments are contained in the Civil Procedure Rules introduced in April 1999 and the Civil Procedure (Amendment) Rules 2013 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. In particular, all assessments of Contract Work as payable by the Agency are to be carried out on the standard basis subject to the provisions of the Specification, the Regulations and this Guidance (see Paragraph 6.9 of the Specification).

CPR 44.3(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. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and*
- (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.”*

Under CPR 44.4:

*“(1) The court will have regard to all the circumstances in deciding whether costs were—*

- (a) if it is assessing costs on the standard basis—*
  - (i) proportionately and reasonably incurred; or*
  - (ii) proportionate and reasonable in amount, or*
- (b) if it is assessing costs on the indemnity basis—*
  - (i) unreasonably incurred; or*

- (ii) *unreasonable in amount.*
- (2) *In particular, the court will give effect to any orders which have already been made.*
- (3) *The court will also have regard to—*
  - (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 to resolve the dispute;*
  - (b) *the amount or 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, effort, specialised knowledge and responsibility involved;*
  - (f) *the time spent on the case;*
  - (g) *the place where and the circumstances in which work or any part of it was done; and*
  - (h) *the receiving party’s last approved or agreed budget.”*

1.4 The assessment of costs payable under legal aid should operate on the same principles whether the assessment is carried out by a costs officer of the court or by an assessor of the Agency, the object in all cases should be to achieve a fair assessment of the costs due to the provider under the Contract. The question of whether costs are reasonable and/or proportionate is to be resolved on an objective basis having regard to all relevant circumstances, and particularly the matters listed in CPR 44.4(3). It should not be influenced by the Lord Chancellor also being the paying party, beyond the fact that resolution of genuine doubts are to be resolved in the Lord Chancellor’s favour under CPR 44 .3 (2)(b).

1.5 The primary document in assessing costs is the bill of costs or the claim form submitted, which sets out the items and amounts being claimed. Items not appearing in the bill or claim form will not be paid.

1.6 Assessment of fee-earner’s costs involves making a judgment, having regard both to the bill and to supporting documents provided and all relevant circumstances, as to whether, in respect of individual items of work and the case/matter as a whole:

- (a) the work done;
- (b) the time taken;
- (c) the remuneration rates applied;

- (d) any enhancement claimed;

is in accordance with the provisions of the Contract and Regulations reasonable and proportionate. Assessment of disbursements is considered further at section 3 below.

### Work done

1.7 Allowance is only made for work claimed where it is supported by appropriate evidence on the file. The onus is on the provider to supply evidence on the file that the work was done.

1.8 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 fee-earner doing his or her 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 or she instructed an expert to prepare a report which in the end did not help his or her 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.

1.9 However, 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 provider made an application to the court which was unsuccessful may lead the assessor to ask whether it was reasonable to have made the application.

1.10 Note that the provisions of CPR 46.9, concerning solicitor and client assessments, expressly do not apply to assessments of legally aided work. In particular, the fact that the Client has requested that or approved work being carried out (CPR 46.9(3) (a)) does not mean that this work can be claimed under legal aid. Further, the assessment of legal aid costs is on a standard rather than indemnity basis (see 1.3)

1.11 Accordingly, the question of whether an item is allowed on an assessment of costs payable under legal aid should in principle be determined in the same way as whether it is allowable against another party on an inter partes detailed assessment, subject to the following specific exceptions falling within the definition of “legal aid only costs” in Paragraph 6.50 of the Specification:

- (i) Work (including counsel’s fees, experts’ reports or other disbursements) that the Agency has specifically requested or authorised to assist in decision making regarding the grant, continuation or amendment of the terms of legal aid;
- (ii) Completion of the Lord Chancellor’s forms and other communications with the Agency
- (iii) Work for which the Agency has granted prior authority (Paragraph 5.10 of the Specification)

- (iv) Costs of reasonable adjustments to comply with the provider's duty under the Equality Act 2010
- (v) Travel expenses of a legally aided client other than to attend court as a witness of fact

Work falling under categories (i), (ii), (iv) and (v) will still be assessed as to the reasonableness of the time or amount claimed

### **Time Spent**

- 1.12 The assessor must then assess whether the time spent was reasonable, in particular whether the work has been performed with reasonable competence and whether a reasonably competent fee-earner (in relation to the work being undertaken) would have taken that time to perform the work. Again, there should be no difference in time allowable whether an item is being assessed on an inter partes detailed assessment or for payment under legal aid. Where, in licensed work cases, the skill or experience of the fee earner leads to work being undertaken with greater speed than would be expected from a reasonably competent fee-earner a claim for enhancement may be considered (see section 12 of this guidance).

### **Proportionality**

- 1.13 Previously the rules on proportionality in costs orders had been set out in a point of principle determined by the Court of Appeal in *Secretary of State for the Home Department v Lownds*, however, with the introduction of the CPR (Amendment) Rules 2013, this point of principle is now obsolete. The relevant provision is now CPR 44.3(5) which states:

- “(5) Costs incurred are proportionate if they bear a reasonable relationship to –*
- a) the sums in issue in the proceedings;*
  - b) the value of any non-monetary relief in issue in the proceedings;*
  - c) the complexity of the litigation;*
  - d) any additional work generated by the conduct of the paying party; and*
  - e) any wider factors involved in the proceedings, such as reputation or public importance.”*

### **Contract Requirements**

- 1.14 Work is only payable in accordance with the terms of the Contract and the Remuneration Regulations. Certain rules within the Specification, at Paragraph 6.59 apply to all forms of service of Contract work.

### **Compliance with the Civil Legal Aid Regulations**

- 1.15 All Contract work must be carried out in accordance with the Merits Regulations and the Procedure Regulations. The criteria appropriate to the forms of service and type of

case set out in the Merits Regulations must be satisfied at all times that work is carried out and this work must be done in accordance with the criteria under which legal aid was granted.

- 1.16 In relation to controlled work providers must not continue to act where the relevant criteria are no longer satisfied. In licensed work solicitors and other legal representatives are subject to a duty to report to the Agency in a number of circumstances set out in Regulation 40 of the Procedure Regulations.
- 1.17 Compliance with all legal aid legislation is a requirement under Clause 7.14 Standard Terms. If a provider fails to report a significant change, which is known to him or her, in either the circumstances of the funded client or the case, costs subsequently incurred may be disallowed where they are considered not to have been reasonably incurred or the failure to report a change in circumstances has caused a loss to the LAA. Costs should only be disallowed in cases where it is clear that the provider has failed to report a change of circumstances that has meant that the Merits Regulations Criteria for the work authorised by the certificate are clearly not satisfied. Notification of the new circumstances may legitimately be made with an application for amendment of the certificate, provided such an application is made soon after the change. In the absence of misleading or withheld information in the application, providers are entitled to rely on any amendment to the certificate granted by the Director.

#### **Recorded and Unrecorded Time**

- 1.18 In Contract work, routine letters and telephone calls are remunerated on a fee per item basis. Other preparation and attendances are generally recorded in units of 6 minutes per time spent, payable according to the appropriate hourly rate.
- 1.19 Primarily, information from the files will consist of:
- (a) letters;
  - (b) “notes” of work done, attendances on the client and others and telephone attendances;
  - (c) documents prepared and considered.
- 1.20 The letters and notes of telephone calls on file will generally be sufficient to justify the unit charge for those items. For other preparation and attendance, including longer letters and telephone calls being claimed on a time basis, all time spent by a fee earner should be recorded on the file. Estimated time may be disallowed, particularly for substantial amounts of time. In *Brush v Bower Cotton and Bower* [1993] All E.R. 741, having considered *Re Frascati* (2 December 1981, unreported) and *Johnson v. Reed* [1992] All 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...”*
- 1.21 Such time should only be allowed where clearly supported by the evidence from the file. This may include the length and complexity of letters or other documents prepared or considered and the hand written notes of attendances.

- 1.22 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 must be reasonable and proportionate.
- 1.23 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 file note/computer record 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).
- 1.24 As well as looking carefully at individual attendance notes/computer records 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. Further, the contents of the letters/documents and file notes are of general importance in allowing the assessor to make a judgment as to the weight and complexity of the case and the particular problems with which the provider had to deal.
- 1.25 Standardised file 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.
- 1.26 In particular, any individual attendance note for providing advice or taking instruction over four units (24 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 four units (24 minutes).
- 1.27 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.
- 1.28 There is no requirement that file notes should be typed up. If they are, then a reasonable time (see 2.16) may be allowed for time spent dictating a file note where it is reasonably lengthy and detailed, and relates to an attendance or notes used in preparation of the case. Costs will not be allowed for preparation of file notes solely to record time expended.
- 1.29 Note that there is a restriction on a fee-earner's attendance with counsel or other advocate at the trial of a fast track matter under CPR 45. The costs of such attendance

are only claimable, as allowed under CPR 45.39, where the court considers it necessary for the fee-earner to attend to assist the advocate (see further Part C, section 13.14).

## **Appeals and Reviews**

- 1.30 The procedures for appealing assessments of Contract Work are set out at Paragraphs 4.16 and 6.72 to 6.82 of the Specification

## **2. Chargeable work**

### **Overheads and administrative work**

- 2.1 Subject to any express exceptions, payment will not be made for time spent on purely administrative matters. This will include the costs of opening and setting up files, maintaining time costing records and other time spent in complying with the requirements of the Contract other than the direct provision of legal services to a client.
- 2.2 Expenses which may be classed as overheads of the contracting provider are generally not payable under the Contract. Photocopying in-house is generally an overhead expense as are the costs of postage, stationery, faxes, scanning, typing and the actual cost of telephone calls. However, see section 3.37 in relation to photocopying charges. Whilst courier fees are listed in Paragraph 6.59 of the Specification as overheads, in some circumstances these will be claimable as disbursements, where they are incurred in relation to a particular case or matter and it was reasonable to do so.
- 2.3 Other examples of overheads include staffing expenses (including training), the cost of maintaining premises, taxes (other than VAT properly charged in relation to an individual case or matter) and administrative expenses.

### **Legal Research**

- 2.4 Legal research is not usually allowable on assessment because:
- (a) fee earners carrying out work under the Contract are assumed to have sufficient expertise in the relevant areas of law; and
  - (b) researching the law is not specific to the immediate matter or case but may be considered part of the overheads of the provider in developing the fee-earner's knowledge of that area.
- 2.5 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 (Perry and Another v The Lord Chancellor Times Law Reports 26.5.1994). Where a claim for substantial research is made, the assessor would expect to see evidence of the research on file, e.g. copies of case reports etc. Fee earners will usually already have at least a general knowledge or understanding of the point being researched and should record their reasons for undertaking the research in addition to their assessment of the effect of the law on the individual circumstances of their case. A generalised attendance note not backed up by this evidence will be disallowed.

- 2.6 However, practitioners cannot be expected to be ‘walking law libraries’ (Johnson v Walks. Court of Appeal 15 March 2000) and it may still be reasonable for time for checking on the application of established law or procedural rules to individual circumstances to be claimed, provided the reasons are evidenced on the preparation note.

### **Preparation**

- 2.7 Preparation (sometimes, misleadingly, referred to as “documents”) will include all drafting of documents, consideration of documents and evidence provided by the client or other parties, and general consideration of strategy, evidence needed and evidence to be put forward and whether to make or accept offers to settle a case, and will include the thinking time of the provider. Regardless of the benchmarks below in respect of what time may be allowed in respect of preparation, providers must not claim time in excess of that actually spent.

### **Documentary evidence**

- 2.8 On receipt of disclosure of documents from another party it will generally be reasonable for all such documents to be considered in detail. On receiving documents from the client an initial brief perusal of all the documents will be reasonable in order to identify which documents are relevant. Having done that, the fee earner may identify that only certain documents are relevant to the case. However, the benefit of any doubt as to whether detailed consideration of a document was justified should always go to the fee-earner, who could face an action for negligence for being unaware of information contained in documents in his or her possession.
- 2.9 In any but the simplest cases there will be the need from time to time to re-examine the core documents to consider their effect on the case. 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 a hearing or key meeting and prior to instructing or briefing counsel and again when trial bundles have to be prepared. The time spent on both of these will inevitably be considerably less if the fee-earner 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.
- 2.10 Where documents are scanned into a computer, the work of scanning is, of course, not claimable as legal work, the selection of which documents are to be scanned is.
- 2.11 In assessing the time spent for perusal and consideration of documents, if in doubt the assessor must have sight of and will have regard to 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. This is likely to be essential in larger, more complex claims.
- 2.12 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, of course, take a longer time either to read or compare with other documents.

- 2.13 In a medical negligence case it would be reasonable for the provider to consider the assisted person's relevant medical records in detail. This is subject to the qualification that, although the fee-earner must have a general knowledge of what is in the medical records it is not uncommon for the records to be supplied to the Claimant's medical expert who then takes on the responsibility of examining and often indexing the records. It would not be reasonable for both the fee-earner and the expert to be paid for detailed examination of the notes. Care must be exercised, however, in extending this qualification to other areas of law. For instance, in mental capacity cases it may be necessary for fee-earners to be familiar with social services records in their entirety, since they may cover wider issues than the expert has been asked to advise on.
- 2.14 Work carried out by an in-house medico legal assistant will generally be considered fee earning work. In cases carried out under the Contract work is generally charged at a prescribed hourly flat rate, but the nature of the work and any special skills and/or qualifications possessed by the person concerned may be relevant to any claim for enhancement, where applicable.
- 2.15 The time allowed for drafting documents has traditionally been based on the time reasonably spent by a fee-earner dictating that document. Increasingly, however, as fee earners are likely to type their own documents, the reference to dictation time becomes less relevant. As a guideline, 6–12 minutes preparation time would be expected per page of a straightforward document, but more complex documents will take longer.
- 2.16 Fee earners must prepare master bundles for 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 considered fee earner work. Where the bundles are above average size it will be reasonable for fee earners, to check that the copies have been properly collated and reproduced.

## **Letters, Calls and emails**

### ***Letters***

- 2.17 In respect of claims for letters out appearing on the file there are in principle three possibilities on assessment:
- (a) that no payment is allowed;
  - (b) the item fee from the Remuneration Regulations is allowed (routine letters out);
  - (c) preparation time is allowed at the appropriate hourly rate from the schedules (non-routine letters).

Subject to the following paragraphs, the default position would be the item fee (b).

- 2.18 A letter may be disallowed where as an item of costs it was unreasonably incurred. The most likely examples of this are:
- (a) Letters that duplicate information already provided or communication that has already occurred. However, unless overall costs have been held to be disproportionate, the test is one of whether it was reasonable in all the circumstances to send the letter, not whether the letter was strictly necessary to progress the case. For example, a letter simply confirming an appointment that has already been made may be disallowed if it is sent on a routine administrative basis by a non fee earner, but it may be accepted as reasonable where the fee earner has considered the letter appropriate in the circumstances of a particular client.
  - (b) Multiple letters sent unreasonably. A letter should generally be disallowed if its content could reasonably have been included in another letter that was sent on the same day. Clearly, that will not be the case if a second letter is drafted following a significant change of circumstance on that day (or otherwise after dictation of the first letter), or where an open and a without prejudice letter are sent at the same time to another party. It may in any event be reasonable to have separate letters to deal with different matters for the sake of clarity. This will be particularly important in family cases where it will be good practice for practitioners to deal with different aspects of the case (e.g. divorce, Children Act, financial proceedings, injunction) in separate letters.
  - (c) Letters arising from the oversight of the fee-earner. That would include a letter enclosing a document that the fee-earner had previously forgotten to send or otherwise to address a matter that should have been dealt with previously. Otherwise, however, covering letters enclosing documents are allowable.
- 2.19 For a claim for a non-routine letter to be allowed the time spent must be justified by the substance of the letter. The length of the letter will not itself be determinative of this. A letter of more than one page may be allowed at only the standard rate where, having regard to all the circumstances, including the substantive content of the letter, it was not reasonable for more than 6 minutes to be spent on its preparation. That may particularly be the case where the substance of the letter consists mostly of quotation from another document. Conversely, it may be reasonable to claim more than one unit for a single page letter or less; a concise letter may well take longer to prepare than a verbose letter with the same substantive content, and is likely to be more effective for the client. The letter must not be charged both as a routine letter and also as a time charge.
- 2.20 Where details are inserted into a standard format letter, the letter will be payable as a routine or non-routine letter rate on the same principles as detailed in paragraph 2.19 above, having regard to the contents inserted into the standard template.
- 2.21 When considering the claim as a whole, 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.

- 2.22 A claim for routine letters received can be made in family cases/matters but not in other civil proceedings. In both civil family and non-family proceedings a claim may be made for consideration of non-routine letters received at the hourly rate for the time reasonably expended, but not in addition to a claim for a routine letter in.

**Telephone calls**

- 2.23 Telephone calls may again be claimed as routine (with the item fee in the schedule) or non-routine, or may be not allowable at all.

- 2.24 Calls may be disallowed in a similar way to routine letters because, for example:

- (a) they are administrative non fee earner work, such as a routine reminder of an appointment that has already been made or confirmation of receipt of correspondence;
- (b) they arise from the previous oversight of the fee earner, for example the client's justifiable complaint about lack of contact or progress; or forgetting to take instructions or provide an advice on a short point that should have been included in the time for an earlier attendance or call. However, in either situation, where the updating on the case, further instructions or advice are such as to require a non-routine call, this time should be allowed as it would be additional to the time spent in any earlier attendance in any event;
- (c) they are abortive. However:
  - (i) It would be reasonable for an initial unsuccessful attempt to make a telephone call to be charged as a routine call. Repeated attempts to call the same number, however, will require justification regarding the urgency and importance of the call;
  - (ii) where justifiable, preparation time may be claimed for preparing for the call;
  - (iii) time may, in principle, be charged for an attendance note recording repeated attempts to make a call and the reasons for these repeated attempts;
  - (iv) where 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.

- 2.25 In relation to long calls any call of six minutes or more in length may be claimed as a timed attendance, but not also as a telephone call.

- 2.26 Short periods of time 'on hold' of up to 6 minutes may be incorporated as part of a non-routine call. For longer periods, it is not justifiable for the full attendance rate to be claimed, but it will not necessarily be reasonable to expect a fee earner to attempt to carry out other work. Accordingly, subject to the reasonableness of making the call, it will be appropriate to claim such time at the waiting rate.

- 2.27 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.

#### ***Faxes, e-mails and texts***

- 2.28 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, for example, a hard copy of a letter sent by e-mail or fax because 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.
- 2.29 Routine e-mails or faxes received are not claimable as separate items, except in family cases where a charge may be made for a letter received. 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.
- 2.30 Text messages may be claimed as short telephone calls or attendances paid at the hourly rate for the time reasonably incurred, under the same principles applying to telephone calls above.
- 2.31 Where a provider sends a message on CCMS this is treated as equivalent to sending an e-mail or letter to the LAA and may be claimed as such.

#### **Attendances on the client and others**

- 2.32 Attendance records should show not only the time spent but also what was done and in the case of an actual attendance, what was discussed.
- 2.33 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 fee-earner 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 reasonable to see the witness a second time to go through the statement prepared by the provider 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 or as a result of a new issue arising.
- 2.34 It is the fee earner's responsibility to ensure that attendances on the client are not excessive. Where such excessive attendances do occur they should not be allowed on assessment under legal aid any more than they would be on an inter partes detailed assessment (see paragraph 1.6) Further, it should be remembered that, in licensed work, if the legally aided client requires the proceedings to be conducted unreasonably or in such a way as to incur unjustifiable expense under legal aid, the fee-earner is under a duty to report this to the Director and the Director may choose to withdraw the determination of legal aid (Regulation 42, the Procedure Regulations). Where a fee-earner fails to report that the client is requiring the proceedings to be conducted unreasonably or at an unjustifiable expense when it was reasonable to

have expected it, subsequent costs may in any event have been unreasonably incurred. Only a proper study of the file will reveal this.

- 2.35 As with preparation time, attendance notes/computer records or other relevant documents should justify the time claimed. If the documentation does not provide adequate information or does not exist at all then the costs should be reduced or disallowed.
- 2.36 In some cases, it may be appropriate to allow for the attendance of more than one fee earner on a client e.g. where preparation work has been divided between more than one fee earner owing to the volume of papers and/or the involvement of more than one specialised area of law and/or complexity of the case. However, the file must provide justification as to why the attendance of more than one fee earner was reasonable at the particular meeting.
- 2.37 It will be unusual that a fee earner will be able to claim for attendance (or other communications) with other fee earners in the same organisation working in the same category of law. The attendance note will need to justify why it was necessary for the fee earner with conduct to seek advice from a colleague, given that fee earners should be given cases that are within their competence. Examples of where such time may be reasonable could include:
- where the case or matter has reasonably been shared between more than one fee earner (as in paragraph 2.36 above);
  - where a novel or developing point of law arises which it is reasonable to discuss with a colleague in conjunction with or in place of research;
  - where a difficult or unusual point from a different area of that category of law arises unexpectedly and it is reasonable to discuss with someone more specialist in that area;
  - where it is reasonable and cost effective to instruct a more experienced advocate within the organisation to attend a hearing;

However, time spent in routine supervision of one fee earner by another should generally be considered part of the provider's overheads.

- 2.38 Where an issue arises in a different category of law, attendances and written communications with a fee earner in that category will be allowable, subject to reasonableness in the usual way.

### **Reviewing files**

- 2.39 Files will sometimes 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 providers would be expected to be reasonably familiar with their files 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. Where a fee-earner undertakes his or her own advocacy it will be generally reasonable to claim time in preparing a brief to him or herself.

- 2.40 Equally, if 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 fee earner then again it may be reasonable for that fee earner 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 file notes should be linked to some particular development or need to take further action on the file. Even within a period of one month, it may be justifiable to claim a short period (e.g. one to two units) reviewing the file before taking a particular action.
- 2.41 Extra time incurred that arises from conduct of the file changing from one fee earner to another within the provider's organisation is not allowable. Such changes occur through the firm's own administrative arrangements and a private client would, for example, be unwilling to pay for the cost of a new fee earner familiarising him or herself with the file because the firm had chosen to transfer the matter or the previous fee-earner had left the provider, other than as allowable under paragraph 2.37, above. However, where work is required while the fee-earner with conduct of the matter is unavailable in circumstances beyond that fee-earner's control, and it is reasonable not to wait for that fee-earner to become available, reasonable time should be allowed for a new fee-earner to review the file. Examples of this would be a hearing, such as for an injunction, listed while the usual fee-earner was unavailable (but not where this was because the fee-earner had failed properly to supply dates to avoid) or other urgent instructions from the client.

### **Travel time by the fee earner**

#### ***Generally***

- 2.42 Where there is doubt as to the reasonableness of the amount of time claimed for travel the assessor should usually allow the amount of time that it would be reasonable to expect the fee-earner to take to travel between the two places concerned. If the travelling time is longer than usual fee earners are expected to record in the file note the reasons for this. Travel times (and expenses) will be based on the journey from the fee-earner's office rather than home, unless the journey was actually made from the fee-earner's home and the travel was shorter/less expensive than it would have been from the office.
- 2.43 Where travelling time is incurred a decision will need to be made whether it was reasonable for the fee earner to travel or whether the work could be done in some less expensive way, for example by instructing a local lawyer agent or by attending on the client by telephone or by using methods of remote communication where appropriate.
- 2.44 Normally, where a five hour round trip is required it may be difficult to justify the fee-earner's travelling time and expenses, and it would be more appropriate to instruct an agent who is able to attend within a one hour round journey. However, in some cases it may be reasonable for the fee earner to travel and the reason for making the

journey should be recorded on the file. Examples of when it may be reasonable for the fee earner to travel for a longer time are as follows:

- (a) court applications, other than those that are straightforward;
- (b) conferences with counsel;
- (c) interviewing a witness where the fee earner will wish to test the witness's credibility for him or herself;
- (d) because of the specialised nature of the case, the fee earner's close personal understanding of the matter or the nature of the client;
- (e) where there is a lack of suitably qualified agents in the area concerned;

2.45 Where any claim for travel time is reduced because it is considered that a local agent should have been instructed, a notional allowance should be made for time that would have been spent briefing the agents and considering any reports or correspondence.

2.46 Under Paragraph 6.59(c) of the Specification, in respect of all travel time and expenses or agent fees, no extra costs are payable that arise from the fee earner being based in a location distant from the client where it would have been reasonable for the client to have instructed a nearer provider. This will need to be determined on the facts of any particular claim. However, vulnerable clients in particular should not be expected to have to carry out extensive research or make repeated attempts to find a provider with capacity to take on their case where they are aware of a particular, more distant, provider able to do so. No disallowance should be made where the client confirms that they have made attempts to instruct local providers. Further, no reduction in respect of time or expenses will be made where a distant provider is instructed because the proceedings are taking place within that provider's locality (e.g. the office is based within 10 miles of the relevant court or tribunal).

