

# Costs Assessment Guidance

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# Costs Assessment Guidance

## Part A: All Contract Work

### Section 1: General Principles

#### Introduction

- 1.1 This guidance applies from 14 November 2010 to civil matters and cases governed by the 2010 Standard Civil Contract. It relates primarily to services payable at Hourly Rates under the terms of the Specification to that Contract, including any notional assessment of the costs of a case or matter paid as a standard or graduated fee, and is Guidance referred to in Paragraph 6.9 of the Specification. The rules concerning entitlement to standard or graduated fees are set out in the Specification, and further guidance on the family standard and graduated fees is contained in Annexes 1 and 2 to this guidance. The guidance does not apply to work carried out under the Contract Specification in force from 1 October 2007 or under previous Contract Specifications. In particular, it does not apply to cases in the Family Category Category of law, or for Housing cases that are carried out under the Unified Civil Contract rather than the 2010 Standard Civil Contract. The guidance issued under the Unified Civil Contract continues to apply to such cases.
- 1.2 . As under the previous Specification, assessment and prior authority procedures and remuneration rates are governed expressly by terms of the Contract, as permitted by the Community Legal Services (Funding) Order 2007. Under the earlier General Civil Contract , relevant provisions of the Civil Legal Aid (General) Regulations 1989, Legal Aid in Family Proceedings (Remuneration) Regulations 1991 and the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 were incorporated into the Contract by reference via provisions of the Contract Schedule and Specification. For cases under the new Specification, these regulations have no applicability.
- 1.3 The previous Specification had made procedural changes in relation to whether assessment is by the court or Commission, to reflect the fact that Public Law Children Licensed Work cases are

now remunerated via standard fees, assessment by the court not being required where only a standard fee is claimed.

- 1.4 Prior Authorities have an important role in cost assessment. Our guidance on Authorities can be found at section 5 to Part D of Volume 1 of the LSC Manual and on our website [www.legalservices.gov.uk](http://www.legalservices.gov.uk)

### **Basic Framework**

- 1.5 The Legal Services Commission is obliged to pay remuneration for civil cases properly due in accordance with the Community Legal Services (Funding) Order 2007 (as amended) and its contracted obligations.
- 1.6 Work is remunerated according to time spent by a fee earner at the relevant hourly rate. The rates are set by the 2010 Standard Civil Contract and are found in the Payment Annex to the Contract Specification. The rates in the Payment Annex cover all civil matters or cases commenced under the 2010 Standard Contract save for those that become subject to an Individual Case Contract with the Commission.
- 1.7 Note that, under the 2007 Funding Order and Contract Specification, work is no longer ever payable from the Community Legal Service fund to providers at un-prescribed market rates. This is a change from the position under the General Civil Contract, in particular for cases in the Court of Appeal and Supreme Court, but will also affect permitted conveyancing costs in implementing orders or agreements in family cases (such that the old Point of Principle CLA10 no longer applies).

### **The approach to assessment**

- 1.8 Many of the basic principles governing assessments are contained in the Civil Procedure Rules introduced in April 1999 which provide the general framework for dealing with costs, including the courts' discretion in the making of costs orders, the form and process of detailed assessment, and the basis, and criteria for quantification of costs. In particular, all assessments of Contract Work as payable by the Commission are to be carried out on the Standard Basis subject to the provisions of the Specification and this Guidance (see Paragraph 6.9 of the Specification).

**CPR 44.4(2) states that:**

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

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

**Under CPR 44.5:**

*44.5 (1) The court is to 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) were 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 must give effect to any orders which have already been made.*

*(3) The court must 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; and*

(g) *the place where and the circumstances in which work or any part of it was done.*

1.9 The assessment of costs payable from the CLS fund 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 Commission, 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 44.5(3). It should not be influenced by the Commission's also being the paying party, beyond the fact that resolution of genuine doubts are to be resolved in the Commission's favour under CPR 44.51(a).

1.10 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.

1.11 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;

are in accordance with the provisions of the Contract, reasonable, and proportionate. Assessment of disbursements is considered further at section2 below.

### **Work done**

1.12 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.

1.13 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.

- 1.14 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 supplier made an application to the court which was unsuccessful may lead the assessor to ask whether it was reasonable to have made the application.
- 1.15 Note that the provisions of CPR 48.8, concerning solicitor and client assessments, expressly do not apply to assessments of CLS funded work. In particular, the fact that the Client has requested that or approved work being carried out (CPR 48.8(2) (a)) does not mean that this work can be claimed against the CLS fund. Further, the assessment against the CLS fund is on a standard rather than indemnity basis (see 1.8)
- 1.16 Accordingly, the question of whether an item is allowed on an assessment of costs payable from the CLS fund 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 6.52 of the Contract Specification:
  - (i) Work (including counsel’s fees, experts’ reports or other disbursements) that the Commission has specifically requested or authorised to assist in decision making regarding the grant, continuation or amendment of the terms of CLS funding;
  - (ii) Completion of the Commission’s forms and other communications with the Commission
  - (iii) Work for which the Commission has granted prior authority (Paragraph 5.25 Contract Specification)
  - (iv) Costs of reasonable adjustments to comply with the supplier’s duty under the Disability Discrimination Act 1995 (as amended); now under the Equalities Act 2010
  - (v) Travel expenses of a funded 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**

- 1.17 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 from the CLS fund. 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, Part C)

### **Proportionality**

- 1.18 In **Secretary of State for the Home Department v Lownds** [2002] EWCA Civ 365 the Court of Appeal determined a point of principle relating to the assessment of proportionality in costs orders made under the Civil Procedure Rules. The Court stated that:

*“what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable.”*

- 1.19 If the total costs claimed appear disproportionate to the matters at issue, therefore, the test in relation to each item of costs is that it was necessary, rather than just reasonable, to incur that item (and, as before, that the cost of the item is itself reasonable). In that case, a claim for damages, proportionality of the costs of the respective parties was to be determined in relation to the sums that it was reasonable for the parties to believe that the Claimant might

recover when the claim was commenced, rather than in relation to the sum actually recovered.

### **Contract Requirements**

- 1.20 Work is only payable in accordance with the terms of the 2010 Standard Civil Contract. Certain rules within the 2010 Standard Civil Contract Specification, at Paragraphs 1.19 to 1.21 and 6.61, apply to all levels of service of Contract work.

### **Compliance with the Funding Code**

- 1.21 All Contract work must be carried out in accordance with the Funding Code Criteria, Procedures and Guidance. The Funding Code Criteria appropriate to the level of service and type of case must be satisfied at all times that work is carried out and this work must be in accordance with the Criteria under which funding was granted.
- 1.22 In relation to Controlled Work Suppliers must not continue to act where the Criteria are no longer satisfied. In Licensed Work solicitors and other legal representatives are subject to a duty to report to the Commission in a number of circumstances under rules C43 and C44 of the Funding Code Procedures. These include a requirement to notify the Commission where new information or a change of circumstances has come to light that may affect the terms or continuation of the certificate (rule C43 (iii)).

**Point of Principle CLA 3** states:

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

- 1.23 Costs should only be disallowed on reliance on this Point of Principle in cases where it is clear that the supplier has failed to report a change of circumstances that has meant that the Funding Code 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, suppliers are entitled to rely on any amendment to the certificate granted by the Commission.

## **Recorded and Unrecorded Time**

- 1.24 In Contract work, routine letters and telephone calls are remunerated on 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.
- 1.25 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.
- 1.26 The letters and note 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...”*
- 1.27 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.
- 1.28 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.
- 1.29 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).

- 1.30 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 supplier had to deal.
- 1.31 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.
- 1.32 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).
- 1.33 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.
- 1.34 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.
- 1.35 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 46. The costs of such attendance are only claimable, as allowed under CPR 46.3, where the court considers it necessary for the fee-earner to attend to assist the advocate (see further Part C, section 13.13).

