

1. GUIDANCE ON THE USE OF AGENTS

This guidance is specifically designed with detained Mental Health clients in mind, although some of the more general points are applicable to all Civil contracts. It was written following the High Security Hospital (HSH) Equality Impact Assessment which was commissioned following complaints from providers who no longer hold HSH contracts and could no longer advise their historic clients.

Agents may be used by providers holding HSH contracts to enable clients to be advised by a solicitor, where that solicitor's firm does not hold a current HSH contract.

Providers are also permitted to use 30% of their NMS for one Procurement Area (PA) to advise clients in a PA for which they do not hold a contract (under 9.7 of the 2010 Standard Civil Contract Specification). HSHs are defined as PAs therefore this rule applies to HSHs so providers with a contract in one HSH may advise clients in an HSH for which they do not hold a contract. Please note it continues to be the case that under normal circumstances, providers without a contract in any HSH may not use the 30% allowance to advise clients in HSHs (as set out at 9.8 of the Specification).

Whilst unlikely, in principle it is possible for providers to use both the 30% allowance and Agents in combination.

2. CONTRACT CLAUSES

The relevant sections of the 2010 Standard Civil Contract Standard Terms and Specification are reproduced below:

2010 Standard Civil Contract Specification:

- 2.7 *The general rule is that you may instruct Agents, Counsel or Approved Third parties from time to time to carry out or assist with Contract Work where you are satisfied that it is in the interests of your Client to do so, subject to your compliance with the rules on Working with Third Parties in Clause 3 of the Standard Terms. However you may not entrust an entire Matter or case to Counsel or an Approved Third Party; you may only entrust an entire Matter or case to an Agent if the Agent satisfies all the conditions set out in Paragraph 2.8 below.*
- 2.8 *The conditions referred to in Paragraph 2.7 above are that:*
- (a) the Agent's work is subject to your supervision;*
 - (b) the Agent works solely or mainly for you;*
 - (c) the Agent is integrated into your processes, including Data Protection and Equal Opportunities, and is shown in your management structure;*
 - (d) the Agent's work is covered by your insurance;*
 - (e) you retain responsibility for each Matter or case undertaken by the Agent; and*
 - (f) Matters and cases undertaken by the Agent are not referred to a separate organisation.*
- 2.9 *Where you instruct an Agent you may claim payment for the work as if you had carried it out directly. Where you instruct an Agent to carry out services which are covered by a Standard or Graduated Fee, any fees or costs related to your use of the Agent will be included in the Standard or Graduated Fee and may not be claimed separately.*
- 2.10 *Further rules on the use of Counsel are set out at Paragraphs 3.75 to 3.79 (Controlled Work), 5.27 to 5.29 (Licensed Work) and in Category Specific Rules.*

- 2.11 Unless we have specified otherwise, you may not rely on the use of any Agent or Counsel as evidence of satisfying any of the Service Standards in this part of the Specification. For example, the obligation to have an Authorised Litigator under Paragraph 2.17 below requires you to employ such a person in your organisation, not to rely on instruction of an Agent or Counsel.

2010 Standard Civil Contract Standard Terms:

3. Working with third parties

Performing Contract Work yourself

- 3.1 This Contract is personal to you. Subject to Clause 3.2, you must not give, bargain, sell, assign or otherwise dispose of the benefit of any of your rights, or sub-contract, novate or otherwise delegate any of your obligations, under this Contract without our prior written consent. Any breach of this Clause 3.1 shall be a Fundamental Breach.

Sub-contracting, Agents, Counsel and Approved Third Parties

- 3.2 For the purposes of Clause 3.1, we consent to you:
- (a) sub-contracting your obligations under this Contract to the extent specified in your Contract for Signature; and
 - (b) appointing Agents to undertake Contract Work in accordance with the Specification;
 - (c) appointing Counsel to undertake Contract Work in accordance with the Specification; and
 - (d) appointing Approved Third Parties to undertake Contract Work in accordance with the Specification.

Your responsibility for third parties

- 3.3 You will remain responsible to us for the fulfilment of all of your obligations under this Contract irrespective of whether you have entered into a sub-contract or appointed an Agent, Counsel or Approved Third Party in respect of the same. If you appoint:
- (a) sub-contractors or Agents pursuant to this Clause 3 you are responsible for ensuring that;
 - (i) their work is properly supervised;
 - (ii) supervision of them is, in all respects, equal to your supervision of your employed solicitors and legal advisers;
 - (b) any person pursuant to this Clause 3 you are responsible for ensuring that;
 - (i) all payments are made to them for their work;
 - (ii) their work complies with this Contract; and
 - (iii) the use of such persons does not increase the costs payable by us.
- 3.4 If an Approved Third Party, Agent, Counsel or a sub-contractor ceases providing services to you, you are responsible for ensuring that you continue to fulfil your obligations under this Contract. You must also promptly notify us of any termination or expiry of any arrangements between you and any of your sub-contractors.