#### ***Travel to the legally aided client***

2.47 Usually, the legally aided client will be expected to attend the provider's offices (see *Various Lewward Claimants v Kent and Medway Health Authority and Another* [2003] EWHC 2551 (QB)). However, there may be circumstances where the fee-earner has to travel to the client, for instance, because the client is house bound or may be detained in prison or in hospital. Reasonable travelling time and disbursements may be reimbursed in these circumstances, subject to the above Contract provisions. This will include travel to a client before a legal help form is signed, where justified under the Specification, provided the client subsequently signs the legal help form and is confirmed as eligible for legal aid. Where travelling costs to the client are claimed, fee-earners should always record the reason for the travel.

#### **The Use of Solicitor/Legal Advisor Agents**

2.48 Use of agents is subject to the requirements of Paragraphs 2.5 to 2.8 of the Specification. In particular the provider conducting the case or matter is responsible for supervision of the agent and ensuring that the agent carries out the work in accordance with the Contract.

- 2.49 Where another provider is instructed as an agent they stand in the shoes of the conducting provider and their costs form part of the conducting provider's profit costs. They are not claimable as disbursements nor can any claim be made on account of providers' agents' fees. In particular, (and as confirmed in the judgment of *R (SP) v the Lord Chancellor* [2013] EWHC 4011 (Admin)), under Clause 3 of the Contract Standard Terms another provider cannot be instructed as a legal expert (i.e. an Approved Third Party). If agents are instructed, London rates are payable where the agent is based within the Agency's London region.
- 2.50 Counsel in independent practice cannot be a provider's agent. Providers may indicate that the reason they manage their work this way is because prior commitments or the distance of the court make instruction of counsel desirable where there are insufficient numbers of local providers to use as agents. Providers may of course continue to instruct counsel where necessary in the course of litigation but they must do so in accordance with the Contract and Regulations. Counsel's fees must be charged as such, either under the Family Advocacy Scheme or under a fee note delivered by counsel.
- 2.51 However, barristers who are employees of a solicitor's firm or other providers may be instructed as an agent in the same way as any other fee earner of that firm or provider.

### **Waiting**

- 2.52 Most waiting will occur on attendances at court, and the fee earner will have very little control over the length of time involved.
- 2.53 Few fee earners will wish to spend time in waiting. However, fee earners should not be unreasonably cautious in assessing the time that he or she needs to arrive at court. As a guideline, the earliest should generally be half an hour before a case is timed to start or before any pre hearing conference or attendance. However, for longer journeys in particular, it may not be practicable to ensure arrival even within that period.
- 2.54 Where time is claimed at court as attendance or conference, rather than waiting, rates for taking further instructions from the client, conferences with counsel or negotiations with other parties, the important question is whether there is evidence on the file of attendances that were reasonably undertaken. Fee earners and/or counsel may generally be expected to be fully prepared before the hearing, but sometimes, it may be more convenient for the fee earner or counsel 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 also be a legitimate use of the time available to take further instructions. In some cases, such as possession proceedings brought by social landlords, the initial hearing may represent the first opportunity to address the case with the opponent.
- 2.55 In most cases it will be more difficult to justify claiming time for attendance or conference beyond the time that the matter was due to go into court, unless the Judge directs that the parties spend time considering settlement or other issues. However, 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. A lunchtime adjournment is not included in waiting time, but

claims may be made for any attendance or conference that takes place during that adjournment.

- 2.56 It is, of course, essential that no time is claimed both as attendance/conference and waiting.
- 2.57 Waiting time must be charged at the rates appropriate to waiting and not at rates appropriate to advocacy.

### **Form completion**

- 2.58 Time may not be claimed for the completion of forms that are not specific to a case or matter. No time can be claimed for completion of forms that are required purely to meet providers' contracting obligations towards the Lord Chancellor (see further Paragraph 6.59(a) of the Specification).
- 2.59 Under Paragraph 3.10 of the Specification, where the legal help form is signed in the course of an interview, and it is confirmed that the client is eligible for services, a claim for time from the beginning of the interview may be made. Under Paragraph 3.18 of the Specification, telephone advice given before the application form is signed is also claimable, provided the client does subsequently sign the application form and is confirmed as eligible for legal aid. Accordingly, where the client is confirmed as eligible for legal aid, time spent in completing the legal help form should be allowed.
- 2.60 A claim may be made for completion of application forms for Controlled Legal Representation in Immigration cases and for licensed work certificates (in the latter case, time will be claimed under the certificate itself following a delegated, telephone or faxed application grant of legal aid, otherwise under legal help; see further Part C, section 10.15). The basic time standard for such forms is 30 minutes, but more may be payable in complex cases, particularly if a substantial statement of case is required and where the application is for emergency legal aid or is to report a grant of emergency legal aid by delegated functions. Reasonable time may also be claimed for completion of forms to seek amendments to licensed work certificates, for payments of account under certificates and for increases to upper financial limits in controlled work cases.
- 2.61 Reasonable time may be claimed for making the equivalent applications via CCMS. The basic time standard for completion of a non-merits tested application is 30 minutes, and 48 minutes for a merits tested application. These times are intended to be a guide only and times in excess of this may be allowed where reasonable justification is provided. For CCMS claims additional time may be claimed for inputting the means information into CCMS. Where this is done in the client's presence it will form part of the costs of the attendance upon the client. Where the information is input into CCMS by the fee earner without the client being present 30 minutes will generally be considered reasonable, but additional time may be justified depending on the individual circumstances of the case.
- 2.62 Time may also be claimed for completion of forms Claim1, Claim 1A, Claim2 and POA1. For forms Claim1, Claim 1A and Claim2 this will normally be 12 to 18 minutes; for a POA1, 6 minutes should usually be sufficient. This includes cases where a Claim1 or Claim 1A is submitted following detailed assessment of the costs by the court. Where the bill of costs is prepared with the Claim1 or Claim 1A for assessment by the Agency, further allowance is likely to be appropriate. Work done in preparing and submitting

the CIV Claim2 form, together with the covering letter, is remunerable as contract work even if the costs of the substantive work are met in full by the other side on an inter partes basis. The time spent in completing a Claim 1 and Claim 1A in family proceedings can only be claimed separately where the claim is accepted as an exceptional case or is not subject to a Standard/Graduated Fee; otherwise it is covered by the Standard/Graduated Fee. Where allowable, the time standards for the Claim1, Claim 1A and POA 1 will apply.

- 2.63 Time may also be claimed for amendments and claims made via CCMS. For allocation of costs to Counsel 12 to 18 minutes will usually be considered reasonable. The basic time standard for all other amendments is 24 to 30 minutes. For payments on account 12 minutes will usually be sufficient. For a bill where time is claimed on an hourly rates basis the basic time standard is 24 to 30 minutes per 10 items. For Court Assessed bills without a claim under FAS 30-36 minutes will normally be considered reasonable. For Court Assessed bills where a claim is made under FAS 54 to 60 minutes may be reasonable. Additionally, time may be claimed for reporting outcome codes via CCMS. For a standard outcome with no costs or statutory charge 12 minutes will usually be sufficient. For an outcome with costs or statutory charge 24 minutes will usually be sufficient. However, these times are intended to be a guide only and times in excess of this may be allowed where reasonable justification is provided.
- 2.64 Otherwise, completion or assistance with completion of eligibility forms is not normally claimable. This is not legal work, but compliance with the requirements of the Contract and Regulations in respect of provision of services only to clients who are financially eligible. In exceptional circumstances, where the client does not have relatives, friends or other support to provide assistance, it may be permissible to claim for time in relation to eligibility forms. This would be in circumstances analogous to those of *Ecclestone*, above, where without such assistance the client's case or matter would not be viable because they would be unable to obtain legal aid. Care must be taken to ensure that the fee earner does not assume responsibility for the statement of the client's eligibility.
- 2.65 More generally, under the Specification and under usual principles, completion of forms on behalf of the client will usually not be claimable unless their content is such that legal assistance is justified.

### 3: Disbursements

#### General

- 3.1 "Disbursements" means counsel's fees, experts' fees, court fees, travelling and witness expenses and other out of pocket expenses properly incurred by a fee earner which would be properly chargeable to a client. Counsel's fees are also treated as disbursements for most purposes but are considered separately at section 13 of the Guidance. Disbursements are assessed on the basis of determining whether they were reasonably and proportionately incurred and are reasonable in amount subject to any prior authority granted. Invoices or receipts should be provided in respect of any disbursement of £20 (including VAT) or more. However, where the nature of the disbursement, such as court fees and mileage, means that no invoice or receipt is available, a note should be left on file to this effect.

- 3.2 The Lord Chancellor can specify what disbursements can be charged under any form of service. See Paragraph 4.24 of the Specification in relation to controlled work and Paragraph 6.60 of the Specification in relation to licensed work. For residential assessments and other disbursements specifically excluded from legal aid, see the guidance on prior authorities in the “Narrative and guidance: public funding” document on the Ministry of Justice website at <http://www.justice.gov.uk/legal-aid/funding>
- 3.3 “Reasonable” means what is reasonable for the proper conduct of the case in all the circumstances. The test is based on the view/knowledge of the reasonably competent fee earner at the time the disbursement was incurred. Hindsight should not be used.
- 3.4 Regard must be had to the purpose and importance of the disbursements to the case, the particular service involved and 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 and at the particular time.
- 3.5 Paragraph 6.59(c) of the Specification applies to disbursements as it does to travelling time. Where it would have been reasonable for the client to instruct a more local provider, payment for disbursements that are more expensive by reason of the distance of the client from the provider’s office will be limited accordingly.

#### **Mediation Costs**

- 3.6 A fee-earner or counsel acting under a certificate for full representation cannot themselves provide mediation or arbitration services in the same case, but the fees of a mediator or arbitrator can be claimed under such a certificate as a disbursement, except in family cases.

#### **Costs of Communication Support Professionals**

- 3.7 A disbursement does not include costs which are overheads of the provider or to be borne by them by way of some professional obligation. The Equality Act 2010 places an obligation on service providers to make reasonable adjustments so that they can assist clients with disabilities. The provider as service provider is therefore obliged to make adjustments, where it would be reasonable to do so. The adjustment is not a disbursement as it is to be borne by the provider. Where it would not be reasonable to make the adjustment, the client can be charged and so the costs may be a disbursement and reimbursed by the Lord Chancellor. In recognition of the level of these costs and to prevent any gap in provision, the costs of sign language interpretation have been deemed unreasonable for providers to bear on an ongoing basis. These costs will be reimbursed by the Lord Chancellor. It is important, however, for the costs of the interpretation, and any additional preparation time incurred by the interpretation, to be calculated and notified to the Agency separately, so that the cost does not get passed onto the BSL client via the statutory charge. These costs should therefore be reported as part of the costs of assessment.

#### **Agents’ fees**

- 3.8 Where an agent undertakes work that is otherwise fee earner work, it must be claimed as part of the conducting provider’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 an agent is instructed outside of England and Wales, details of the instruction should be set out in the claim but the charge will be a disbursement. The costs will be assessed on the basis of the costs allowable in that jurisdiction (*McCullie v Butler* [1962] 2 Q.B. 313)

- 3.9 Non-fee earner enquiry agent work should be claimed as a disbursement. Such work will include 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 fee-earner's knowledge at the time of instruction? and
  - (b) is the charge a reasonable one?
- 3.10 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 the witnesses rather than divide the work among separate agents.

#### **Fee earner's travelling expenses**

- 3.11 Generally, the questions that will arise are:
- (a) was there a reasonable need for the journey?
  - (b) was the appropriate form of transport used?
- 3.12 Most travel will be to court, to chambers 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.
- 3.13 These expenses are generally to be allowed at the actual expense incurred or at a specified mileage rate (45 pence per mile). 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.
- 3.14 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 that incurred as a result of travelling by public transport or it is reasonable in the circumstances, for example where heavy bundles have to be transported. However, if there is no saving in travelling time and no evidence of special circumstances then the disbursement should be reduced to the equivalent of that which would have been incurred using public transport.
- 3.15 Paragraph 5.22(3) of the Practice Direction to Rule 47.6 CPR (Civil Procedure (Amendment) Rules 2013) states that local travelling expenses incurred by providers will not be allowed on assessment. What is 'local' will be a matter in the discretion of the court dealing with the case at the relevant time, but as a general rule, will be taken to mean within a radius of 10 miles from that court. However, courts will generally

take a flexible approach and may allow travel expenses where local public transport is known to be poor. Any claim for travel expenses within this 10 miles radius should be supported by a file note giving the particular reasons for the claim. Where justifiable under paragraph 3.14 above, the costs of taxi travel are claimable within the 10 mile radius.

- 3.16 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. Cheap air fare offers should be used where possible. It would be usual to expect alternative quotes to be sought to identify the most competitive route. 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.
- 3.17 Invoices/receipts should always be produced in support of claims for travel expenses. Claims for up to £20 will not normally require substantiation by provision of a receipt or disbursement voucher, but should be justified on file. If prior authority has been obtained to cover the expense, then any 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.

#### **Travel/overnight expenses**

- 3.18 The cost of overnight accommodation should only be allowed in exceptional circumstances where the assessor is satisfied that an attendance at a distance is justified and that the need for an overnight stay is justified. The need for an overnight stay would only be justified if it would otherwise involve so much travelling that it would be unreasonable to undertake the travel and attendance in a single day or the attendance was likely to be so long that travel and attendance in a single day would be unreasonable.
- 3.19 The “Guide to Allowances” currently suggests an overnight allowance of £111.25 for expert and professional witnesses staying in London, Birmingham, Manchester, Leeds, Liverpool and Newcastle- Upon-Tyne City Centres and £81.25 elsewhere. These rates may therefore be applied for fee-earner expenses, however, please note that the rates may be subject to change.

The Guide to Allowances referred to above is the Guide to Allowances under Part V of the Costs in Criminal Cases (General) Regulations 1986. The latest version is dated June 2007 and can be found on the Ministry of Justice website (<http://www.justice.gov.uk>). Although it is titled Costs in Criminal Cases, it is also applicable to costs in civil cases.

#### **The congestion charge**

- 3.20. The congestion charge may only be claimed as a disbursement where it is incurred exclusively in relation to the case or matter. Fee earners of providers based inside the charging zones will need to provide evidence that they would not have incurred the charge if it were not for that particular fee-earner case work, given that if a fee earner uses a private car to travel to/from his or her office inside the zone the daily charge will be triggered by his or her normal journey to/from work.

- 3.21 Further, the congestion charge should be taken into account when considering the most cost effective and appropriate form of travel.
- 3.22 No payment can be made without evidence that the congestion charge has been paid for the date claimed.

### **Client's travelling expenses**

- 3.23 In a detailed assessment under Part 47 of the CPR there is no provision for payment of a legally aided client's travelling expenses unless they are required to attend court (see paragraph 3.29 below). The EU Directive on cross-border disputes (Directive 2002/8/EC – 27 January 2003) established minimum common rules on cross-border disputes, including travel, interpretation and translation costs.

### **Legally aided client's travel costs to attend experts**

- 3.24 *R v. Legal Aid Board No. 15 Area Office (Liverpool) ex parte Eccleston [1998] 1 W.L.R. 1279* says that the Lord Chancellor does have power to grant prior authority for a legally aided client's travel expenses to see an expert, where the report is essential for the proper conduct of the proceedings, and the legally aided client cannot afford the expense involved in travelling to the expert.
- 3.25 In licensed work cases the issue of whether to pay for a legally aided client's travel costs to attend an expert is more likely to arise than in controlled work cases. Prior authority applications for costs that are either unusual in nature or unusually large can be made under Paragraph 5.10 of the Specification. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns the personal expense of the legally aided client may arguably make the expense unusual in its nature.
- 3.26 The fee earner is not, of course, obliged to seek a prior authority but may instead seek to justify the costs on assessment. However, it is advisable to seek prior authority given:
- (a) the exceptional nature of these costs; and
  - (b) that prior authority is the only proper mechanism whereby costs covered by an inter partes costs order but not allowed on an inter partes detailed assessment may be allowed on assessment under legal aid.
- 3.27 In his judgment in *Eccleston*, 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 legally aided 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 legal aid does not automatically satisfy the test of "impecuniosity". The legally aided 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. 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 legally aided client to seek financial assistance from the Lord Chancellor to attend the appointment. This is akin to a visit to the legally aided client's own provider's office. An application for prior authority or payment should generally be refused in these circumstances unless the legally aided client can demonstrate 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 fee-earner 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 that is unavailable locally or a limitation period is approaching and the legally aided client could not be seen promptly locally (provided that the legally aided client and his or her fee-earners were not responsible for the delay in instructing the expert). The nearest expert with appropriate expertise should be used, i.e. it is not necessarily justified to use a London expert in a Manchester case if an appropriate expert is available in Liverpool;
- (f) The legally aided client must justify why he or she needs to attend the meeting with the expert; for example, if a physical examination is necessary then clearly it would be reasonable for the client to attend;
- (g) The applicant must provide a full breakdown of the proposed expense;
- (h) Any available alternative sources of funding should be considered;
- (i) The proposed expenditure must be proportionate in relation to the issues in the case.

3.28 Where a legally aided 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 legally aided 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 where inter partes costs are ordered. Prior authority will generally be refused.

#### **Client's/witness's travel costs to attend court**

3.29 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) net loss of income;
  - (b) travel;
  - (c) hotel expenses;
  - (d) subsistence.
- 3.30 A fee earner may pay these expenses on behalf of his or her client and then include the payments in the bill of costs as they would generally be recoverable as a disbursement. Receipts should be produced where relevant.
- 3.31 The usual principles as to reasonableness and proportionality apply. If it was unreasonable for the client to attend the hearing in furtherance of his or her case, for example because the hearing was an interim hearing where the client's presence was not strictly necessary, then the disbursements would not normally be allowed. Note, however, that rule 27.3 Family Procedure Rules 2010 requires that parties to proceedings governed by those rules attend any hearing or directions appointment of which they have notice, unless the court has directed otherwise.
- 3.32 The expenses must also be reasonable as to amount and could be expected to fall within the following categories:
- (a) Net 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: (45 pence per mile);
    - (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.

### **Disbursements in cross-border disputes**

- 3.33 The Lord Chancellor had implemented the European Directive on Legal Aid [13385/02] when it came into force. This Directive applied to 'cross-border' disputes which are cases where one party to proceedings in England and Wales, resides in an EU member state outside of that area. The Directive will not be retained as part of domestic legislation after the end of the transition period for the withdrawal from the EU (the

implementation period completion day). As part of the original withdrawal agreement, however, the terms of the Directive will continue to apply to relevant legal aid applications received by the Director before the end of the transition period.

3.34 Article 7 of the Directive stipulates that legal aid should cover the following costs directly related to the cross-border nature of the dispute:

*“(a) interpretation;*

*(a) translation of the documents required by the Court ...which are necessary for the resolution of the case; and*

*(b) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the case is required ...and cannot be heard to the satisfaction of the Court by any other means.”*

3.35 In terms of travelling costs, the test is the same as set out in paragraph 3.27 in that the client’s presence at Court must be necessary in order to make or keep the case viable.

3.36 In a cross-border dispute, the costs of travelling to experts will be subject to the test in *Eccleston* (i) – see paragraph 3.27, except that the Agency will not require impecuniosity to be shown.

3.37 Articles 7(a) and (b) of the Directive provide a safety net for the payment of interpretation or translation costs. Where proceedings are initiated by public bodies it is a matter of human rights that the documentation of the proceedings are in a language the recipient will understand. In such cases, it would be reasonable to expect the public body to provide translated documents. In all other circumstances the Lord Chancellor will meet the translation/interpretation expenses where necessary and subject to reasonableness in amount.

### **Photocopying**

3.38 Section 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. This is reflected in paragraph 6.59 (e) of the Specification, as these costs are considered as office overheads.

Section 4.16(5) of the Costs Practice Direction to CPR Part 43 states as follows:

*“The cost of making copies of documents will not in general be allowed but the court may exceptionally in its discretion make an allowance for copying in unusual circumstances or where the documents copied are unusually numerous in relation to the nature of the case. Where this discretion is invoked the number of copies made, their purpose and the costs claimed for them must be set out in the bill.”*

3.39 The exception stated in the Practice Direction is if there are “...unusual circumstances...” or the documents “...are unusually numerous...” There is no guidance on determining these factors. However, as a rule of thumb, copying 500 pages will generally be considered exceptional, but a lower figure may be argued to be exceptional in the particular circumstances of a case. Where copying is sent out commercially the lowest available rate should be sought. Where copying is carried out

in house the total amount claimed should not exceed the lowest commercial rate obtainable.

- 3.40 Where copies of documents held by the provider are requested by another party, this will be subject to the other party making payment per page requested, and no claim should be made on assessment regardless of the amount or nature of this copying. Where another party requests payment for copies of documents they provide this payment is claimable on assessment, subject to the reasonableness of the amount. However, the usual position will be that each party will request copies of documents from other parties following disclosure. In that case payment can only be claimed on assessment in respect of the balance of costs payable to another party.

### **Restrictions on Experts' charges**

- 3.41 Experts' charges are subject to maximum rates or fixed fees as listed in Schedule 5 of the Remuneration Regulations. Paragraph 6.60 of the Specification provides that the Lord Chancellor will not pay fees or at rates in excess of those listed in the Remuneration Regulations unless the Lord Chancellor considers it reasonable in exceptional circumstances and has granted prior authority to exceed the fees or rates.

- 3.42 The rates are maximum rates although the fees are prescribed fixed fees under the Remuneration Regulations. Hence providers remain under a duty, pursuant to Clause 2.4 of the Standard Civil Contract Standard Terms, and where the statutory charge and/or contributions may apply, towards the client, to seek to obtain the best value for money in instructing experts. This will be particularly relevant if a provider is aware that an expert is seeking to increase his/her previous rates or fees to the maximum allowed under the Remuneration Regulations. Where an expert is limited to a maximum hourly rate, the time claimed will of course remain subject to assessment.

- 3.43 Where the cost of instructing an expert would normally be shared between a legally aided client and other parties, the claim under legal aid cannot exceed the relevant proportion of the maximum rate or fee. For example:

A surveyor (non housing-disrepair) is jointly instructed by a legally aided client and local authority and the survey takes 6 hours, the maximum claim from legal aid will be £120, i.e. 3 hours at the maximum surveyor (non-housing disrepair) rate of £40 per hour. If the surveyor seeks to charge more than £240 in total, it will be a matter between the surveyor and local authority whether the authority are prepared to pay more than £120 in respect of their share. More specifically, if the surveyor sought to claim £480 or more for 6 hours work it would not be legitimate to claim the full 6 hours at the maximum rate of £40 per hour under legal aid, and the balance from the local authority; that would not be charging the legally aided client's share of the instructed work at the appropriate hourly rate. Similarly, the maximum cost under legal aid of a jointly instructed DNA test would be £126, half of the maximum fixed fee.

- 3.44 Schedule 5 of the Remuneration Regulations and paragraph 6.60 of the Specification define the test for exceptional circumstances for the purposes of paragraph 3.41, above, as meaning that the expert's evidence is key to the client's case, and either (i) the complexity of the material is such that an expert with a high degree of seniority is required; or (ii) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence. Note that this does not

permit an expert to charge in excess of the usual maximum rates or fixed fee simply by virtue of being instructed at short notice.

- 3.45 Regarding the further requirement for claims in excess of the fees or rates within the Remuneration Regulations, that prior authority has been obtained from the Agency, in Licensed Work cases prior authority should be sought under Paragraph 5.10 of the Specification. For controlled work, however, there is no prior authority process. Instead, evidence supporting the claim for exceptional circumstances should be retained on file in case of assessment.
- 3.46 The Specification contains further restrictions on the charges made by experts that can be claimed from the Lord Chancellor in contract work. Paragraph 4.29 of the Specification prohibits claims in respect of separate administration charges or cancellation fees where more than 72 hours' notice is given of the cancellation. Schedule 5 of the Remuneration Regulations limits claims in respect of an expert's travelling costs to 45 pence per mile and travel time to £40 per hour. There are also provisions as to the rate that may be claimed for independent social work in paragraphs 7.180 to 7.181 of the Family Specification. By virtue of Paragraph 6.61 these restrictions apply to licensed work as well as controlled work cases.
- 3.47 Within the Remuneration Regulations, it is the location of the expert that determines whether London or non-London rates or fees apply. London rates will apply where the expert is based within a London Borough. If an expert has offices in more than one location, the location of the provider will be taken in account in deciding the appropriate rates.
- 3.48 Claims for experts' fees of a type not listed in the Remuneration Regulations will be assessed at the rate or fee that appears appropriate having regard to the purpose and importance to the case of the disbursement, the estimates obtained from different experts of that type and the rates allowed for other disciplines within the Remuneration Regulations.