## **Appeals and Reviews**

- 1.36 The procedures for appealing assessments of Contract Work are set out at paragraphs 4.35 and 6.68 to 6.87 of the 2010 Standard Civil Contract Specification

## **Section 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 2010 Standard Civil Contract other than the direct provision of legal services to a Client.
- 2.2 Expenses which may be classed as overheads of the contracting Supplier 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 3.36 in relation to photocopying charges. Whilst courier fees are listed in paragraph 6.61 of the Specification as an overhead, 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 2010 Standard Civil 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 supplier 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 Valks. 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 supplier. Regardless of the benchmarks below in respect of what time may be allowed in respect of preparation, suppliers 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 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 documents 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

**Point of principle CLA6** states:

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

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

**Point of Principle CLA 7** states:

*“It is reasonable in medical negligence cases for the funded client’s solicitors to consider in detail copies of the medical records relevant to the issues in the case.”*

2.14 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.

2.15 **Point of Principle CLA 12** states:

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

In cases carried out under the 2010 Standard Civil Contract work is generally charged at a prescribed hourly flat rate, but the factors referred to in CLA 12 may be relevant to any claim for enhancement.

- 2.16 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.
- 2.17 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. It will be reasonable for fee earners, where the bundles are above average size, to check that the copies have been properly collated and reproduced.

## **Letters, Calls and emails**

### *Letters*

- 2.18 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 payment schedule 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).

- 2.19 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.

2.20 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.

2.21 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 principle as in paragraph 3 above, having regard to the contents inserted into the standard template.

2.22 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.

2.23 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***

2.24 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.

2.25 Calls may be disallowed in a similar way to routine letters because e.g.:

- (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.

- 2.26 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.
- 2.27 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.
- 2.28 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***

- 2.29 Where an e-mail or fax is sent instead of a letter then it can be allowed as a letter on normal principles. A printout of the e-mail or fax must be kept on file. No separate claim can be made for sending a hard copy e.g. of a letter sent by e-mail or fax as no extra preparation time is involved. The assessor may in his or her discretion allow an actual time charge for preparation which properly amount to attendances provided that the time taken has been recorded.
- 2.30 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.
- 2.31 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.

### **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 supplier 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 against the CLS fund any more than they would be on an inter partes detailed assessment (see paragraph 1.8). Further, it should be remembered that, in Licensed Work, if the funded client is requiring the proceedings to be conducted unreasonably or in such a way as to incur unjustifiable expense to the fund, the fee-earner is under a duty to report this to the Commission (rule C44 (i) Funding Code Procedures) who may consider withdrawing funding. Where a fee-earner fails to do this 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 5 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

However, time spent in routine supervision of one fee earner by another should generally be considered part of the supplier'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 suppliers 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 supplier 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 supplier, other than as allowable under paragraph 2, 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 the 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.

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, e.g.

- (a) court applications, other than those that are straightforward;
- (b) conference with counsel;
- (c) interviewing a witness where the fee earner will wish to test the witnesses 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

it may be reasonable for the fee earner to travel. The reason for making the journey should be recorded on the file.

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 6.61(c) of the 2010 Standard Civil Contract 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 supplier. This will need to be determined on the facts of any particular claim. Clients will be able to obtain details of their nearest specialist providers from CLA. 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 Funded Client***

2.47 Usually, the funded client will be expected to attend the fee earner'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 funded client is house bound or may be being detained in prison or in hospital. Reasonable travelling time and disbursements may be reimbursed in these circumstances, subject to the above contract provision. This will include travel to a client before a Legal Help form is signed, where justified under the Contract Specification, provided the client subsequently signs the Legal Help form and is confirmed as eligible for funding. 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 2.7 and 2.8 of the 2010 Standard Civil Contract 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 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. If agents are instructed, London rates are payable where the agent is based within the Commission'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 2010 Standard Civil Contract and regulations. Counsel's fees must be charged as such, either under the family graduated fee 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 barristers may generally be expected to be fully prepared before the hearing, but sometimes, it may be more convenient for the fee earner or barrister to arrange a conference at court prior to a hearing than at their offices or chambers at a different time. Where further documents or evidence are served at the last minute it may 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. If the parties are still in discussion at the time of the hearing, however, 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 Commission (see further paragraph 6.61 (a) of the Specification).

2.59 Under the General Civil Contract Specification the time was not claimable for completion of the Legal Help form Controlled Work 1. At that point, the client has not been assessed as eligible to receive the public funding service before its completion and no funded level of service is in place in respect of that matter. However, under Paragraph 3.12 of the current Contract Specification, where the form is signed in the course of an interview, and it is confirmed that the client is eligible for funding, a claim for time from the beginning of the interview may be made. Under Paragraph 3.29 of the Specification work telephone advice given before the form is signed is also claimable, provided the client does subsequently sign the form and is confirmed as eligible for funding. Accordingly, where the client is confirmed as eligible for funding, time spent in completing the Legal Help form should no longer be disallowed.

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 devolved, telephone or faxed application grant of funding, 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 funding or reports a devolved grant of emergency funding. 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 Time may also be claimed for completion of forms Claim1, Claim2 and Claim4. For forms Claim1 and Claim2 this will normally be 12 to 18 minutes; for a Claim4, 6 to 12 minutes should be sufficient. This includes cases where a Claim1 is submitted following detailed assessment of the costs by the court. Where the bill of costs is prepared with the Claim1 for assessment by the Commission, further allowance is likely to be appropriate. The time spent in completing a Claim1A and Claim4A in relation to section 31 care proceedings can only be claimed separately where the claim is accepted as an exceptional case; otherwise it is covered by the Standard/Graduated Fee. Where allowable, the time standards for Claim1 and Claim4 will apply.

- 2.62 Otherwise, completion or assistance with completion of means forms is not normally claimable. This is not legal work, but compliance with the requirements of the 2010 Standard Civil Contract in respect of provision of services only to clients who are financially eligible. Information on means, further, is usually that of the client. 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 means 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 public funding. Care must be taken to ensure that the fee earner does not assume responsibility for the statement of the client's means.
- 2.63 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, an example being applications for Disability Living Allowance.

## **Section 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.
- 3.2 Under Funding Code Criterion 1.3 the Commission can specify what disbursements can be charged under any level of service. See Paragraph 4.21 of the Specification in relation to Controlled Work and section 2.5 of the Funding Code Guidance in relation to Licensed Work. For residential assessments and other disbursements specifically excluded from funding, see the guidance on prior authorities on 2 the LSC Website.
- 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 6.61(c) 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 payment will be limited accordingly.

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

- 3.6 A disbursement does not include costs which are overheads of the firm or to be borne by them by way of some professional obligation. The Equalities 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 Commission. 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 Commission. 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 Commission 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**

- 3.7 Where an agent undertakes work that is otherwise fee earner work, this 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)
- 3.8 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?
- 3.9 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**

- 3.10 Generally, the questions that will arise are:
- (a) was there a reasonable need for the journey;
  - (b) was the appropriate form of transport used.
- 3.11 Most travel will be to court, to counsel for a conference, to take statements from witnesses, to inspect the scene of the incident or to see the client. All these have been dealt with elsewhere when considering the time spent.
- 3.12 These expenses are generally to be allowed at the actual expense 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.
- 3.13 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 e.g. 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.
- 3.14 Paragraph 4.16 of the Practice Direction to Rule 43.4 CPR 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 allow 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. Further, of course, the costs of taxi travel will be claimable within the 10 mile radius, where justifiable under paragraph 4 above.

- 3.15 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, however, the more money spent on an air ticket, the greater degree of flexibility is purchased in terms of late booking facilities, flight availability and refund on cancellation. 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.
- 3.16 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. All expenses of £20 or more (excluding mileage) must be substantiated by the relevant disbursement voucher or an explanation why it is not available on the claim or on file. If prior authority has been obtained to cover the expense, then the voucher and a copy of the authority must be available but there is no need to justify why the expense was incurred, unless the amount exceeds the prior authority given.

