F O 2 C 7 U S

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SEPTEMBER '99

Legal Aid Board

# LEGAL AID IN THE NEW MILLENNIUM

**The Access to Justice Act received Royal Assent on 27 July. The Act will bring about major changes in the delivery of legal services throughout England and Wales, both civil and criminal. It creates the Community Legal Service (CLS) and the Criminal Defence Service (CDS). It ends civil legal aid and replaces it with a community legal service fund. The Legal Aid Board will be replaced by the Legal Services Commission which will have responsibility for both the CLS and CDS.**

It is not yet clear when the Act will be brought into effect. However, our working assumption is that the Legal Services Commission and the Community Legal Service will be brought into being on 1 April 2000 and the Criminal Defence Service created in October 2000. This timeframe will allow for the drafting and approval by Parliament of all the subordinate legislation which will be so important in turning the new Act into a practical reality.

One of the key changes brought about by the Act is the abolition of the merits test for civil legal aid and its replacement by a Funding Code. The Board has already carried out a comprehensive consultation exercise on the Code and is currently putting together a report on the consultation for the Lord Chancellor. We will publish this report and a revised Code in the Autumn of this year to allow for further consultation before the Lord Chancellor seeks Parliamentary approval for it.

In order to facilitate implementation of the Community Legal Service the Board has made some changes to the boundaries of its area offices. The importance of local authorities in particular, as co-funders of civil legal services has long been recognised. The CLS will encourage far greater co-ordination and co-operation between the Legal Services Commission and local authorities in determining the need for legal services and how they should be funded. It became clear to us that area office boundaries which cut across local authority areas would reduce the effectiveness of that co-ordination and co-operation. At the same time significant changes have been taking place in the criminal justice system with new arrangements within the Crown Prosecution Service (CPS). Accordingly, the Board decided to make changes that ensured that our boundaries did not conflict

*Steve Orchard, Chief Executive of the Legal Aid Board*

with boundaries in the CPS, the police service or local authorities. The main practical effect of these changes is that our Regional Legal Services Committees (RLSC) are now covering areas easily recognisable to local authorities and we have a single RLSC for the whole of Wales. There will be no immediate practical change as a result of these developments to the work of lawyers. For the moment they will continue to send work to the same place as they have always done, although some changes will be made with the introduction of contracting from 1 January 2000. There will also be some changes in where green forms are processed between now and the end of this calendar year (see page 4). After 1 January 2000 all residual green forms will be processed in a limited number of offices only. Individual practitioners will be told directly of any changes that affect them.

We were very pleased that the Lord Chancellor has been able to accept all the proposals in our report on contracting immigration work. As a consequence, contracting exclusivity for certificated work in this category of law will be introduced at the same time as exclusivity for family and matrimonial law. Without a contract no solicitor will be able to apply for a civil legal aid certificate in any immigration matter after 1 January 2000. In addition to this change the Lord Chancellor has decided that within the context of contracts representation will be allowable before the immigration appellate authorities. Also, financial incentives providing better cash flow will be available to contracted organisations which wish to expand the amount of asylum work they do.

In July the Board issued two consultation papers with its proposals for contracting all criminal work. One paper dealt with the particular problems posed by very high cost cases. The second set out the strategy the Board intends to follow in contracting from October 2000. These papers are essential reading for all criminal practitioners.

In August we issued a major consultation paper on quality standards to apply within the Community Legal Service. This was done at the Lord Chancellor's request because of the advice of his Quality Task Force that the franchise specification (LAFQAS) should form the basis of the quality mark but with some changes. The consultation paper we have issued sets out clearly what changes to LAFQAS are proposed and also identifies other levels at which organisations should be able to apply for certification and how their applications should be assessed. It is essential that all franchised organisations read and understand the proposed changes in LAFQAS and how accreditation and certification at other levels will be dealt with.

The CLS presents a major challenge and opportunity for the Board and, in the future, the Legal Services Commission. The CLS will spread far beyond services delivered by legal aid alone. It brings together all the major funders of legal services but also provides opportunities for organisations which receive no public funding at all to join the CLS.

The Board's response to the Lord Chancellor's consultation paper on the CLS sets out clearly how we believe the CLS should be constructed and how we recommend the Legal Services Commission should take responsibility for quality standards and effective co-ordination and co-operation with other funders. Copies of the response are available from the Board's head office.

Elsewhere in Focus you will find articles dealing in detail with a number of the issues raised above. We will continue to do our best to keep you all informed during this exciting period of major change. ■

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# Keith Vaz launches Norwich Community Legal Service Partnership


*Keith Vaz, Parliamentary Secretary at the LCD meets Madeleine Pollitt and Tracey Vigar, staff at LAB.*

In one of his first duties as newly appointed Parliamentary Secretary at the Lord Chancellor's Department, Keith Vaz MP, attended the formal launch of the Norwich Community Legal Service Pioneer Partnership in early July.

The launch, which took place at the City Hall in the centre of Norwich, was also attended by local MPs, City Councillors and members of the Pioneer Partnership steering group. Local solicitors, not-for-profit agency managers, the County and City Councils and key funders of advice including the National Lottery Charities Board and the Legal Aid Board make up the steering group. Welcoming the Minister to the city, deputy leader of the City Council David Fullman spoke of the reputation of Norwich's advice arcade, an innovative means of delivering advice from a single site.

Sheila Hewitt, chair of the Eastern Legal Services Committee, outlined in more detail the progress of the partnership. She told Mr Vaz of the developments that had been made in terms of mapping need and identifying levels of advice, noting the influx of people from surrounding rural areas who also seek legal advice and assistance in Norwich. The next steps for the project were to focus on reaching working agreements between providers of advice, whether firms of solicitors or advice agencies, to manage referral arrangements to the benefit of those seeking legal advice and assistance in the city.

Mr Vaz, himself at one time a solicitor in private practice, described the work going on in Norwich as

> *"at the heart of the Government's plans to develop the Community Legal Service."*

Mr Vaz said:

> *"Legal and political rights in theory are of no use unless people can benefit from them. Without access to information and advice, people are disempowered. The work that is being done in the City will make the Government's vision of networks of quality assured advisers providing comprehensive legal advice and assistance to communities across England and Wales a reality".*

Following the launch, the Minister met City Councillors and officers together with Legal Aid Board officials to assess the emerging findings of the pioneer project. The Norwich pioneer is one of six established across England and Wales. ■

*Sheila Hewitt, chair of the Eastern Legal Services Committee meets Mr. Vaz.*

# Civil Advice and Assistance

## From 1 January 2000

The majority of legal aid civil advice and assistance will be provided under contract from 1 January 2000. From this date only those legal services providers with a contract from the Board will be able to start new civil advice and assistance work. However, providers who do not have a contract in personal injury will still be able to continue to provide new advice and assistance in relation to those areas of law until 1 April 2000. The current arrangements for clinical negligence to be provided only by franchised firms will also continue until 1 April 2000. After 1 April 2000 all new civil advice and assistance cases can be commenced only if the provider has a contract with the Board in the relevant category.

All civil advice and assistance case start and case outcome reports under contracting will be processed from a single Legal Aid Board office. Providers with contracts will use the new case reporting forms for all cases from 1 January 2000, even where those cases started before that date.

For non-contracted firms, from 1 January 2000, all outstanding civil advice and assistance claims, extensions requests and authorities will be handled by 3 area offices: London, Reading and Nottingham.

## Before January 2000

To enable the Board to prepare for the change in processing claims and case reports, we have already started a phased transfer of all advice and assistance work to London, Reading and Nottingham. Some legal aid practitioners will have already been asked to send Claim 10 bills and extensions to either Nottingham or Reading and all firms who do not have an immigration franchise should already be sending their immigration bills and extensions to the London area office. The full timetable for the transfer of all civil advice and assistance work is as follows:

**1. TRANSFER TO NOTTINGHAM AREA OFFICE.**

| AREA OFFICE | TRANSFER DATE |
|---|---|
| Chester | 2/8/99 |
| Manchester | 30/8/99 |
| Newcastle | 4/10/99 |
| Liverpool | 4/10/99 |
| Leeds | 1/11/99 |
| Birmingham | 29/11/99. |

**2. TRANSFER TO READING AREA OFFICE.**

| AREA OFFICE | TRANSFER DATE |
|---|---|
| Brighton | 2/8/99 |
| London | **FOR NON IMMIGRATION CLAIM 10 WORK ONLY** – 13/9/99 |
| Cardiff | 25/10/99 |
| Cambridge | 25/10/99 |
| Bristol | 1/1/2000. |

**N.B. FROM 2/8/1999 ALL FIRMS WHO DO NOT HAVE A FRANCHISE IN IMMIGRATION SHOULD SEND ALL *IMMIGRATION* CLAIM 20 WORK TO THE LONDON AREA OFFICE.**

Those practitioners who have already started sending their bills in to Nottingham or Reading will have received a letter explaining the procedure. All remaining practitioners will be contacted shortly before their scheduled transfer date, confirming the date of transfer and where future Claim 10's should be sent.

Reading and Nottingham area offices will have significant volume increases for the next few months. While we re-deploy our resources we would ask for your continued support and co-operation. Listed below are 6 points we would ask you follow to help us ensure we continue to maintain levels of service to you.

1. Please do not telephone the Reading and Nottingham area offices once they start to deal with your work, unless the matter is extremely urgent. We aim to continue to meet the national targets and there should not be any need to contact us ( 90% of Claim 10 bills in 4 weeks and 90% of Claim 10 extensions in 3 days).
2. If a claim has not been paid, please send a copy to the appropriate office when chasing the payment and if the claim has not been processed, we will pay the claim on the copy provided to prevent any further delays.
3. Although you have been used to having one reference number for your client covering both the Claim 10 and any subsequent legal aid certificates, you will now find that you will be issued with a stand alone reference for your Claim 10. Consequently, when submitting your claim for costs, please submit the Claim 10 as soon as possible and when submitting your Claim 1 or Claim 2, simply note the Claim 10 costs on the front. If you do submit both the Claim 1 and the Claim 10 together, please submit them to your parent office who will then forward the Claim 10 to either Reading or Nottingham.
4. If you require an extension to the green form which requires a decision in less than 3 days please contact the relevant area office by fax.

The fax numbers are:

READING – **0118 9584056**
NOTTINGHAM – **0115 9560717**
LONDON – **0171 8135371**

5. Please clearly indicate on the front page of the Claim 10 whether it is a bill or an extension you are submitting. This will considerably aid our sorting process.
6. Any appeals against a provisional assessment by either Reading or Nottingham will be heard at these offices. If you wish to attend an appeal and it is not practical for you to attend at one of these sites then please indicate clearly on the appeal notice that you wish to attend and where you wish the appeal to be heard. Arrangements will be made for the appeal to be prepared and then sent on to the appropriate area office.