#### **Disbursements for experts reports in Court of Protection cases**

- 3.49 Under Section 49 of the Mental Capacity Act 2005 the Court of Protection has a general power to call for reports to assist in any question relating to the person in question. Such a report may help the Court in determining whether an oral hearing is needed and can be obtained from the Public Guardian, a Court of Protection Visitor, a Local Authority or an NHS body.
- 3.50 A report under Section 49 is not an allowable disbursement under legal help.
- 3.51 Where legal representation is in force a proportionate share of the cost of the report may be an allowable disbursement if such costs could be charged to the client in the absence of legal aid

#### **Disbursements for investigatory work under exceptional case funding**

- 3.52 Section 10 of LASPO makes available civil legal services that are otherwise out of scope of the Act (as described in Part 1 of Schedule 1 to LASPO). Legal aid provided under section 10 of LASPO is known as exceptional case funding.

- 3.53 Providers and members of the public are able to apply for initial grant of exceptional case funding (“ECF”) to allow them to investigate the possibility of a further ECF application being made to cover the substantive services sought. If granted, legal help will be made available to allow a provider to carry out this initial investigatory work and make the further application for exceptional case funding (if appropriate).
- 3.54 It is important to note that the general provisions on incurring disbursements under Controlled Work are applicable to civil legal services carried out for the above purpose. In particular, all disbursements must be reasonably and proportionately incurred and reasonable in amount. Moreover, specific regard must be had to the limited nature of the services provided. The onus will be on the provider to show that each disbursement was necessary on the basis of the information available to the provider at the time (in line with requirements of section 10 of LASPO) to investigate the possibility of making a further application for exceptional case funding, rather than, say, for use in the proceedings for which exceptional funding might subsequently be sought. Reference should also be made to the provider pack for exceptional case funding applications, and the expectation that expert, or other third party, reports will rarely be necessary as part of such an application.
- 3.55 The reasonableness of any expenditure will be assessed in the light of the prospects of a successful application for exceptional case funding for the substantive services sought. More particularly, it will not be considered reasonable to incur substantial expense in relation to assessing the application of the merits criteria, unless it has been established that the substantive application is otherwise likely to meet the requirements for an exceptional case determination under section 10(2)(a) LASPO. In this respect, regard should also be had to the possibility of an application for investigative representation under exceptional case funding where the cost of the proposed disbursement would be £400 or more (see paragraph 6.11 Lord Chancellor’s Guidance (general) under section 4 LASPO).

## 4. VAT

- 4.1 This section deals with general issues of Value Added Tax (VAT) as it affects the Agency and claims made by its providers for work done. VAT is a complex tax governed by the Value Added Tax Act 1994 (VATA) so this overview is very limited in scope. 4.2 VAT is a tax on consumer expenditure collected in the United Kingdom on all business transactions. It is collected whenever there is a taxable 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. Solicitors’ firms are usually registered for VAT and provide a service in respect of their business. The position of Not for Profit Agencies may be more complicated.
- 4.3 When a VAT registered provider is preparing a bill to his or her client, VAT must usually be added to the value of the supply when the provider’s bill is calculated. For example, a bill for £100 must, at current rate, have the VAT (of £20.00) added making the total the client is due to pay £120.00.

- 4.4 All services (whether legal help, help at Court, help with family mediation, family help or legal representation) provided by the provider in a legally aided case are supplied to the client. As they are supplied to the client, the client is the recipient of the service so it is always the client's status that is relevant. This is particularly important if the client is considered to reside overseas. It will also be important where the proceedings have arisen during the course of the client's business.
- 4.5 For the purposes of VAT law, anything which is not a supply of goods but is done for a consideration is a supply of services (VATA, 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 legally aided cases, the fact that the Lord Chancellor pays the provider does not alter the relationship between the client and the provider for VAT purposes.
- 4.6 VAT is generally added to the work done by the provider, which is fairly straightforward. 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**

- 4.7 Those items identified by providers as disbursements and expenses are not always the same as those that HM Revenue and Customs classify as disbursements for VAT purposes. The correct treatment depends on whether the item of expenditure is:
- (a) a cost incurred by the provider in the course of making a supply; or
  - (b) a disbursement incurred by the provider as the client's agent, which is then charged to the client.

#### **Costs incurred**

- 4.8 Any item incurred by a provider in the course of making his or her 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).
- 4.9 The question to ask is whether or not the expenses incurred were an integral part of the provision of legal advice to the client. Some examples of such expenses are; the provider's travelling expenses; postage; and telephone charges.
- 4.10 If a provider has to go to court to represent the client the supply he or she makes is not just the provision of advocacy and advice but includes his or her travel time together with the incidental travelling expenses.
- 4.11 As a general rule, travelling expenses incurred by a provider in the performance of his or her client's instructions are not VAT disbursements and must be included as part of the provider's overall charge.
- 4.12 *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 solicitors 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 therefore could not be divided for the purposes of calculating VAT.

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

#### **True Disbursements**

- 4.14. Disbursements for the purposes of VAT are those where amounts are paid to third parties by the provider, acting 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, Paragraph 25.1.1:**

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

- 4.15 All of these conditions must be satisfied before a payment can be treated as a disbursement for VAT purposes. The following may be treated as disbursements provided the guidelines set out above are adhered to:

- (a) company registration fees;
- (b) company search fees;
- (c) court fees;
- (d) witness fees;
- (e) sheriff agent fees;
- (f) oath fees paid to a solicitor or Commissioner for Oaths.

- 4.16 Recent caselaw<sup>1</sup> has indicated a restrictive approach to what can be considered a true VAT disbursement. Note in particular that since the *Brabners LLP* case, the HMRC concession that the fees for postal searches could be considered true disbursements has been withdrawn. The Law Society have provided [guidance](#) on this issue.
- 4.17 Because of uncertainty as to the treatment of some disbursements, in particular in relation to experts' reports and interpreters' fees, where a provider is in doubt how to account for VAT they should contact either their HMRC office or their usual tax advisers.

#### **How should VAT disbursements be treated?**

- 4.18 The provider has two options. The first is to pass on the cost of the disbursement to the client as a VAT inclusive amount (if taxable) and exclude it from the calculation of any VAT due on the main supply of legal services to the client. The provider cannot reclaim the input tax on the supply.
- 4.19 Unless the invoice for the disbursement is addressed directly to the client, the client is also prevented from reclaiming input tax as he would not hold a valid VAT invoice.
- 4.20 Generally it is only advantageous to use this method of treating a VAT disbursement where the client is not entitled to reclaim the VAT. This generally happens in legally aided bills, except where the client can reclaim (for example where the proceedings were brought in the course of the client's business).
- 4.21 Alternatively, services can be treated as supplied to and by the provider under Section 47(3) VATA. The provider can then reclaim the related input tax (subject to the normal rules) and must charge VAT on the onward supply if appropriate. If a provider supplies goods as an agent and issues an invoice in his or her own name, he or she must account for VAT as if he or she were the seller.

#### **How should providers claim VAT?**

- 4.22 When submitting a claim there is a requirement that disbursements are detailed on the relevant pages of the CIV CLAIM1, CLAIM 1A and CIV CLAIM2. On whatever basis a VAT component of a disbursement is being claimed (i.e. whether as part of the provider's supply of services or because a true disbursement invoice contains a VAT element), the net and the VAT elements of the disbursements must be itemised separately in the appropriate sections of the form.

#### **Counsel's fees**

- 4.23 A concessionary treatment for counsel's fees was agreed when VAT was first introduced in April 1973. The provider may treat counsel's advice as supplied directly to the client and the settlement of the fee as a disbursement. Counsel can elect to apply on their fees the VAT rate applicable at the time the service was provided or apply the rate at the time that the total bill is presented. Either is acceptable subject to the VAT rate being valid. For Counsel subject to the Family Graduated Fee Scheme or

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<sup>1</sup> First-tier Tax Tribunal in *Brabners LLP v The Commissioners for her Majesty's Revenue & Customs* [2017] UKFTT 0666 and the *obiter* comments of the Court of Appeal in *British Airways v J. Prosser* [2019] EWCA Civ 547

Family Advocacy Scheme, they may bill per Hearing or activity, the date of the Hearing or activity will determine the VAT rate in these circumstances. Counsel's VAT invoices may be amended by adding 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. Equally for counsel it is the client's VAT status that is relevant.

#### **Legal services supplied to overseas clients**

- 4.24 If an individual receives legal services for a non-business purpose, i.e. in their own personal capacity, for VAT purposes the services are deemed to have been provided where the individual belongs (VATA Section 7A and Schedule 4A, paragraph 16(2)(d)). UK VAT is therefore generally not chargeable where the services are provided to a client who is considered to reside overseas. . However, it should be noted that supplies in relation to land in the UK are always chargeable to UK VAT (VATA, Schedule 4A, paragraph 1).
- 4.25 In legally aided cases involving ownership and related issues of United Kingdom property, therefore, VAT must 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 persons estate or where the services relating to land are incidental to a much larger transaction.

#### **What is an "overseas client"?**

- 4.26 For individuals receiving services in a personal capacity, section 9 VATA provides that they belong where they have their "usual place of residence or permanent address". "Usual place of residence" does not have to mean permanent residence although length of stay is a factor.
- 4.27 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;
  - (b) where their family is; or
  - (c) where their job is.

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

- 4.28 This issue usually arises in respect of the immigration status of an individual in the UK. If a client's asylum status is not yet determined (or has been determined and they have no right to stay), HMRC's view is that, even though the client may be physically present in the UK, their place of residence can only be in the country from which they have originated. The same VAT position will apply to other individuals with no right to stay, for example an illegal entrant who is not an asylum seeker.
- 4.29 Once a person has been granted a right to stay (for example a person serving on overseas forces, students attending university in the UK, or self-employed nurses under contract) VAT applies as normal. In cases where the client is resident, VAT can

be accounted for in the usual way. If the client is the sponsored person residing overseas, then VAT does not apply and is not accounted for.

- 4.30 Consequently, **any** legal services provided to asylum seekers (or others without a right to stay), whether for their asylum applications or in relation to other areas of law, are supplied to them in their country of origin. This places the service outside the scope of UK VAT.
- 4.31 The tax point will be at the conclusion of the legal work, not the date that the claim is submitted and no apportionment should be necessary unless other work is done after the determination of the right to stay, when the client would be resident and VAT chargeable. However, if VAT is chargeable for part of the life of the case or matter, for example because the legally aided client changes their residence during its course, the bill or claim will be apportioned accordingly. However, VAT cannot be apportioned across a fixed fee and where a client is not subject to VAT at the commencement of a stage then VAT should not be paid on the fixed fee. If the client has lost contact with the provider before the case has concluded, it would be right not to charge VAT for the work done.
- 4.32 . If an applicant without a right to reside in the UK does not have an identifiable country of origin, they might be considered not to “belong” anywhere. In those circumstances they could not fulfil the condition under paragraph 16(1) Schedule 4A to VATA of belonging to a country other than the UK or the Isle of Man, and the place of supply is deemed, under section 7(2)(b) VATA, to be where the provider belongs. UK VAT is, therefore, be chargeable when the country in which the person ‘belongs’ has not been determined. HMRC [guidance VATPOSS04600](#) states that such a situations are likely to be exceptional.
- 4.33 Where a client is granted, or otherwise possesses, the right to remain in the UK, the place of supply of services to them will remain the UK even if they subsequently overstay (section 3.8 VAT [Notice 741A](#)). Where the right to remain is subsequently revoked, the should still be treated as resident in the UK for VAT purposes, such that VAT will continue to be payable on services provided to them, until the issue is finally resolved (through any appeal or other legal process). See again the HMRC guidance VAPOSS04600, above.
- 4.34 Providers will need to be aware of their client’s immigration status in order to know how to treat the supply for VAT purposes correctly. HMRC policy in relation to overseas clients is available at the HMRC pages on [www.gov.uk/](http://www.gov.uk/). Any queries on VAT in individual cases should be referred to the HMRC’s National Advice Service on 0845 010 9000.

#### **Business cases and payment of a third party’s costs**

- 4.35 Business cases may be paid under legal aid for legal persons under an individual case contract where the effective administration of justice test is met. Separate guidance for Exceptional Funding Cases should be referred to in those circumstances. However, guidance on VAT issues for business cases is that VAT paid can be offset as “input tax” where the proceedings relate to the business. 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 Lord Chancellor’s responsibility to pay VAT on the legal costs incurred.

## Changes to VAT rates

- 4.36 Legally aided cases can generally be viewed as a single supply of services to the client, such that a uniform VAT rate can be applied to profit costs (including disbursements forming part of the provider's supply of services to the client) based on the date of final work (excluding bill preparation) contained in the providers claim form. This will not apply to VAT that has been charged on a true VAT disbursement before the rate charge. However, other methods of accounting for VAT may be permissible, and providers should liaise with HMRC if they wish to claim VAT on a different basis.

## 5. Work relating to the Proceeds of Crime Act 2002

### Introduction

- 5.1 Work done by a provider to comply with the Proceeds of Crime Act (POCA) 2002 and the money laundering regulations generally (i.e. work done that is not client-specific), is administrative work and as such is not claimable under legal aid. Similarly, internal consultations (e.g. between a fee-earner and the firm's money-laundering compliance officer) would be administrative work under general cost assessment principles.
- 5.2 The situation is more complex in situations where the work is client-specific and is not an internal consultation. This is work that is directly involved in the provision of contracted legal services to the client and so may be claimed under legal aid, subject to reasonableness and the views below as to what may be allowed under legal aid.
- 5.3 This work may include:
- (a) Procedures for checking the client's identity;
  - (b) Providing advice to the client on the effect of the money laundering laws;
  - (c) Taking further instructions where the solicitor has knowledge or is suspicious that a money laundering offence may have taken place;
  - (d) Considering whether to make a report to NCIS;
  - (e) Reporting to NCIS where appropriate;
  - (f) Applying to the court for guidance;
  - (g) Considering whether the firm can continue to act for the client in the circumstances;
  - (h) Considering how to advise the client without 'tipping off'.

### Checking identity and making a risk assessment

- 5.4 In identifying whether someone is likely to be involved with the proceeds of crime, the Financial Services Authority recommends that advisers undertake a risk assessment and high risk businesses are identified as any that involve an intensive use of cash, for example plant hire, restaurants, night clubs, dry cleaning, building, plumbing, electrical or decorating services, mini cabs and market traders. Whilst this does not mean that individuals who have these trades/are employed in these businesses are guilty of

offences, it is the higher use of cash transactions that might lead to some monies being received that might be the proceeds of crime.

#### **Advice to the client about the solicitor's responsibilities under POCA**

- 5.5 To what extent these costs are chargeable will depend on why the work is being done and when. The Law Society recommends that solicitors explain the law in this area in their client care letters so that the client understands at the outset what steps can be taken and that when taken they are directly chargeable to the client. It would be an amendment to the firm's standard client care letter and should not form a separate letter. The Law Society advises that the explanation should be in general terms without reference to the client's particular circumstances.
- 5.6 After initial instructions are received there may be points at which the fee-earner and client spend time on POCA issues, for example, considering another party's finances. Such time is chargeable under legal aid, subject to the reasonableness of the time spent.

#### **Taking further instructions on whether an offence has or will be committed**

- 5.7 The provider may be receiving monies from (or otherwise becoming concerned in financial arrangements) with the client or someone else – common examples would be:
- transactions or settlements during the case;
  - private payment for legal services; or
  - receiving legal aid contributions
- 5.8 Reflecting on whether an offence has been committed and what steps to take may be driven by a number of reasons, including:
- (a) to avoid the fee-earner committing the offence of failing to disclose;
  - (b) to determine whether the client's or someone else's assets are criminal property in the context of assessing financial eligibility; or
  - (c) to obtain consent from NCIS where the firm is to receive monies from (or otherwise becoming concerned in financial arrangements) the client or another.
- 5.9 If the purpose of the work is to consider how to avoid an offence by the fee-earner of failing to disclose, it is not allowable under legal aid. This work does not benefit the client, and its performance has no effect on the question of whether the provider can continue acting.
- 5.10 In contrast, if the provider has made a report to NCIS and also has to consider whether it can continue acting and how to advise without 'tipping off', this work would be claimable, subject to reasonableness.
- 5.11 If the purpose of the work is to determine whether the client's or someone else's assets are criminal property in the context of applying financial eligibility criteria, it is

not claimable. Work done in the context of applying financial eligibility criteria is not claimable.

- 5.12 If the purpose of the work is to obtain a consent from NCIS (and therefore a defence to substantive money laundering offences) because the provider is to receive monies from or otherwise concerned in suspected financial arrangements, it is claimable if the transaction or settlement is in the context of the case. This work can be properly described as directly involved in the provision of contracted legal services, as a necessary part of the process.
- 5.13 If the reason for receiving monies or becoming concerned in arrangements is the collection of private payment for legal services, then by definition it is nothing to do with the Lord Chancellor or the Director and is therefore not claimable.
- 5.14 If the reason is to do with the collection of contributions which have been assessed as being payable after a means assessment for criminal legal aid, it should be claimable if and to the same extent as the work done collecting other types of contributions may be claimable.

#### **Considering whether the provider can continue to act**

- 5.15 Any application for an adjournment within proceedings is generally within the scope of the certificate. If a provider has to seek directions and guidance from the Court as to whether or not they should continue as the client's solicitor, this will fall within the scope of proceedings. Whilst this is not a usual step, in the sense that it is not common within the proceedings, it arises out of the provider's professional obligation to appear as they are on the court record as the acting representative. It is anticipated that directions would only be sought where there was a pending hearing and the fee-earner was unsure whether to continue to act. In such cases, this is client specific work.
- 5.16 If, however, the reference to the Court is to seek the Court's guidance on whether or not the provider should report to NCIS, the driver for the application is the provider's position and is therefore not within the proceedings and not client specific. It is not capable of an amendment to the certificate as it does not fall within the proceedings.
- 5.17 Whilst considering whether the provider can continue to act is client specific work, and will be allowed subject to reasonableness, considering whether the provider has 'tipped off', or making an application directly to the Court in respect of the provider's own position is not client specific.

#### **Complying with Production Orders**

- 5.18 Once NCIS has conducted an investigation, the Serious Organised Crime Agency (SOCA) may decide to initiate proceedings. This can include a production order served on a provider for the release to SOCA of client documentation.
- 5.19 Whether this is chargeable will depend on the legal aid position. If the client is a former client, with no current relationship existing between client and provider, the work in complying with the order will be borne by the provider. However, where the client is a current client with the benefit of legal aid, compliance with the order would be client specific.



## Part B: Controlled work

### 6. Civil Legal Aid Legislation

- 6.1 Only work within the appropriate forms of service can be paid for. In particular, the issue and conduct of legal proceedings is not permitted under legal help.
- 6.2 All aspects of carrying out controlled work are delegated to providers and they, rather than the Director, are the assessing authority for the client's means under the Financial Regulations.
- 6.3 An assessor (LAA or ICA) may only depart from a provider's assessment that the relevant merits test is satisfied where the provider's decision was 'manifestly unreasonable'. In this context the term 'manifestly unreasonable' means where the use of provider's assessment was plainly unreasonable, such that no reasonably competent solicitor, in light of their then knowledge, could have concluded that the relevant merits test was met rather than because an assessor has simply made a different, although equally valid, decision about merits. However, the provider must be aware that the continuing obligation to review merits and sufficient benefit is fundamental to the legal aid scheme, and therefore such review should be continued throughout the exercise of delegated functions.
- 6.4 This principle cannot apply, however, in respect of work that is not within the scope of the Act. The Director has no power to determine that an applicant qualifies for services not described in Part 1, Schedule 1 of the Act other than in the context of an exceptional case determination under section 10 of or Schedule 3 to the Act. Hence no power to make such a determination can be delegated to providers. Accordingly, any work that is out of scope of the Act cannot be paid, although an assessment decision to this effect is, of course, subject to the usual contractual appeal process.

### 7. Escape fee cases

- 7.1 Escape fee cases were formerly known as exceptional cases, however, with the creation of the provision for exceptional case funding for out of scope work under Section 10 of LASPO, there has been a need to rename this type of claim to escape fee cases.

Matters that are initially subject to Standard or Graduated Fees will be assessed by the Director where the provider claims the matter has escaped the Standard Fee on the basis that the costs, as calculated at hourly rates, exceed the relevant threshold. A claim for an escape fee is made on form EC-Claim1.

- 7.2 In escape fee cases the time spent in preparing the EC-Claim1 form may in principle be claimed within that form on the same basis as time spent in preparing a Claim1 in licensed work proceedings. However, where the costs of the matter (excluding the preparation of the EC-Claim1) do not reach the relevant escape fee threshold, the costs of preparing the EC-Claim1 may not be used to qualify the matter as one which attracts an escape fee. If such a claim is submitted to the Agency the costs of

preparation of the EC-Claim1 would be disallowed as unreasonably incurred and the matter would be paid as a Standard or Graduated Fee.

- 7.3. If the amount payable for the Claim, not including the costs of preparing the form EC-Claim1, is assessed as being below the threshold for payment of an escape fee, then only the Standard or Graduated Fee is payable for the matter and there is no discretion to allow the costs of preparing the EC-Claim1 as an additional item.

## **8. Housing Possession and Homelessness Cases**

- 8.1 Under table 7(c) of Part 1 of the Remuneration Regulations, higher rates are payable for housing cases that involve legal help provided in relation to a review under section 202 of the Housing Act 1996 or legal help or help at court provided to a defendant to a possession claim in the county court. These rates are those generally applicable for controlled legal representation, save that any advocacy provided under help at court is paid at the same rate as preparation/attendance, and not the controlled legal representation advocacy rate.
- 8.2 In respect of homelessness cases, the increased rates apply only where the matter involves assistance in pursuing a section 202 review, not where advice is given as to the possibility of seeking a review that is not pursued, nor where the client attends for the first time after a section 202 decision has been made and a further section 202 review does not arise within the matter. In respect of possession cases, the increased rates apply to any case where legal help is provided in relation to possession proceedings that have been issued in the county court. These rates will therefore be considered to apply to applications to suspend warrants for possession or to suspend, postpone or set aside possession orders, whether or not legal representation is subsequently obtained in relation to the case.
- 8.3 Where a matter contains assistance described in paragraph 8.2, the higher rates may be reported for all the work carried out in the matter. This will be relevant for:
- (i) calculating whether the matter reaches the escape fee threshold;
  - (ii) the amount payable for the matter if it does escape the Standard Fee;
  - (iii) provisions relating to average costs per case in the Contract Standard Terms.
- 8.4 Note that the higher rates in table 7(c) of the Remuneration Regulations have no impact on the level of the Fixed Fee or escape fee threshold which are as set out for all Housing work in the Remuneration Regulations.

## **9. Disbursements**

- 9.1 Note that in controlled work matters, court fees are not a permitted disbursement.
- 9.2 The Standard and Graduated Fees do not include payment for disbursements. These are claimable as incurred, subject to potential assessment, on a monthly basis. All claims for disbursements are potentially subject to assessment. Details of disbursements incurred must be included in any claim for an escape fee in form EC-Claim1.