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

- 3.17 The cost of overnight accommodation should only be allowed in the exceptional circumstances that the assessor is satisfied that an attendance at a distance is justified and that the need for an overnight stay is justified. This would involve so much travelling that it would be unreasonable to undertake the travel and attendance in a single day or such a long attendance that travel and attendance in a single day would be unreasonable.
- 3.18 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.

### **The Congestion Charge**

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

### **Client's Travelling Expenses**

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

### **Funded Client's travel costs to attend experts**

- 3.23. *R v. Legal Aid Board No. 15 Area Office (Liverpool) ex parte Eccleston* [1998] 1 W.L.R. 1279 says that the Commission does have power to grant prior authority for a funded client's travel expenses to see an expert, where the report is essential for the proper conduct of the proceedings, and the funded client cannot afford the expense involved in travelling to the expert.
- 3.24. In Licensed Work cases, where this issue is more likely to arise, prior authority applications will be made under Paragraph 5.25 of the 2010 Standard Civil Contract Specification, for costs that are either unusual in nature or unusually large. Whilst the amount requested is unlikely to be unusually large, the fact that the request concerns a personal expense of the funded client may arguably make the expense unusual in its nature.
- 3.25. 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 against the CLS fund.

3.26 In his judgment, Mr Justice Sedley determined that the client must be “impecunious” and that the expense must be necessary “in order to make or keep the case viable”. When considering an application for prior authority in connection with such expenses the following criteria should be applied:

- (a) It must be demonstrated that the expenditure is necessary to keep the proceedings viable. In other words the test is that the litigation would not be able to continue or would fail unless this expense is met;
- (b) The funded client must establish that he or she does not have the resources to meet the expense. The fact that a litigant is in receipt of public funding does not automatically satisfy the test of “impecuniosity”. The funded client should provide a full breakdown of weekly income and outgoings, together with capital resources, to demonstrate that he or she cannot afford to meet the particular expense. This test will be more difficult to satisfy where the amount is small, although each case should be determined according to its individual circumstances;
- (c) If the expert is based locally, then it would not generally be reasonable for the funded client to seek financial assistance from the Commission to attend the appointment. This is akin to a visit to the funded client’s own provider’s office. An application for prior authority or payment should generally be refused in these circumstances unless the funded 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 funded client could not be seen promptly locally (provided that the funded client and his or her fee-earners were not responsible for the delay in instructing an expert). The nearest expert with appropriate

expertise should be used e.g. it is not necessarily justified to use a London expert in a Manchester case if an appropriate expert is available in Liverpool;

- (f) The funded client must justify why he or she needs to attend the meeting with the expert; e.g. if a physical examination is necessary then clearly it would be reasonable to do so;
- (g) The applicant must provide a full breakdown of the proposed expense;
- (h) Any available alternative sources of funding should be considered;
- (i) The proposed expenditure must be proportionate in relation to the issues in the case.

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

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

3.28 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.

3.29 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.

3.30. 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 e.g. because the hearing was an interlocutory hearing where the client's presence was not strictly necessary, then the disbursements would not normally be allowed.



3.31 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**

3.32. The Commission has implemented the European Directive on Legal Aid [13385/02]. This Directive applies to 'cross-border' disputes which are cases where one party to proceedings in England and Wales, resides outside of that area. 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.”*

3.33 In terms of travelling costs, the test is the same as set out in paragraph 15 in that the client's presence at Court must be necessary in order to make or keep the case viable.

- 3.34 In a cross-border dispute, the costs of travelling to experts will be subject to the test in Eccleston (i) – see paragraph 3.26, except that the Commission will not require impecuniosity to be shown.
- 3.35. 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 Commission will meet the translation/interpretation expenses where necessary and subject to reasonableness in amount.]

### **Photocopying**

- 3.36 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 Rule 6.61 (f) of the 2010 Standard Civil Contract Specification, as these costs are considered part of office overheads.
- 3.37 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. 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.
- 3.38 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**

- 3.39 The 2010 Standard Civil Contract Specification contains restrictions on the charges made by experts that can be claimed from the Commission in Contract Work. Paragraph 4.24 prohibits claims in respect of separate administration charges or cancellation fees where more than 72 hours notice is given of the cancellation. Paragraph 4.27 limits claims in respect of an expert’s travelling costs to 45 pence per mile and travel time to £40 per mile. By virtue of Paragraph 6.63 these restrictions apply to Licensed as well as Controlled Work cases.

## Section 4: VAT

- 4.1 This section deals with general issues of Value Added Tax (“VAT”) as it affects the Commission and claims made by its providers for work done. VAT is a complex tax so this overview is very limited in scope. A full guide has been published by the Law Society and can be accessed at their website [www.lawsociety.org.uk](http://www.lawsociety.org.uk) following the “Tax Law” and “Law Society VAT Guide” links.
- 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 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 usually registered for VAT and provide a service in respect of their business for profit. 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 £17.50) added making the total the client is due to pay £117.50. The rate of VAT is due to rise to 20% in January 2011.
- 4.4 All services (whether Legal Help, Help at Court or Legal Representation) provided by the provider in a publicly funded case are supplied to the client. As they are supplied to the client, the client is the recipient of the service 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, but that will be unusual in proceedings under the Access to Justice Act.
- 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 (Value Added Tax 1994, Section 5(2)). Whilst there must be a link between the service and the payment for those services, the payment itself does not have to come from the recipient. In publicly funded cases, the fact that the Commission pays the 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 straight forward. There are however a number of more complex issues which need to be borne in mind when calculating the exact value of the supply.

## **Disbursements and expenses**

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

- (a) a costs incurred by the 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. Examples of such expenses are; the provider's travelling expenses; postage; and telephone charges. . CPR PD 44 confirms this approach.

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 be 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 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:**

- (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) land registry postal search and registration fees;
- (d) land charges postal search and registration fees;
- (e) court fees;
- (f) witness fees;

- (g) sheriff agent fees;
- (h) oath fees paid to a solicitor or Commission for Oaths.

4.16 Because of uncertainty as to the treatment of some disbursements, in particular in relation to experts' reports and interpreters' fees, the Commission would advise providers to contact their HMRC office where they are in doubt how to account for VAT.

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

- 4.17 The providers have two options. The first would be to pass on the cost of the disbursement to the client as a VAT inclusive amount (if taxable) and excluded from calculating any VAT due on the main supply of legal services to the client. The provider cannot reclaim the input tax on the supply.
- 4.18 Unless that invoice for the disbursement is addressed directly to the client, the client is also prevented from reclaiming input tax as he does not hold a valid VAT invoice.
- 4.19 Generally it is only advantageous to use this method of treating a disbursement if no VAT is chargeable on the supply by the third party where the client is not entitled to reclaim the VAT. This generally happens in publicly funded bills except where the client can reclaim. Those circumstances are limited to where the proceedings were brought in the course of the client's business.
- 4.20 Alternatively, services can be treated as supplied to and by the provider under Section 47(3) of the Value Added Tax Act 1994. 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?**

- 4.21 Page 6 of the CLSCLAIM1 and pages 4 and 7 of the CLSCLAIM2 contain boxes for providers to detail disbursements incurred. The first box described as "disbursements subject to VAT" covers those costs incurred which are truly part of the provider's integral service. These must be entered here with VAT amounts even if no VAT has been charged e.g. travel expenses and interpreters fees. This box should also be used for disbursements which are "true disbursements" where VAT has been charged e.g. experts reports. The second box described as "disbursements not subject to

VAT” is for those items which would not form part of the integral supply “true disbursements” e.g. court fees, search fees and also expert reports where no VAT is paid because the expert is not VAT registered.