If you have any queries on the above please do not hesitate to contact the Project Manager, Helen Hinchliffe at the Reading area office. ■

## Personal Injury and Clinical Negligence Cases after 1 January 2000

Personal injury and clinical negligence cases will not be subject to the Board's civil contracts commencing on 1 January 2000. These contracts will be referred to as the Legal Services Commission general civil contracts when the Access to Justice Act 1999 comes into force, currently scheduled for 1 April 2000. They will be extended to cover all clinical negligence and remaining personal injury cases from that date.

For the period 1 January 2000 to 31 March 2000, all practitioners will be able to start new personal injury advice and assistance cases (other than clinical negligence) whether or not they have a contract or are franchised. For firms without a contract Claim 10's should be submitted in future to either the Reading or Nottingham office in accordance with the time-table and guidance set out elsewhere in this issue of Focus. Further guidance will be given in due course as to how firms with a contract should submit claims for personal injury advice and assistance after 1st January.

Clinical negligence cases are already limited to practitioners who have a clinical negligence franchise contract with the Board under the Legal Aid (Prescribed Panel) Regulations 1999. Those arrangements will continue until 31 March 2000. Further guidance will be given in due course as to how clinical negligence franchisees should claim for advice and assistance work in the future.

**From 1 April 2000 the position will be as follows:**

1. Clinical negligence cases will continue to be fully within scope, and will continue to be handled only by clinical negligence franchisees largely as now, only under the terms of the Commission's general civil contracts. These will include firms (with a panel member) which have passed their preliminary audit and have a temporary clinical negligence franchise i.e provisional franchisees.
2. Some personal injury cases will continue to be fully within scope, principally those which do not involve allegations of negligence (e.g. actions for deliberate assault). These cases will be restricted to personal injury franchisees for the first time by bringing them into the Commission's general civil contracts on 1 April 2000.
3. Other personal injury cases will be brought back into scope (though not for advice and assistance) by directions from the Lord Chancellor in certain limited circumstances, which are likely to be in high cost, high investigative cost or public interest cases, on the basis of limited financial support from the Commission. These cases will also be brought into the Commission's general civil contracts from 1 April 2000, and will be restricted to personal injury franchisees.

Hence from 1 April 2000 it will not be possible for firms without a personal injury franchise (including those which have passed their preliminary audit and therefore have a provisional franchise) and a contract to start any new personal injury case funded by the Commission. Notice was given that this was likely to be the case in Focus 26 at page 9 (March 1999).

In the case of both personal injury and clinical negligence, contracts will not initially limit the number of case starts either for advice work or for full representation. All offices with a full or provisional franchise in personal injury or clinical negligence on 31 March 2000 will be eligible for a contract. Offices which obtain a franchise or pass a preliminary audit after that date will be eligible for a contract straight away.

The Board is currently redrafting its "Exclusive Contracting" Documentation (the terracotta document) so as to take into account the Access to Justice Act, and this will be published as the general civil contract of the Legal Service Commission. It will extend the terms of the contract to cover personal injury and clinical negligence. The revised version should be available in October. At that time guidance will be given as to how provisional and full franchisees in personal injury and clinical negligence can apply for contracts. ■

# The CLS Quality Mark

The Access to Justice Act is expected to come into force in April 2000, leading the way for the introduction, amongst other things, of the Community Legal Service (CLS). Implementation of the CLS is subject to consultation (see article on page 9), however, one initiative that is clear is the need for a CLS Quality Mark; a quality standard that can apply to the whole range of available legal services (including all those that will not be funded by legal aid).

The concept is that the public, in seeking legal information or help, will be encouraged to look for organisations that are members of the CLS, have been awarded the Quality Mark and display the badge or logo.

Over the past few months, the Board has worked with a Quality Task Force, made up of representatives of the main CLS funders, providers and users, to develop proposals for a Quality Mark standard and for accompanying certification and accreditation processes. A consultation paper outlining those proposals was circulated to all solicitor firms and others in late August.

In there we proposed that the CLS Quality Mark should be a single quality standard which could be applied to all information and legal help services from display stands containing leaflets, through libraries, to advice agencies and solicitors' practices. It should be fully audited against clear and defined criteria and should be accompanied by national publicity in a range of media to inform the public of what the Quality Mark is, what it is for and where to find services displaying the CLS Quality Mark badge.

Although the CLS Quality Mark would be a single standard with consistent key elements (e.g. Access to Service, Referral arrangements and Running the Organisation) it would be awarded at several different quality levels. The requirements and auditing demands becoming more stringent as organisations pursued higher levels of service provision.

To aid public recognition and to reduce confusion about where to find CLS legal services, we proposed to apply just two "badges" to the different service provision levels; one for CLS Information Points and one for CLS Legal Help Points.

Information points would be those services where the client primarily decides for themselves what they want and, should they need further help, uses a CLS directory to find an appropriate legal help service. The CLS Directory would list available CLS Quality Mark services as well as explaining what the services were and what they could provide.

The legal help points would be made up of those services providing clients with help, from simple one-off advice through to complex case management and court representation. Given the diversity of such services, at least two levels of quality standards would need to apply, the first for general legal help providers (i.e. enabling services offering mostly one-off advice), and the second for specialist providers (i.e. services akin to the range offered by legal aid franchisees now).

The specialist CLS Quality Mark level would be based on the Board's existing quality standard LAFQAS (Legal Aid Franchise Quality Assurance Standard), plus some additional requirements covering Referral arrangements, Client Satisfaction and possibly Access to Service. Existing franchisees would be "passported" into the CLS Quality Mark at the specialist level, with additional requirements needing to be met within 1 year.

Other providers would choose the quality level best suited to the service being delivered and then ensure that procedures were in place to meet the relevant requirements.

Copies of the Board's CLS Quality Mark consultation paper can be obtained from the Franchise Development Group at our head office address, or by telephoning **0171 813 8604**. Please note that any comments need to be sent to the same department no later than Friday 15 October 1999.

A new CLS logo will be introduced in anticipation of the CLS launch expected in April 2000. Practitioners should bear this in mind if they are printing new stationery in the new year. ■

# EXCLUSIVE CONTRACTING – Update

Invitations to bid for the exclusive contracting of Civil Advice and Assistance were sent to offices on Section A of the Bid Panel on 28 June 1999. The deadline for the receipt of bids passed on 13 August 1999. Early indications are that over 95% of the solicitors offices that were invited to bid returned their completed bids before the deadline.

Offices that missed the deadline for receipt of bids, and offices that were not invited to bid, can still apply to join Section B of the Panel, but they must have applied for a franchise and passed a preliminary audit in the relevant categories before they submit their application. Further details and application forms for Section B of the Bid Panel are available from local area office franchise teams.

## Immigration

We have issued a supplement to the contract documentation applying specifically to the immigration category. Offices that have submitted bids in the immigration category may now revise their maximum bid after they have had the opportunity to consider the supplement. Any revisions to immigration bids must be received by the relevant legal aid area office by 8 October 1999 in order to be taken into consideration.

## Generic Contracts

The deadline for offices to make an application for a Generic Franchise and remain on Section A of the Panel to bid for a Generic contract passed on 30 July 1999. A number of offices were invited to bid for a generic contract in categories which include; education, community care, prisoner's rights, and actions against the police.

## The Next Steps

All the contract bids are now being collated and considered by local area offices. The allocation of funds to individual contracts and tolerances will take place shortly. In the Autumn, following the allocation, we will notify bidders of their provisional contract award.

## Not-for-Profit Sector

The draft contract documentation for the Not-for-Profit sector was published in April 1999, and the Not-for-Profit Legal Aid Franchise Quality Assurance Standard (LAFQAS) was published in May 1999. The final version of the Not-for-Profit contract documentation will be published shortly. Bids for exclusive contracts in the Not-for-Profit sector are currently being considered, and we hope to announce provisional contract awards in the Autumn. ■

# The effect of the delayed implementation of Part II of the Family Law Act 1996 on the Family Mediation Pilot Project and Section 29 of the Act.

## Background

Part III of the Family Law Act 1996 introduces publicly funded mediation and, under section 29 (Section 15(3F) Legal Aid Act 1988) requires that applicants for a civil legal aid certificate for certain family matters consider the possibility of mediating the dispute prior to their application being considered. The pilot implementation of section 29 commenced in Northamptonshire and Bristol in March 1998. This was extended in September 1998 to include Birmingham (including Coventry), Cambridge, Manchester (including Bury and Stockport) and Peterborough. On 26 April 1999, the pilot was implemented in selected postcodes across the country, and in July this was extended to include central London. Currently the percentage of the population potentially covered by section 29 is approximately 50%.

The contracting process for Mediation suppliers to undertake legally aided family mediation has been organised into 4 phases. Phases 1 and 2 of the contracting process are now complete. The Board is currently in the process of finalising contracts with mediation suppliers who are involved in Phase 3 which will bring the number of contracted suppliers up to 262.

## The delay of the implementation of Part II of the Family Law Act

Part II of the Family Law Act includes a requirement that couples considering divorce attend information meetings designed to rescue saveable marriages and, where this is not possible, promote mediation in divorce as an alternative to adversarial litigation. In a recent written parliamentary answer, the Lord Chancellor, Lord Irvine, announced that the Government does not intend to implement Part II of the Family Law Act 1996 in the year 2000.

There has been some concern amongst mediators and solicitors as to how this will affect the provision of publicly funded mediation. However, publicly funded mediation is provided under Part III of the Act, and as such is unaffected by the announcement. Since the release of the written parliamentary answer, the Lord Chancellor has given public support to the continued provision of publicly funded mediation. The pilot of section 29 continues to be in force in areas across the country. These areas will be expanded this Autumn to include Phase 3 mediation suppliers. This expansion of the areas covered will bring the percentage of the population potentially covered by section 29 up to approximately 70%.

For further information contact the mediation unit on 0171 813 1000 (ext. 4992). ■

# Changes to the Police Station Accreditation scheme from 1 January 2000

The accreditation scheme is set to undergo a number of changes which take effect on **1 January 2000**. From this date, accreditation candidates will have to complete the first four portfolio cases and then submit them to a testing organisation. The testing organisation will then issue an application form so that the candidate can register with the Board as a probationary representative. The probationary representative can then attempt any of the three tests (portfolio, written or critical incidents) but he or she must have passed one of the tests within six months of registration and have gained full accreditation within twelve months of registration.

From 1 January 2000, accredited representatives will be required to undertake 6 hours CPD every two years at a course relevant to giving advice at police stations. The course provider must be authorised by the Law Society to self-accredit CPD courses. Details of the CPD undertaken are to be recorded on the Certificate of Fitness form which must be signed by the supervising solicitor every two years. Transitional arrangements are in operation for existing accredited representatives.