- 9.3 Under controlled work, the general position is that counsel’s fees do not count as a disbursement and are not claimable in addition to any Standard or Graduated Fee. Counsel may be instructed under controlled work but, subject to category specific provisions of the Specification, the provider is responsible for agreeing and paying any counsel’s fees out of (but not limited to) the Standard or Graduated Fee – see Paragraphs 3.58 – 3.61 of the Specification.
- 9.4 The following category specific provisions of the Specification contain further rules as the use of counsel under controlled work:

	2018 Contract Specification
Family	7.170 – 7.174
Immigration	N/A
Mental Health	9.59- 9.64

## Part C: Licensed work

### 10. The legal aid certificate

#### General

- 10.1 The legal aid certificate and any amendments to it are conclusive as to what work the provider or counsel have been authorised to do. On assessment it is the only authority under which providers and counsel may be paid.
- 10.2 Even where a certificate covers the proceedings up to and including trial, it will bear a limitation to that effect. Subsequent work such as implementation or enforcement is only covered to the extent specified.
- 10.3 The certificate may, however, be limited as to steps in the proceedings, to particular parties or to certain work, for example the obtaining of an opinion from counsel. If the certificate is limited payment will not be made from legal aid for work done outside the limitation.
- 10.4 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. Providers may charge for reasonable costs incurred in responding to a notice to show cause which may result from counsel's opinion, or any other report on case from the provider.
- 10.5 Even with a full certificate a fee earner may seek a prior authority under Paragraph 5.11 of the Specification if he or she wants to be sure of payment of specific costs.
- 10.6 The certificate can only cover one action, cause or matter, (in particular, no client should generally have more than one certificate for private law family proceedings). See regulation 37 of the Procedure Regulations.
- 10.7 However, in *Gareth Pearce v Ove Arup Partnership Ltd* [2004] EWHC 1531 (Ch), it was held that the equivalent provision under regulation 46 (3) of the Civil Legal Aid (General) Regulations 1989 only prevented a certificate covering more than one set of civil proceedings in existence at the same time. Thus where solicitors had issued but not served a first set of proceedings they were not prevented from claiming in respect of a second set of proceedings under the same certificate.
- 10.8. The certificate will cover only one legally aided 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 legally aided client will be the minor or person under disability.
- 10.9 The legal aid certificate will specify both an individual nominated fee earner and provider. If there is a change of provider (even if the same individual fee earner

continues to be nominated), an amendment of the certificate should be applied for to amend the name of the conducting provider.

- 10.10 Work under the legal aid certificate can be carried out by any caseworker within the provider's office.
- 10.11 The Agency's computer system determines the individual proceedings within each action, cause or matter. Each legal aid certificate issued will set out for each of the proceedings a limitation on the scope of the certificate for the work authorised to be undertaken as well as a limitation on the allowable costs that can be incurred in respect of the work authorised.
- 10.12 It is essential that both fee earners and counsel ensure that the legal aid certificate covers all the work that needs to be done for the legally aided client. All legal aid certificates contain a limitation and it is particularly important to ensure that any work done is within the limitation if payment is to be made. Clause 30.17 of the Contract Standard Terms obliges the provider to check the legal aid certificates issued.
- 10.13 Generally if the wording is incorrect or not in accordance with the needs of the legally aided client, it will affect:
- (a) provider and counsel, who will not get paid for work outside the scope of the certificate;
  - (b) the legally aided client who might not be covered for 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 under legal aid.
- 10.14 On assessment regard must be had to the scope of the legal aid 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.

#### **Work claimed pre- or post-certificate**

- 10.15 Subject to the specific exceptions set out in paragraph 10.16 below, payment will not be made under legal aid for any work done in advance of the date from which the legal aid certificate takes effect or after the date of its withdrawal. Note, however, that work carried out following a delegated, telephone or faxed application grant of legal aid, including the completion of forms reporting the exercise of delegated functions and applying for a substantive legal aid certificate will be within the temporal scope of the legal aid certificate. Further, since legal aid certificates are issued with effect from a particular date, but not a particular time, work carried out before the actual exercise of delegated functions but on the same date will also be within the temporal scope.
- 10.16 In respect of work carried out after the date of withdrawal of the certificate, the following exceptions apply:
- (i) The retainer between a legally aided client and provider determines upon receipt of a notice of withdrawal of a legal aid 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 provider retainer does not determine until the fee earner has served the appropriate notice, the appropriate notice upon withdrawal of the legal aid certificate is set out in Regulation 49 of the Procedure Regulations. The provider will be entitled to be paid for lodging and serving the appropriate notice, once the legal aid certificate has been withdrawn.

- (ii) Any work reasonably done pending the dismissal of the appeal against withdrawal of the legal aid certificate in order to protect the interests of the client should be allowed. This must relate to the proceedings rather than the appeal itself.
- (iii) If the appeal is successful and the Director substitutes a determination for the withdrawal, the determination (unless the Director directs otherwise) takes effect as if the original determination had not been made. Therefore, any work conducted by the provider in the intervening period will be remunerated as if the withdrawal had never happened.
- (iv) Where proceedings have not been issued the provider is not obliged to serve such notices. Indeed, the retainer may in fact have determined before the application for withdrawal of the legal aid certificate is applied for.
- (v) Closing letters to the client and other interested parties will also be claimable following withdrawal of the legal aid certificate.
- (vi) Preparation and checking of a bill of costs and the costs of detailed assessment proceedings are payable under the legal aid certificate. Time spent completing forms Claim1, Claim 1A and Claim2 may also be claimed under the legal aid certificate.
- (vii) Time may be claimed for work in correcting a legal aid certificate after withdrawal to correct a mistake on the legal aid certificate.

## **Forum**

- 10.17 Where a legal aid certificate specifies the forum for proceedings then that forum must be used. Where a legal aid certificate is silent proceedings may be taken either in the family court, county court or the High Court.
- 10.18. Where the legal aid certificate specifies proceedings in the family court or a county court it will not, unless amended, cover proceedings after a transfer to the High Court. If the legally aided client wishes to transfer the proceedings to the High Court then an application for an amendment of the legal aid certificate must be made to the Director. 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 legal aid certificate should be made immediately after the order transferring the proceedings. In the absence of an amendment the legal aid certificate will not cover any subsequent work.
- 10.19 No amendment of the legal aid certificate is required on a transfer of proceedings from the family court or a county court to the High Court where the legal aid certificate does not specify a particular court. Nor is an amendment required where the legal aid certificate specifies proceedings in the High Court and the proceedings are transferred down to the family court or a county court.

## 11. Costs limitations

### General

- 11.1 Costs limitations are imposed on all certificates issued under LASPO by the express authority of Regulation 35 of the Procedure Regulations. Providers only have cover to carry out work up to the costs limitation imposed. The limitation limits the costs to be incurred under the legal aid certificate to a figure including disbursements and any counsel's fees, but excluding VAT.
- 11.2 Although a number of cost limitation figures may be imposed throughout the progress of the case, it is only the limitation imposed on the final version of the legal aid certificate that is relevant for assessment. Bills or claims do not need to be apportioned to reflect the different costs limitations throughout the case.
- 11.3 A costs limitation is binding on assessment either by the Court or the Agency. Any claim for costs must be submitted in accordance with the final costs limitation of the legal aid certificate. Whatever sum of costs is claimed on the legal aid certificate the liability for costs under legal aid will not exceed the final costs limitation imposed on the legal aid certificate and the Lord Chancellor will not pay in excess of that limitation (Clause 30.17 of the Standard Terms and Paragraphs 6.55, 6.62 and 6.63 of the Specification).
- 11.4 Claims for costs for assessment by the Agency may be submitted in excess of the limitation on the legal aid certificate on the basis that costs may be assessed down in any event, but the final amount allowed on assessment will not exceed the limitation.
- 11.5 When calculating costs, the profit costs figure should be calculated by reference to the relevant remuneration hourly rate. If any uplift or enhancement is likely to be claimed this figure should be added to the profit costs. Fee earners 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.
- 11.6 The limitation does not include the costs of assessment or disbursements related to those costs, but does include the costs associated with preparing and checking the bill of costs (Paragraph 6.42 of the Specification).

### Procedure on Assessment

- 11.7 The procedure is that costs are to be assessed in the usual way, and the costs limitation on the legal aid certificate should be imposed at the conclusion of the assessment by disallowing the amount of costs claimed in excess of the limitation under the legal aid certificate. Alternatively, the assessment could conclude at the point that the costs limitation is reached. However, the former approach will be preferable, particularly where an inter partes detailed assessment is also conducted. It is important to note that:
- (i) work does not become out of scope of the legal aid certificate (and therefore not recoverable inter partes) by virtue of having been conducted outside of the costs limitation on the legal aid certificate in force at the time of that work, as it would where work is conducted beyond the terms of a scope

limitation; the costs limitation on a legal aid certificate is a restriction on final payment under Legal Aid;

- (ii) accordingly, where a bill exceeds the final costs limitation on a legal aid certificate, it is not the costs at the end of the case that are specifically outside of the costs limitation any more than the costs of any other part of the case;
- (iii) however, the restriction of costs to the final costs limitation of the legal aid certificate is properly a part of the assessment, by either the court or the Agency and is not a separate deduction or penalty following that assessment.

### **Recovery of costs between the parties**

11.8 Paragraph 1.40 of the Specification places it beyond doubt that the indemnity principle does not apply to costs limitations. A costs limitation under a legal aid certificate protects the client and legal aid itself. However, it does not inhibit costs recovery between the parties. A successful legally aided client may recover costs from the paying party in excess of the final costs limitation imposed.

### **Impact on counsel's fees and disbursements**

11.9 It is primarily the provider's fee earner who is responsible for monitoring the total costs under the legal aid certificate and for ensuring that those costs are kept within the costs limitation.

11.10 In general, if the total of the counsel's fees and the provider's costs exceed the costs limitation on the legal aid certificate, counsel should be paid in full and the shortfall will be borne entirely by the conducting provider.

11.11 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 provider, and will not concern the Lord Chancellor further. If counsel had no knowledge of the limitation the provider will be obliged to indemnify counsel for his/her loss. However, this should be rare because providers are under an obligation to send counsel a copy of the certificate and any amendments to it.

11.12 There is no similar 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 provider. Even if the total amount due to the provider is reduced as a result of the costs limitation under the legal aid certificate, the expert or other service provider will be able to recover from the provider such fees as have been contractually agreed between them. It is not a matter that concerns the Lord Chancellor or affects the amount allowed on assessment.

11.13 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 £2,250.

- On assessment, the provider's bill, as initially assessed, 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 under legal aid is £2,250. The payment made would be £1,000 to counsel and the balance of £1,250 to the provider covering both profit costs and disbursements.
- If however, counsel's fees alone were £3,000 and the provider's profit costs and other disbursements were £5,000, counsel would be paid £2,250 and the provider nothing. Additionally, counsel could seek an indemnity for his or her loss of £750 if he or she had not been given notice of the costs limitation imposed.
- Where counsel had such notice he or she would receive the £2,250 due under the limitation but would not be entitled to claim further sums from the provider.

### **Certificates transferred to another provider**

11.14 One of the first tasks of an incoming provider must be to consider the costs actually incurred to date and, where necessary, to apply for an increase in the costs limitation under the legal aid certificate. The new provider should also determine whether the relevant cost benefit criteria aspect of the Merits Regulations continue to be satisfied. The outgoing provider should provide the incoming provider with details of the costs incurred up to transfer promptly. If, on assessment, there is a shortfall between the costs claimed and the costs limitation and this is because of a failure of the first provider, the shortfall should be met out of the costs that would be apportioned to the first provider.

### **What if the certificate contains multiple proceedings?**

11.15 Because of the way the Agency's old computer system (CIS) works, a certificate covering more than one set of proceedings may 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.

On the Agency's new computer system (CCMS) which will be in use in some areas from 1 April 2013 and all areas subsequently, there will be only one cost limitation per certificate, no matter how many proceedings there are.

11.16 Providers 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 legal aid certificate are likely to exceed the highest limitation.

## **12. Enhancement of costs**

### **General discretion: providers**

12.1 It is for the provider to claim enhancement where he or she considers that it is justified and to indicate the level of enhancement sought. It will also be advisable for the provider to draw attention to any factors on which they particularly rely to justify either the need for enhancement or the level sought. However, in any event the

assessor has a duty to consider on the evidence before him or her, whether the claim for enhancement is justified.

- 12.2 The criteria for the enhancement of provider's bills are contained in Section 6 of the Specification (Paragraphs 6.12 to 6.17). The Specification provides a fixed level of remuneration that may be increased by up to 50%. The rates may be increased potentially by up to 100% in High Court, Upper Tribunal, Court of Appeal or Supreme Court cases. The Agency's approach will be to consider the appropriate level of enhancement and apply a cap of 50% or 100%; it will not apply a general 50% reduction to the enhancement.
- 12.3 The Specification provides a two stage process for enhancements. The first stage is a threshold test - whether any enhancement should be allowed.
- 12.4 The 'relevant authority' - the costs officer or caseworker assessing the case - must be satisfied (Paragraph 6.13) that:
- (a) the work was done with exceptional competence, skill or expertise;
  - (b) the work was done with exceptional speed; or
  - (c) the case involved exceptional circumstances or complexity.

If the assessor is satisfied that this test is met then it will be appropriate to go on to the second stage to consider the amount of any increase.

- 12.5 The second stage has its own set of criteria, namely that the 'relevant authority' shall have regard (Paragraph 6.15) to:
- (a) the degree of responsibility accepted by the fee earner;
  - (b) the care, speed and economy with which the case was prepared; and
  - (c) the novelty, weight and complexity of the case.

For counsel, the tests for applying an enhancement are contained in Regulation 7 of the Remuneration Regulations, and further guidance is set out from paragraph 12.12 below.

- 12.6 Under the Specification, enhancement only applies to hourly rates, never to Standard or Graduated Fees. Further, in determining whether a family case escapes a Standard Fee, only base costs without any enhancement may be taken into account; see paragraph 7.21 of the Specification.
- 12.7 There is clearly some overlap between the factors that will justify enhancement under the 'threshold test' and the factors determining the level of enhancement. In neither case can an exhaustive list of features of a case be identified that will demonstrate the presence of these factors, and each claim must be considered on its own merits, but examples of indicators that an assessor may look to are given below.
- 12.8 In relation to the threshold test, the case must be viewed as exceptional in one of the ways referred to in Paragraph 6.13 of the Specification, the comparison suggested by Paragraph 6.17 being with the generality of legally aided proceedings to which the

prescribed rates apply. 'Exceptional' has its normal meaning of "unusual" or "out of the ordinary", hence more than simply above the average. In relation to the three limbs of 6.15:

(a) **The work was carried out with exceptional competence, skill or expertise**

This may cover work where the fee-earner demonstrates unusually detailed knowledge relevant to the case or skilfully pursues an unusual or difficult legal argument, it may also include unusual skill in identifying and marshalling evidence in pursuing or defending a case and/or identifying a particularly effective tactic on behalf of the client. Enhancement may be indicated under this heading where the provider has carried out the case or particular work in a way that has required less time than would have been expected of a notional reasonable fee-earner, or may have conducted the case so well that the client has received a better result than might usually have been expected. Another example of unusual skill may be taking instructions and providing effective representation for a client who is a child, is seriously mentally ill or is otherwise very vulnerable.

(b) **The work was done with exceptional speed**

Enhancement may arise under this provision where the fee-earner has proactively pursued a case, for example in obtaining with unusual speed re-housing, community care support, receipt of welfare benefits, an injunction, release from mental health detention or other resolution of the client's problem; it may also be justified if the fee-earner carries out substantial work at short notice because of urgent deadlines, such as proposed deportation or dispersal or injunction hearings where the client is a defendant.

(c) **The case involved exceptional circumstances, novelty, weight or complexity**

Complexity may relate to legal issues, questions of expert evidence or other evidential issues, for instance seeking or challenging witness evidence in possession proceedings based on allegations of nuisance. It may also take into account difficulty in taking instructions from the client or other witnesses. Alternatively, that may be viewed as falling within "exceptional circumstances", which may also include the nature of the issues as they affect the client, such as liberty, right to remain in the country, the roof over the client's head, addressing domestic violence or avoiding destitution. A case requiring substantial out of hours work may also be considered to fall under this limb or particular work may be considered under 6.15(b) of the Specification.

12.9 In relation to the level of enhancement, within the limbs of Paragraph 6.15 there are a number of possible factors:

- (a) **Degree of Responsibility:** in respect of the degree of responsibility accepted by the fee-earner, one consideration will be the extent to which the provider has carried out work without recourse to counsel, whether in relation to analysis and planning of the case, drafting or advocacy. Another point may be that the fee-earner has identified or addressed evidential issues that might otherwise have incurred the time of an expert;

- (b) **Care, speed and economy:** this contains three components:
- (i) Care: this may include aspects of the skill with which the fee-earner has carried out work within the case and in particular the care with which the fee-earner has dealt with a vulnerable client;
  - (ii) Speed: will involve similar considerations as in paragraph 12.8(b) above in relation to exceptional speed;
  - (iii) Efficiency: enhancement under this provision will reflect a reward for the provider for claiming less time or less in disbursements than might otherwise have been expected, whether because of the way in which particular items of work have been carried out or because of the way in which the case has been planned more generally;
- (c) **Novelty, weight and complexity:** this again contains three components:
- (i) novelty: it should be clear from the provider's claim whether the case involves a novel point of law or legal context;
  - (ii) weight: may refer to the volume of documentation, other material, or the number of issues arising. It may also refer to the importance of the case to the client;
  - (iii) complexity: this is discussed at paragraph 12.8(c) above

12.10 Enhancement is likely to be allowed at higher levels where more of the above seven factors are present in the case and where any of the factors are strongly present. The fact that enhancements are capped at 50% in proceedings below the High Court and otherwise 100% does not mean that these maximum enhancements are only payable where all the above factors are present within the case or work. A maximum enhancement could be payable on the basis of one factor alone where it is particularly strong.

12.11 In considering whether a case qualifies for any enhancement, the comparison is to be made with other proceedings for which legal aid is available, not solely with cases within the same category of law (in non-family cases) or with cases of the same type of proceedings, such as judicial review. However, there is no basis for arguing that proceedings within specific categories of law, or types of proceedings will inherently satisfy the above criteria, such that an enhancement should be payable in every such case. Each claim must be considered on its own facts.

#### **Enhancement of counsel's costs (non-family)**

12.12 There is a discretion under Regulation 7(3) of the Remuneration Regulations to pay an enhancement to the normal hourly rates set out in Table 1 of Schedule 2 of the Remuneration Regulations where:

- a) the work was done with exceptional competence, skill or expertise;
- b) the work was done with exceptional speed; or
- c) the case involved exceptional circumstances or complexity.

When calculating the percentage by which the hourly rates may be enhanced, the Regulations require regard to be had to:

- i. the degree of responsibility accepted by counsel;
- ii. the care, speed and efficiency with which counsel prepared the case; and
- iii. the novelty, weight and complexity of the case.

Any such enhancement cannot exceed either 100% for proceedings in the Upper Tribunal or High Court; or 50% for all other proceedings. These are effectively the same tests that apply to providers.

However, regulation 7(5) makes further provision in relation to the percentage increase to be allowed, notably that “care” includes the skill with which the case has been carried out and, in particular, the care that counsel has shown towards a vulnerable client, and that “weight” means the volume of documentation or other material in the case; the number of issues arising in the case; or the importance to the client of the case.

### **Claims for enhancement from both provider and counsel on the same matter**

12.13 The questions of whether both the provider and counsel should apply for an enhancement and the amount of any enhancement fall into three categories:

1. where it would be difficult for both the provider and counsel to claim enhancement;
2. where the provider and counsel could both potentially claim, dependent on their performance on the case;
3. where both are likely to be able to claim.

12.14 The threshold tests as set out in paragraphs 12.4 to 12.12 above must be applied to the circumstances of each case where an enhancement is claimed. In some cases it may seem clear that one of the provider or counsel has met the enhancement criteria and it may then be difficult for the other to claim an enhancement as well. Assessors will have to consider whether the claims for enhancement made by the provider and counsel on the same case both satisfy the enhancement criteria.

In cases which have required the provider or counsel to conduct work which could meet the enhancement criteria then it may be possible for both the provider and counsel to claim, depending on the part that each has played in the case. For example, the provider may need to deal with some issues with exceptional speed whilst on the same case counsel may demonstrate exceptional competence or expertise in advising or representing that particular client such that both would be entitled to an enhancement.

Finally, where the case itself involved exceptional circumstances or complexity then it will be possible for both the provider and counsel to make claims for enhancement, if the nature of the case required each to conduct work such that the enhancement criteria were met. The percentage of enhancement payable will then be subject to the criteria described in paragraph 12.5 above for providers and 12.12 (i) to (iii) for counsel.

### ***General points on enhancement of both provider and counsel's fees***

- 12.15 Where there are claims from both provider and counsel on the same matter, the assessor needs to be satisfied that each claim satisfies the criteria for enhancement.
- 12.16 Counsel will not be entitled to an enhancement simply by virtue of the fact that the provider has felt the need to instruct him or her for advice or advocacy. The fact that counsel is instructed could simply reflect different skills that providers and counsel have. However, it may be that counsel does take an unusual share of the load on a case and any enhancement should be made accordingly. Alternatively, the instruction of counsel may suggest that the degree of responsibility accepted by the provider is passed on to counsel at least to some extent. Therefore, any claim for enhancement may be more difficult for the provider to justify. That does not mean that a provider can never claim an enhancement where they have instructed counsel, however, the assessor would need to consider whether or not both the provider and counsel meet the relevant enhancement criteria on the same case.

### **Enhancement of whole or part**

- 12.17 Enhancement rates can be applied to the whole case, to classes of work or to individual items. In general, one of the latter two approaches is likely to apply. It would be less usual to allow enhancement on routine letters or telephone calls or travel and waiting. However, one exception would be where the enhancement is being awarded owing to speed, for example securing an out of hours injunction, where it may be inappropriate to differentiate between time drafting and attending and making urgent telephone calls or sending urgent letters when applying the enhancement.

### **Enhancement in Family Cases**

- 12.18 Special rules apply to enhancements for work done in proceedings in the family category. These are set out in paragraphs 7.20 to 7.23 of the Specification. In accordance with these provisions, no enhancement or potential for enhancement of hourly rates may be taken into account for the purposes of determining whether a case escapes from any Standard or Graduated Fee.
- 12.19 The enhancement provisions apply to all courts regardless of the person or court before whom the proceeding are heard.
- 12.20 A guaranteed minimum enhancement of 15% is payable in respect of work carried out by a fee-earner on the Resolution Accredited Specialist Panel, the Law Society's Children Panel (in respect of proceedings relating to children) or the Law Society Family Law Panel Advanced.
- 12.21 Where the fee-earner is a member of the accredited specialist panel of Resolution or the Law Society Panel Advanced, 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 Panel, the enhancement is only available for work done under the 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.”*

- 12.22 The minimum guaranteed enhancement is not available for supervision or to work done by other fee-earners. When preparing the bill for assessment, the narrative must clearly state the fee-earner for whom the enhancement is claimed and the basis for the enhancement.
- 12.23 As indicated in paragraph 12.3 above, the Panel Membership enhancement is a guaranteed minimum enhancement, and is not payable in addition to any enhancement allowed under the general Specification.

### **13. Counsel’s fees**

#### **General Position**

- 13.1 Providers are generally free to instruct counsel under licensed work, subject to the requirement to obtain a prior authority to instruct Queen’s Counsel or more than one counsel. The approach to such authorities can be found by following the “Narrative and guidance: public funding” link on the Ministry of Justice website at <http://www.justice.gov.uk/legal-aid/funding>.

Note, however, that (as confirmed by the Administrative Court in *R (SP) v Lord Chancellor* [2013] EWHC 4011 (Admin)) under the Standard Terms of the Contract it is only possible for a third party to carry out work as either: an Agent, Counsel or Expert in non-legal matters. Counsel cannot therefore be paid as an Expert for providing legal advice. Any work carried out by a barrister in independent practice is subject to the remuneration provisions for counsel within the Remuneration Regulations.

- 13.2 Rules on payments to counsel are contained in Paragraphs 6.83 to 6.84 of the 2018 Specification. Save for work in Family Proceedings falling within the Family Advocacy Scheme (FAS) Counsel’s fees are subject to assessment by the Agency or the court but fees due to counsel are generally paid directly by the Lord Chancellor.

#### **The Reasonableness of Using Counsel**

- 13.3 Paragraph 5.1 of Practice Direction 44 to rule 44.2 CPR (Civil Procedure (Amendment) Rules 2013) 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 give any expression of opinion 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.

- 13.4 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 fee earner had acted as advocate (as well as a disallowance of the counsel’s brief fees and the fee

earner's costs of his or her instruction). The Agency will follow this principle. If the court order expresses an opinion it will be considered on assessment.