Can we specify criteria for third parties who may be instructed?

- 3.5 We may require that Agents, Approved Third Parties and Counsel appointed by you in relation to Contract Work must possess such experience, qualifications, or be members of such panel, or hold such accreditation as we may specify in the Specification and may from time to time specify Agents and Approved Third Parties who may not be appointed.

Can we specify payment rates for third parties?

- 3.6 We may specify from time to time, the maximum payments (by way of hourly rates or otherwise and which may be banded by reference to experience, location, area of expertise or otherwise) that we will reimburse you in respect of work carried out by Approved Third Parties and Counsel whom you appoint. Your obligations in respect of payment rates to be made to Approved Third Parties and Counsel are set out in the Specification.

Third parties time-recording

- 3.7 Subject to Clause 3.8, all agreements you make with Approved Third Parties under which the fees payable by you exceed £250 per Matter or case, Agents, Counsel or sub-contractors in connection with Contract Work, must require them to keep accurate records of the time they spend on the work you have appointed them to do and of the work done.
- 3.8 If an Approved Third Party is already working with a Client at the time of your instruction by the Client, your obligations under Clause 3.7 are only to use your reasonable endeavours to require such Approved Third Party to keep the required records and permit them to be audited in accordance with Clause 3.9.

Access your sub-contractors must give to us

- 3.9 You must ensure that any agreement you have with any sub-contractor you appoint pursuant to Clause 3 includes a directly enforceable right for us to enter their premises and Audit the Contract Work that they have undertaken to the same extent as we have the right to enter your premises and Audit Contract work that you have undertaken in accordance with this Contract.

Terminating your arrangements with third parties

- 3.10 Without limiting our rights under Clause 24 and/or 25, we may require you to terminate your arrangements with any Approved Third Party, Agent, Counsel or sub-contractor (and not use such Approved Third Party, Agent, Counsel or sub-contractor to undertake Contract Work or work in relation to Contract Work) if the standard of such work undertaken by or any other acts or omissions of such Approved Third Party, Agent, Counsel or sub-contractor is or are such as to entitle us to terminate this Contract (including pursuant to Clause 24.14).

3. GUIDANCE

The key element of the Contract Specification that is most likely to be misunderstood by providers is the section (2.7) that states:

However you may not entrust an entire Matter or case to Counsel or an Approved Third Party; you may only entrust an entire Matter or case to an Agent if the Agent satisfies all the conditions set out in Paragraph 2.8 below.’ ...[where]... ‘the Agent works solely or mainly for you’

Therefore provided the entire matter is not entrusted to the Agent, providers are able to instruct Agents without conditions being attached.

Providers have queried what criteria would avoid being deemed to have ‘entrusted an entire Matter or case to an Agent’. The following table indicates what would be considered compliant and what would not:

Compliant	Non-compliant
Supervising Agent directly	Solely billing the case

Attending hospital with or without Agent to complete and sign CW1/2 Form ¹	Providing only administrative support on case
Casework undertaken by one of provider's staff	Attendance at hospital solely to explain Agent arrangements to the client
Representation undertaken by one of provider's staff	
Attendance at hospital to interview client with or without Agent	
Contact with hospital to request information e.g. medical records or to negotiate	
Agent working in provider's office	
Discussion of case between Agent and provider (legal) staff	

The 2010 Standard Civil Contract Specification contains a definition of 'substantial legal work' which, if carried out by the provider, would certainly establish that the entire Matter or case had not been entrusted to an Agent. This is:

- 3.43 For the purpose of paragraph 3.42(b) above 'substantial legal work' must consist of at least:
- (a) an additional 30 minutes of preparation or advice; or
 - (b) separate communication with other parties on legal issues

4. FURTHER LIKELY QUERIES

The other area which is likely to be queried by providers is claiming of time spent either Supervising the Agent or otherwise complying with the above terms. The following are the key areas likely to be questioned:

- a) Cost Assessment Guidance 2.37: *'time spent in routine supervision of one fee earner by another should generally be considered part of the supplier's overheads' [i.e. is not remunerable]*
- b) Cost Assessment Guidance 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.'*
- c) If a provider is travelling to the hospital in order to sign up the client, then they may claim for the travel and waiting and a maximum of 18 minutes for completing the CW1/2 form (where reasons for granting LH/CLR noted on file)
- d) Arrangements between provider and Agent (and possibly Agent's provider) for payment for work completed are a private matter, to be agreed by the parties concerned

Olly Toop, 10th October 2011

¹ Please note that the CW1/2 form must be signed by a member of the provider's Approved Personnel which cannot, by definition, be the Agent