Probationary representatives who registered with the Board before 1 July 1999 will have to pass the portfolio stage before **31 December 1999** otherwise the Board will suspend them from **1 January 2000**. They can, however, attempt another test before 31 December if they fail the portfolio. Probationary representatives, registered on or after 1 July 1999, who submit a portfolio by 31 December 1999 will be given until **30 June 2000** to pass one of the tests. They must still, however, gain accreditation within 12 months of registration.

For more details of the other changes, please contact Martin Carroll on **0171 813 8978**. ■

# Supervision of police station representatives

Guidance was published in **Focus 25** on the supervision of police station representatives. This guidance resulted from the case of R-v-LAB ex p. Rafina (reported in Focus 23) which concerned the supervision of work undertaken by clerks. The guidance has therefore been modified so that it continues to apply to non-solicitor representatives undertaking police work but excludes such work undertaken by solicitors. Copies of the revised guidance are available from the Board (Martin Carroll on 0171 813 8978). ■

## Asylum Screening Interviews

The Immigration and Nationality Directorate has confirmed that, for the foreseeable future, substantive asylum interviews will not take place immediately after the screening interviews.

Legal representation at the screening interview itself is not required as it consists of a series of simple questions which the applicant can answer without the need for legal advice.

In those circumstances the Board will not pay for representation at any asylum screening interview which takes place after 30 September 1999. The Guidance on the Exercise of Devolved Powers has been amended accordingly (see paragraph 1.4.2 of the immigration section at page 22 of this edition of Focus). ■

# Criminal Defence Service Consultation Papers

The Board has published proposals, set out in two consultation papers, for taking forward the establishment of the new Criminal Defence Service in line with Government objectives set out in the White Paper, *Modernising Justice.*

In, *Introducing Contracts for Criminal Defence Services with Lawyers in Private Practice*, the Board sets out its overall strategy for introducing contracts for this work. The Board plans to introduce contracts for:

- very high cost criminal cases on a pilot basis from early in 2000
- advice and assistance and magistrates' court cases in October 2000
- Crown Court cases by 2003.

This strategy – tackling as a priority both the "top" and "bottom" of the spectrum of cases – will establish a contractual (quality assured) relationship between the Board and all private practice suppliers of criminal defence services, and provide for special levels of control over those high cost cases which consume a disproportionate amount of criminal defence spending.

In *Ensuring Quality and Controlling Cost in Very High Cost Criminal Cases* the Board provides further details of its plans to manage these cases under individual case contracts with defence teams.

Payment for work done under the contract will be agreed between the Board and the defence team using overall case and individual stage plans. Prices to be paid will be agreed on a stage by stage basis for work which has been agreed in advance and actually carried out as set out in the stage plan. Stage payments will be fixed, subject to limited tolerances and revision in the light of unforeseeable occurrences. Payment will be made as the case progresses.

The Board proposes that hourly rates – set in regulations – should be used as a basis for setting stage prices. Hourly rates would be set for both solicitors and counsel.

A specialist panel of solicitors will be established to undertake serious fraud cases and other cases involving serious financial impropriety. A defendant's choice of solicitor in such cases will be limited to members of this panel.

Copies of the papers can be obtained from the Board (on **0171 813 1000** ext. 8677). The consultation period runs to the end of September 1999. ■

# Narey Update

Focus 24 reported on the piloting of a number of initiatives aimed at reducing delay in the criminal justice system – the Narey measures. The pilots for cases in the magistrates' courts concluded on 31 March and the consultants, Ernst and Young, have now completed their evaluation. Their report was published on 2 August. The Government has accepted Ernst and Young's recommendations and all the provisions will be implemented nationally on 1 November 1999, save for CPS provision of out of hours advice to the police. Local Trials Issues Groups are already preparing for implementation. You should ensure that you keep in touch with your representative on the local implementation team.

Ernst and Young reported that the arrangements for legal aid during the pilot period supported the effectiveness of inter-agency co-operation. The Board is proposing to extend these arrangements nationally. The revised procedures will stay in place until the introduction of criminal contracting in October 2000. The Board will review these arrangements prior to the introduction of contracting to determine how this work should be remunerated under the contracted scheme.

The arrangements will function in the following manner. At an Early First Hearing (EFH) or an Early Administrative Hearing (EAH), the defendant may be represented by the court duty solicitor or a solicitor of choice who is a current duty solicitor, or a solicitor who is a duty solicitor representative, on any court or police station scheme.

The defendant can request representation from either the court duty solicitor or the duty solicitor of choice, for cases listed as EFH or EAH. Representation will be non-means tested and, for cases where defendants wish to be represented by their own duty solicitor, will not be confined to solicitors who are members of the local duty scheme.

Discussions are continuing between the Law Society and the Lord Chancellor's Department on one aspect of these arrangements: whether funding for representation at EFH's and EAH's should be limited to a set number of hearings per case (i.e. two EFH's and one EAH) and, if so, whether any flexibility in these arrangements would be necessary in specific circumstances. The availability of criminal legal aid will be unaffected by these changes and an application can be made at any time for such an order.

Payment for attendances by either the court duty solicitor or the defendant's choice of duty solicitor will be at the current court duty solicitor rates. Claims for payment should continue to be submitted on form CLAIM13.

The CLAIM13 will be amended from 1 November 1999 to support the additional information that the Board will be recording. The amended forms will be dispatched to all firms that hold a forms masterpack during mid to late October. There will be a covering letter providing guidance on the completion of the form as well as the inclusion of an amended checklist. If you do not have a masterpack, please contact the Business Support Unit. Additional minor changes have been made to the CLAIM7 and CLAIM8. The new forms will become mandatory from 1 November 1999. ■

# The Community Legal Service

The Lord Chancellor's Department published a consultation paper outlining its work in the establishment of a Community Legal Service in May 1999. Once the Board becomes the Legal Services Commission next year, we will have responsibility (under the Access to Justice Act) for the operational implementation and further development of the Community Legal Service. We have taken the opportunity to develop our thinking about the CLS in its implementation and have published the results of that development as a response to the LCD's consultation paper.

The paper gives background to the development of the CLS, which we see as a logical step following from the work in which we have been engaged for the last decade: quality standards and quality assurance (franchising), contracting (including with the not-for-profit sector), alternative methods of delivery (see pages 10 & 11) and needs assessment. We also explore how the CLS might look in practice; the likely client focus and, in particular, how the Commission, local authorities and other funders will work together in partnership. The CLS partnerships will be key in ensuring the most effective deployment of the available resources in addressing the legal needs of the community, beyond the needs of those eligible to be helped through the CLS Fund.

Separate sections of our response look at the proposals for establishing quality standards for the CLS, and the way forward in developing the CLS Website. Copies of the consultation paper are available from Area Offices, as well as from: **Jenny Treacy, Policy and Legal Department, Legal Aid Head Office, 85 Gray's Inn Road, London, WC1X 8AA.** ■

# Legal Aid Board Website Launched

The Legal Aid Board has launched a website to provide greater access to information. The site which will be regularly updated includes consultation papers, research documents, guidance material, as well as press releases and the Board's newsletter *Focus*.

The site covers information aimed at the profession as well as the public. There is a special section called 'Seeking Legal Aid?' which leads to the Board's information leaflets on eligibility, the statutory charge, customer service and franchising. The site will become central to the development of the Community Legal Service (CLS) and will provide information on CLS suppliers.

The site is designed so that it can be easily adapted at minimum cost when the Legal Aid Board is replaced by the Legal Services Commission next year.

The launch of the website marks the first step towards facilitating Electronic Data Interchange for suppliers. The site will develop with experience and through direct feedback from users. ■

The address is:

**www.legal-aid.gov.uk**

# Millennium Compliance at the Legal Aid Board

The Legal Aid Board is pleased to confirm that, all its Business Critical Systems will be millennium compliant by end of October 1999.

The Board like many other organisations, realised at an early stage problems associated with some computerised systems' inability to process date dependent information correctly and promptly initiated a programme of work to ensure the Board's compliance.

The Board decided at the outset of the compliance work to have a common and clear framework upon which to base its work and accordingly adopted the BSI (British Standards Institute) DISC-PD2000-1* specification for compliance, an extract of which is given below:

> *"Year 2000 Conformity shall mean that neither performance nor functionality is affected by dates prior to, during and after Year 2000"*

The Board was more fortunate than most other organisations in that it had planned to replace all its legacy systems with a new Corporate Information System (C.I.S.) which had been designed to be compliant.

In addition, the Board has sought millennium compliance assurances from its supplier chain.

The Board also urges those in the profession who have not yet ensured their millennium compliance to do so as soon as possible.

Further information on millennium compliance can be obtained from the following sources:

Taskforce 2000
(www.taskforce2000.co.uk)
Tel: 0870 240 0301

Action 2000
(www.bug2000.co.uk)
Tel: 0845 601 2000

Y2K Lawyers Association
(www.y2klaw.org)
Tel: 0171 223 9635/0131 459 2345

Further information on the Board's compliance can be obtained from:

Kish Patel, Year 2000 Project Manager, Legal Aid Board
Tel: 0171 813 8685. ■

# Methods of Delivery Pilot: Update

At present, most advice and assistance is given face to face in a solicitor's office or at an advice centre. The main objective of the Methods of Delivery Pilot is to agree contractual arrangements for different methods of delivering legal services. It takes forward the recommendations from the research commissioned by the Board the Policy Studies Institute set out in the report – *Access to Legal Services – the contribution of alternative approaches.*

The pilot will make an important contribution to the development of the Community Legal Service. It will allow new types of contract to be signed with legal service providers. These contracts will make legal services more accessible and allow the Legal Services Commission (currently the Legal Aid Board) to fund services which will plug gaps in priority areas where need is identified as high, but supply levels are low. In addition, it will give the LSC the contract tools which will enable it to target particular client groups who may have difficulties accessing services able to deal effectively with their specific problems.

Organisations have now been selected to take part in the pilot which will commence early in 2000.

The different methods involved are:

- Specialist support for advisers ('second tier')
- outreach
- telephone and
- services combining telephone and outreach

These are described below.

## I Specialist Support for Advisers

The Legal Aid Board Methods of Delivery Pilot will give solicitors and advice agencies direct access to specialist consultancy services. These will be available free of charge to the users.

Organisations which provide what is currently legally aided civil advice and assistance will be able to seek guidance from experts in key areas of social welfare law, immigration and human rights. Advice can be sought on complex issues, and the most difficult cases can be referred on to one of the six 'second tier' specialists.

These specialists services include three separate but related elements:

- advice through a consultancy telephone line
- taking on complex cases through referral
- training in particular subject or specific client group skills.