### **Entitlement to instruct counsel**

- 13.5 There are specific restrictions on the use of counsel in the Specification. Paragraph 6.59(d) of the Specification provides that unless the provider has obtained prior authority, or an authority has been given by the Lord Chancellor, a claim for costs for a Queen's Counsel or more than one counsel will not be allowed.
- 13.6 No counsel's fees should be allowed for two counsel or at QC rates unless the appropriate authority has been given, except that a Queen's Counsel's fees will be allowed at junior rates. This does not, however, prevent counsel's fees being recovered on an inter partes assessment.
- 13.7 Even where authority is given to instruct more than one counsel or a Queen's Counsel the fees should not be allowed in cases where the statutory charge applies, unless the provider has, in addition to obtaining the authority, obtained his or her client's informed consent: *Re: Solicitors; Taxation of Costs [1982] 2 ALL ER 841*. The provider's file will therefore be checked to ensure that there is evidence of explanation to the client of the possible effect such instructions may have if costs are not recovered inter partes, and of the client's acceptance of this.

Note, however, that authority for Queen's Counsel is only needed where counsel is acting as such; it is always open for Queen's Counsel to act and be paid at junior counsel rates. See further the guidance on prior authorities by following the "Narrative and guidance: public funding" link on the Ministry of Justice website at <http://www.justice.gov.uk/legal-aid/funding>

### **Terms of the authority**

- 13.8 It is also important to ensure that the instruction of counsel, where authority is required, is strictly in accordance with the terms of the prior authority given by the Lord Chancellor. The following points should be noted:
- (a) where an authority is given or the terms of a limitation allow the obtaining of counsel's opinion that authority/limitation covers one opinion only;
  - (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 (Taj) & Anor v Wandsworth London Borough Council (No.3) [1983] 1 WLR 1171*
  - (d) an authority for 'instructing counsel' includes any instructions to or briefing of counsel after the date of the authority; and

- (e) an authority for ‘instructing a QC alone’ will cover work by the Queen’s counsel normally done by a junior such as settling court documents.

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

**Quantum of Counsel’s Fees and Enhancements**

13.9 The majority of counsel’s fees in non-family proceedings in the county court, High Court, Court of Appeal and Supreme Court will be determined by reference to prescribed rates set out in Schedule 2 of the Remuneration Regulations. The location of counsel’s chambers will determine whether the London or non-London rate is applicable. Where a chambers has more than one address the location of the provider will be taken into account.

13.10 There is a discretion under Regulation 7(3) of the Remuneration Regulations for the Lord Chancellor to pay an enhancement to the normal hourly rates set out in Table 1 of Schedule 2 of the Remuneration Regulations. Full details of the circumstances where an enhancement can be claimed can be found at paragraph 12.12 above.

**General**

13.11 For cases not falling within the provisions of Schedule 2 to the Remuneration Regulations and subject to the rules for fast track trials, counsel’s fees are ‘at large’, i.e. at the discretion of the assessing officer. Payment of counsel for attending a hearing or a trial is by way of brief fees and refreshers.

**Fast track trials**

13.12 Fast track trial (and multi track trial) provisions are subject to the prescribed remuneration rates. They apply only in the limited circumstances where the prescribed rates do not cover the level of counsel instructed or court.

13.13 Under CPR 45 Section VI 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.

<b>Value</b>	<b>Amount of fixed costs the court can award</b>
Up to £3,000	£485
£3,001 to £10,000	£690
£10,001 to £15,000	£1,035
For proceedings issued on or after 6 <sup>th</sup> April 2009, more than £15,000	£1,650

13.14 If counsel appears for more than one party only one award is made (CPR 45.40). The court cannot award more or less than these fixed costs except in accordance with CPR 45.39 in which case the court may award an additional £345 in respect of the attendance of the fee earner or other representative of the provider. Further costs may be awarded if there is a separate trial for an issue. These additional costs cannot exceed two thirds of the amount of a claim of that particular size, subject to a

minimum award of £485. For other hearings, the fee is at large and the guidance below applies.

### ***Other trials and hearings***

13.15 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 for the first day of the trial;
- (c) overnight expenses for the first day of the trial;
- (d) waiting time on the first day;
- (e) negotiating, discussions with the provider and conferences at court on the first day.

13.16 Where relevant or appropriate the brief fee also includes 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 if judgement is not given at the conclusion of the trial

13.17 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, meetings with experts and preparation of final submissions. In legally aided 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* – is an important case in discussing the nature of brief fees, at least in very complex actions.

13.18 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 that the work was done at a time when any necessary authority for the instruction of counsel had been given): *Loveday v. Renton* (above).

13.19 The brief fee does not cover:

- (a) preparing written skeleton arguments in appeal courts;
- (b) written skeleton arguments in exceptionally complicated cases; or
- (c) written closing or additional submissions invited by the court.

A separate fee is payable in respect of such work.

### ***Refresher fees***

13.20 A refresher fee is paid for any day or part day on which a trial continues after the first.

## **Quantum**

- 13.21 Unfortunately there is little specific guidance as to the assessment of the proper brief fee. The points made in *Re H [1995] 2 FLR 733* are relevant. “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.
- 13.22 Guidance for counsel’s brief fees 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 Senior Court Costs Office. 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*.
- 13.23 Travelling time or expenses are not allowed in addition to the brief fee.

## **14. The Agency’s assessment limits**

### **General**

- 14.1 Paragraph 6.36 of the Specification provides that, subject to the general discretion of the Lord Chancellor, licensed work costs will be assessed by the Agency in cases not involving an inter partes detailed assessment.

### **Family Proceedings**

- 14.2 If family proceedings involve separate aspects which are concluded with an order for assessment then an assessment of costs incurred up to the date of that order plus costs of implementing the order may take place. If subsequently the same certificate covers other ancillary applications then, on conclusion of those subsequent applications, further assessments can take place. In each case, the ancillary application being assessed must have been concluded before the next application has started. If there is any overlapping of applications those applications should be assessed together in one claim.

### **Inter Partes Costs**

#### ***Court assessment***

- 14.3 Where a legally aided 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.
- 14.4 Only the court can assess costs between the parties. If it is, or may be, necessary for the court to assess costs between the parties then the court will also assess costs payable under legal aid.

#### ***Agreed Inter Partes Costs***

- 14.5 Where inter partes costs have been agreed and recovered, the provider may claim their legal aid only costs under legal aid. Such costs will be assessed by the Legal Aid Agency (Paragraph 6.45 of the Specification).

### ***Fixed and Undetermined Orders***

- 14.6 From the Agency’s perspective, an order for costs will be a fixed order or an undetermined order. If the order is fixed, then the amount of the costs to be paid will be determined when the order is made, and specified in the order. In that case, inter partes costs are not subject to detailed assessment and the claim may be assessed by the Agency.
- 14.7 However, an order of the form “defendant to pay the claimant’s costs in this application limited to £250”, the bill must be assessed by the courts. The receiving party is only entitled to £250 if the bill is assessed by the court at that or a higher sum.
- 14.8 With any other form of inter partes costs order in favour of the legally aided client, only the court can determine those costs if the parties have not agreed the figure between themselves.

## **15. The Assessment Process**

### **Authority for Assessment of Costs under legal aid**

- 15.1 The right to assessment of costs is governed by Paragraph 6.33 of the Specification.
- 15.2 Where proceedings have been issued, the normal event giving rise to the right for assessment under Legal Aid is a final order for public funding assessment.
- 15.3 If the proceedings end without such an order, acceptance of an offer of settlement or discontinuance of proceedings by either party is an authority for a public funding assessment, as it gives rise to a right to assessment under Paragraph 6.33(b) Specification and CPR 47.7.
- 15.4 Otherwise, whether or not proceedings have been issued, the withdrawal of the legal aid certificate (after any appeal has concluded and after service of any required notices by the provider) is authority for a public funding assessment.
- 15.5 If on receipt of a claim the legal aid certificate has not been withdrawn and there is no order for assessment, the Agency can still assess the claim if the legal aid certificate is ready for withdrawal on non-contentious grounds, i.e. the case has concluded or the legally aided client consents to the withdrawal of the legal aid certificate.
- 15.6 However, if there is no withdrawal of the legal aid certificate and the only likely grounds for withdrawal are contentious, i.e. because of an unfavourable counsel’s opinion or the provider being without instructions, the show cause procedure will be implemented and the claim returned to the provider with instructions to resubmit the claim when a withdrawal has been made.
- 15.7 Summary assessment under the CPR is not possible in relation to payment to providers under legal aid or under an inter partes order for costs where the receiving party is legally aided (Practice Direction 9.8 of CPR 44.6).

### **Preparation of a bill**

- 15.8 Bills drawn up by law costs draftsmen after 26 April 1999 are “work done” within the meaning of paragraph 18(3) of the Practice Direction to Part 41 of the Civil Procedure Rules (CPR). A law costs draftsman’s fee may be paid, in accordance with the guidance below, for any bill drawn up for assessment by the Agency where it was reasonable to instruct a draftsman to draw the bill.
- 15.9 Although the cost draftsman’s fee may sometimes have been viewed as a disbursement, the better view is that this work forms part of a providers’ profit costs, with any draftsman acting as their agent (*Crane –v- Canons Leisure Centre* [2007] EWCA Civ. 1352). Whilst the draftsman may charge the provider at a percentage of the profit costs as drawn in the bill, the rate claimed for drafting the bill should be that for preparation within the relevant table of the Remuneration Regulations. The same will apply where the preparation of any Precedent H Costs Budget is carried out by the costs draftsman.
- 15.10 Under the Contract, time for preparing a bill is in principle claimable in this way for both family and civil non- family cases in all forums. However, for cases covered by Standard or Graduated Fees, time for preparing a bill cannot be claimed in addition to the Standard or Graduated Fee and will only be payable for cases which escape that fee.

### **The statutory charge and contributions**

- 15.11 Under Regulation 6(1)(b) of the Statutory Charge Regulations, 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 the associated costs thus fall within the costs of the main proceedings and count towards the statutory charge and the costs to which the client is required to pay contributions, where relevant (Paragraph 6.42(b) of the Specification).

### **Time taken**

- 15.12 In the majority of cases an allowance of 30 - 60 minutes will be appropriate. Where a greater time is claimed, the provider 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 preparation is made more complex by the nature or circumstances of the case. A lengthier amount of time will be allowable where the assessable costs exceed £2,500. The allowance for preparation is in addition to the time allowed for checking and signing the bill. See paragraph 2.63 for guidance regarding bills submitted via CCMS.

### **Costs recovery bills**

- 15.13 Where after payment of a final bill, enforcement proceedings take place (after the discharge of the legal aid certificate) and the provider pursues recovery of inter partes costs under authority from the Lord Chancellor, the provider can apply to the Agency for assessment of the costs incurred.

## **The costs of assessment**

- 15.14 Under paragraph 6.38 of the Specification, detailed assessment proceedings are deemed to be proceedings to which the legal aid certificate relates, whether or not it has been revoked or withdrawn. The costs are, therefore, to be paid under legal aid unless the court orders otherwise. The conducting providers may prepare and attend on a detailed assessment where necessary without requiring any amendment to the legal aid certificate. This work is remunerated on an hourly rate basis at the same rates and subject to reasonableness in the same way as other preparation and (where relevant) advocacy.
- 15.15 Under Paragraph 6.39 of the Specification, any such costs claimed in respect of an inter partes assessment will be set off against any inter partes costs recovered in the case as a whole. This is subject to the limited exception of those costs properly falling within the definition of legal aid only costs at Paragraphs 6.50 (b) or (c) of the Specification.
- 15.16 The costs of the detailed assessment proceedings do not form part of the statutory charge (nor those costs to which the legally aided client may be required to pay a contribution). This exclusion, however, does not include the costs of drawing up the bill.
- 15.17 Detailed assessment proceedings commence with the filing of a Request for Detailed Assessment or, if earlier, the service of Notice of Commencement. Included in the costs of detailed assessment proceedings are the work in preparing the Request or Notice; (where applicable) considering points of dispute and preparation of replies; court fees; the costs of attendance on the detailed assessment; time spent checking any provisional assessment; or completing the legal aid assessment certificate. However, the costs allowable for completion of the Claim1, Claim 1A or Claim2 do not fall within the costs of detailed assessment.
- 15.18 More generally, there is no provision allowing the costs of an assessment by the Agency to be claimed under the legal aid certificate. Allowance is made for the costs of the Claim1, Claim 1A and Claim2 as constituting bill preparation. No time may be claimed under the legal aid certificate for appeals against assessments by the Agency.
- 15.19 In Standard or Graduated Fee cases the costs of detailed assessment proceedings fall outside the relevant fee (which covers costs incurred under the certificate at first instance). Therefore, such costs may, so far as reasonable, be claimed in addition to the Standard or Graduated Fee but are never relevant in determining whether a case escapes from that fee.
- 15.20 The allowance for checking a provisional assessment can only be granted in the event that a provisional assessment (i.e. a reduction) has been made of the substantive costs. If a claim for checking a provisional assessment is included in a bill for assessment it will not be payable if the costs are allowed as claimed. This work is allowable only on the basis that the provider is giving consideration as to whether to request a full detailed assessment hearing. No allowance is payable in respect of checking an assessment by the Agency since no payment is allowable in respect of such assessments generally.

## **Late claims**

15.21 Under Paragraph 6.33 of the Specification, all claims for Assessment or claims for payment must be submitted to the Agency within three months of the right to claim accruing.

15.22 Under Paragraph 6.35 of the Specification, there is provision for reduction or disallowance in respect of late claims in cases where the client has a financial interest in the claim because the statutory charge may arise, the client has paid contributions and/or his or her legal aid certificate has been withdrawn.

After the 3 month period referred to in Paragraph 6.33 of the Specification, the Agency may serve a notice requiring the claim to be submitted within a further two months. If the provider fails to submit their claim within that period, costs may be disallowed up to the value of the client's financial interest.

This provision of the Contract was made in order to limit delays in Agency being able to account to legally aided clients for monies owed to them or, in the case of revocation, to prevent the Lord Chancellor's position on recovery from the client being prejudiced (*Legal Services Commission v Rasool* [2008] EWCA Civ 154).

15.23 More generally, under Clause 14.5 of the Contract Standard Terms, persistent submission of late claims may lead to contract sanctions, including termination.

## **16. The legally aided client's rights on assessment**

### **General**

16.1 Paragraph 6.58 of the Specification confers certain rights on a legally aided client who has a financial interest in the assessment of their provider's costs and corresponding obligations on the conducting fee earner.

### **Definition of a "Financial Interest"**

16.2 A legally aided client has a financial interest if he or she is required to make any contribution or if the statutory charge will apply to his or her case. If the question of whether the statutory charge may arise has not been determined, or if an assessment or reassessment of means is pending, then it should be assumed that the legally aided client does have a financial interest.

16.3 Revocation of a determination of legal aid will also give the legally aided client a financial interest (Paragraph 5.15 of the Specification) because upon revocation they are liable for the costs allowed.

### **The legally aided client's rights**

16.4 The rights given to a legally aided client are that on an assessment, review or appeal he or she can make written representations to the Agency or to a costs assessor within 21 days of being notified of his or her rights.

### **The fee earner's obligations**

16.5 The obligations imposed on the fee earner are threefold:

- (a) To supply the legally aided client with a copy of the bill of costs;

- (b) To inform the legally aided client of their financial interest and their right to make written representations;
  - (c) To endorse on the bill whether or not the legally aided client has a financial interest, has been supplied with a copy of the bill and has been informed of their right to make written representations.
- 16.6 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 provider but no balancing of the legally aided client's account will take place until the outcome of any costs appeal is known. The amount due after a provisional assessment by the Agency would be paid to the provider and, depending on the outcome of any appeal, the Lord Chancellor may pay the additional sum or recoup as appropriate.
- 16.7 The following is a suggested form of the endorsement:
- "I certify that a copy of the attached bill has been provided to the legally aided client pursuant to Paragraph 6.58 of the 2018 Standard Civil Contract Specification, 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 an Independent Costs Assessor or appeal to the Agency's Costs Appeals Committee. I confirm that either 21 days have passed since the copy bill was provided to the legally aided client or the legally aided client has confirmed in writing (copy attached) that he/she will not be making any objections to the bill."*
- 16.8 The paragraph requires that the endorsement be on the bill, however, where the claim is to be assessed by the Agency it can also be by way of a covering letter with the costs claim

**Procedure upon receipt of written representations in assessment by the Agency**

- 16.9 If written representations are received from the legally aided client in respect of their provider's bill, a copy of the representations will be sent to the conducting fee earner 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 fee earner says he/she has none to make.

Representations by a legally aided 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 an inaccuracy in the bill, for example, that work claimed was not actually undertaken.
- 16.10 Following assessment, the outcome will be confirmed to the legally aided 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 provider will be informed that written representations made by the legally aided client were taken into account in assessing the bill and a copy of those representations is attached.

- 16.11 If the provider goes on to appeal to a Costs Assessor, the legally aided 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 legally aided client must also be given an opportunity to attend, if they so wish.

## **17. Detailed assessment and appeals from detailed assessment**

### **Detailed assessment by the Court**

- 17.1 Costs that fall to be determined by way of detailed assessment through the courts will need to comply with the provisions of Part 47 of the Civil Procedure Rules (CPR).

### **Time Limits**

- 17.2 CPR 47.18(2) sets a three month time limit, from the date on which the right to detailed assessment arose, for the commencement of detailed assessment proceedings. CPR 47.14 also introduces a time limit for within which a detailed assessment hearing must be filed.
- 17.3 CPR 47.8 contains sanctions for delay in the commencement of detailed assessment proceedings. A paying party is entitled to apply to the court for an order that the receiving party commences the detailed assessment procedure. The court may direct that unless the proceedings are commenced within a specified period then all or part of the defaulting party's costs may be disallowed. Where the receiving party commences proceedings late, but no application has been made by the paying party, the court may disallow interest on costs for the relevant period. In legally aided cases CPR 47.8 applies as if the Lord Chancellor is the paying party.
- 17.4 Where delay is brought to the Agency's attention the Agency will make applications to the court under CPR 47.8. This provision is to enable counsel to be paid his/her fees or for the client's case to be balanced and monies released where the provider has failed to commence detailed assessment proceedings promptly. Counsel is not entitled to commence detailed assessment proceedings in his/her own right. The Agency will, once notified, write first to the defaulting provider warning of the possibility of a 47.8 application. If the detailed assessment process is not then commenced within the time frame given, the Agency will make the application and the provider's costs will be at risk.

### **Appealing from assessment of Costs**

- 17.5 In the circumstances set out in CPR 52.3, permission must be sought to appeal.

### **Costs of appealing against a detailed assessment**

- 17.6 There is no presumption that the provider will recover their costs from legal aid where they appeal against the assessment of their costs under CPR Part 52. The costs will be recoverable only to the extent that the court hearing the appeal orders the costs to fall within the legal aid certificate (Paragraph 6.40 of the Specification).
- 17.7 A provider who wishes to appeal against the detailed assessment of their costs in a legally aided case must therefore consider whether, having regard to factors such as:

- (a) the amount in issue;
- (b) the merits of their argument, and
- (c) any wider principle involved,

the appeal will succeed and the court will award costs under legal aid, if not the opposing party.

17.8 The client is not a party to the proceedings. In reality any appeal will be brought by the provider and not the client in any event. Since there is no presumption that the legal aid certificate covers the costs of the appeal, the client has no protection under Section 26(1) LASPO in respect of their opponent's costs of the appeal. In the event that the client has a financial interest and has pursued the appeal, an order for costs could be made against the client. The Court, however, could order that the costs of the appeal are covered by the legal aid certificate.

17.9 If the court orders that the provider's and/or counsel's costs be paid by legal aid:

- (a) the client does not have to pay a contribution in respect of those costs; and
- (b) the costs do not add to the statutory charge (Paragraph 6.42(a) of the Specification).

## Appendix 1 – Family Fee Scheme Guidance (Excluding Advocacy)

This Appendix incorporates the Family Fee Scheme Guidance (Excluding Advocacy) into the Costs Assessment Guidance. This had previously been a standalone guidance document.

- 1.1 The following tables set out the forms of service available in the family category for public and private law work as set out in the Procedure Regulations. They show how they are paid (i.e. controlled work or licensed work) and how they correspond to the family fee schemes – the Private Family Law Representation Fee Scheme (PFLRFS) and the Care Proceedings Graduated Fee Scheme (CPGFS).

### Public Law

Form of Service	Funded As
legal help	controlled work
family help (lower)	controlled work
legal representation	licensed work

### Private Law

Form of Service	Funded As
legal help	controlled work
family help (lower)	controlled work
help with family mediation	controlled work
family help (higher)	licensed work
legal representation	licensed work

The grant of each form of service is subject to the relevant parts of the Procedure Regulations.

## 2. Categories of work

- 2.1 Public law matters are those for which advice may be provided in relation to proceedings or potential proceedings falling to be considered under Chapter 2 of the Merits Regulations and will attract the legal help family public law fee set out in Table 2(a) of the Remuneration Regulations.
- 2.2 If a client seeks advice about an adoption matter this will fall within the definition of public law for the purposes of the fee scheme. If proceedings were to be issued the

application for legal aid would be considered under Regulation 66 of the Merits Regulations. A public law Legal Help (level 1) matter start should be opened.

- 2.3 Private law matters are those that involve disputes between individuals. If the client seeks advice about an application for a Special Guardianship Order (and there are no related care proceedings) this will fall within the definition of private law. The payment rates in Table 3(a) of the Remuneration Regulations apply to all controlled work within the family category other than public law work.
- 2.4 In some cases it may be unclear whether the case is a public or private law case. For example, the client may seek advice about a contact matter but the local authority has in the past been involved with the family because of allegations of violence. In this case, the matter start will be a private law one as this is the issue on which the client is seeking advice and if proceedings were to be issued these would be under Section 8 of the Children Act 1989. If, subsequently, the local authority were to issue a letter before proceedings then a family help (lower) (level 2) public law matter could be opened. Therefore, it is possible to have a private law and public law matter start for the same client in these circumstances.
- 2.5 However, in most cases, only one legal help matter start may be opened for one client in the family category. The exception is where they relate to family disputes that are entirely separate and which would be issued and heard separately if they resulted in proceedings. This may perhaps be because they arise out of different family relationships, for example where there are contact issues in respect of two children who have different fathers. It could also be in cases where a public law matter start is justified for legal help advice in relation to concerns raised by the local authority and the client then also requires advice in relation to divorce which would justify a private law matter start.
- 2.6 A new matter start may be opened if the conditions set out in paragraph 3.34 of the Specification have been satisfied. This includes where at least 3 months have elapsed since the claim was submitted and there has been a material development or change to the client's instructions. If, for example, the arrangements as to contact break down completely and the other party refuses contact, this would constitute a material development enabling a new matter start after 3 months. However, a change in the client's instructions as to timing of contact arrangements would not constitute a material development and any further work will need to be carried out under the previous matter start.

### **3. Legal help (Level 1)**

- 3.1 Legal help advice (Level 1) is available in both family private and family public law matters. No application to the Director is required but the standard criteria in Part 3 of the Procedure Regulations as well as the criteria for legal help in Regulation 32 of the Merits Regulations must be met. This means in particular that legal help advice should only be provided where there is sufficient benefit to the client to justify the work being carried out.

## Public Law

- 3.2 Legal help in public law cases will cover the initial meeting with the client and follow-up advice and assistance as appropriate including correspondence and liaising with the local authority. Legal help also covers completing any necessary application for legal representation. Advice can be provided to clients both before and after a child protection conference. There will usually be more appropriate support to clients attending child protection conferences than attendance at those conferences where providers may only be able to take a limited note. However, there may be some exceptional circumstances where the attendance of the provider is necessary, not merely to provide support for the client but to enable proper legal advice to be given at the conference itself and where, for example, the provider needs to be present at the meeting to progress the client's case.
- 3.3 The fee for legal help (level 1) in public law matters is set out in Table 2(a) of the Remuneration Regulations. It is a single national fee. For public law matters a case may escape the Standard Fee and be paid on hourly rates at legal help (level 1) if the profit costs calculated at the legal help rates set out in Table 7(a) of Schedule 1 of the Remuneration Regulations are 3x the Standard Fee. This differs from private law cases where only certain matters can escape at legal help (level 1). This is because the way in which cases move to family help (lower) (level 2) is different to private law cases.

## Private Law

- 3.4 The fee for legal help (level 1) in private law matters is a single fee irrespective of the number of issues with which the client initially presents, i.e. a client may only seek advice on a contact issue or they may seek advice on a contact issue, financial issues and a divorce. It covers the initial meeting with the client and any work flowing from the meeting up to the point where it is appropriate to grant family help (lower) (level 2), if available.