### **Counsel’s fees**

4.22 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’s VAT invoice may be amended by the name and address of the client and inserting per before the agent’s own name and address. The fee note from counsel can be recognised as a valid VAT invoice in the hands of the client. Equally for counsel it is the client’s VAT status that is relevant.

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

4.23 Where the services are provided to a client who is considered to reside overseas, VAT is not chargeable if the client resides outside the EU. It should be noted however that supplies in relation to land are always chargeable.

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

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

### **What is an “overseas client”?**

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

4.27 If an individual receives services for a non business purpose i.e. in their own personal capacity, they belong for VAT purposes where there have their “usual place of residence”. “Usual” place of residence does not have to mean permanent residence although length of stay is a factor.

4.28 Three factors determine “usual place of residence”. These are established in a Tribunal decision of US AA Limited (LON/92/19504) as:

- (a) where the person actually lives irrespective of homes and other countries;
- (b) where their family is; or
- (c) where their job is.

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

4.29 HMRC take the view that the legal services are supplied where the client belongs, i.e. where they have their place of residence. If the 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, e.g. an illegal entrant who is not an asylum seeker.

4.30 Once a person has been granted a right to stay, e.g. overseas forces, students attending university here, or self-employed nurses under contract, VAT applies as normal. In cases where the client is resident, e.g. services supplied to a resident sponsor, 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.

4.31 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 where that country is outside of the EU. Inside the EU, the service attracts VAT (where the supply is not for the purposes of any business activity of the client).

4.32 The tax point will be at the conclusion of the legal work 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 funded client changes their residence during its course, the bill or claim will be apportioned accordingly. 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.

4.33 As this is existing HMRC policy, although the policy was not matching common practice, providers may have previously over claimed VAT. The Commission is not, however, expecting providers to identify such cases and actively seek refunds until the Commission has established a



refund policy with HMRC. For all pending cases unbilled, and for all future work on or after 1 October 2005, VAT should not be charged.

- 4.34 Providers will need to be aware of their client's immigration status in order to know how to correctly treat the supply for VAT purposes. HMRC policy in relation to overseas clients is set out in VAT information sheet 07/05 (Clarification of place of supply policy) which is available at [www.hmrc.gov.uk](http://www.hmrc.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 In business cases, VAT paid can be offset as "input tax" where the proceedings relate to the business. Such cases are extremely unusual under the Access to Justice Act 1999, but may be funded where, for example, there are serious allegations of abuse of position by a public authority. If the business client wins the case and gets a costs order against the losing party, the paying losing party will pay net of VAT (i.e. not pay VAT) on the costs order. It remains the Commission's responsibility to pay VAT on the legal costs incurred.

#### **Changes to VAT rates**

- 4.36 Funded 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 based on the rate in force at the conclusion of the case (not including the billing process). This will not apply to VAT that has been charged on a true VAT disbursement before the rate change. 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. The Commission publishes detailed guidance regarding VAT rate changes on the LSC Website following consultation with HMRC.

## **Section 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 from the legal aid fund. 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 from the fund, subject to reasonableness and the views below as to what may be allowed against the Fund.

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, e.g. 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 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 change their client care letters to explain the law in this area 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 to the Fund, 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 (under the proposed new system for means-testing criminal legal aid).

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** against the fund. 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 has to also 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 Commission and is therefore **not claimable**.
- 5.14 If the reason is to do with collecting contributions under the proposed new system for means-testing 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 funding 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. Where however the client is a current client with the benefit of public funding, compliance with the order would be client specific.

## **Part B: Controlled Work**

### **Section 6: Funding Code**

- 6.1 Only work within the appropriate level of service can be paid for. In particular, the issue and conduct of legal proceedings is not permitted under Legal Help.
- 6.2 Work will not be paid where the appropriate Funding Code Criteria are not met. This applies both to merits on a continuing basis (e.g. sufficient benefit of the work at Legal Help) and, at the outset of the matter, financial eligibility. This reflects the fact that all aspects of carrying out Controlled Work are devolved to providers and that they, rather than the Commission, are the assessing authority for the client's means under the Community Legal Service (Financial) Regulations 2000.

### **Section 7: Exceptional Cases**

- 7.1 Matters that are initially subject to Standard or Graduated Fees will be assessed by the Commission where the provider claims the matter as an Exceptional Case on the basis that the costs, as calculated at hourly rates, exceed the relevant threshold. A claim for an Exceptional Case is made on form EC-Claim1.
- 7.2 In exceptional cases the time spent in preparing form EC-Claim1 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 not including the preparation of the EC-Claim1 do not reach the relevant Exceptional Case threshold, the costs of preparing the EC-Claim1 may not be used to qualify the matter as an Exceptional Case. Were such a claim to be received by the Commission, the costs of preparation of the EC-Claim1 would be disallowed as unreasonably incurred and the matter paid as a Standard or Graduated Fee (subject to Paragraph 8.46 of the Specification).
- 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 as an Exceptional Case, 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.

## **Section 8: Housing Possession and Homelessness Cases**

- 8.1 Under Section 7(c) of the Payment Annex to the Specification, 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 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 threshold for payment as an Exceptional Case
  - (ii) the amount payable for the matter if it is accepted as an Exceptional Case;
  - (iii) provisions relating to average costs per case in the 2010 Standard Civil Contract and Standard Terms.

There is no equivalent provision, however, to that under the Tailored Fixed Fee Scheme whereby an additional top-up fee (either or fixed amount or based on time incurred) could be claimed at the end of the financial year.

- 8.4 Note that the higher rates in Section 7(c) of the Payment Annex have no impact on the level of the Fixed Fee or Exceptional Threshold, which are as set out for all Housing work in Section 1 of the Payment Annex

## **Housing Possession Court Duty Scheme (HPCDS)**

- 8.5 Although participation in a HPCDS is restricted to providers holding an Exclusive Schedule, the rules under which the Schemes operate are contained within Section 10 of the 2010 Standard Civil Contract Specification and the payment rates are contained in section 6 of the Payment Annex to the Specification.
- 8.6 The HPCDS also has rules concerning Matter Starts that link to Controlled Work carried out under the main Specification. In particular, Paragraph 10.37 of the Specification prevents a claim being made under the HPCDS where a Matter Start in the Housing Category is opened for the client in respect of that case in the following 6 months.
- 8.7 Paragraph 10.37 should be read, however, alongside Paragraph 3.59 of the Specification. Where the possession hearing attended under the HPCDS resulted in an order intended to conclude the proceedings, such as a general adjournment on terms or a postponed possession order, any subsequent restoration of or enforcement action in the proceedings should be treated as a new case, such that both the HPCDS and Matter Start fixed fee may be claimed

## **Section 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, not on the basis of average increase in disbursements at the end of the financial year as under the Tailored Fixed Fee Scheme. All claims for disbursements are potentially subject to assessment. Details of disbursements incurred must be included in any claim for an Exceptional Case in form ECClaim1.
- 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 3.75 to 3.79 of the Specification.
- 9.4 The following Category Specific provisions of the Specification contain further rules as the use of counsel under Controlled Work:
- (i) Family – Not applicable



(ii) Immigration – Paragraphs 8.74, 8.95, 8.96 to 8.97, 8.103 an 8.105 50 8.107

(iii) Mental Health – paragraphs 9.43 to 9.45.

## Part C: Licensed Work

### Section 10: The Funding Certificate

#### General

- 10.1 The funding certificate, and any amendments, are conclusive as to what work the provider/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, e.g. as to implementation/enforcement, is only covered to the extent specified.
- 10.3 The certificate may, however, be limited as to steps in the proceedings, particular parties or to certain work, e.g. obtaining an opinion from counsel. If it is limited, payment will not be made out of the Community Legal Service Fund for work done outside the limitation. Providers should be aware that work done outside of the certificate cannot be paid for by the funded client or anyone else on the client's behalf (s.22(2) Access to Justice Act 1999 and Paragraphs 1.45 to 1.49 of the 2010 Standard Civil Contract Specification) save in the limited exceptions set out in *Littaur v. Steggles Palmer* [1986] 1 WLR 287.
- 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 5.25 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, apart from the exceptions set out in C35 of the Funding Code Procedures (in particular, no client should generally have more than one certificate for private law family proceedings).