### SPECIALIST 'SECOND TIER' SERVICES

| | Specialist help in: |
|---|---|
| Joint Council for the Welfare of Immigrants | **Immigration** |
| Tyndallwoods Solicitors | **Welfare Benefits**<br>**Community Care, Health, Education**<br>**Immigration** |
| Shelter | **Housing** |
| Liberty/Public Law Project | **Human Rights, Public Law** |
| NACAB Specialist Support Unit | **Employment** |

In addition, the Board has agreed to contract with a set of barrister's chambers who will be funded to provide consultancy telephone lines ("CallCounsel"), pieces of written advice (counsel's opinion) and a programme of training:

| | |
|---|---|
| Two Garden Court Chambers | **Housing**<br>**Immigration**<br>**Employment** |

One important aspect of all these services will be consultancy telephone lines which will be available early next year to any solicitor or advice agency with an exclusive contract. The Board will publicise the telephone consultancy numbers and the times the lines are open. Tyndallwoods will be providing a service which covers the Birmingham region, the remaining services will all be providing national coverage.

The 'second tier' service providers will be able to talk through a particularly difficult case and take referrals where appropriate.

All the above services will be providing training courses for contract holders e.g. specialist skills training in a particular area of law. These courses will be available at a special rate for contract holders from early 2000.

## II Services direct to the Public: Outreach, Telephone and Combination Services

The pilot will also address access issues by taking legal services out of the office environment into the heart of the community. These 'outreach' services will allow advice to be given at venues such as doctors surgeries, libraries and other advice agencies. The Board is also contracting in the pilot with a mobile service.

Contracting for telephone advice and assistance will also be piloted, assisting clients who may find it difficult to travel. In some areas of law it is clear that this can be an effective means of providing full advice and assistance casework. Note that the focus is on full casework not solely short one off advice and information.

Combinations of outreach and telephone services will also be piloted.

The telephone advice, outreach and combination (of telephone and outreach) services will be contracted for access time to these services – the hours spent at outreach sessions and the numbers of hours the telephone line is open.

| | | |
|---|---|---|
| **OUTREACH SERVICES** | | |
| Carlisle Community Law Centre | Local – (urban & rural) areas within Cumbria County Council | Debt<br>Housing<br>Welfare Benefits |
| Stoke-on-Trent CAB | Local (urban) – Stoke-on-Trent | Debt<br>Housing<br>Welfare Benefits |
| Birmingham District CAB Health Unit | Local (urban) – Birmingham | Debt<br>Welfare Benefits |
| Camden Community Law Centre | Local (urban) Camden | Immigration |
| **TELEPHONE SERVICES** | | |
| Sheffield Debt Support Unit | Local (urban) – Sheffield | Debt |
| NMA Money Advice | Local (urban & rural) – Norwich & rural surrounds | Debt<br>Welfare Benefits |
| Northumberland Distance Debt Unit | Local (rural) – Northumberland | Debt |
| **COMBINATION SERVICES** | | |
| Shelter Cymru | 3 counties (rural) – Caerphilly, Carmarthen & Denbighshire | Housing |
| Dial Doncaster | Local (urban) – Doncaster | Welfare Benefits |
| Preston & Western Lancashire Racial Equality Council | Local (urban) | Immigration |

The pilot is expected to run for 12-15 months. The Legal Aid Board will make recommendations to the Lord Chancellor at the end of the pilot.

For further information contact: Sarah Maclean, Legal Aid Board, 85 Gray's Inn Road, London WC1X 8AA. Access to Legal Services – the contribution of alternative approaches. by Jane Steele and John Seargeant, ISBN 0 85374 761 X, available from Policy Studies Institute, 100 Park Village East, London NW1 3SR, £15.

Copies can be ordered on 01476 541080 ■

# Notice to practitioners regarding the Board's Debt Recovery Unit

This Notice is intended to make clear to practitioners the extent to which the Board's Debt Recovery Unit will pursue or enforce awards of costs and/or damages in favour of an assisted person.

The Debt Recovery Unit will become involved in a case where, and so long as, money is due and owing to the Legal Aid Board.

Where costs are due from the assisted person's opponent the Debt Recovery Unit will only accept a case if all or part of the statutory charge amount is outstanding and/or unsecured.

This means that if the assisted person has agreed to the registration of a charge on their property or damages sufficient to cover the deficit on the assisted person's account have been paid into the fund the Debt Recovery Unit will not take on the case. This is the position even if there are outstanding damages and/or orders for costs.

Where only part of the sums outstanding are payable to the Board, the Debt Recovery Unit will attempt to recover the total sum due from the opponent but will cease any enforcement action once the Board's interest is protected or recovered.

If the Debt Recovery Unit is involved in a case it will consider all the circumstances and make a commercial decision as to the appropriate action necessary to enforce the sums due. That decision will be based on the size of the debt, the chances of successful recovery and the likely costs involved. The Debt Recovery Unit may conclude that it would not be justified to incur further costs or take any enforcement action.

Where the Board's interest has been protected, recovered, or, alternatively a decision made not to take any action, the assisted person is free to do what they can to enforce. It should be noted that if the Board's interest has not been recovered or recovered in full the assisted person must pay into the fund all sums they successfully recover until the deficit has been repaid in full.

Whilst legal aid is potentially available it is unlikely to be granted where the enforcement procedures to be used are straightforward and/or where the Debt Recovery Unit has made a decision that either enforcement is unlikely to be successful or that a private client would not pursue the debt given the costs and/or risks involved. ■

## Extension of Scope to Cover Representation before the Immigration Appellate Authorities

The Lord Chancellor has agreed that representation before the Immigration Appellate Authorities (the Adjudicators and the Immigration Appeal Tribunal) may be covered under the Board's general civil contracts next year. We are delighted that the Lord Chancellor has accepted the Board's recommendation made in our report submitted to him in May 1999 (Access to Quality Services in the Immigration Category).

We believe that this extension of scope will encourage more quality suppliers to take on cases at earlier stages thereby supporting faster and more effective decision making within the immigration and asylum system. Representation will be paid for at the rate of £57.25 per hour.

Organisations with contracts will be able to provide representation in cases which meet specific merits criteria. Decisions on whether individual cases meet the criteria will be made by the practitioners themselves but subject to audit by the Board. If representation is consistently provided in matters where there is no positive outcome for the client the Board will be able to apply contract sanctions.

Copies of the Exclusive Contracting Immigration Supplement are available from:
Nishma Malde, Exclusive Contracting, 6th Floor, 29/37 Red Lion Street, London, WC1R 4PP. ■

# Legal Aid Board Accreditation

The Board has been accredited by the United Kingdom Accreditation Scheme (UKAS) to ISO 45012.

ISO 45012 is the international standard which sets out the requirements for organisations which operate assessment and certification of quality systems, and UKAS is the national body responsible for assessing and accrediting to this standard. It assesses the competence of an organisation (in this case the Board) to audit and certify that organisations (i.e. franchisees) meet a recognised specification (i.e. LAFQAS).

Accreditation entitles the Board to use the national accreditation mark, in conjunction with our own franchise logo and, subject to certain rules, also extends to certificate holders. We will be writing to you at a later date with more specific details, when we will also take that opportunity to issue you with a new certificate incorporating the new mark.

Steve Orchard, Chief Executive, said:

*"This is a significant achievement by the Board, and in particular a recognition of the Board's auditing capabilities. It provides a solid foundation for the Community Legal Service (CLS) and the Commission's role in setting and maintaining quality standards for the CLS".* ■

# Criminal Prior Authorities: Additional Notes for Guidance

This guidance is intended to supplement Note For Guidance 18-17 contained at pages 238-241 of the 1998/99 Legal Aid Handbook. It is the practitioner's responsibility to ensure that the relevant information is submitted to enable requests for prior authorities to be properly considered.

It is emphasised that the completion of the Board's application form is only one requirement of an application. Rarely, if ever, will a completed form by itself provide sufficient information and accompanying explanation or documentation will be just as important. Examples (which are not exhaustive) of what may be required to enable the area committee to establish the reasonableness of a request are:-

(a) A signed statement from the assisted person clearly showing the nature of the defence or mitigation, so as to show how the report will possibly assist the case.

(b) A detailed opinion from the advocate, identifying the need for the report and the way in which it will materially assist the case.

(c) The relevant prosecution evidence.

(d) A minimum of two quotations from proposed experts or a cogent explanation for their absence.

(e) If an application is made close to trial, a clear explanation as to why it could not have been made at an earlier stage.

(f) Where an application is made after any plea and directions hearing, a certification from the solicitor that the need for a report had been canvassed before the Judge at the pre-trial hearings together with details of any directions made by the Judge. If the matter has not been canvassed with the Judge, then a cogent explanation should be supplied as to why not.

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

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

# Scope of a Legal Aid Certificate

Practitioners should note the decision in **Bridgewater -v- Griffiths 29 April 1999 (SCCO Taxation Review No. 8 of 99)** in which the court upheld the Board's interpretation of Regulation 46(3) of the Civil Legal Aid (General) Regulations 1989.

The Plaintiff was granted a legal aid certificate to take proceedings for personal injury. A writ was issued but not served and subsequently expired. The Plaintiff then transferred her instructions to another firm who issued and served a second writ whilst apparently unaware that there had been an earlier action under the same legal aid certificate.

The case proceeded on the basis of the second writ and substantial costs were incurred. A settlement was eventually reached and the Defendant was ordered to pay the Plaintiff's costs. On taxation, the Defendant contended that the legal aid certificate did not cover the second action as Regulation 46(3) prevents a certificate from relating to more than one action, cause or matter. The Defendant argued that as the Plaintiff had no liability for costs under the certificate, there was no entitlement to recover any costs incurred following issue of the second writ by virtue of the "indemnity principle".

The court accepted that a fresh certificate must be obtained in respect of each action. Once an action has been commenced and assigned an action number then the scope of the certificate cannot be amended to cover the issue of any further proceedings even if they relate to the same cause of action, unless one of the exceptions expressly set out in Regulation 46(3) applies.

The Board considers that it is the duty of the conducting solicitor and counsel to check that a legal aid certificate covers all of the work which needs to be undertaken on behalf of the assisted person. Particular care should be exercised where a change of solicitor occurs and work has been undertaken previously by another firm. Payment cannot be made for work which falls outside of the scope of the certificate. ■

# Civil Legal Aid – Means Assessment

The Board is introducing changes to the means assessment application forms for: the self employed; those operating a business in partnership, and directors/ shareholders of limited companies.

Such applicants will still complete the normal application form MEANS1 but will also complete a supplementary form providing more details about their business or trade. The MEANS1 has been revised slightly and will direct applicants to the correct supplementary form(s). The new supplementary forms will replace the existing forms L18 and L30.