This may include a letter of advice following the meeting, making a telephone call on behalf of the client or writing to the other party on behalf of the client in order to move the case forward as well as referring the client to another organisation. It also covers general advice about the dispute and methods of dispute resolution such as mediation. Legal help will also be appropriate for completing the application for family help (higher) or legal representation where negotiation and further work under family help (lower) (level 2) is not appropriate, for example, where the other party has failed to respond to any correspondence.

The fee for private law legal help (level 1) is a national fee and is set out in Table 3(a) of the Remuneration Regulations.

- 3.5 There are certain types of matters which can only be remunerated at legal help (level 1) regardless of the work that may be carried out (Paragraph 7.58 of the Specification). These include family disputes:
- (a) which involve more than simply taking instructions from and advising the Client, and providing any follow up written or telephone advice; and

- (b) where you are involved in substantive negotiations with a third party (either by conducting the negotiations yourself or by advice and assistance in support of mediation); and
  - (c) where the dispute, if unresolved, would be likely to lead to family proceedings; and
  - (d) which do not primarily concern processing a divorce, nullity, judicial separation or dissolution of a civil partnership; and
  - (e) which do not primarily concern advice relating to child support.
- 3.6 Advice and assistance in relation to domestic violence is also only available under legal help. In many cases an emergency application for legal representation in any event will be the most appropriate in these matters and no legal help matter will be opened. The costs for completing the application for legal representation should be claimed on the certificate. However, in other cases where further work is required, for example where the client returns for advice after further incidents, these cases may become exceptional for the purposes of payment at legal help (level 1) and be paid at hourly rates. Advice and assistance may also be appropriate under this form of service for a respondent in domestic violence proceedings for whom legal representation will not be granted under the appropriate criteria.
- 3.7 Apart from domestic violence cases the only other private law cases that can escape the Standard Fee at legal help (level 1) are divorce only cases when advising the Petitioner or Respondent and International child abduction cases as defined in the Family Specification (see Paragraph 7.55 of the Specification). The escape threshold is three times the Standard Fee calculated at legal help rates in Table 7(b) of Schedule 1 of the Remuneration Regulations.
- 3.8 This is because it is unlikely in international child abduction and domestic violence cases that family help (lower) (level 2) work will be appropriate as more usually an application for legal representation will be required. These cases may, therefore, become escape fee cases at legal help (level 1).
- 3.9 Where the only issue is advice on divorce this is remunerated at legal help (level 1) although there is a separate fee when advising the petitioner in divorce proceedings (Table 3(b) of the Remuneration Regulations). This higher fee may be claimed where the client requires advice to initiate and progress divorce proceedings and where proceedings are actually issued. This includes where advising the petitioner in judicial separation proceedings or in an application for the dissolution of a civil partnership (Paragraph 7.56 of the Specification). However, this enhanced petitioner fee may not be claimed in addition to the family help (lower) (level 2) fee for children or finance. If a matter moves on to family help (lower) (level 2) then only the standard legal help (level 1) fee may be claimed.
- 3.10 Although in most cases a controlled work matter will be opened for a new client, if the matter is an urgent one so that the use of delegated functions is appropriate to grant legal representation no new Matter Start should be opened. Instead all work carried out on the day of the grant of licensed work is claimed under that certificate.

- 3.11 Where a client has previously received advice from a family specialist via the Community Legal Advice (CLA) telephone service but now seeks face to face advice than a new matter start may be opened for that client. However, any costs incurred as a result of the telephone advice should be noted on the file as this may be required on any application of the statutory charge.

#### **4. Family Help (Lower) (Level 2)**

- 4.1 Family help (lower) (level 2) is available in both private law cases and in public law cases. This form of service is controlled work and no application to the Director is required. Although there are specific criteria in the Specification as to when a family help (lower) (level 2) fee may be claimed it should be remembered that this is in addition to the criteria set out in Regulations 32 to 35 of the Merits Regulations, i.e. the reasonable private paying individual test must still be met.

##### **Public Law**

- 4.2 In public law work family help (lower) (level 2) is available when advising a parent or person with parental responsibility for a child and where the local authority has given written notice of potential section 31 care proceedings, including by the provision of a written summary of its particular concerns, as envisaged by the President's Public Law Outline. This form of service is available where the client requires advice and assistance with a view to avoiding proceedings or narrowing and resolving any issues with the local authority and is non means tested. It may require a meeting with the Local Authority which may be attended by the provider under family help (lower) (level 2).
- 4.3 Family help (lower) (Level 2) advice may be provided separately from public law legal help (level 1) advice. If written notice has already been received by the client from the local authority before the solicitor receives instructions the client will not require advice under legal help (level 1) and only family help (lower) (level 2) should be used. However, because this form of service may be stand-alone and is non-means tested regardless of whether legal help (level 1) has been used or not, a separate form CW1PL should be completed and a copy of the letter before proceedings from the local authority attached.
- 4.4 The fee for family help (lower) (level 2) public law advice is set out in Table 2(b) of Schedule 1 to the Remuneration Regulations. A case may escape the Standard Fee if the actual costs calculated at the rates set out in Table 7(c) of Schedule 1 are more than 3x the Standard Fee. If advice has been provided at both legal help (level 1) and at family help (lower) (level 2) then the case will escape the Standard Fee if the actual costs are more than three times the legal help (level 1) and family help (lower) (level 2) fees put together. In these cases the rate set out in Table 7(c) will be applied for both forms of service.
- 4.5 Disbursements may be incurred separately from the Standard Fee payable. However, disbursements other than out of pocket expenses (for example, experts' fees) should not be incurred under this form of service. Any outstanding assessments would be undertaken by the local authority pre-proceedings or considered by the court in the context of proceedings.

## Private Law

- 4.6 In private law cases when the provider is satisfied that the criteria for family help (lower) (level 2) in Paragraph 7.58 of the Specification and the criteria in the Merits Regulations are met, the confirmation on the Legal Help CW1 should be completed. This will be when all the work that can be carried out under legal help has been completed and then the matter can only proceed by negotiation under family help (lower) (level 2).
- 4.7 There are some types of proceedings that can only be remunerated at legal help (level 1) (see 3.5 above). However, for all other proceedings family help (lower) (level 2) will only be appropriate where:
- a) the matter involves more than simply taking instructions from and advising the client and providing any follow up written or telephone advice (whether or not there is a second meeting with the client). Family help (lower) (level 2) will also not be appropriate where the client requires only general advice about the dispute and methods of dispute resolution such as Family Mediation;
  - b) you are involved in substantive negotiations with a third party (either by conducting the negotiations yourself or by advice and assistance in support of mediation);
  - c) there is a significant family dispute which, if unresolved would be likely to lead to family proceedings. Where there is no dispute, i.e. the parties have already agreed to contact arrangements, then family help (lower) (level 2) will not be appropriate and any advice provided to the client will be under legal help (level 1).
- 4.8 In private law cases a client may be granted family help (lower) (level 2) for both children and finance issues and may claim a separate Standard Fee for both as set out in Table 3(c) and (d) of Schedule 1 to the Remuneration Regulations. However, both matters must satisfy the criteria for family help (lower) (level 2), i.e. there must be substantive negotiations with a third party in respect of each aspect. There is a separate fee for a provider whose office is based in the Agency's London Procurement Area and those outside of the London Procurement Area.
- 4.9 It should be noted that these criteria differ from the previous criteria set out in the Contract. There is now no longer any requirement for a second meeting to take place in order for the criteria for family help (lower) (level 2) to be satisfied. However, there must be evidence on the file of involvement by the provider in substantive negotiations with a third party or their legal representative. See further at paragraph 4.17 below on involvement by the provider in the mediation process.
- 4.10 The first question is whether negotiations have taken place. The existence of negotiations must be clearly evidenced on the file. The following should be borne in mind:
- In order for there to be negotiations there must have been proposals and counter-proposals put forward to resolve the issues. If proposals are put to the other side and these are simply ignored, or are accepted or rejected

straightaway, then there is no negotiation. In circumstances where a proposal would place the child or client at risk of harm the counterproposal may be for no arrangements to be in place. In many cases an alternative such as indirect or supervised contact may be proposed. There does not always need to be a counter proposal to constitute a negotiation but the file should evidence proper consideration and a formal response.

- Negotiations can take place by any means including face-to-face, telephone, email or correspondence, provided the exchange is evidenced on the file.
- Negotiations may take place between lawyers or with the other party directly or another third party.

4.11 The fact that such negotiations exist is not itself enough to trigger entitlement to a family help (lower) level 2 fee. You must show that you are actively involved in the negotiations as required under 7.58 of the Specification. If mediation is taking place between the parties the test is whether you have provided advice and assistance in support of mediation – see further at paragraph 4.17 below. In any case where mediation is not taking place family help (lower) (level 2) can only be claimed if you can show, and evidence on the file, that you are conducting the negotiations. Therefore:

- You must be engaging directly with the third party or their representative to progress the negotiations.
- If your client or others are negotiating with the other side but are coming to you for advice on issues arising during the negotiation that does not constitute conducting the negotiation.
- What is important is your genuine engagement with the third party to progress the negotiation. Sometimes the other party may choose not to respond to you directly, but to respond via your client or some other person. The fact that some communication may not come to you directly does not preclude you from meeting the criteria set out in Paragraph 7.58 of the Specification.

4.12 Although negotiation under family help (lower) (level 2) is appropriate, legal aid for Collaborative Law will not be provided under any form of service.

4.13 Providers should also consider whether the cost benefits criteria in the Merits Regulations is met in conjunction with the criteria in the Specification. For family help (lower) (level 2) the cost benefit test means that the benefits to be gained from the help provided must justify the likely costs, such that a reasonable private paying client would be prepared to proceed in all the circumstances. If, for example, in a divorce matter there were no assets it is unlikely that family help (lower) (level 2) would be justified to prepare a clean break order. In addition, the criteria in Paragraph 7.58 of the Specification would not be met in that there is no dispute likely to lead to family proceedings.

### **Settlement Fee**

4.14 A separate settlement fee for both children and finance matters is also available at family help (lower) (level 2) where the matter settles in accordance with Paragraph 7.65 of the Specification. A settlement fee is available if:

- a) that aspect of the case, i.e. the children or finance issue, has been fully concluded at family help (lower) (level 2);
- b) that aspect of the case does not proceed to a new level of service within three months of the settlement in a children case and six months in the case of a finance matter either with the original or a new provider.
- c) there has been genuine settlement to conclude the aspect of the case rather than, for example, a reconciliation between the parties or one party dying or disengaging from the case;
- d) in the case of finance disputes the settlement is recorded in a formal written agreement or consent order. If the matter is a children one then the settlement may be evidence by correspondence on the file;
- e) the case has not escaped from the Standard Fee. If the case has escaped because it is more than three times the Standard Fee then the settlement supplement will not also be payable. The whole case will be paid based on the hourly rates for the work actually done.

4.15 If a settlement has concluded the provider must wait at least 21 days before claiming the settlement fee to ensure that the settlement does not break down. If the settlement subsequently breaks down as set out in (b) above then the Agency should be notified and the Settlement Fee may be reclaimed.

4.16 Applications to court under family help (lower) (level 2) can be made to obtain a necessary consent order following settlement of all or part of the dispute. Applying to the court must be justified on a private client basis. It will therefore be exceptional in children cases (having regard to the no order principle) but more usually in money cases. Attendance by the provider at court will not usually be necessary in these circumstances unless attendance has been ordered by the court or in other exceptional circumstances as assistance will usually be provided at this level to the client by assisting with written representations.

### **Mediation and family help (lower)**

4.17 When a client is actually participating in family mediation and is in need of legal assistance this may be provided under family help (lower) (level 2). However, the mere fact that a mediation session takes place does not itself justify the provision of family help (lower) (level 2) nor will the referral to mediation itself. This is work that can be carried out under legal help (level 1). In order for the provider to be “involved in the negotiations”, they will need to have actively assisted in the mediation process by providing advice to the client as the mediation is in progress in order to claim the family help (lower) (level 2) fee (including advising on any potential settlement reached). The provider will still need to consider whether the other criteria to move to family help (lower) (level 2) are met in that particular case and whether legal input is required.

### **Help with Family Mediation**

4.18 Help with family mediation is a new form of civil legal service introduced from April 2013. It may only be provided where the client is participating in family mediation or has participated in mediation within the last 3 months. It also allows the preparation of a consent order following settlement of the dispute following family mediation. Some of the work that may be carried out under help with family mediation may also

be carried out under family help (lower) (level 2). However, the criteria for these forms of service differ and the evidence requirement in terms of domestic violence or child protection that are required for family help (lower) (level 2) are not required for help with family mediation. In addition, help with family mediation cannot escape the standard fee.

- 4.19 A fee for help with family mediation may not be claimed if family help or legal representation has been provided in relation to the same family dispute within the previous six months. Similarly, if family help or legal representation is provided within six months of help with family mediation being provided the help with family mediation fee will be recouped (paragraph 7.70 of the Specification).
- 4.20 In certain circumstances a fee for preparing a consent order following mediation may also be claimed (see section 7.71 of the Specification). This may only be claimed by the provider responsible for drawing up the consent order and therefore may only be claimed by one provider in any one case.

### **Conveyancing**

- 4.21 Conveyancing services are generally excluded from the scope of legal aid under LASPO. However, for certain family matters under paragraphs 12 and 14 of Part 1 to Schedule 1 of the Act such work may be carried out where it is necessary to give effect to arrangements for the resolution of a family dispute and where civil legal services have previously been provided in relation to that dispute. Work to implement an agreement or consent order including any necessary conveyancing work can therefore be carried out under family help (lower) (level 2) and is included within the fee. In circumstances where the provider instructs another firm to carry out conveyancing work, this cannot be charged as a disbursement. The second firm is carrying out the work as agent and any payment to the firm carrying out the work will be made out of the standard fee.
- 4.22 Where the case concludes at controlled work level, costs over the escape fee threshold will be flagged on the CMRF. Providers should complete a form EC1 Claim 1 for these cases and submit this with their file. If the costs after assessment are less than the escape fee limit then the statutory charge will not apply and the full amount recovered may be paid to the client and the Standard Fee will be paid to the provider in the usual way. If the amount is in excess of the escape fee limit then the provider will be paid the amount up to the escape fee limit (i.e. 3x the Standard Fee) but the amount in excess of the escape fee limit and any disbursements will be met from the monies recovered by the client.

## **5. Private Family Law Representation Scheme (PFLRS)**

- 5.1 Once all the work that could have been carried out under legal help (level 1) and family help (lower) (level 2) has been completed, and provided that the criterion in the Merits Regulations are met, then an application for a legal aid certificate may be made. The fees to be paid for this work are covered by the Private Family Law Representation Scheme (PFLRS). This scheme covers all private law cases with the exception of the following:
- a) International Child Abduction proceedings;

- b) Proceedings under the Inheritance (Provision for Family and Dependants) Act 1975;
- c) Proceedings under the Trusts of Land and Appointment of Trustees Act 1996;
- d) Applications for forced marriage protection orders;
- e) Proceedings for defended divorce, judicial separation or dissolution of civil partnership;
- f) Nullity proceedings or annulment of a civil partnership;
- g) Applications for a parental order under the Human Fertilisation and Embryology Act 2008;
- h) Proceedings under the inherent jurisdiction of the High Court in relation to children;
- i) Separately representing a child other than in specified proceedings;
- j) Proceedings in the Court of Appeal or the Supreme Court;
- k) In a final appeal;
- l) Under a High Cost Case Contract;

Proceedings that fall into these categories are defined in full in Paragraph 7.55 of the Specification. These cases will not fall under the private law fee scheme and continue to be remunerated at hourly rates as set out in Tables 9 and 10 of Schedule 1 to the Remuneration Regulations or in accordance with a High Court Case Contract.

- 5.2 For cases that do fall within the scheme there are separate Standard Fees set out in the Remuneration Regulations for the three aspects of a private law case namely: domestic abuse, children cases and finance cases. For children and finance cases a family help (higher) and a legal representation fee are available. In Domestic Abuse cases legal representation will be the appropriate form of service and only this fee is therefore payable. The fee that is payable will be determined by the court in which the case concludes. Therefore, if the case starts before a District Judge or Circuit Judge but is transferred to a High Court judge where it concludes the High Court judge fee will be payable. However, if the case is transferred to the High Court judge for one element only and then returns to a Circuit Judge or District Judge where it concludes it is the lower fee which will be paid.
- 5.3 Any combination of fees may be claimed under a certificate provided that the criteria in the Merits Regulations are satisfied for each aspect and legal aid has been granted for each aspect. Where a certificate covers more than one aspect, each aspect and form of service should be specified on the legal aid certificate. If a legal aid certificate covers family help (higher) (level 3) and is extended to legal representation (level 4), the Standard Fees for each form of service may be claimed. For example, if legal aid has been granted and work done for family help (higher) (level 3) in children matters and family help (higher) (level 3) and legal representation (level 4) in finance a combined fee of level 3 (children) + level 3 (finance) + level 4 (finance) would be payable together with any payments under the Family Advocacy Scheme for advocacy work. A claim for costs in relation to each aspect may be made separately if appropriate.
- 5.4 A Standard Fee can generally only be claimed once for a particular aspect under a single legal aid certificate unless this is expressly allowed in the Specification (see Paragraph 7.81 of the Specification). For example, if legal aid is granted for applications for both residence and contact (or for a child arrangements order in respect of both issues) only one fee for the children aspect will be paid. In some cases

two Standard Fees may be claimed, for example, in domestic abuse enforcement proceedings (see paragraph 5.21 below). In addition, where more than one party is represented in the same family proceedings only one fee will be paid as if the work was all being carried out under a single legal aid certificate.

### **Family help (higher) (level 3)**

- 5.5 Family help (higher) (level 3) can be granted for private law family proceedings (family help (higher) is not available in public law proceedings.) In children cases family help (higher) legal aid certificates will be limited to the issue of necessary proceedings and representation in the proceedings save in relation to or at a contested final hearing. In financial cases family help (higher) certificates will cover the issue of necessary proceedings up to and including the Financial Dispute Resolution hearing and/or obtaining a necessary consent order. Legal representation would only be necessary if a First Hearing Dispute Resolution Appointment (FHDR) (and any subsequent interim hearings) or Financial Dispute Resolution appointment is unsuccessful in resolving the issues and the case is proceeding to a contested final hearing.

### **Emergency Proceedings**

- 5.6. Part 5 of the Procedure Regulations should be taken into account in decisions on granting emergency legal aid. If the Agency considers that the appropriate form of service should have been family help (higher) then the legal aid certificate will be limited to family help (higher) and no fee for legal representation may be claimed unless the legal aid certificate is subsequently extended to that level.

### **The Private Family Law Representation Scheme (PFLRS) and Family Advocacy Scheme (FAS)**

- 5.7 Costs claimed under the PFLRS do not include work which may be carried out in relation to advocacy and which will be remunerated under the Family Advocacy Scheme (FAS). The FAS includes advocacy at court hearings and advocates meetings. It also includes all preparation, travelling and waiting time related to these. Preparation for a hearing, therefore, will fall within the FAS and is not claimed separately under the PFLRS, nor is it taken into account in determining whether a case becomes an escape fee case. (Please also see paragraphs 14.12 – 14.13 of Appendix 2 for further guidance on this). The exception to this is when a solicitor prepares for a hearing that does not take place and no fee is therefore claimed for the hearing under the FAS. In these cases the preparation that has been undertaken may be claimed within the PFLRS and may be taken into account in determining whether a case becomes an escape fee case.
- 5.8 Where it is appropriate for a provider to attend court, not as an advocate but, for example, to issue proceedings in person or to attend with counsel these costs will fall to be assessed within the PFLRS (or the Care Proceedings Graduated Fee Scheme (CPGFS)) and will count towards whether a case becomes an escape fee case using the prescribed hourly rate.

### **Escape Fee Cases**

- 5.9. A case will escape the Standard Fee and be paid at hourly rates when the actual costs under the PFLRS (excluding VAT and disbursements) are 3x the Standard Fee (however, please note that any work covered by the Family Advocacy Scheme is excluded from this

calculation). Where a legal aid certificate covers two or more aspects, each aspect will be considered separately for the purposes of calculating the fee. However, where a legal aid certificate covers more than one form of service, for example, family help (higher) and legal representation, both fees will be taken into account for the purposes of determining the Standard Fee. For example, if a legal aid certificate covers both children and finance, the work carried out for each aspect would be considered separately and the case may escape the Standard Fee for children but not finance where the Standard Fee would be paid. If the children matter was claimed at family help (higher) (level 3) and legal representation (level 4) then the escape fee limit would be 3x the level 3 fee + level 4 fee.

- 5.10 No enhancement of hourly rates (for example, where the fee earner is a relevant panel member) may be taken into account for the purpose of determining whether a case escapes from the Standard Fee. However, once it has been established that the case does escape from the Standard Fee then appropriate enhancements may be claimed on the hourly rate. However, the percentage by which hourly rates may be enhanced can never be more than 100%.

### **Applications to Court**

- 5.12 Proceedings may be issued where it is necessary in order to obtain disclosure of information from another party, usually in relation to financial matters, with a view to early resolution of the matter. However, it is expected that in ancillary relief matters pre-application disclosure and negotiation will take place in appropriate cases in accordance with any pre-application protocol and that this will be carried out under family help (lower) (level 2). Where the matter is resolved an application to finalise a consent order may also be made under family help (lower).
- 5.13. Where ancillary relief issues are in dispute, a family help (higher) certificate will usually, without amendment, allow the issue of proceedings up to and including disclosure of evidence and the Financial Dispute Resolution (FDR) appointment. Making or defending an application for interim relief will also be covered under family help (higher) provided it is justified in the circumstances of the particular case (in terms of prospects and therefore cost benefit) and it is heard at or before the FDR appointment. A specific amendment is, however, needed for any conveyancing and other implementation work even if this is carried out under family help (higher).
- 5.14 In finance cases a settlement fee is available for finance cases which conclude at family help (higher). A settlement fee is payable in addition to the Standard Fee where the following conditions are satisfied:
- a) The finance aspect is fully concluded under family help (higher);
  - b) It does not proceed further to a new level of service within 6 months or as far as you are aware to another provider;
  - c) There has been a genuine settlement to conclude the case rather than, for example, reconciliation between the parties or one party dying or disengaging from the case;
  - d) The settlement is recorded in a form of consent order approved by the court;

- e) The finance aspect has not escaped from the Standard Fee. If the case calculated at hourly rates has escaped the Standard Fee all costs will be paid at hourly rates and no settlement fee will also be paid. In determining the Standard Fee for these purposes the settlement fee will not be taken into account.
- 5.15 The settlement fee may be claimed in addition to any settlement fee claimed by the advocate under the FAS. For example, if an advocate attended the FDR at which the case was settled so that the case did not proceed to level 4 the advocate may claim a settlement fee under FAS and the provider may also claim a settlement fee under the PFLRS.

### **Moving from family help (higher) to legal representation**

- 5.16 A legal aid certificate for family help (higher) cannot cover representation at a final contested hearing. Once it is clear, possibly following the FDR appointment, that the matter cannot be resolved or fully resolved by negotiation and a contested final hearing is necessary, an application may be made to amend the legal aid certificate to cover legal representation. Work therefore carried out once the certificate for Legal Representation is granted, should be claimed under the legal representation fee rather than the Family Help (Higher) fee. In children cases family help (higher) will cover all steps short of work in relation to or representation at a final contested hearing. The usual scope includes representation at any finding of fact hearing and consideration of any CAFCASS report. In ancillary relief cases a limited amount of follow-up work arising from any FDR appointment is within scope without the need for an amendment, provided it is both justified and reasonable with a view to achieving a settlement of the matter. However, there will be some instances where work is carried out under family help (higher) but the hearing under the FAS is paid as a final hearing. This will be the case where a fact-finding hearing is necessary. However, for the purposes of the PFLRS work will still be carried out under family help (higher).
- 5.17 Once a case has moved to legal representation then all work is carried out at that level. The case will not move back to family help (higher) in respect of that particular aspect, although legal aid may be granted and the legal aid certificate amended for another aspect of the case. It is possible therefore that there may be authorisation on the certificate for family help (higher) children issues but the finance issues have moved to legal representation.
- 5.18 Some private law cases will start at legal representation. Applications for non-molestation orders, will, for example, start at legal representation and the fee structure under PFLRS is in respect of a legal representation fee only. Negotiation and attempted settlement of the matter will not be appropriate for domestic abuse cases. However, there may be cases where the matter has already passed the family help (higher) stage before the provider is instructed, for example, the FDR has taken place and a final hearing has been listed. In these cases legal representation will be granted at the outset and only the legal representation fee will be claimed.
- 5.19 Once a matter has been set down for a final hearing and preparation has taken place for that hearing the legal representation fee may be claimed even if the final hearing is subsequently cancelled.