- 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 funded client. Joint certificates cannot be issued. In the case of a minor or a person under disability although a litigation friend or child's guardian may be named in the certificate the funded client will be the minor or person under disability.
- 10.9 The 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 certificate can be carried out by any Caseworker within the provider's office.
- 10.11 The Commission's computer system determines the individual proceedings within each action, cause or matter. Each certificate issued will set out for each of the proceedings a scope limitation for the work authorised to be undertaken as well as a costs limitation on the costs to be incurred in respect of such work authorised.
- 10.12 It is essential that both fee earner and counsel ensure the certificate covers all the work that needs to be done for the funded client. All certificates contain a limitation and it is particularly important to ensure the work to be done is within the limitation, if payment is to be made. The Standard Terms of the 2010 Standard Civil Contract (30.17) oblige the provider to check the certificates issued.
- 10.13 Generally if the wording is incorrect or not in accordance with the needs of the funded client, it will affect:
- (a) provider and counsel, who will not get paid for work outside scope;
  - (b) the funded 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 against the Community Legal Service Fund.

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

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

10.15 Subject to the specific exceptions set out in paragraph 17 below, payment will not be made out of the fund for any work done in advance of the date from which the certificate takes effect or after the date of its discharge or revocation (as being outside the scope of the certificate). Note, however, that work carried out following a devolved, telephone or faxed application grant of funding, including the completion of forms reporting the exercise of devolved powers and applying for a substantive certificate, will be within the temporal scope of the certificate. Further, since certificates are issued with effect from a particular date, but not a particular time, work carried out before the actual exercise of devolved powers but on the same date will also be within the temporal scope.

10.16 With the introduction of devolved powers for Licensed Work in Special Children Act proceedings, point of principle CLA 39, which allowed for work to be claimed for three days before the date of the certificate in those proceedings, is no longer of relevance.

10.17 In respect of work carried out after the date of discharge of the certificate, the following exceptions apply:

- (i) The retainer between a funded client and provider determines upon receipt of a notice of revocation or the notice of discharge of a certificate. The retainer will determine immediately or, if an appeal has been brought which has been dismissed, it will determine after receipt of the notice of the dismissed appeal. If proceedings have been issued, the provider retainer does not determine until the fee earner has served the appropriate notice under Rule 56.5 Funding Code Procedures (Regulation 4 Community Legal Service (Costs) Regulations 2000). Therefore the provider will be entitled to be paid for lodging and serving the appropriate notice, once the certificate has been revoked or discharged.
- (ii) Any work reasonably done pending the dismissal of the appeal against discharge or revocation 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, the discharge or revocation may be rescinded and therefore work done in the intervening period will be remunerated as if the

discharge/revocation never happened. If the appeal is unsuccessful the discharge/revocation period cannot generally be paid for and only the work done in relation to the exceptions above will be allowed.

- (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 discharge was applied for.
- (v) Closing letters to the client and other interested parties will also be claimable following discharge or revocation.
- (vi) Preparation and checking of a bill of costs and the costs of detailed assessment proceedings are payable under the certificate. Further, time spent completing forms Claim1 and Claim2 may be claimed under the certificate.
- (vii) Time may be claimed for work in correcting a certificate after discharge or revocation to correct a mistake on the certificate.

## **Forum**

10.18 Where a certificate specifies the forum for proceedings then that forum must be used. Certificates covering private law proceedings under the Children Act 1989 may contain a condition as to the court in which proceedings are to be commenced. Where a certificate is silent proceedings may be taken either in a Family Proceedings Court, county court or the High Court. Point of Principle CLA44 States:

*Where a legal aid/public funding certificate contains a limitation that proceedings are to be issued in the Family Proceedings Court but the proceedings are in fact issued in a different Court then no costs relating to the issue or conduct of the proceedings may be paid by the Commission as these would be outside the scope of the certificate granted. Solicitors must check the limitations on the certificate and seek an amendment if they wish to act outside them.*

This Point of Principle technically remains valid notwithstanding the fact that remuneration rates for providers within the family proceedings court and county court have been harmonised for all types of family proceedings. However, it will now be unusual for a certificate to be limited to the Family Proceedings Court in that way.

10.19 Where the funding certificate specifies proceedings in a county court it will not, unless amended, cover proceedings after a transfer to the High Court. If the funded client wishes to transfer the proceedings to the High Court then an application for an amendment must be made to the 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 certificate should be made immediately after the order transferring the proceedings. In the absence of an amendment the certificate will not cover any subsequent work.

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

## **Section 11: Costs Limitations**

### **General**

11.1 Costs limitations are imposed on all certificates issued under the 1999 Act by the express authority of C33 of the Funding Code Procedures. Providers only have cover to carry out work up to the costs limitation imposed. The limitation limits the costs to be incurred under the approval/certificate to a figure including disbursements and any counsel's fees but excluding VAT.

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 a certificate that is relevant for assessment (Rule C38.2 Funding Code Procedures). 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 Commission. Any claim for costs must be submitted in accordance with the final costs limitation of the certificate. Irrespective of the sum of costs on the assessment certificate the fund's liability does not exceed the final costs limitation imposed and the Commission will not pay in excess of that limitation (Clause 30.17 2010 Standard Civil Contract Standard Terms and Paragraphs 6.57, 6.64 and 6.65 of the Specification).

11.4 Claims for costs for assessment by the Commission may be submitted in excess of the limitation, 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 6.44 of the Specification).

#### **Procedure on Assessment**

11.7 The procedure would normally be for costs to be assessed in the usual way, and the costs limitation imposed at the end of the assessment by disallowing the amount of costs in excess of the limitation. Alternatively, the assessment could end at the point that costs have been allowed up to the final costs limitation. 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 (and therefore not recoverable inter partes) by virtue of having been conducted outside of the costs limitation 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 is a restriction on final payment from the CLS fund;
- (ii) accordingly, where a bill exceeds the final costs limitation, it is not the costs at the end of the case that are specifically outside of the limitation any more than the costs of any other part of the case;
- (iii) however, the restriction of costs to the final costs limitation is properly a part of the assessment, by either the court or the Commission, itself, and not a separate deduction or penalty following that assessment.

#### **Recovery of Costs Between the Parties**

11.8 Paragraph 1.50 of the Specification places it beyond doubt that the indemnity principle does not apply to costs limitations. A costs limitation on a certificate protects the client and the fund. It does not however, inhibit costs recovery between the parties. A successful funded client may recover costs from the paying party in excess of the final costs limitation imposed.

#### **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 certificate and for ensuring that the costs are kept within the financial limitation imposed.

11.10 In general, if the total of counsel's fees and the provider's costs exceed the costs limitation, counsel will 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 Commission 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, 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 Commission 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 £2,500.
- 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 from the fund is £2,500. The payment made would be £1,000 to counsel and the balance of £1,500 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 £2,500 and the provider nothing. Additionally, counsel could seek an indemnity for his or her loss of £500 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 £2,500 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, and determine whether the cost benefit aspect of the Funding Code Criteria continue to be satisfied. It is good practice for the outgoing provider promptly to provide the incoming provider with details of costs incurred. After obtaining an amendment, if, on assessment, there is a shortfall because of the costs limitation which is due to a failure of the first provider, the shortfall should be met out of the costs of the first provider.

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

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

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 certificate are likely to exceed the highest limitation.