Each form will advise applicants what additional information they will need to submit to support the figures they have provided e.g. profit and loss accounts, Inland Revenue calculation sheets etc.

The aim of the new forms is to simplify the application process by ensuring that in the majority of cases the Board has sufficient information to make an assessment of means without having to make additional queries after the application has been submitted.

It is hoped that the new forms will be introduced for use from 1 October 1999. At the time of reading this article legal aid practitioners may well have already received the revised pack of forms.

If you have any queries regarding these new arrangements please contact Neil Tyson, Means Assessment Policy Co-ordinator, Legal Aid Board, Policy and Legal Dept., 85 Grays Inn Road, London WC1X 8AA, DX 328 LON/CH'RY LANE, Tel 0171 813 1000 Ext 8568. ■

# Notice to practitioners regarding the claiming of Law Costs Draughtsmen's fees

As practitioners will be aware, Law Costs Draughtsmen's fees can now be claimed at an hourly rate in bills presented under the Civil Procedure Rules which came into effect on 26 April 1999.

The Board has received queries about the rate to be allowed in legally aided cases and the extent to which fees for drawing up the bill, either by the solicitor or law costs draughtsman, should be allowed on assessment.

It is acknowledged that there is some divergence of approach amongst costs judges. Pending judicial decisions on the points raised it is considered necessary to publicise the Board's approach to bills submitted for assessment. Our position is supported by the Chief Costs Judge at the Supreme Court Costs Office and the Principal Family Registry.

Area offices will adopt the following approach:-

### (i) Retrospectivity

The transitional provisions of the CPR Part 51 Paragraph 18 state that any assessment of costs, which takes place on or after 26 April 1999, will be in accordance with the new Rules although the general presumption is that no costs or work undertaken before that date will be disallowed if such costs or work would have been allowed on taxation before 26 April 1999. Lawyers will consequently be no worse off under the transitional provisions. It is the Board's view that neither should they be advantaged by a retrospective application of the rule in relation to Law Costs Draughtsmen's fees. The Board is of the view that the rules should not be imposed retrospectively for work done before 26 April 1999. Bills submitted for assessment should therefore only claim a Law Costs Draughtsman's fee for the element of bill preparation relating to work done on/after 26 April 1999. Area offices will continue to operate on this basis until there is a definitive decision on the issue of retrospectivity.

### (ii) Time taken

Where an allowance is due for time spent preparing the bill for assessment it should rarely exceed an hour. In the vast majority of cases an allowance of 20 to 30 minutes will be more appropriate. This is in addition to the time allowed for checking and signing in compliance with the regulations.

### (iii) Civil non-family cases

The hourly rate allowed will be the relevant preparation rate for the conducting solicitor with reference to Column 1 of Schedule 1 of the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994.

### (iv) Family cases

The schedules to the Legal Aid in Family Proceedings Regulations 1991 already provide an allowance for preparing the bill and these should be followed. There is no such allowance for prescribed family proceedings in the Magistrates' Court, and as there is no process equivalent to assessment by the court, a Law Costs Draughtsman's fee is not considered to be recoverable.

### (v) The Statutory Charge

Regulation 119(2) of the Civil Legal Aid ( General) Regulations 1989 refers only to the costs associated with taxation. It is area office practice not to disregard the costs of preparing the bill for assessment when considering the statutory charge. This approach will continue for the time being, although it is under review by the Lord Chancellor's Department. ■

# Costs Limitations

As practitioners will be aware, the Board now imposes a costs limitation on the initial grant of legal aid or ABWOR approval in every case, including family/matrimonial cases.

This article is to clarify the issues that have arisen since costs limitations were introduced. It replaces the existing guidance at Note for Guidance 9-15 of the Legal Aid Handbook.

## What is a costs limitation?

It is a financial limitation on the work to be done under the legal aid certificate/ABWOR approval. It is specifically authorised by Regulations 107(A) & (B) of the Civil Legal Aid (General) Regulations 1989. These regulations provide that the costs limitation is binding on any assessment by the Court or by the Board. Hence, the Board's liability to pay the assisted person's representative will not exceed the final costs limitation imposed.

## How does it differ from a costs condition?

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

## How do I calculate whether my costs are within the financial limit?

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

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

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

## What happens on assessment?

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

## Does the limitation affect recovery of costs between the parties?

Regulation 107(B) has been amended to put it beyond doubt that the indemnity principle does not apply to costs limitations. A costs limitation on a certificate protects the client and the legal aid fund. It does not inhibit costs recovery between the parties so a successful assisted person may recover costs from the paying party in excess of the final costs limitation imposed.

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

Regulation 107A provides that as between solicitor and counsel, it is primarily the solicitor who is responsible for monitoring the total costs under the certificate and for ensuring that the costs are kept within the financial limitation imposed.

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

The exception to this is where counsel's fees alone exceed the costs limitation on the certificate and counsel has been sent a copy of the certificate or amendment bearing the relevant costs limitation. In those circumstances, counsel will only be paid the sum due under the costs limitation. Any remaining shortfall in counsel's fees will be a matter between counsel and the conducting solicitor, and will not concern the Board further. If counsel had no knowledge of the limitation the solicitor will be obliged to indemnity counsel for his loss. However, this should be rare because solicitors are under an obligation to send counsel a copy of the certificate and any amendments to it under Regulation 59(2).

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

### *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 solicitors bill, as allowed, is £4,000 which consists of £1,000 Counsel's fees and £3,000 profit costs and other disbursements.

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

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

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

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

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

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

It is essential that incoming solicitors are aware of the costs position so they can determine whether the costs benefit aspect of the merits test continues to be satisfied and what steps they will need to take for that client. The imposition of the costs limitation does not itself increase the burden of a solicitor taking over a legal aid certificate. It does however reinforce best practice.

## What if the certificate contains multiple proceedings?

Because of the way the Board's CIS computer system works, a certificate covering more than one set of proceedings will have more than one costs limitation imposed. It is intended that there should be only one applicable costs limitation for all the work authorised by the certificate. Accordingly, the costs limit will be the highest of the limitations specified.

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

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

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

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

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

## When should I apply for an amendment?

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

An amendment should be applied for when the future work to be done is likely to exceed the costs limitation imposed. Note for Guidance 9-15 in the 1998/99 Legal Aid Handbook is not strictly correct in stating that any amendment to the costs limitation will not operate retrospectively. The correct position is that applications for an increase in the costs limitation will not be necessarily granted merely because the existing limitation has been exceeded. Any decision to amend must be based on whether it is justifiable. Area offices will, when considering amendment requests, make a decision as to the reasonable level of costs to be incurred for the future work in relation to the scope of the certificate

## What if I have more than one certificate where the proceedings are linked (but it is not a multi party action)?

When applying for an amendment solicitors are asked to consider the costs across the certificates and to request any increase to cover the work to be done under all the certificates. Area offices will consider the work to be done and apportion the costs equally between the certificates unless solicitors explain the circumstances which justify a greater increase in costs for any individual certificate. ■

## Important notice for Family Practitioners operating under the pilot of Section 29 of the Family Law Act 1996

Please note that form S29.5 will be replaced by form S29.6 on 8 November 1999. From that date, applications for civil legal aid certificates for family matters which are affected by the pilot of Section 29 of the Family Law Act 1996 will be rejected unless they are accompanied by form S29.6. ■

# Final phase of the Board's mediation pilot

Independent mediation services or solicitor mediators wishing to participate in the final phase of the Family Mediation Pilot should contact the Family Mediation Project on 0171 813 1000. Requests for application forms can be faxed on 0171 813 5330. Completed application forms must be returned by 5 p.m. 15 October 1999. ■

## Civil Legal Aid
### – Change of Solicitor Amendments

The purpose of this item is to remind practitioners that Note for Guidance 10-03 in the Legal Aid Handbook 1998/1999 (pages 157 to 159) contains revised guidance regarding applications for amendment to show a change of solicitor.

The guidance indicates that in dealing with a change of solicitor amendment request, whether to an emergency or a substantive certificate, the area office will consider the reason(s) for the change, as well as all the circumstances of the particular case. The civil legal aid merits test is reapplied and the reasonableness of the proposed change considered. Factors relevant to the application are the work which has been done, the scope of the certificate and the work remaining to be done, so as to balance the reason(s) put forward for the change and the likely increase in costs.

The guidance indicates that an amendment is likely to be granted where:

- no or only minimal costs have been incurred;
- there has been a change of address by the assisted person making it no longer reasonable for him to continue to instruct the existing solicitor;
- the change is based on a conflict of interest, or the absence of a conflict of interest;
- the change is based on a change of firm by the existing solicitor; or
- the amendment applied for is by a child to their own certificate in a public law Children Act case involving a guardian ad litem and the court has sanctioned the proposed change.

The guidance indicates that an amendment is likely to be refused where:-

- the current scope of the certificate is narrowly limited;
- there has been a previous change of solicitor amendment – the greater the number of requests, the less likely the amendment is to be granted;
- the stage reached in the proceedings is such that most of the necessary work has been undertaken and the likely increase in costs would be significant; or
- in cases of client dissatisfaction with the case and/or the solicitor, no complaint has been made under the solicitor's complaints procedure under Practice Rule 15.

In cases of client dissatisfaction practitioners should note that where no or insufficient information is given regarding the making of a complaint to the existing solicitor/firm, then the application is likely to be rejected or refused. The current versions of the application for amendment in civil cases (APP6 - version 6) and the checklist for form APP6 (version 5) require information to be given as to whether a complaint has been made and, if so, copies of the relevant documents/correspondence regarding the complaint and its outcome, as well as why the assisted person remains dissatisfied.

In some cases area offices may make enquiries of the current solicitor. To avoid delay it is clearly helpful if practitioners reply speedily to such enquiries and, when making applications, ensure that they are supported by as much of the relevant information as possible.

Where an amendment is refused the show cause procedure may be instituted, having regard to the merits test and/or the change of solicitor amendment request itself.

Even where the amendment is granted, it may be appropriate to restrict the scope of the certificate more tightly than was previously the case. This may reflect the current costs and/or merits of the case. Alternatively a restriction in scope may be used to enable the new, incoming solicitor to report more fully on costs and/or merits or particular aspects of the case, so that the continuation of the certificate can be considered. ■

# Solicitors with Higher Court Advocacy Rights – Opinions and Advocacy in Civil Cases

## 1 What is the main point?

1.1 The Legal Aid Board recognises that there may be circumstances when a solicitor acting for an assisted person in a civil case will wish to obtain an opinion from a solicitor with higher court advocacy rights, instead of an opinion from counsel, or to instruct such a solicitor to perform advocacy in a higher court.