- 5.20 Generally there should only be one legal representation fee claimed per aspect of case. If there is a final hearing and the case is subsequently set down for a review hearing at a later date a further legal representation fee cannot be claimed. However, a separate legal representation fee may be claimed where there are enforcement proceedings in relation to that same matter.

### **Enforcement**

- 5.21 If it is necessary to return to court after a final hearing for enforcement proceedings in any private law case covered by the PFLRS and such representation is authorised under the legal aid certificate an additional enforcement fee may be claimed. In children and finance cases this enforcement fee is a sum equal to half the relevant children or finance legal representation fee. Only one additional fee may be claimed in one set of proceedings and all work carried out in the enforcement proceedings may be taken into account in determining whether a case escapes the Standard Fee.
- 5.22 For domestic abuse cases, if further court hearings are necessary after the final hearing to deal with breach of the injunction, by application for committal or otherwise (and assuming that all the relevant criteria and guidance are met) a second standard legal representation fee for domestic abuse proceedings may be claimed under the legal aid certificate. The trigger for claiming the additional fee is attendance by an advocate at one or more enforcement or committal hearing. No more than two Standard Fees may be claimed for one set of domestic abuse proceedings.
- 5.23 Where a separate fee for enforcement proceedings is claimed for any aspect under the PFLRS that fee will be taken into account in determining the escape fee threshold. For example, if a family help (higher), legal representation and an enforcement fee are claimed the escape fee threshold will be the aggregate of all those fees.
- 5.24 The additional enforcement fee is only payable for enforcement proceedings. If any other hearing takes place after a final hearing no further additional fee is payable. If, therefore, a final hearing takes place in a children matter and a further hearing is listed for review, or a subsequent application is made which relates to that aspect and requires a further hearing no additional fee may be claimed. Any work carried out, however, would be considered in relation to whether a case escapes the Standard Fee and claims under the FAS could be made in respect of any additional hearings.

### **Transfer of solicitor**

- 5.25 Where a client transfer's provider during private law proceedings and the first provider ceases to provide representation then an application will be made by the second provider to the Director for a transfer of the legal aid certificate. In relation to the fee to be paid, each provider will calculate their fees separately on an hourly basis and any provider whose fees are equal to or greater than the Standard Fee will claim the Standard Fee. If the fees of any provider are less than the Standard Fee they may claim half the Standard Fee. The appropriate fee will depend on the level at which the provider started work in the case. For example, if the second provider is only instructed once the matter has reached legal representation this will be the Standard Fee. A case may escape the Standard Fee in the usual way, i.e. if the costs calculated on an hourly basis are more than 3x the Standard Fee.

- 5.26 Where a provider acts for more than one party but the client transfers to a new provider during the case (perhaps because of conflict of interest reasons) but the first provider continues to represent one or more clients, each provider is remunerated separately and each will be entitled to a full Standard Fee subject to the usual escape fee provisions.
- 5.27 Where a client transfers to another provider, provided that some work is carried out there is no minimum amount of work that must be undertaken in order to claim the Standard Fee or half the Standard Fee where appropriate. However, if you have acted for the client for less than 24 hours then you will be paid on hourly rates (paragraph 7.19 of the Specification).

### **Claims and payments on account**

- 5.28 Claims for payments on account may be made for cases under the PFLRS or CPGFS in the usual way under the Specification at Paragraphs 6.19 onwards. Under these provisions when a legal aid certificate is issued, an application for the first payment on account may be made 3 months after the issue of the legal aid certificate. No more than two applications for payment on account on a legal aid certificate may be made in any 12 month period regardless of the number of proceedings on the legal aid certificate. The claim is made by completing a CIV POA1.
- 5.29 Where an application for a payment on account relates to a Standard Fee then the application may not be for more than 75% of the Standard Fee unless sufficient costs have already been incurred to escape the fee. Similarly claims may also include the work which is carried out under the FAS but any claim for payment on account may not exceed 75% of the Standard Fee and any bolt-on. Disbursements may be claimed at 100%.
- 5.29A During the period 1 August 2020 to 30 April 2021 applications for payment on account in relation to work set out at paragraph 5.29 in relation to the Standard Fee under the PFLRS or CPGFS may not exceed 80%. Claims for payment on account under FAS can be claimed up to 100% of the Standard Fee and any bolt-on.
- 5.30 General provisions for final assessment and payment are contained at paragraphs 6.31 to 6.35 of the Specification and in the earlier parts of this guidance. Subject to these provisions payment may be claimed when a particular aspect of the case concludes even if the legal aid certificate is continuing for other aspects. For example, if the domestic abuse proceedings have been completed but the finance aspects are still ongoing a claim can be made for the domestic abuse element of the case. Such claims are made on a form CIV CLAIM 1A and on that form the provider will be required to state that they have not claimed any payment previously on account for work within that Standard Fee. If the provider is unable to do this, then any payment on account already made under the legal aid certificate may be recouped from the Standard Fee claimed.

## **6. The Care Proceedings Graduated Fee Scheme (CPGFS)**

- 6.1 The Care Proceedings Graduated Fee Scheme (CPGFS) covers s31 proceedings, i.e. applications for care and supervision proceedings. Other public law cases fall outside the scheme and proceedings under Parts IV or V of the Children Act (and including s25 proceedings) continue to be paid on hourly rates set out in Table 9 (a) of Schedule 1 to

the Remuneration Regulations (although they may fall within the FAS). Other public law proceedings, for example applications for adoption and placement orders are paid at the rates set out in Table 9(b) of the Remuneration Regulations. It should be noted that the definition of care proceedings for fee scheme purposes does not cover all Special Children Act proceedings. Therefore, there may be some non-means tested proceedings which fall outside the scheme, such as applications for emergency protection orders.

- 6.2 There is one legal representation fee payable for cases falling within the CPGFS. This covers all work from the issue of proceedings up to and including the final hearing. The fees are contained in Table 2(c) of Schedule 1 to the Remuneration Regulations and are divided into four regions depending on where the fee earners office is based (rather than the court). There are also separate fees payable for representing children, parents (and those with parental responsibility) and other joined parties. If a provider has represented more than one child or parent in the proceedings only one fee will be payable but it will be the higher 2+ fee set out in the table. This higher fee is payable where the provider has represented more than one party at at least one court hearing during the case.
- 6.3 There may be some cases where the client's status changes during the proceedings. For example, a grandparent with a residence order may lose parental responsibility during the proceedings if an interim care order is made. In these cases the higher Standard Fee applicable to acting for a parent will apply even though at the end of the case the client does not qualify as a parent for these purposes.
- 6.4 Where the provider is acting for a parent in proceedings, only one certificate will be granted regardless of the number of children in respect of whom the proceedings may have been issued. If a further child is born during the proceedings, in most cases any proceedings in respect of a new baby would be joined or heard together with the existing proceedings. However, if this was not the case and the proceedings were conducted separate and apart from the existing proceedings then a new legal aid certificate would be issued and a separate fee could be claimed for those separate proceedings.

#### **Transfer of solicitor**

- 6.5 There will be some cases where a client (or clients if the provider acts for more than one) transfers solicitor during the course of proceedings. In these cases the second provider will make an application to the Agency for transfer of the certificate on a CIV APP8. In determining what Standard Fee is payable in these cases the following provisions apply. It should be noted that in deciding whether a case escapes from the Standard Fee each provider will be considered separately in terms of their profit costs. Detailed provisions explaining the remuneration on transfer of provider are contained in Paragraphs 7.43 to 7.44 of the Specification.
- 6.6 Where a provider acts for more than one client and one client transfers to a new solicitor but the first provider continues to represent one or more clients the first provider is entitled to the full Standard Fee in the usual way (including the fee for two or more clients if the provider represents more than one party at at least one court hearing). The second provider will claim half the Standard Fee if their costs calculated on an hourly basis are less than the Standard Fee. If the costs are equal to or more than the Standard Fee the full Standard Fee will be claimed. If the new solicitor represents

two or more clients at at least one court hearing during the case the relevant Standard Fee will be that for representing two or more clients.

- 6.7 Where a provider acts for one client only, or acts for two or more clients and they all transfer to new solicitors during the course of the proceedings then each provider will calculate their fees separately on hourly rates and if the fees of either provider are equal to or greater than the Standard Fee then they will claim the whole Standard Fee. If any provider has fees less than the Standard Fee then the provider will claim half the Standard Fee.

#### **Escape fee cases**

- 6.8 Cases under the CPGFS will escape the Standard Fee when costs calculated on an hourly rate are more than 2x the Standard Fee. The hourly rates to be used for these purposes are the rates contained in Table 9(a) of Schedule 1 to the Remuneration Regulations. Only work that is within the scope of the fee scheme should be taken into account so that all work within the FAS as well as disbursements and, for example, final appeals, should be disregarded.

## Appendix 2: Guidance on the Family Advocacy Scheme (FAS)

### 1. General

- 1.1 This guidance sets out how the family advocacy scheme (FAS) will operate. The full provisions of the scheme are set out in Section 7 Part D of the Specification.
- 1.2 Please note that all applications for legal aid made on or after 1 April 2013 are subject to the fees and rates in the Remuneration Regulations. The contract no longer has a Payment Annex.

### 2. Definitions

- 2.1 “*Advocacy Services*” is defined in the Remuneration Regulations as work done:
  - a) by an advocate at a court hearing;
  - b) by an advocate, as such, in connection with an advocates’ meeting;
  - c) by counsel in connection with a conference; and
  - d) by counsel in connection with an opinion,

and fees and rates for advocacy services include, unless different provision is made within the Regulations, remuneration for preparatory work, attendances, travelling and waiting in relations to those services.

“*Counsel*” means either a barrister in independent practice; or a solicitor or Fellow of the Institute of Legal Executives who does not work in a partnership and does not hold a contract with us.

Solicitor advocates (including solicitors with higher rights of audience) who work for, or as part of, a partnership or barristers who are employed or who work in partnership with any other legal representatives do not count as Counsel for the purposes of this guidance.

### 3. Nature of the FAS

- 3.1 The FAS is a Graduated Fee Scheme that provides a separate payment regime for advocacy for all advocates regardless of their professional status during the life of family proceedings. It operates alongside the arrangements for payment of non-advocacy work in these proceedings including payments under the Care Proceedings Graduated Fee Scheme (CPGFS) and the Private Law Family Representation Scheme (PLFRS). Further information on those fee schemes can be found in the Family Specification and in Appendix 1 of this guidance.
- 3.2 The payments that are made under FAS are set out in Schedule 3 of the Remuneration Regulations.

#### 4. Scope of the scheme

- 4.1 The scheme applies to all advocates, regardless of their professional status, who undertake family work under a legal aid certificate that was granted following an application made on or after 9 May 2011.
- 4.2 The FAS does not include the work of the solicitor conducting the case, other than for advocacy. This work will be paid in accordance with the provisions of the CPGFS or the PFLRS.
- 4.3 Only one Standard Fee may be claimed per activity under the FAS and only one legal representative may claim for advocacy at a particular hearing (unless this is otherwise authorised under an Individual Case Contract). Therefore, if a solicitor attends at court with an advocate this would be outside the scope of the FAS.

#### 5. Exclusions from the scheme

- 5.1 Advocacy Services provided:
- (a) to any party in international child abduction proceedings;
  - (b) in proceedings under the Inheritance (Provision for Family and Dependents) Act 1975;
  - (c) in proceedings under the Trusts of Land and Appointment of Trustees Act 1996;
  - (d) in proceedings under Part 4A of the Family Law Act 1996, i.e. applications for Forced Marriage Protection Orders;
  - (e) in a defended cause for divorce or judicial separation or for dissolution of a civil partnership or the legal separation of civil partners;
  - (f) in proceedings for nullity of marriage or annulment of a civil partnership
  - (g) in applications for a parental order under the Human Fertilisation and Embryology Act 2008;
  - (h) in proceedings under the inherent jurisdiction of the High Court in relation to children;
  - (i) in proceedings in which the advocate separately represents a child other than proceedings which are specified proceedings within the meaning of section 41(6) of the Children Act 1989 or are heard together with such specified proceedings;
  - (j) in proceedings in the Court of Appeal or the Supreme Court;
  - (k) in an appeal against a final order;
  - (l) by a Queen's Counsel acting as such under a prior authority given by the Director;
  - (m) under an Individual Case Contract for a Very High Cost Case;
- fall outside the FAS.
- 5.2 The exclusion for appeals against any final order applies to all levels of court including such an appeal from the lay justices to a District Judge or Circuit Judge. Appeals against

any interim order, for example an interim care order, are within the scope of the FAS unless they have reached the Court of Appeal or Supreme Court.

- 5.3 Advocacy Services under an Individual Case Contract are remunerated in accordance with that contract. For the avoidance of doubt, it is open to such a contract to provide for payments in accordance with the FAS.
- 5.4 Advocacy Services provided by Queen's Counsel acting as such and having been instructed under a prior authority will be remunerated in accordance with that prior authority.
- 5.5 Otherwise, where Advocacy Services are provided by solicitor advocates in proceedings excluded from the FAS such work should be claimed under the relevant hourly rates set out in the Remuneration Regulations. Where such Advocacy Services are provided by Counsel, they are subject to reasonable remuneration as determined on cost assessment. Any such assessment of the reasonableness of Counsel's fees may, however, take into account the rates which would be payable if the services had been provided by a solicitor or the rates which would have been payable had the services been remunerated under the provisions of the Community Legal Service (Funding) (Counsel in Family Proceedings) Order 2001 less 10%.
- 5.6 Where Advocacy Services are excluded from the FAS and are being claimed at hourly rates as set out in the Remuneration Regulations, the preparation rate contained in the Remuneration Regulations should be used for preparation for advocacy where this is claimable.
- 5.7 Where a single hearing or activity involves significant work both within and excluded from the FAS the whole hearing or activity will be treated as excluded from the FAS for remuneration purposes.

## **6. What work is included in the scheme**

- 6.1 The scheme includes all Advocacy Services in the family category subject to the exclusions listed above.
- 6.2 All work in the following venues is included:
  - (a) family court; and
  - (c) High Court.
- 6.3 An application to a court of first instance for permission to appeal is within the scope of the FAS and will be treated as part of the provision of advocacy at the hearing before that court.
- 6.4 Counsel's written advice on whether to bring an appeal may be claimed under the FAS subject to the rules on Counsel's Opinions set out at Paragraphs 7.137 to 7.138 of the Specification and Section 10 of this Guidance.

## **7. The nature of payments under the scheme**

- 7.1 Payments under the scheme are essentially fixed or standard fee payments payable for a specific activity. There is a range of fees dependent upon the nature of the proceedings, the type of activity undertaken and the venue of the work. Certain fees are only payable to Counsel.
- 7.2 In some types of proceedings there are limited additional payments (called bolt-on fees) that may be made to reflect additional complexity or preparation for the advocate. These are usually percentage uplifts on the base fee in a particular case and may be claimed on interim and final hearings.
- 7.3 Any bolt-ons claimed will be verified by the judge, magistrate or legal adviser at the hearing on the appropriate form (the Advocates Attendance Form).

## **8. High Cost Case Contracts**

- 8.1 A case may be identified as high cost either at the outset or after the legal aid certificate is granted. Part 6 of the Procedure Regulations and the Merits Regulations set out procedures and criteria for Very High Cost Cases.
- 8.2 If an Individual Case Contract is issued, it sets the remuneration to be paid. The case plan and the overall price will be based on any hearings', anticipated venue and the length. The Individual Case Contract may provide for payments to be made in accordance with the FAS.

## **9. Legal aid certificates**

- 9.1 The scheme includes all forms of service applicable to family certificated work, currently, family help (higher) and full representation.
- 9.2 The existing requirement to obtain authority for, or where either Leading Counsel or multiple Counsel are to be instructed will continue. See paragraphs 13.5 to 13.7 of the Costs Assessment Guidance for further details on instructing Leading or multiple Counsel.

## **10. Categories - generally**

- 10.1 The scheme is divided into five different categories for the purposes of determining the level of remuneration for particular proceedings. The five categories are:

### *Public law*

- (a) s31 Care and Supervision Proceedings;
- (b) Other Public Law Children;

### *Private law*

- (c) domestic abuse proceedings;
- (d) private law children;

- (e) ancillary relief and all other non-excluded family work.

These categories essentially correspond to the types of family cases identified in the Merits Regulations although in public law cases these are defined by reference to whether the application is for a care and supervision order or is another type of public law children case.

- 10.2 Categories are of importance because different levels of fees are prescribed for each category. Each advocacy service can be claimed under one and only one category.

## **11. Categories – what does each category include?**

- 11.1 The general type of proceedings within each category is defined in Section 7 of the Specification. The text of the Specification and the guidance on what generally falls within each category is set out below.

- 11.2 The wording for each proceeding on the face of the legal aid certificate helps to identify which category of fee applies to assist the advocate.

### *Public Law Children – Care and Supervision Proceedings*

- 11.3 Part B of the Family Specification defines these as:

*“proceedings or potential proceedings under section 31 of the Children Act 1989.”*

- 11.4 This category also includes applications for residence, contact, child arrangement orders etc. under the Children Act 1989 where these are either made within care proceedings or are “related proceedings”. “Related proceedings” are proceedings which are being heard together with public law proceedings, or in which an order is being sought as an alternative to an order in such proceedings.

### *Other Public Law Children Proceedings*

- 11.5 Part B of the Family Specification defines this category as:

*“any Public Law Work other than s31 Care Proceedings.”*

- 11.6 Other Public Law Children cases for the purposes of the FAS include applications for a child assessment order, an emergency protection order, a secure accommodation order, other proceedings under Parts IV & V of the Children Act 1989 and adoption proceedings.

### *Domestic Abuse Proceedings*

- 11.7 Domestic Abuse Proceedings are defined in Part C of the Family Specification. This category includes all proceedings for the protection of the person arising from a family relationship. It will include any application for a non-molestation or occupation order under Part IV of the Family Law Act 1996 and injunctive relief in family proceedings under the Protection of Harassment Act 1997. It should be noted that although

applications for a Forced Marriage Protection Order are included within this definition for the purposes of the Merits Regulations they are excluded from the FAS scheme.

- 11.8 This category 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 proceedings but rather applications made within, or incidental to, ancillary relief proceedings or other financial proceedings.

#### *Private Law Children Proceedings*

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

- 11.10 Proceedings where the child is a party to the proceedings and is to be represented separately are included within the definition of private law children cases but are excluded for the purposes of the FAS where representing the child as set out above.

#### *Ancillary relief and all other family work*

- 11.11 This category covers ancillary relief proceedings and all other family work not falling within the other categories. It specifically includes all applications for financial relief work whether within divorce or Schedule 1 Children Act applications for financial provision for children and other miscellaneous applications.

## **12. Categories – mixed categories**

- 12.1 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.
- 12.2 When the continuing proceedings fall within more than one category, an advocate must, for the purpose of payment under the FAS, choose under which single category they would wish to be paid for all the Advocacy Services performed when making a claim for payment. Usually, an advocate will claim at the category that pays the highest rate. For example, in an application for a child arrangements order that subsequently involves allegations of abuse to a degree that the local authority issues care proceedings, at the point at which a new certificate is issued, an advocate can claim all future work (including issues as to contact) at the higher care proceedings rate.
- 12.3 Where an Advocacy Service includes work from two categories but it falls within a single set of proceedings only one fee will be paid, for example, if a single hearing covers both private law and children and financial issues then only one hearing fee will be payable and the advocate can choose which hearing fee to claim.

### **13. Categories – what is a single set of proceedings?**

- 13.1 For particular Advocacy Services only two fees can be claimed per case. In order to determine what is or is not a 'case' for the purposes of determining appropriate claiming, applications to the court constitute a single set of proceedings, irrespective of whether they are made separately or together, where they are heard together or consecutively or are treated by the court as a single set of proceedings. In private law proceedings each aspect of the case (e.g. children and finance), counts as a separate case for the purposes of claiming opinions and conferences.
- 13.2 The different types of Advocacy Services are defined in section 37 below. For each single set of proceedings payment will only be made twice for opinions and conferences. In contrast, interim hearing fees 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.
- 13.3 Where Advocacy Services are undertaken within a single set of proceedings, which covers a number of categories, only one fee is due, rather than one fee per category.
- 13.4 Where an advocate represents more than one party in a single set of proceedings, s/he is paid as if s/he represented a single party.
- 13.5 The fees are national fees and the same fee is payable regardless of where in England and Wales the work is carried out.
- 13.6 Generally, work undertaken in each of the five categories constitutes a single set of proceedings. For example, family injunctions usually proceed with a timetable of applications and hearings separate 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.
- 13.7 Similarly, it is usual for the court to deal with issues as to where the child will live and who a child will spend time with 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.
- 13.8 Sometimes simultaneous separate proceedings within a single category might become a single set of proceedings. For example, if there are contact issues relating to more than one child 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 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.
- 13.9 A care case which hears, in the alternative, an application for a child arrangements order will be one single set of proceedings if heard together or consecutively by the court.

### **14. Activities – what are activities?**

- 14.1 For the purposes of payment under the FAS, all work undertaken within a single set of family proceedings is broken down into five activities. The definition of what work

each includes and guidance on the same is set out below. Only one Standard Fee may be claimed per activity although there is no limit on the total number of Standard Fees that may be claimed per case.

## **The Activities**

### ***Interim hearings***

- 14.2 A Standard Fee may be claimed for the provision of advocacy at an Interim Court Hearing. This covers all work relevant to such hearings including incidental work and preparation such as drafting of skeleton arguments and orders, travel time (save for exceptional travel) and waiting at court as well as the advocacy within the hearing itself.
- 14.3 This activity covers all hearings other than the final hearing itself (for fact finding hearings see sub-paragraph 14.10 below). Commonly, this will cover all directions hearings including: the first appointment and the Financial Dispute Resolution hearing in an ancillary relief case; other interim or review hearings; within care proceedings, the Case Management Conference Hearing and Issues Resolution Hearings (where subparagraph 14.9 below does not apply).
- 14.4 There are different fees paid for interim hearings depending on the category of the case and the court in which the advocacy is undertaken.
- 14.5 To reflect the importance, complexity and additional preparation required for the Financial Dispute Resolution hearing (FDR) in ancillary relief proceedings a separate fee is payable for FDRs. This fee is also paid if the first appointment is treated as the FDR.
- 14.6 The fee payable for an interim hearing will depend on its length. For this purpose the length of the hearing is measured from the time that the hearing is listed to start at court to the time that the hearing concludes, disregarding any period in which the court is adjourned, either for lunch or overnight. Where, however, the court provides a specific direction to the advocates for earlier attendance, in respect of that particular hearing, time will run from the earlier time if the advocate is able to establish that such a specific direction was made. Where for an emergency hearing the court has not listed a time for the hearing and the papers are only issued by the court on the day of the proposed hearing so that the advocate must wait at court to be heard the length of the hearing will be measured from the time that the papers were issued. If the application is issued and the hearing is then not heard until the next day the hearing time for that day will end when the advocate is informed of this and will start again at the time that they are told to attend for the following day.
- 14.7 Where a court directs a party to adjourn for further discussions at court then that time will be included in the calculation of the interim hearing fee.
- 14.8 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 the advocate will receive the appropriate fee as if the hearing had taken place at court. However, in these cases the hearing time will start from the time that the telephone call/video conference is first attempted rather than the time

that the hearing was listed. Bolt-ons may be claimed for telephone/video hearings if appropriate although due to the nature of these hearings bolt-ons are less likely to be applicable. It is unlikely, for example, that the criteria for the expert bolt-on would be met. As there will be no Advocates Attendance Form, detailed notes of the hearing will need to be recorded and the claim justified on the CLAIM 1A or CLAIM 5A.

- 14.9 Where a case is resolved at an Issues Resolution Hearing held under the Public Law Outline (PLO) and no further hearings take place then this hearing will be paid as a final hearing.
- 14.10 In Private Law Children cases where a “finding of fact hearing” is held in accordance with the Practice Direction 12J of the Family Procedure Rules 2010: Residence and Contact Orders: Domestic Violence and Harm, it will be paid as a final hearing.