### **When to Apply for an Amendment**

11.17 An amendment should be applied for when the future work to be done is likely to exceed the costs limitation imposed. Any decision to amend must be based on whether it is justifiable. Regional offices will, when considering amendment requests for future work, make a decision as to the reasonable level of costs to be incurred for that work in relation to the scope of the certificate.

11.18 An increase will not be granted merely because the existing limitation has been exceeded. Any decision to increase the cost limitation in order to cover costs incurred in excess of the existing limitation (sometimes, wrongly, referred to as retrospective amendment) must be exceptional. Particular considerations are:

- (i) there is no provision for amendment of certificates after their discharge or revocation (the Commission will in any event discharge a certificate after assessing a final bill), save for the implied power to correct an error on the certificate. Accordingly any application to amend the costs limitation at the end of the case must be made before discharge or costs assessment when the certificate will be final.

- (ii) Regional offices will exercise their discretion on the facts of each case. A retrospective amendment is more likely to be granted where costs were incurred by events outside of the provider's control. In any event all requests for extension should be made in a timely manner. If a provider exceeds the limitation by reason other than the circumstances of the case, or the request for amendment is made many months later or on preparation of the bill of costs, the amendment is less likely to be granted.
- (iii). Some examples of when it may be reasonable for such an amendment to be granted are:
  - (a) urgent injunction work requiring weekend work when the regional office is closed:  
or
  - (b) during the final hearing or up to five days prior to its commencement;
    - (i) unexpected witnesses appear;
    - (ii) issues which were thought to be agreed turn out not to be agreed;
    - (iii) witnesses take longer than estimated to give their evidence;
  - (iv) large amounts of unexpected new evidence are received from the opponent;
  - (c) it becomes clear the hearing will last for longer than estimated.

11.19 Note that, in preparation for the introduction of Delivery Transformation, provision is made within the Contract Specification (Paragraph 6.67) for certificates to contain separation limitations in respect of counsel's and experts' fees. Paragraph 6.91 of the Specification allows the Commission to introduce provision for counsel and experts to claim their fees directly from the Commission,

## **Section 12: Enhancement of Costs**

### **General Discretion**

12.1 It is, in the first place, 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 particular rely to justify either the need

for enhancement or the level sought, or other factors that might not otherwise be obvious to the assessor. However, the assessor in any event has a duty to consider whether, on the evidence before him or her, whether any enhancement claimed is justified.

12.2 The code for the enhancement of bills is contained in Section 6 2010 Standard Civil Contract Specification (Paragraphs 6.15 to 6.20 ). The Specification provides a fixed level of remuneration that may be increased by up to 100%. In civil non-family proceedings only, the rates may be increased potentially by up to 200% in a High Court, Court of Appeal or Supreme Court case. The Specification provides a two stage process.

12.3 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 6.16) 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 of this, 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 6.18) to:

- (a) the degree of responsibility accepted by the fee earner;
- (b) the care, speed and economy with which the case was prepared;
- (c) the novelty, weight and complexity of the case.

12.6 Under the Specification, enhancement applies only 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 7.19 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 the Commission may look to are given below.

12.8 In relation to the threshold test, the case or relevant must be viewed as exceptional in one of the ways referred to in Paragraph 6.16, the comparison suggested by Paragraph 6.20 being with the generality of funded 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 6.16:

- (a) 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, seriously mentally ill or otherwise very vulnerable. To some extent, enhancement under this limb may reflect the fact that prescribed rates make no allowance for more senior grades of fee-earner. Providers may wish to emphasise the experience of a particular fee-earner to identify or support a claim for enhancement, although this will be neither necessary nor sufficient in itself to satisfy this limb, which expressly refers to the work carried out.
- (b) 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 hearing where the client is a defendant.
- (c) 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 be considered to fall under this limb, or particular work may be considered under 6.16(b), above.

12.9 In relation to the level of enhancement, within the limbs of Paragraph 6.18 there are a number of possible factors:

- (a) 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) 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 the same considerations as in paragraph 9(b) above;
  - (iii) Economy: enhancement under this provision will reflect a reward for the provider for claiming less time or 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) 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 or other material or the number of issues arising, or to, the importance of the case to the client, as discussed above;
  - (iii) Complexity is discussed at paragraph 9(c) above

- 12.10 Enhancement is likely to be allowed at higher levels the more of the above seven factors are present in the case and the more strongly any of the factors are present. The fact that enhancements are capped at 100% in proceedings below the High Court and otherwise 200%, does not mean that these maximum enhancements are only payable where all the above factors to be accepted as present within the case or work. A maximum enhancement could be payable on the basis of one factor alone where this 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 public funding 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 Whole Or Part**

- 12.12 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 will be preferable. 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 Clinical Negligence cases**

- 12.13 Solicitors can be members of the Law Society's Medical Negligence Panel. While this is a relevant matter in considering enhancement, **Point of Principle CLA 21 (amended)** states:

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

*Factors which may indicate whether a clinical negligence case was conducted with exceptional competence, skill or expertise, so as to justify an enhancement under Regulation*

*5(1)(a) of the same Regulations, include: the extent to which the solicitor relied on his or her own expertise rather than counsel; and whether the solicitor him or herself has obtained the client's medical records, identified and assessed the relevant contents, and following that analysis, sent a detailed letter of instruction to the client's medical expert or experts."*

## **Section 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 is explained in section 5.2 of the guidance on Authorities on the website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk).
- 13.2 Rules on payments to counsel are contained in paragraphs 6.88 to 6.92 of the Specification. Counsel's fees are subject to assessment by the LSC or the court but fees due to counsel are generally paid directly by the LSC.

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

- 13.3 Prior to the introduction of the Civil Procedure Rules, no fee could be paid to counsel attending in the High Court in chambers, in the county court on an interlocutory hearing or where multiple counsel were used unless the court certified the case as "fit for counsel".
- 13.4 CPR 44.8.7 now provides that on detailed assessment the costs judge should have regard to any order of the court which expresses an opinion as to whether or not the hearing was fit for the attendance of one or more counsel. The court is unlikely to make an order unless:
- (a) expressly asked by the paying party;
  - (b) more than one counsel appeared; or
  - (c) the court wishes to record that the case was not fit for counsel.
- 13.5 The court will always express an opinion where more than one counsel appears. Assessors should ensure they have sight of such orders. If counsel's fees are not to be allowed, there should be a notional assessment of the costs as if the solicitor/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 Commission will follow this principle. If the court order expresses an opinion it will be considered on assessment.

### **Entitlement to instruct counsel**

#### ***High Court and County Court***

- 13.6 There are specific restrictions on the use of counsel in the Specification. In the High Court and county court, (in both civil and family proceedings) Paragraph 6.61(e) provides that unless there is specific authority in the certificate, or an authority has been given by the Regional Director, a Queen's Counsel or more than one counsel shall not be instructed.
- 13.7 No counsel's fees should be allowed in these circumstances unless the appropriate authority has been given, except that a QC's fees will be allowed at junior rates. This does not, however, prevent counsel's fees being recovered on an inter partes assessment.
- 13.8 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 not recovered inter partes, and of the client's acceptance of this.
- 13.9 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 on the LSC Website.

#### ***Terms of the authority***

- 13.10 It is also important to ensure that the instruction of counsel, where authority is required, is strictly in accordance with the terms of the authority given. 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, see **Point of Principle CLA 1 (amended)**:

*"A certificate bearing a limitation containing the words 'Limited to obtaining counsel's opinion' covers the obtaining of one opinion only (which may follow a conference). Work done by a solicitor to clarify a genuine ambiguity in the opinion itself could, however, be allowed. If at the time of receipt of counsel's written opinion, counsel is not in a position to advise on the settling of proceedings no*



*further work can be carried out until the limitation is removed or amended to allow either a further written opinion from counsel or further work by the solicitor.”*

- (b) authority to instruct a Queens Counsel does not cover a senior junior;
- (c) an authority for ‘briefing counsel’ covers only:
  - (i) attendance at the trial;
  - (ii) a conference after delivery of the brief;
  - (iii) preparation of a skeleton argument (certainly in an appeal or in the Court of Appeal and where reasonable in any court) *Din v. Wandsworth LBC (No. 3)*.
- (d) an authority for ‘instructing counsel’ includes any instructions to or briefing of counsel after the date of the authority;
- (e) an authority for ‘instructing leading counsel alone’ will cover work normally done by a junior such as settling court documents.