1.2 The Legal Aid Board considers that it is right that solicitors with higher court advocacy rights (although they are not "counsel") should be recognised as capable of giving opinions (like counsel) and that, although there are no regulations specifically covering payment for work done by solicitors with higher court advocacy rights in civil cases, they should be treated in a way similar to counsel. Any counsel or solicitor instructed should be independent of the conducting solicitor's firm.

## 2 Are there any new limitations?

2.1 The Board is changing the standard limitations on legal aid certificates so that, wherever the words "counsel's opinion" appear, they are replaced by the words "external counsel's opinion" and followed by the words "or the opinion of an external solicitor with higher court advocacy rights".

2.2 When a certificate is limited in this way, the conducting solicitor may choose whether to obtain an opinion from a barrister (who is not employed by the conducting solicitor's firm) or from a solicitor with higher court advocacy rights. Such a solicitor must not be a partner in, employed by, or a consultant to the conducting solicitor's firm but rather from a different firm. The job of the conducting solicitor is to get the opinion from a person whom they consider appropriate to give it.

2.3 The current limitations that allow a solicitor's report are not affected and will still be used where appropriate, i.e. where a report from the conducting solicitor is required. Note that in this context a solicitor's report will cover a report from an in-house barrister as what is required is a report from the conducting solicitor's firm.

## 3 Independent opinions

3.1 The Board will always require a solicitor from another firm to be instructed. The use of such a solicitor who must not be a partner in, or employed by, or a consultant to the conducting solicitor's firm will ensure that the opinion obtained is independent and objective (in the same way that an external counsel's opinion would be).

## 4 What standards have to be met?

4.1 Opinions from solicitors with higher court advocacy rights must comply with the Bar Council's guidelines (see pages 737 to 739 Legal Aid Handbook 1998/99). They must also be dated and state the solicitor's name and roll number and include a statement confirming that the solicitor has higher court advocacy rights.

4.2 Instructions to solicitors with higher court advocacy rights must comply with Regulation 59(2) of the Civil Legal Aid (General) Regulations 1989 "Instructing Counsel" in respect of the information to be provided.

## 5 Are charges profit costs or disbursements?

5.1 When one solicitor has instructed another (e.g. to attend court), the charges of the instructed solicitor have always been included in the instructing solicitor's bill as profit costs. This is still the case, but subject to the following exception.

5.2 When a solicitor with higher court advocacy rights (from a different firm) provides an opinion (like counsel), that solicitor's charges may be (but do not have to be) included as a disbursement in the instructing solicitor's bill. This recognises that the solicitor with higher court advocacy rights is providing the same service as a barrister.

5.3 If a solicitor with higher court advocacy rights acts as an advocate on behalf of his or her own firm or is instructed as an advocate on behalf of another firm when higher court advocacy rights are not required, his or her charges must be included in the instructing solicitor's bill as profit costs in the normal way. Where, however, he or she acts as an advocate for another firm and higher court advocacy rights are required his or her charges may be included as a disbursement in the instructing solicitor's bill.

5.4 There is no obligation to claim the costs of a solicitor with higher court advocacy rights as a disbursement. This is an option and they may still be claimed as profit costs.

## 6 What payment rates apply?

6.1 The Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 as amended and the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 as amended which apply in the county courts and the High Court do not specifically cover payment for opinions from solicitors with higher court advocacy rights. Payment should, therefore, be claimed at the "preparation" rate. If the payment is properly claimed as a disbursement (see paragraph 5 above) the appropriate hourly rate (e.g. franchised/non-franchised and London/out-of London) depends upon the rate which the solicitor providing the opinion is entitled to charge. It does not depend upon the rate that the conducting solicitor is entitled to charge.

6.2 When advocacy is performed by a solicitor with higher court advocacy rights, the appropriate rate

is that for advocacy by a solicitor (not counsel). The fact that the solicitor has higher court advocacy rights does not affect the amount chargeable.Where advocacy performed by a solicitor with higher court advocacy rights is properly claimed as a disbursement (see paragraph 5 above) the appropriate hourly rate depends upon the rate which the solicitor performing the advocacy is entitled to charge. It does not depend upon the rate that the conducting solicitor is entitled to charge.

6.3 Any orders or regulations governing or prescribing payment (and any enhancement or "mark-up" which the instructed solicitor wishes to claim) from the legal aid fund, continue to apply e.g. the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994 as amended or the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 as amended. However, the prescribed rates do not restrict the amounts recoverable from any other party to the proceedings.

6.4 On House of Lords costs assessments, payment for preparing petitions for leave to appeal to the House of Lords, and for any advocacy at such leave hearings, will (as is always the case when such work is performed by counsel) be subject to the maximum rate that would be payable to junior counsel for such work

**7 Do invoices have to be prepared?**

7.1 When work done by a solicitor with higher court advocacy rights is properly claimed as a disbursement (see paragraph 5 above), that solicitor must send the conducting solicitor an invoice for the work.

7.2 The invoice must detail the work done, the time spent, the payment rate applied (without any element of enhancement or other "mark up") and VAT. If any enhancement or "mark up" is claimed, this must be shown separately with reasons why it is claimed.

7.3 Where the work done was advocacy before a court where higher court advocacy rights were required, this must be stated on the invoice.

**8 What payments on account may be claimed?**

8.1 Disbursements incurred in instructing a solicitor with higher court advocacy rights are subject to the usual provisions for payment on account of disbursements. Applications for payments on account must be made by the conducting solicitor (not the instructed solicitor) with the receipted invoice.

8.2 To treat solicitors with higher court advocacy rights like barristers, the Board will not make payments on account of such disbursements to be incurred – only on account of disbursements that have already been incurred and will make maximum payments of 75% of the amount claimed.

8.3 The amount claimed on account should be at the appropriate rate (see paragraph 6 above) but without any element of enhancement or "mark-up". Enhancement or "mark-up" will not be paid on account but may be payable after the final bill has been assessed.

**9 Whom does the Board pay?**

9.1 All payments by the Board are made to the conducting solicitor's firm. There is no provision in the regulations for paying solicitors with higher court advocacy rights direct.

9.2 When a conducting solicitor has included, as a disbursement in his or her bill, the charges of a solicitor with higher court advocacy rights, the minimum sum which the conducting solicitor must pay that solicitor is the full amount of the payment he or she receives for that work.

**10 Can prior authorities or ABWOR prior permissions be granted?**

10.1 As a solicitor with higher court advocacy rights is not "counsel", neither authority under Regulation 59 Civil Legal Aid (General) Regulations 1989 nor prior permission under Regulation 23 Legal Advice and Assistance Regulations 1989 is required. However, if an opinion from a solicitor with higher court advocacy rights has been obtained in proceedings covered by ABWOR or in authorised summary proceedings, area offices will, on assessment, look carefully at the reasonableness of obtaining the opinion and of the costs incurred.

10.2 Instructing a solicitor with higher court advocacy rights is not a step which falls within either Regulation 61 Civil Legal Aid (General) Regulations 1989 or Regulation 22 Legal Advice and Assistance Regulations 1989 so neither prior authorities nor prior permissions will be granted.

**11 How are forms and bills completed?**

11.1 Where work done by a solicitor with higher court advocacy rights is claimable as a disbursement by the conducting solicitor, it should be shown as such in his or her bill and claim for payment and any claim for payment on account.

11.2 In each case, a copy of the receipted invoice should be attached and the form or bill should set out the work that was done and the fact that it was done by a solicitor with higher court advocacy rights. This is necessary to enable the work to be properly assessed.

**12 Should value for money be a consideration?**

12.1 Value for money should be a consideration for a conducting solicitor in deciding whom to instruct to provide an opinion or perform advocacy services. In cases where payment is covered by regulations e.g. the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 as amended, the prescribed rates will be a starting point from which to assess value for money, but may not be the sole consideration. ■

# Guidance: Exercise of Devolved Powers – Update

- Introduction
- General – Advice & Assistance
- General – Means Assessment – Legal Advice & Assistance/ ABWOR
- General – Civil
- Immigration – Advice & Assistance
- Welfare Benefits – Advice & Assistance
- Crime – Advice & Assistance

# Amendments to Guidance:

## Exercise of Devolved Powers

The Guidance: Exercise of Devolved Powers is to be updated by **Issue 10** which is being sent to franchisees and subscribers prior to the implementation date of **30 September 1999**.

All the substantive changes arising from the update have been consulted upon with practitioner groups prior to being finalised.

## The main changes in the update are:

- **To amend the guidance in General – Advice & Assistance regarding the use of separate application forms for advice and assistance (green forms) in welfare benefit matters.**
- **To amend the guidance in Immigration – Advice & Assistance regarding asylum screening interviews.**
- **To amend the suggested time in Welfare Benefits – Advice & Assistance for checking benefit entitlement and providing a written report on entitlement. Also to amend Welfare Benefits – Advice & Assistance to give new guidance on completion of application forms and on further advice on the same matter after submission of the claim for costs.**

## Other changes are:

1. To update the Introduction to refer to the mandatory exercise of devolved powers.
2. To amend the guidance generally at General – Advice & Assistance to reflect the Costs Assessment Guidance changes which appear in this issue of Focus (see pages 24 -47). The main changes above also reflect that Guidance.
3. To amend the guidance at General – Means Assessment – Legal Advice & Assistance/ABWOR to indicate that student loans should be treated by taking the annual student loan obtained by the student and dividing by 52.
4. To amend the guidance generally to reflect the new guidance on the use of solicitors with higher court advocacy rights in civil cases which appears in this issue of Focus (see pages 18-19).
5. To include advice and assistance regarding an application to the Criminal Cases Review Commission in the Crime franchise category and to exclude all appeal proceedings (but not advice and assistance) from any franchise category.

The guidance of relevance to non-franchisees appears below with additions and amendments to the existing text shown in bold type.

## General – Advice & Assistance

2.7.2. Separate matters – Non-Matrimonial

2.7.2.2 A single form should be used to provide general, preliminary advice, including checking any benefit currently paid, providing a report on entitlement to welfare benefits generally and advising on applying for particular benefits. Where a separate problem is identified or subsequently arises this ***may*** justify the use of a

separate, additional form eg. general benefits advice followed by a particular housing benefit problem such as a specific query regarding the particular client's entitlement, including a review/appeal (two forms unless the original form continued to be used) or followed by particular housing benefit and income support problems (three forms unless the original green form continued to be used). **However, in order to justify the use of a separate form, the query or problem raised must be substantive, ie. there must be evidence that the benefit in question has been miscalculated or wrongfully refused.**

Where preliminary, general advice as to welfare benefits is triggered by advice in another legal subject area (eg. for the solicitor to recognise the need for benefits advice or to indicate benefits available to the client in the particular matrimonial or personal injury context) this will not normally constitute a separate matter justifying the signature of a fresh green form unless/until more specific detailed advice is given eg. as to the individual client's particular entitlement (including a check of benefit in payment or entitlement report) or as to a specific **substantive** problem.