### ***Final Hearings***

- 14.11 In care proceedings, the main hearing will be the hearing at which the court determines whether or not a section 31 order is made. If a final hearing is listed for a split hearing with certain issues being heard and/or determined in advance of other issues (for example, findings of fact and/or threshold criteria), this must be claimed as a final hearing rather than an interim hearing plus a final hearing. In ancillary relief proceedings, it is likely to be the hearing at which the court determines the form of relief entitlement and in family injunctions, the on notice hearing which will determine the form and continuation of the without notice injunction order made. The definition includes all preparation or incidental work relating to the hearing including preparation, travel to court and waiting at court as well as the advocacy within the hearing itself.
- 14.12 Under the FAS final hearings are also paid based on units of time. There is a daily rate payment for each day, or part day of a hearing regardless of the length of time spent at court.
- 14.13 The FAS fee covers all work carried out by the advocate at a hearing, including any preparatory work, attendances, travelling and waiting and preparation of attendance notes in relation to the advocacy under any of the Representation scheme.
- 14.14 However, the position if a provider attends court to sit behind counsel is different. In those situations, the provider may claim for all work carried out at court under the appropriate Representation scheme. No claim can be made under the FAS. The preparation note may, therefore, be claimed under the Representation scheme as it does not relate to advocacy services.

### ***Cancelled hearing***

- 14.15 Where a self-employed advocate has been instructed to provide advocacy at a hearing and carries out at least 30 minutes of preparation work for the hearing, but the hearing does not take place (i.e. it is cancelled before the advocate travels to court) they will be able to claim a payment for a one hour hearing (hearing unit 1) if the cancelled hearing was an interim hearing, or half of the final hearing fee if the cancelled hearing was a final hearing. No bolt-on fees may be claimed with any claim for a cancelled hearing.

14.16 This fee will only be available to a self-employed advocate. Where an in-house advocate is to undertake a hearing any preparation carried out by the in-house advocate may be treated as preparation in the case generally in relation to the representation fee under the PFLRS and CPGFS and may count towards whether a case becomes exceptional.

***Advocates meetings***

14.17 The FAS will pay a separate fee for advocates' meetings that take place as directed by the court in accordance with the Public Law Outline (PLO) to encourage attendance. These will be payable in any public law proceedings where the PLO is applied.

14.18 Although it would usually be expected that two advocates' meetings would take place in accordance with the PLO, provided that the advocates' meeting is held as directed by the court and in accordance with the PLO there is no limit to the number of these fees that may be claimed. No fees for advocates' meetings will be payable in Private Law Children cases.

14.19 The definition of advocates' meeting includes meetings held by video conference, webcam or telephone where this appropriate in the circumstances.

14.20 It is not envisaged under the PLO that an advocates meeting would take place on the same day as a hearing. However, if an advocates meeting does take place on the same day as an interim hearing then it may be claimed only if the meeting takes place outside of any time period that is taken into account in calculating the fee for the interim hearing.

***The opinion fee***

14.21 An opinion fee may be claimed where Counsel is instructed to provide an opinion and provides an opinion in writing. This fee may only be claimed by Counsel. No bolt-ons may be claimed for opinions.

14.22 Up to two opinion fees may be claimed in each single set of proceedings. If there are separate children and finance proceedings these will be considered separately for these purposes. No opinion fee may be claimed under the FAS in domestic abuse proceedings.

14.23 In addition to the two opinions claimed per set of proceedings a further opinion may be claimed in relation to any proposed appeal against a final order.

14.24 An opinion may include providing advice or drafting pleadings/affidavits after the issue of proceedings.

***The conference fee***

14.25 A conference fee is paid for all work carried out in connection with a conference. This can include conferences by telephone or video link or webcam where this is appropriate in the circumstances. Conference fees may only be claimed by Counsel. No bolt-ons may be claimed for conferences.

- 14.26 Up to two conference fees may be claimed in each single set of proceedings. As for opinions in private law proceedings, if there are separate children and finance proceedings these will be considered separately for these purposes. However, no conference fee may be claimed under FAS in domestic abuse proceedings.
- 14.27 As only two conference fees may be claimed Counsel will need to designate the conferences for which he or she seeks payment under the FAS.
- 14.28 No conference fee may be claimed for any conference held on the same day as a final hearing. Any discussions or negotiations taking place on any day of a final hearing will be covered by the fee for advocacy at that hearing.
- 14.29 A conference fee may be claimed for a conference that takes place on the same day as an interim hearing, only if the conference takes place outside of any time period that is taken into account in calculating the fee for the interim hearing. Therefore, no conference fee may be claimed for a conference that takes place between the time that the hearing is listed to start and the time that hearing actually starts as this will be claimed as part of the hearing unit.
- 14.30 Where different Counsel is subsequently instructed and the allowable conference fees have already been claimed, no further claims for conference fees 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 as to whether the conference fees payments have already been claimed from either the outgoing Counsel, or instructing solicitors.
- 14.31 The fee 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.

**Bolt-ons**

- 14.32 Certain hearings will attract a bolt-on to reflect the extra work undertaken by the advocate or to reflect complexity. Such additional payments are referred to as “bolt-ons”. The bolt-ons are set out in the table below:

<b>Private Law Children</b>	<b>Public Law Children and Other Public Law Children</b>
Expert’s cross examination (20%)	Expert’s cross examination (25%)
Client – allegations of significant harm (25%)	Client - allegations of significant harm (25%)
Advocate’s Bundle Payments	Client lack of understanding (25%)
Exceptional travel fee	Advocate’s Bundle payments
	Exceptional travel fee

<b>Domestic Abuse</b>	<b>Ancillary Relief (and other)</b>
Exceptional travel fee only	Early resolution fee  Advocate's Bundle Payments  Exceptional travel fee

*Representation of a client who is facing allegations that he or she has caused significant harm to a child*

- 14.33 This bolt-on is only available to the advocate representing the client against whom such allegations are made and it applies only so long as those allegations remain a live issue in the proceedings. If the allegations are no longer an issue that is being pursued by the local authority or have been found against in a finding of fact hearing the bolt-on will no longer be available for subsequent hearings. The client may either be the parent of a child who is the subject of the proceedings or another person (including a child) against whom such allegations are made. However, it is not available to advocates who may be representing other parties in the same proceedings.
- 14.34 Although the bolt-on is available in private law children proceedings as well as public law children proceedings, in public law proceedings it only applies if a local authority is making or adopting the allegations against the client. It does not apply if the allegations are made by other parties to the proceedings but not adopted by the local authority.
- 14.35 For the purposes of the bolt-on, the following conditions constitute significant harm:
- a) death,
  - b) significant head and/or fracture injuries;
  - c) burns or scalds,
  - d) fabricated illness,
  - e) extensive bruising involving more than one part of the body,
  - f) multiple injuries of different kinds i.e. three or more different types of injuries
  - g) other significant ill-treatment (such as suffocation or starvation) likely to endanger life,
  - h) sexual abuse
- 14.36 The test, therefore, of significant harm in this context is different than that contained within the Children Act 1989. For example, the threshold criteria in a care case may be met in terms of the child suffering significant harm because of chronic neglect but this will not in itself satisfy the test for the bolt-on.

*Representation of a person who has difficulty in giving instructions*

- 14.37 This bolt-on is available in public law children cases only. It is not available in private law children, finance or domestic abuse cases. The bolt-on is available to the advocate where:
- a) their client has difficulty giving instructions or understanding advice; and

- b) this is attributable to a mental disorder (as defined in section 1(2) of the Mental Health Act 1983) or to a significant impairment of intelligence or social functioning; and
- c) the client's condition is verified by a medical report from either a psychologist or psychiatrist.

14.38 In order to be eligible for the bolt-on the client represented by the advocate will need to be suffering from a diagnosed mental illness or impairment of intelligence or social functioning. Whilst payment of the bolt-on is automatic if the conditions are met, given that it turns on representation of the client, it also requires a medical diagnosis. A report from either a psychologist or psychiatrist should be available for the Judge, Magistrate or Legal Advisor, prior to verification for that particular hearing. The report may be one which has been prepared prior to the issue of proceedings or has been directed by the court during proceedings.

*Where the evidence of an independent expert witness is cross-examined and substantially challenged by a party at a hearing*

14.39 This bolt-on is available only in public and private law children cases. It is not available in finance or domestic abuse cases. It applies only for hearings where an independent expert has been required to attend court for the purpose of giving evidence which is to be cross-examined and substantially challenged by any party at the hearing. Officers of Cafcass or Welsh family proceedings officers, any social worker employed by, or acting on behalf of a local authority or an employee of any party to the proceedings do not count as independent expert witnesses. Similarly, a GP providing routine, non-clinical information as to medical care received would not be an expert witness for these purposes.

14.40 The bolt-on only applies to the individual hearing at which the cross-examination is to take place and not to the proceedings in general, even if expert reports in the case are available. Usually to claim the bolt-on it will be expected that the expert will have actually been cross-examined at the hearing. However, there may be instances where the expert has been directed to attend but has either been stood down immediately prior to the hearing or has attended but his/her oral evidence has not been required. In such cases the advocate may have already prepared for the cross-examination and in these instances the bolt-on may be claimed (if certified as appropriate on the advocates' attendance form) provided that the attendance of the expert at the hearing was properly cancelled less than 72 hours before the hearing. The bolt-on will be payable to each advocate at the hearing where the cross-examination was to have taken place. It does not matter, therefore whether a particular advocate is intending to challenge the evidence of an expert provided that the evidence of the expert will be challenged by one of the advocates at the hearing.

Because the bolt-on is per hearing it will apply to the whole hearing at which it is claimed i.e. if expert evidence is heard over 2 days of a 10 day hearing then the bolt-on is claimed for the whole 10 day hearing.

Because the bolt-on is per hearing and not per expert it may only be claimed once per hearing regardless of the number of experts cross-examined at a hearing.

### ***Early resolution fee***

- 14.41 This bolt-on fee can be claimed only in Private Law Finance cases that settle at the first appointment or FDR. It may be claimed by the advocate who is entitled to the hearing fee for that hearing, but only if the following conditions are satisfied:
- (a) The finance aspect of the case has been fully concluded at that first appointment or FDR hearing;
  - (b) The advocate attending that hearing materially assisted in the settlement of heads of agreements;
  - (c) The finance aspect of the case does not proceed further to a new level of service within six months of the settlement or heads of agreement reached;
  - (d) There has been a genuine settlement to conclude that aspect of the case, rather than, for example, a reconciliation between the parties or one party dying or disengaging from the case;
  - (e) The settlement or heads of agreement is recorded in a form of a Consent Order approved by the Court, either at the hearing itself or subsequently.
- 14.42 Where the conditions for the payment of a settlement fee subsequently change, for example if the agreement breaks down within 6 months and there are subsequent proceedings to enforce the order, then the settlement fee may be recouped.
- 14.43 Entitlement to this bolt-on settlement fee is separate to the entitlement to the Settlement Fee payable under the PFLRS to the solicitor. For example, if a case is in substance settled by the solicitor prior to the FDR hearing and a hearing took place only to secure a Consent Order, no bolt-on fee could be claimed by the advocate. However, if the advocate had materially assisted in the settlement negotiations or by way of legal advice or drafting, the bolt-on fee could be claimed provided the hearing took place and the above conditions were satisfied.
- 14.44 Only one settlement fee is payable per case under FAS. In the event that two claims for a Settlement Fee on a single set of proceedings are submitted then the second claim submitted will not be paid.

### ***Advocate's bundle payments (formerly Court bundle payments)***

- 14.45 Practice Direction 27A (PD27A) has effect from 31 July 2014 and introduces a maximum limit for Court Bundles in family cases of 350 pages, unless the Court has directed otherwise. This prevents the majority of family cases reaching the previous Court Bundle bolt-on of 351 pages or over under the FAS. The old Court Bundle bolt-on will still apply to any hearings before 31 July 2014, however, for hearings on or after 31 July 2014, a bolt-on will be available based on the size of the advocate's bundle instead.
- 14.46 The advocate's bundle will consist of those served documents relevant and necessary to the case, including a paginated index of the contents. The advocate's bundle may include the documents listed in paragraphs 4.2 and 4.3 of PD27A (and which may be included in the court bundle) and other documents relevant to the case which have

been served by the parties to the proceedings to which the hearing relates. Notes of contact visits will only be included in the advocate's bundle for the purposes of the FAS if they have been included in the court bundle.

- 14.47 Verification of the size of the advocate's bundle will be carried out by the judge or person before whom the case is heard by way of a paginated index of documents served in the case that the advocate would be expected to have agreed with the other parties, as appropriate. Additionally, the advocate will need to provide an explanation of why any documents included in the paginated index which do not fall within paragraphs 4.2 and 4.3 of PD27A are relevant and necessary to the case.
- 14.48 Advocate's bundle payments (ABP) may not be claimed in domestic abuse proceedings but may be claimed in public and private law children cases and in finance matters.
- 14.49 For interim hearings, if the advocate's bundle comprises 350 to 700 pages an advocate's bundle payment 1 (ABP1) may be made, and if the advocate's bundle is over 700 pages an advocate's bundle payment 2 (ABP2) may be claimed. In Private Law Proceedings, advocate's bundle payments may only be claimed at one interim hearing per case. For this purpose the children and finance aspects of a case will be treated separately. In public law proceedings advocate's bundle payments may be claimed for no more than two interim hearings and each of these must be either a case management conference, an issues resolution hearing or otherwise a hearing that is listed for the hearing of contested evidence.
- 14.50 For final hearings only, a higher ABP3 payment is available if the advocate's bundle is in excess of 1400 pages.
- 14.51 An advocate must obtain certification of the relevant number of pages of the advocate's bundle on the Advocates Attendance Form in order to claim this payment. The Agency may request copies of both the agreed paginated list and the explanation of why additional documents not referred to in paragraphs 4.2 and 4.3 of PD27A are included either before or after payment is made.
- 14.52 An advocate taking on a case part way through must satisfy themselves as to whether the advocate's bundle payment/s have already been claimed or are intended to be claimed by an advocate at an earlier hearing.

## **15. Payment**

### **The calculation of the fee**

- 15.1 Part D of the Family Specification defines how fees under the FAS are calculated. Different fees are paid in respect of each advocacy activity provided in different categories of case. These standard fees may be increased by payment of a bolt-on fee.
- 15.2 The total fee will also vary depending on the Court in which the advocacy service is undertaken.

## **The starting point**

- 15.3 Each advocacy service has a base fee or hearing unit, which is the primary fee that an advocate will be paid. In respect of hearings this base fee may be multiplied to reflect the total time spent in court. Payments may then be increased by further additional payments, where the work done is within the criteria and rules for these. The fees for each service are set out by category in the Remuneration Regulations. The specific rules for the calculation of the hearing unit are also set out in Part D of the Family Specification.

### ***The base fee for conferences and opinions***

- 15.4 These are both non-hearing services and, as such, have a set base fee according to the category of the proceedings. The fee paid does not depend upon the amount of time spent on the activity. This is in contrast to the hearing units, which have a base fee calculated by time spent and the category of proceedings
- 15.5 Up to two base fees may be claimed for each set of proceedings. A further payment for exceptional travel may also be claimed in respect of conferences.

### ***Interim hearings***

- 15.6 The total fee payable under the FAS for an interim hearing depends on its length. The Remuneration Regulations specify fees as either Hearing Unit 1 or 2. The length of the hearing is measured from the time that the hearing is listed at court to start to the time the hearing concludes.
- 15.7 The fee payable for Hearing Unit 1 will apply if time spent at court (as defined in subparagraph 15.6 above) is 60 minutes or less. Where the length of the hearing is greater than 60 minutes and up to 2.5 hours then Hearing Unit 2 will apply. If the length of a hearing is more than 2.5 hours then a multiple of Hearing Unit 2 will be paid based on the total length of the hearing in hours divided by 2.5 and rounded up.

If an interim hearing takes place over 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. For example, if an interim hearing lasts five and a half hours in total, spread over two days, the fee payable is Hearing Unit 2 x 3. Note that it is never possible to claim both Hearing Unit 1 and Hearing Unit 2 for the same hearing or to claim multiples of Hearing Unit 1.

An Advocate's Attendance Form must be completed for each hearing for which payment is claimed. The only time that the form does not need to be completed is where a hearing takes place by telephone or video conference or where only a Hearing Unit 1 without bolt-ons is being claimed.

If the advocate has attended at court and then the hearing does not take place, because for example there is no judge to hear the case, the advocate will claim the Hearing Unit fee for the time spent at court. Usually this will be the Hearing Unit 1 fee. However, in cases which are listed and are not heard but the advocate has been required to wait at court for more than an hour after the listed time before being told

that the hearing will not take place then the appropriate Hearing Unit 2 fee may be claimed.

If an interim hearing is listed but is subsequently vacated by the court and the advocate is only informed when they arrive at court this should be claimed as an interim Hearing Unit 1. No Advocates' Attendance Form needs to be completed in these circumstances.

If an advocate attends for an "at risk" hearing which is subsequently not heard that day but is put back to another, the hearing time will commence from the time the hearing was originally listed until the time at which the advocate was stood down. Again in these situations an Advocate's Attendance form will not be signed.

One copy of the Advocates' Attendance form is required for each hearing and this will need to be signed and the appropriate bolt-ons initialled by the Judge, Magistrate or Legal Advisor. A copy does not need to be retained on the court file but the original must be forwarded to the Agency with the claim for payment. If the bolt-ons have been initialled then the form does not need to be sealed provided that the original is forwarded to the Agency with the claim for payment.

Where a hearing lasts more than one day a separate Advocates' Attendance form does not need to be submitted for each day. The start time on the first day and the time which the hearing ends on the final day must be recorded on the form. The advocate will also need to state the day on which the hearing started and the day on which it completed and the total number of days over which the hearing took place.

For interim hearings payment will be referenced to the number of hours and this should be recorded on the claim form.

### ***Final hearing***

15.8 Because this is the hearing intended to determine and conclude the case, the hearing unit is based on a daily fee rather than smaller periods of time. One hearing unit is paid from the time the main hearing actually begins to the time that it finishes on that day regardless of what time this may be.

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 considered a final hearing, for example on or before the due date it emerges a party has not been served correctly, or the wrong hearing date was sent, it is clear that this is not a hearing that is expected to be effective or contested.

15.9 A directions hearing that concludes the case does not make the hearing a final hearing.

15.10 On the making of an order the court may decide to review the position after an interval of some months. That subsequent review is not a continuation of the final hearing but an interim hearing. The court may make further directions, continue or vary the order. None of these circumstances turn that later hearing into either the continuation of the final hearing or a new final hearing.

- 15.11 It is possible in certain circumstances for more than one final hearing fee to be paid in a case. In particular this can occur where a final hearing has taken place but subsequent enforcement proceedings are issued which are required to be finally determined or where an earlier fact finding hearing has taken place.

### **Claiming Bolt-ons**

- 15.12 Once the base fee for the hearing has been established then the circumstances of the case may mean that an additional bolt-on fee may be claimed. Bolt-ons are only available for interim and final hearings. A number of the bolt-ons are expressed as percentages of the hearing fee. If two bolt-ons are claimed these percentages are added together.

#### Example:

*An advocate attends an interim hearing before a District Judge on an application for a care order. The hearing is listed to begin at 10.30 and completes at 12.00. The advocate is therefore able to claim Hearing Unit 2 at £238.46. The circumstances of the case are such that the advocate is able to claim the bolt-on for representing a parent against whom allegations are made (25%) and also for representing a client who has difficulty giving instructions/understanding advice (25%). The total percentage bolt-ons which may be claimed are therefore 50% i.e. £119.23.*

*The total claim for the hearing unit and bolt-ons will therefore be £357.69. On top of this any fixed bolt-ons are also added, such as payments for advocate's bundles, early resolution fees and payments for exceptional travel. These are added to the claim once the Hearing Unit and percentage bolt-ons have been established. The fixed bolt-ons do not also attract the percentage uplift.*

### **Exceptional travel fee**

- 15.13 This Bolt-on payment is available for all Hearings and is the only Bolt-on which can also be claimed for attendance at an advocates' meeting in Public Law cases (all advocates) and for conferences (Counsel only). However, the exceptional travel fee is payable only where the Director is satisfied that:

- (a) it was reasonable to instruct the advocate in question in all the circumstances of the case, taking into account whether there were any suitable potential advocates situated more locally to the court; and
- (b) the journey from the advocate's office or chambers to the court (or location of the Advocates' Meeting or conference) exceeds 25 miles each way. This is calculated on the basis of actual distance travelled by the most direct route rather than the distance measured in a straight line.

- 15.14 It may be reasonable to instruct an advocate who is not local where:

- (a) the conduct of proceedings required a specialist advocate, and that no specialist advocate was available locally; or

- (b) the instructing providers were unable to find an advocate who was available and prepared to work under the FAS.

15.15 All advocates will need to justify the payment either on the CLAIM 1A for solicitors or on the CLAIM 5A for Counsel. Counsel should also supply a copy of their brief or instructions with the claim.

### ***Disbursements***

15.16 Disbursements are not included in FAS and may be claimed in addition to payments made under the scheme.

15.17 Further guidance on disbursements can be found at Section 3 of this Guidance.

### ***Payment to replacement advocate***

15.18 In the situation where one advocate replaces another for whatever reason whilst providing an ongoing advocacy service the papers may be passed to another advocate to undertake the advocacy.

15.19 No separate payment is made to the first advocate for wasted preparation. If the initial work was undertaken by a solicitor then this should not be claimed under either the PFLRS or the CPGFS. 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 the advocate.

### ***Multiple applicants***

15.20 Where there are multiple parties, who are represented by one advocate and the court deals with the applications by hearing them together, only one fee is payable. For example, if there are two clients 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 advocate, only one fee will be paid for the hearing rather than two.

15.21 Where two applications for payment under the FAS are made in such circumstances the Agency will process one claim for payment but reject the others and link the files accordingly to prevent duplicate payment. If the statutory charge arises the single fee will need to be apportioned equally between all of the certificates involved.

15.22 Solicitors will claim payments under the FAS in the same way as other claims for payment including those under the PLFRS and CPGFS. This includes claims for payments on account and for final payments, which will be made on a CLAIM 1A.

15.23 No payment on account may be claimed in relation to services provided by Counsel under the FAS. Instead Counsel may apply to the Agency on a CLAIM 5A for payment under the scheme once the relevant hearing or other item of work is concluded.

15.24 For all hearings the advocate will be required to submit an Advocates Attendance Form signed by the Judge, Magistrate or legal advisor, confirming the bolt-ons that are to be claimed and the length of the hearing. In addition, where an early settlement fee is claimed a copy of the consent order should be provided with the claim. Advocates

generally should be prepared to supply such documentation as the Director may request to justify the particular work done.

- 15.25 The Family Specification (Paragraph 7.174) obliges solicitors to provide Counsel with all information necessary to claim the appropriate payment due under FAS. Under Paragraph 5.13 of the Specification all instructions delivered to Counsel must:
- a) Include a copy of the current certificate, where available;
  - b) Include a copy of any prior authority to instruct Counsel; and
  - c) Be endorsed with the certificate reference number, where available.
- 15.26 Where the certificate has not yet been issued at the point that instructions are delivered to Counsel, a copy must be provided to Counsel within 14 days of receiving it. Where the solicitor delays in complying with that obligation, Counsel should inform the Agency's contracting team at the relevant regional office.
- 15.27 All claims for additional payment including bolt-ons and any incidental disbursements must be made at the same time as the claim for the advocacy service. If not claimed any later claim will be rejected.

## **16. Assessment**

### ***The Agency's role on assessment***

- 16.1 The Contract governs payment of provider's costs for family work. Costs assessment is explained more generally earlier in this Guidance.
- 16.2 The Director will initially assess all fees due to Counsel under the FAS whilst the conducting provider's profit costs and disbursements will be assessed in the usual way, through assessment by either the Director or the Court.
- 16.3 The assessor will consider the following matters:
- a) whether the correct fee was applied for;
  - b) whether the criteria have been met for any additional payments;
  - c) the reasonableness of any incidental expenses claimed;
  - d) whether Counsel has submitted the correct date for which he or she received instructions to carry out the relevant work.
- 16.4 This is not an exhaustive list of all considerations of the issue of what sums are properly and reasonably due to Counsel or providers under the FAS for work carried out within the scope of the certificate.
- 16.5 Where Queen's Counsel, acting as such, is instructed without authority, Counsel's fees will be disallowed entirely. If multiple Counsel are instructed without authority, work done by the second Counsel is outside the scope of the certificate and their fees and any associated costs will be disallowed.

- 16.6 Counsel has a duty to check the limitations placed on a certificate both as to scope and costs to be incurred. Paragraph 6.64 of the Specification 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.

**END OF DOCUMENT**