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

### **Quantum of Counsel’s Fees**

#### ***General***

13.11 Subject to the rules for Fast Track Trials, Counsel’s fees in civil and family law cases are ‘at large’, i.e. at the discretion of the assessing officer. Payment of counsel for attending an interlocutory hearing or a trial is by way of Brief Fees and Refreshers.

#### ***Fast track trials***

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

<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	£1035

More than £15,000

£1650

13.13 If the advocate acts for more than one party only one award is made (CPR 46.4). The court cannot award more or less than these fixed costs unless it decides not to award any fast track costs or CPR 46.3 applies and the court awards an additional £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 of an issue. These additional costs cannot exceed 2/3rds 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.

***In the Multi Track***

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

- (a) all preparation for the trial;
- (b) travelling time and expenses to the first day of the trial (except for junior counsel in Family Remuneration Regulation cases);
- (c) overnight expenses for the first day of the trial;
- (d) waiting time on the first day;
- (e) negotiating, discussions with the provider and conferences at court on the first day.

13.15 The brief fee also includes, where relevant or appropriate, the preparation of a note of the judgement, transcribing such a note and submitting it to the judge for approval, revising it and providing any necessary copies; however an additional fee may be charged for attending on a later day when judgement is not given at the conclusion of the trial

13.16 The brief fee should reflect all the work that is necessary to ensure that the client is properly represented. This can include more than simply appearing in court. There may be meetings of counsel to agree strategy and tactics, meeting with experts, and preparation of final submissions. In publicly funded cases it is proper for counsel's clerk to reflect such work after the event in the brief fee.

*Loveday v. Renton and Anor (No 2) [1992] 3 ALL ER 184* – an important case in discussing the nature of brief fees at least in very complex actions.

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

#### ***Refresher fees***

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

#### ***Quantum***

- 13.19 Unfortunately there is little specific guidance as to the assessment of the proper brief fee. The points made in *Re H* 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.
- 13.20 Guidance for junior counsel’s brief fee for those hearings that last up to one hour and for those lasting up to one day can be found in the Guidance on Summary Assessment as published by the 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] 1 All ER 698*.
- 13.21 Travelling time or expenses are not allowed in addition to the brief fee except in Family cases.

## **Section 14: The Commission's Assessment Limits**

### **General**

14.1 Paragraph 6.39 of the 2010 Standard Civil Contract Specification provides that, subject to the general discretion of the Director, Licensed Work costs will be assessed by the Commission in cases not involving an inter partes detailed assessment. Until further notice, however, this discretion will be exercised such that the procedure for assessment will remain essentially as under the previous Specification. Costs will be assessed by the Commission or the Court according to: whether proceedings have been issued; if so, in which court proceedings have been concluded; the level of costs being claimed requiring assessment ('assessable costs'); whether there is an order for inter partes costs in favour of the funded client; and other special factors. The current assessment limit remains £2,500.

14.2 Assessable costs as costs that are claimed from the Community Legal Service fund other than by way of any Standard or Graduated Fee. In all cases currently governed by this Guidance the 'assessable costs' will be total costs being claimed.

### **Proceedings not issued**

14.3 In any case where proceedings have not been issued, any assessment of costs must be by the Commission. There is no option for detailed assessment by the court.

14.4. For this purpose proceedings are commenced when a claim form is issued at court. Issuing a protective claim, therefore does constitute the issue of proceedings.

14.5 For judicial review proceedings, if an oral or written application has been made for permission, even if unsuccessful, this does constitute proceedings (*R. v. Darlington Borough Council, ex p. The Association of Darlington Taxi Owners* [1994] COD 424) and therefore if the costs exceed the £2,500 limit then the claim must be assessed by the court.

### **Magistrates' Courts**

14.6 Any bill in respect of proceedings that have concluded in the magistrates' or Family Proceedings Courts, regardless of the amount of the claim, must be assessed by the Commission. There is again no option for detailed assessment by the courts. Where a case has transferred from another court but concludes in the magistrate's court all the costs of the case will be assessed by the Commission in one exercise. This is a change to the position under the General Civil Contract, where costs incurred in the other court prior to transfer might have been assessed by the court.

- 14.7 By contrast, where a case started in the magistrates' court but concludes in the county court or High Court, the county court/High Court assessment procedure applies. There is no right to separate assessment of magistrates' court costs at the point of transfer. At the conclusion of the case the full costs of the case must be taken into account in determining whether assessment is by the Commission or the court.
- 14.8 Where assessment is by the court, the court will assess all the costs of the case in one exercise (including costs in the magistrates' court). This is again a change from the previous procedure in which the costs in each level of court were assessed separately.

### **County or Higher Courts**

- 14.9 Any bill for proceedings concluding in the County or Higher Courts, where the total amount of the claim for assessable costs does not exceed £2,500, must be assessed by the Commission. There is no option for detailed assessment by the courts.
- 14.10 All other claims for cases concluding in the County or Higher Courts where proceedings have been commenced and the total of the costs exceeds £2,500 should be submitted to the relevant court for detailed assessment (although see 14.13 below for exceptional circumstances).

### **Special Circumstances**

- 14.11 If proceedings have been commenced and the costs exceed £2,500 the Commission may decide, on the application of the provider or otherwise, to assess the costs where it considers that there are special circumstances, where detailed assessment would be against the interests of the funded client or would increase the amount payable from the fund.
- 14.12 This is a change from the position under the General Civil Contract, where such an assessment could be considered only at the request of the provider. However, the procedure will generally remain as before. Where a provider submits a bill for assessment by the court in accordance with the above provisions, or intends to do so, the Commission will not seek to direct that a claim be prepared instead for assessment by the Commission. The Commission will only consider carrying out an assessment of costs that may exceed the normal assessment limit without the request of the provider in exceptional circumstances, such as where, following an intervention into the provider, the file relating to the certificate cannot be found, and a notional assessment is required to pay counsel's fees or account to the client for money held.

### **Calculating the Limit**

- 14.13 When considering the £2,500 limit in Paragraph 14.1, above, , the total amount of the costs is calculated by the total claim being the profit costs of all providers, plus all counsel's fees and any disbursements but excluding VAT.
- 14.14 The cumulative totals refer to separate proceedings and different totals should be calculated for separate proceedings, e.g.. enforcement proceedings or pre-action discovery work.
- 14.15 Sometimes claims may be submitted which marginally exceed the limits on the basis that, following assessment, the costs will then be below the limit imposed in the Specification. Such claims will be rejected because the assessment limit relates to the costs as claimed not as assessed.
- 14.16 The costs limit relates to the proceedings so that in cases where the provider represents a number of clients and the costs are to be apportioned the limit is not per certificate but the total costs of the work done and to be assessed. For example: acting for two parties in proceedings where the total costs of the proceedings are £5,000 and if apportioned equally the costs per certificate are £2,500, the costs claims will be rejected by the Commission as the true costs are £5,000 and the assessment limit has been exceeded.

### **Inter Partes Costs**

#### ***Court Assessment***

- 14.17 Where a funded client is successful in proceedings there may well be an order for the other side to pay part or all of their costs. Costs payable by the other side are known as inter partes costs or costs between the parties.
- 14.18 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 from the fund. This is an exception to the normal £2,500 threshold for court assessment (paragraph 6.39(a) of the Specification).