Benefit entitlement advice which arises from advice on a child maintenance assessment by the Child Support Agency (and vice versa) should be dealt with under one form unless/until they become separate matters.

**3.4 Prospects of Success and Cost Effectiveness**

**3.4.1** It would only be reasonable to extend the costs limit where a fee-paying client of moderate means would continue to fund the matter. However, where the fee-paying client test would not be appropriate (eg. welfare benefit or immigration cases), if the issue is of such importance to the client that the importance outweighs the likely costs then an extension would also be justified.

**3.4.2 In considering the cost effectiveness of any matter involving money or property, regard must be had to the possible operation of the solicitor's charge as against the exemptions and the limited grounds on which it may be waived.**

**3.4.3 However, where the money or property at stake is capable of quantification and the private client analogy is appropriate, it would usually be unreasonable for the solicitor to incur costs (including disbursements) that exceed or are out of proportion to the amount at stake notwithstanding that the prospects of success, including the likely recovery of costs, were good. It will be appropriate to refuse an extension for costs that are considered to be disproportionate.**

**3.4.4 Where the value of the claim is low, say under £100, there will be costs that are inevitably incurred in taking instructions and providing advice and assistance. It would not generally be reasonable to exceed 1 hour (10 units). Whether that time is reasonably exceeded will depend on the value of the claim and the individual client's impecuniosity. A lower value claim will be of greater importance to the poorest clients and this may justify further work. It will be inappropriate in most low value claims to incur or allow any costs above an hour in the absence of other factors.**

**3.4.5 Likewise, if the solicitor is aware (or ought to be aware) that prospects of success are very poor and/or there is little likelihood of the opponent being worth pursuing, then it may be appropriate to disallow any costs incurred after that situation became apparent (or ought to have become apparent). In these circumstances, limited work may be done to explain the options available to the client and take any necessary steps to reduce the client's exposure to costs.**

**3.4.6 For claims where other issues than money are at stake (regarding a right or non-financial benefit such as an injunction, an extension of leave to remain in an immigration case or housing disrepair), then the importance of the case to the client can be taken into account in assessing reasonableness. The issue must be a substantive one. However, it would not be reasonable to carry on advising a client in relation to a point of merely technical or academic interest.**

**4.** COSTS GUIDELINES

**4.1** INTRODUCTION

4.1.5.1 Generally, letters written and telephone calls are paid at the routine rate set out in Schedule 6 of the Legal Advice and Assistance Regulations 1989. Where a letter written is substantial in length (**usually** more than one page) and/**or** content, or where a telephone call is lengthy and of such substance as to constitute an attendance, then it may be reasonable for the preparation rate to be used. If so, the claim should be the actual time spent calculated at the preparation rate.

4.1.5.4 Where a letter is produced using modern technology, then the routine letter rate should be used (e.g. where details are inserted into a format by the use of a word processor), even where a number of letters using fundamentally the same text are produced on the same file. Time spent inputting information to a word processed document/computer package to generate a letter is not preparation by a fee earner but is akin to typing and is an overhead.

To that extent the solicitor gains the benefit of modern technology and he is not expected to dictate or **substantially** re-draft the text of the letter each time it is used.

**4.2 Complexity**

4.2.2 Each case must be considered on its own facts and merits but the following are factors which may set the particular case outside the guidelines so that the costs which would be necessary, and therefore reasonable, would be in excess of the guidelines:

a), b), c), d), **unamended**

e) the nature of the client leading directly to an increase in costs because of his/her particular characteristics/needs. For example, if the client has learning difficulties, is disabled, has insufficient knowledge of English to communicate with the solicitor or is particularly vulnerable or difficult to take instructions from. If, **however**, clients are unreasonably demanding, it may be unreasonable for additional costs to be incurred. It may be difficult for the Area Office to judge this although, **it is expected that** the solicitor **should** decline to provide further advice and assistance **in such circumstances**.

## General – Means Assessment – Legal Advice & Assistance/ ABWOR

**1.5 Erratic Income (including the self-employed)**

1.5.5 In relation to students, grants should be treated as income by reference to the number of weeks the particular grant is intended to cover and attributed to those weeks. Student loans should be **treated as income by taking the annual student loan obtained by the student and dividing by 52.**

## Immigration – Advice & Assistance

1.2.3 Attendance at ASU (Screening Unit) – Sometimes the PAQ interview will take place at the ASU particularly under the new shortened procedures for asylum. **If this occurs, then attendance on that interview will normally be justified (see 1.5 below). However, attendances on the asylum screening interview will not be justified – (see 1.4 below)**.

1.2.5 Advising, Preparing and Attending PAQ interviews – Where the Home Office or Immigration Service indicates that it wishes to interview the client, a further extension of up to 6 hours (60 units) should normally be sufficient to cover advising the client on the matters raised and preparing for and attending the interview. **Where an interview is attended, a full verbatim note should be taken**. Reasonable travel and waiting should be allowed in addition. Additional time may be required following the interview if specific issues were raised which could prejudice the application. The solicitor would need to clarify these points with the client.

1.4 Should an extension be granted to allow the solicitor to accompany the client to the **asylum screening interview**?

1.4.2 **The Immigration and Nationality Directorate have confirmed that substantive asylum interviews will not be held directly after asylum screening interviews for the foreseeable future. Legal representation is not required at the screening interview and there is no reason why the applicant cannot attend unaccompanied to be fingerprinted and provide documentation.**

**A reasonable period, of no more than 4 units, may be claimed for advising the client on the screening interview procedure, but it will not be reasonable to attend on the screening interview itself.**

**Note: Where the client is to be interviewed by an Immigration Officer under PACE (usually in relation to offences connected with illegal entry) then attendance on that interview will be justified.**

1.5 Should an extension be granted to allow the solicitor to accompany the client to the PAQ interview(s)?

1.5.1 Normally yes: Interviews usually take place at each PAQ attendance so assistance is normally reasonable. Remember, the solicitor must justify attendance each time **and a full verbatim note of the interview must be kept on the file**.

## Welfare Benefits – Advice & Assistance

**1. GREEN FORM AND EXTENSION GUIDANCE**

1.1 Initial Instructions.

1.1.4 The solicitor will take detailed instructions about the client's financial and domestic situation, sometimes by going through a standard questionnaire. He/she may need to peruse documents such as bank statements, rent books or building society statements. Sometimes the information will be fed into a computer software package specifically designed to calculate entitlement and provide a report. Otherwise, the report will be prepared manually.

1.1.5 **Thirty minutes (5 units)** is usually sufficient time to take instructions, check any benefit currently paid and provide a written report to the client on entitlement to welfare benefits generally **unless a longer time is justified on account of a client's mental illness, physical disability, language difficulty, or other communication problem.**

1.3 Is it reasonable for the solicitor to charge for the time spent helping the client to fill in application forms for welfare benefits?

1.3.1 Whilst it is reasonable to use the legal advice and assistance scheme to assess the client's entitlement to welfare benefits, it should not generally be used to assist the client in completing forms. This is an administrative task which should be undertaken by the client even if it means seeking assistance from family or friends. Occasionally it might be reasonable for the solicitor to provide advice regarding the completion of a form, or part of the forms, where, for example, an issue of law arises and it is important that the form is completed in the appropriate legal terms. For example this need might arise when completing certain sections of the D.L.A. claim form or the pro-forma sheets on habitual residence.

**1.7 What is so unusual about Disability Living Allowance?**

1.7.1 Extension requests are more common for cases concerning this particular benefit. This is because of the amount of detail required by the Agency. The application form itself runs to 40 pages and the questions are very detailed. The way the form is completed will very often determine entitlement to, or the level of, benefit paid. The regulations relating to this benefit, themselves centre on the definition of certain words such as 'regular' or 'substantial'. In borderline cases the way questions are answered can make all the difference. Whilst the solicitor cannot complete the form on the client's behalf (see paragraph 1.3.1) the client may require advice regarding how best to answer certain questions. **For example, this need might arise when completing sections of the disability living allowance forms or the pro forma sheet on habitual residence. If there is a specific attendance note explaining what legal issues were raised and/or justifying why advice and assistance was required then a reasonable allowance of 12 to 30 minutes (2 to 6 units) may be made. This may reasonably be extended in complex cases where the circumstances of the client justify the further time spent advising on completion of the forms.**

1.8 Reviews and Appeals to the Tribunal

1.8.1 Advice on a welfare benefit appeal constitutes the same matter as previous welfare benefit advice. The amount which will be justified will depend very much on the legal issues in question and what is at stake for the client. It should normally be possible to advise the client on this aspect (including lodging the review and the appeal) within two hours bearing in mind the expertise of the solicitor and the fact that the same legal issues tend to arise. **If a request for a review only is lodged (ie. the matter does not proceed to appeal) then it is likely that no more than one hour (10 units) would be justified save in an exceptional case.**

1.8.2 Remember that the solicitor may not have been asked to advise previously which means this work would be undertaken within the initial two hour limit without the need for an extension. An extension **may** be required if the solicitor has been involved in, for example, applying for the benefit or providing general welfare benefit advice. Caseworkers should clarify the work undertaken within the initial two hour limit before authorising an extension.

**1.10 Appeals to the Social Security Commissioners**

1.10.1 The solicitor should be able to consider the appeal body's decision, take instructions from the client and submit an appeal to the Social Security Commissioners in 2 – **4** hours (20 – **40**). Up to a further 2 hours (20 units) may be required to respond to any initial response from the DSS.

**1.14 Can further advice and assistance be provided on the same matter after the submission of the claim for costs? (see paragraph 2.7.4 – General – Advice & Assistance).**

**1.14.1 Where a solicitor has previously advised a client in relation to a particular benefit, then it would not normally be reasonable for the same solicitor to provide further advice and assistance to (and, if more than six months have elapsed, to complete a fresh application for advice and assistance on behalf of) the client in relation to the benefit unless there is evidence of a material change in circumstances in the interim period which is likely to affect the client's entitlement to that benefit. A material change in circumstances might not only be a change in the client's financial circumstances but a change in other relevant circumstances, eg. a deterioration in the client's health or disability which could affect their entitlement to benefit.** ■

# An introduction to Guidance: Advice & Assistance Costs Assessment

The Board has, following external consultation, finalised internal guidance to bill assessors. The guidance is set out in full below and its key aim is to improve the justifiability and consistency of decision making in advice and assistance costs assessment.

Whilst it is largely a consolidatory document it will, following training, be introduced by area offices from 30 September 1999. It is published both to improve awareness of the Board's approach to costs assessment and to illustrate best practice for claiming advice and assistance costs.