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

- 14.19 Where inter partes costs have been agreed and recovered, the provider may claim their legal aid only costs from the fund (Paragraph 6.46 of the Specification). Regardless of the amount of the inter partes costs, if the total of the legal aid costs claimed is up to £2,500 then they must be assessed by the Commission, and, if they exceed £2,500, they must be assessed by the Court, as above.

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

- 14.20 From the Commission's perspective, an order for costs it 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, if within the £2,500 limit, the claim may be assessed by the Commission.
- 14.21 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.
- 14.22 With any other form of inter partes costs order in favour of the funded client, only the court can determine those costs if the parties have not agreed the figure between themselves.

## **Section 15: The Assessment Process**

### **Authority for Assessment of Costs against the CLS Fund**

- 15.1 The right to assessment of costs is governed by paragraph 6.36 of the Specification.
- 15.2 Where proceedings have been issued, the normal event giving rise to the right for assessment against the CLS fund 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 CPR 47.7.
- 15.4 Otherwise, whether or not proceedings have been issued, the discharge or revocation of the public funding certificate (after any appeal has concluded and service of any required notices by the provider) is authority for a public funding assessment.
- 15.5 If on receipt of a claim the certificate is undischarged and there is no order for assessment, the Commission can still assess the claim if the certificate is ready for discharge on non-contentious grounds, i.e. the case is concluded or the funded client consents to the discharge.
- 15.6 If, however, there is no discharge and the only likely grounds for discharge are contentious, i.e. unfavourable counsel's opinion or the provider is without instructions, the show cause procedure will be implemented and the claim returned to the provider with instructions to resubmit the claim when a discharge has been made.

- 15.7 Summary assessment under the CPR is not possible in relation to payment to providers from the CLS fund or under an inter partes order for costs where the receiving party is publicly funded (Paragraph 13.9 of the Practice Direction to CPR 44).

### **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 Commission 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 solicitors’/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 Payment Annex.
- 15.10 Under the 2010 Standard Civil Contract bill preparation time 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, bill preparation time 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 40(4) of the Community Legal Service (Financial) Regulations 2000, 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 6.44(b) of the Specification).

### **Time taken**

- 15.12 In the majority of cases that fall within the Commission’s assessment limit an allowance of 30 - 60 minutes will be appropriate. Where a greater time is claimed, the 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. Longer time will, of course, 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.



### **Costs recovery bills**

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

### **The Costs of Assessment**

- 15.14 Under Paragraph 6.41 of the 2010 Standard Civil Contract Specification detailed assessment proceedings are deemed to be proceedings to which the certificate relates, whether or not it has been revoked or discharged. The costs therefore are to be paid from the fund unless the court orders otherwise. The conducting providers may prepare and attend on a detailed assessment where necessary without requiring any amendment to the 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 6.42, however, 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 Paragraph 6.52(b) or (c).
- 15.16 Under Regulation 40(4) of the Community Legal Service (Financial) Regulations 2000 the costs of the detailed assessment proceedings do not form part of the statutory charge (nor those costs to which the funded client may be required to pay a contribution). This does not include the costs of drawing up the bill (see 15.13)
- 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 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 Commission to be claimed under the certificate. Allowance is made for the costs of the claim1 and claim2 as constituting bill preparation. No time may be claimed under the certificate for appeals against assessments by the Commission.

15.19 The allowance for checking a provisional assessment will only be allowable in the event that a provisional assessment has been made of the substantive costs and if included in a bill for assessment 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 Commission since no payment is allowable in respect of such assessments generally.

### **Late Claims**

15.20 Under Paragraph 6.36 of the Specification there is time limit of three months for assessment of bills by the Commission from the date of the right to claim accruing for submission, and for claims to be submitted in respect of bills assessed by the court.

15.21 Under Paragraph 6.38 there is now 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/her certificate has been revoked. After the 3 month period referred to in 6.36 the Commission 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 change to the Contract was made in order to limit delays in the Commission's being able to account to funded clients for monies owed to them or, in the case of revocation, to prevent the Commission's position on recovery from the client being prejudiced (*Legal Services Commission v Rasool* [2008] EWCA Civ 154) ..

15.22 More generally, , under Clause 14.5 of the 2010 Standard Civil Contract Standard terms, persistent submission of late claims may lead to contract sanctions or termination of the contract.

## **Section 16: The Funded Client's Rights on Assessment**

### **General**

- 16.1 Paragraph 8.36 of the 2010 Standard Civil Contract Specification confers certain rights on a funded 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 funded client has a financial interest if he or she has any contribution or if the statutory charge will apply to his or her case. If the question of the statutory charge may arise but has been undetermined, or if an assessment or reassessment of means is pending, then it should be assumed that the funded client has a financial interest.
- 16.3 Revocation of a certificate will also give the funded client a financial interest (Paragraph 5.30 of the Specification) since, under regulation 41(a) Community Legal Service (Financial) Regulations 2000, they are liable for the costs allowed.

### **The Funded Client's Rights**

- 16.4 The rights given to a funded client are that on any assessment, review or appeal he or she can make written representations to the Director 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 funded client with a copy of the bill of costs.
  - (b) To inform the funded client of their financial interest and their right to make written representations.
  - (c) To endorse on the bill whether or not the funded client has a financial interest, has been supplied with a copy of the bill and informed of their right to make written representations.
- 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 funded client's account will take place until the outcome of any costs appeal is known. The amount due after a provisional assessment by the Commission would be paid to the provider and, depending on the outcome of any appeal, the regional office 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 funded client, pursuant to Paragraph 6.60 of the 2010 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 appeals to the Legal Services Commission’s Costs Appeals Committee. I confirm that either 21 days have passed since the copy bill was provided to the funded client or the funded client has confirmed in writing (copy attached) the he/she will not be making any objections to the bill.”*

16.8 The Paragraph requires that the endorsement be on the bill, however, where the claim is to be assessed by the Commission it can also be by way of a covering letter with the costs claim

**Procedure upon receipt of written representations in Assessment by the Commission**

16.9 If written representations are received from the funded 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 funded client may:

- (a) relate to the conduct of the case, i.e. that costs had been wasted or that work was not reasonably done;
- or**
- (b) state that there is an inaccuracy in the bill, e.g. that work claimed was not actually undertaken.

16.10 Following assessment, the outcome will be confirmed to the funded client. They will be notified of their continuing rights on an appeal where the bill has been reduced and at the same time (if representations directly led to a reduction in the claim) the provider will be informed that written representations made by the funded client were taken into account in assessing the bill and a copy of those representations is attached.

16.11 If the provider goes on to appeal to a Costs Assessor, the funded client has similar rights but only if representations were made before the provisional assessment and the representations affected it. It is recognised that whilst there is no specific entitlement for the legal representative to attend on an appeal they are allowed to do so. The funded client must also be given an opportunity to attend, if they so wish.

## **Section 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 47.17(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 requesting a detailed assessment hearing.
- 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 publicly funded cases CPR 47.8 applies as if the Commission is the paying party.
- 17.4 Where delay is brought to the Commission's attention the Regional Office 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. Regional offices 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 Commission will make the application and the provider's costs will be at risk.

### **Appealing from Assessment of Costs**

- 17.5 In all cases except those where:
- (a) the bill was taxed before 26 April 1999, or
  - (b) the appeal is against a decision of an authorised court officer,

the provider needs permission under CPR 52.3 to appeal against a detailed assessment.

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

17.6 There is **no presumption that the provider will recover their costs from the Fund** 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 funding certificate: Paragraph 6.43 of the 2010 Standard Civil Contract Specification.

17.7 A provider who wishes to appeal against the detailed assessment of their costs in a funded 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 against the Fund, 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 now no presumption that the certificate covers the costs of the appeal, the client has no protection under Section 11(1) Access to Justice Act 1999 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 certificate.

17.9 If the court orders that the provider's and/or counsel's costs be paid out of the fund:

- (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 6.44(a) Specification.