# Guidance: Advice & Assistance Costs Assessment

## CONTENTS

## 1. ADVICE AND ASSISTANCE: GUIDANCE ON COSTS ASSESSMENT.

1.1 Introduction

1.1.1 The legal framework for the provision of advice and assistance is set out in Part III of the Legal Aid Act 1988, the Legal Advice and Assistance Regulations 1989 (the 'LAAR 89') and the Legal Advice and Assistance (Scope) Regulations 1989 (the 'Scope regulations').

1.1.2 Only work which is within the scope of the advice and assistance scheme and carried out in accordance with the regulations should be claimed for and paid. Subject to this framework, regulation 30 of the LAAR 89 states that in any assessment of costs the amount to be allowed should be assessed under the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989 as if the work was done by a solicitor in criminal proceedings in a Magistrates' Court.

1.1.3 The general basis for assessment is therefore that set out in Regulation 4 of the Criminal and Care Proceedings (Costs) Regulations 1989. The caseworker shall:

(a) Take into account all the relevant circumstances of the case including the nature, importance, complexity or difficulty of the work and the time involved; and

(b) Allow a reasonable amount of time in respect of all work actually and reasonably done.

1.1.4 An assessment can be made either from the Claim 10 form alone or by calling for the file and going through it in detail.

1.1.5 Any costs allowed on assessment will be at the hourly rates set in Schedule 6 to the LAAR 89 for the time the work was done. The current rates are set out in the Handbook (see also paragraph (1.7) below). Separate rates are set for preparation, travel and waiting respectively and at an item rate for routine letters and telephone calls. A reasonable amount will be allowed for disbursements reasonably incurred.

**1.2 The Essential Claim 10 Checks**

1.2.1 There are a number of issues which can be considered from the Claim 10 form.

(a) Has the claim been properly completed?

There may be a number of omissions on the form, the area office response to which will be determined by the nature of the omission:

**i) Capital/Income – Sections not completed or form not signed by client.**

Regulation 9 of the LAAR 89 provides that where a client makes an application for advice and assistance he should provide the solicitor with the information necessary to enable the solicitor to determine:

– his disposable capital;

– where appropriate whether he is in receipt of income support, income based jobseeker's allowance, family credit or disability working allowance and

– where he is not in receipt of those benefits, his disposable income.

Regulation 9(6) provides that the information required by the regulations should be furnished on a form approved by the Board.

In order to comply with the requirements of regulation 9 the income and capital details must be fully completed at the same time as the application is signed. Solicitors must ensure that both sections for income and capital details on the Claim 10 are completed using words and/or figures as appropriate. A tick or striking-through of the income or capital detail boxes does not furnish information as required by the regulations – see **Legal Aid Board Point of Principle LAA15**. The use of the words not applicable or N/A is not generally acceptable.

The Capital details box asks for three pieces of information and these should be answered as set out below:–

(i) How many dependants does the client have.

This must be answered in words and/or figures reflecting the number of dependents (including partner, children and other dependent relatives).

(ii) The client's total savings and/or other capital.

This must be answered in words and/or figures to provide the total amount of savings/ disposable capital.

(iii) The Client's partner's savings and/or capital.

This must be answered in the same manner as (i) above where:–

- it is clear from the response to (i) that there is no partner,
- the circumstances are such that income/capital

should not be aggregated. (see Paragraph 7(2) Schedule 2 or the LAAR 89).

If so, the words not applicable or n/a should be used. The solicitor must also provide a note of explanation on or with the claim 10.

Similarly, in the Income details section of the claim 10 'not applicable' or n/a must only be used where there is no partner or the couple's means will not be aggregated. A note of explanation must be provided for non-aggregation.

If therefore the income or capital details are not fully completed as above or the form is not signed, then the claim should be assessed at nil as the mandatory requirements have not been met. If the original form is sent back to the solicitors then a copy should be maintained on the file.

**(ii) Form not dated by the client, date incorrectly recorded or work carried out before the date of the form.**

**Legal Aid Board Point of Principle LAA7** provides that if the date inserted on the signing of the form is incorrectly recorded or omitted it shall be admissible to provide the Board with satisfactory evidence to show the date when the form was actually signed. This is because the provision of the date is not itself a mandatory requirement of the regulations in contrast to the information required by Regulation 9 set out in (i) above.

If the date is missing or seems obviously incorrect (e.g. is dated at the same time as the solicitor has completed the claim section) the claim should therefore be rejected and should not be accepted for assessment until satisfactory evidence of date of signature is supplied. Satisfactory evidence will need to be given. This should usually be provided by the client in the form of a letter or statement. It should be signed by the client and state the date the form was completed and when legal advice was first given.

The solicitor should also submit the file with the Claim 10 so that this claim can be verified. However, where the client is unable or unwilling to provide such evidence the solicitor should confirm why. The solicitors file can then be considered to determine whether the initial attendance note provides sufficient evidence.

Any claim for work carried out before the date the Claim 10 was signed should be disallowed, save for:

- telephone advice provided by a franchisee (see page 13 of Claim 10.)
- travel expenses of a franchisee to a client before signature obtained (see page 13 of Claim 10 and paragraph (1.13.2) below).

**iii) Client's details incomplete.**

If the client's details are not fully completed on page 1 of the Claim 10, then again the form should be rejected. In extreme cases, where very few details are given then the policy at (ii) above should be adopted i.e. extraneous evidence from the client should be called for together with the file. Otherwise the solicitor may resubmit a corrected form.

**iv) Details missing from the solicitor's sections of the Claim 10.**

The sections of the file required to be completed by the solicitor e.g. box 2 on page 1, the whole of page 3, or the claim for costs at pages 11 to 14 may be incomplete. Any claim form not signed by the solicitor must be rejected but otherwise, if appropriate, the information may be obtained over the telephone.

**v) Lost Forms.**

The original signed Claim 10 form should be submitted for assessment. If however, the original has been lost the solicitor should complete a fresh form (unsigned ) by the applicant and submit it with a photocopy of the original form (if available) together with a letter signed by a partner of the firm confirming the loss, the accuracy of the contents of the fresh form and that the costs have not been claimed previously nor will be claimed in the future. The caseworker will then decide whether the existence and contents of the original form have been sufficiently proved to justify payment of the claim and assess accordingly.

## 1.3 Is the work done within the initial or extended limit?

1.3.1 Regulation 4 of the LAAR 89 limits the advice and assistance which may be given without extension to two hours work, or three hours in the case of advice and assistance provided where a petition is drafted for divorce or judicial separation. *(Note the limit does not apply to advice and assistance given at Magistrates' Courts under regulation 7 LAAR 89).*

1.3.2 Therefore unless an extension has been applied for and obtained, or in the case of a franchisee, self granted at the appropriate time, then all work above that limit should be disallowed.

1.3.3 Note that extensions cannot be granted retrospectively, so that any work carried out after the limit has been exceeded but before any extension has been granted must be disallowed.

1.3.4 Likewise, if the amount of work carried out exceeds any extension granted, any work in excess of that amount should not be allowed.

1.3.5 Where the work carried out as detailed in the Claim 10 differs substantially from the work previously specified in an extension request then that work may be disallowed. This is because the extension was not granted for that work but for the work put forward in the previous extension application. The work should be disallowed in the absence of circumstances justifying the unspecified work as reasonable (from the perspective of the solicitor's state of knowledge when the work was done and *not* with the benefit of hindsight). The onus would be on the conducting solicitor to show such justification.

***Examples***

*An extension is granted to enable a legal aid application to be made and the time is used instead for further investigations or negotiations.*

*or*

*An extension is granted to include a particular disbursement which is then not incurred but other work is carried out or a different disbursement is incurred instead, up to the limit.*

*In either case the work would be disallowed in the absence of justification.*

### 1.4 Is the Claim 10 Signed on the Clients Behalf?

1.4.1 Regulation 10 of the LAAR 89 provides that where a client cannot for good reason attend on the solicitor in order to apply for advice and assistance, another person may be authorised to attend on the client's behalf. The form should be signed by the authorised person on the client's behalf and should be annotated indicating the full name of the person signing and to also make it clear that the application signed was in accordance with Regulation 10 (e.g. "signed by Mary Louise Smith with the client's authority").

1.4.2 If therefore a Claim 10 is received where it is apparent that the form has been signed on the client's behalf (e.g. because outward travel to a client in detention is claimed on the basis that the form has been signed 'under regulation 10' or the signature appears to be in a name other than that of the client) and either the requirement above has not been complied with, and/or the Claim 10 does not establish good reason then the Claim 10 should be rejected.

1.4.3 The claim may be re-submitted by the solicitor with information from the solicitor of the reason that the application was signed on the client's behalf. If an employee of the firm signed the form, a statement from that person (authorised to attend on the client's behalf) setting out the circumstances of their attendance on the client, together with evidence of the authority from the client should also be submitted – see below.

1.4.4 Good reason is likely to be established where the client is physically unable to attend due to detention in an institution such as a prison, mental hospital, or immigration detention centre. It may include other circumstances such as hospitalisation or inability to travel due to disability. The reason relied upon should always be noted by the solicitor and, if evidence is required or if assessment is being carried out from the file it should be checked by the caseworker. Good reason is unlikely to be established if the incapacity is temporary and the provision of advice and assistance could be postponed without prejudice to the client.

1.4.5 The person authorised must physically attend on the solicitor who is to provide the advice. The authorised person must provide the client's details, brief details about the case and sufficient information to enable the client's financial eligibility to be determined. This information must be provided at the same time that the form is completed and signed by the authorised person. The costs for authorisation of work done prior to the physical attendance by the other person should not form part of the solicitor's claim for costs – see **Legal Aid Board Point of Principle LAA10**.

1.4.6 The person who attends on behalf of the client should normally be independent of the solicitor's firm providing the advice and assistance (e.g. they could be a friend or relative of the client). After the solicitor has made sufficient enquiries of the client why a friend/relative or some other person is not available to be the authorised person, an employee of the firm may be instructed to act as the authorised person. The authorised employee must be an individual other than the solicitor who is to provide the advice.

1.4.7 If an employee of the solicitor's firm is the authorised person then a full note of the authorisation and physical attendance should be kept on the file. Work in respect of the authorisation and any attendance note should be included within the solicitor's claim for costs. If a client provides written authority, a copy should be kept by the solicitor. If authorisation is by telephone, a note should be made. The solicitor is expected to first ask the client whether a friend/relative or some other person is available. The solicitor's

note should therefore provide reasons why such a person was not available and confirm that enquiries have been made about their availability. There may be reasons why to the client may not wish to authorise a friend or relative or any other person and if so these should be noted on the file. Temporary unavailability of friends/relatives/others would not be sufficient where the advice is not urgent and can be postponed.

### 1.5 Was authority to sign a fresh green form required?

1.5.1 Regulation 16 of the LAAR 89 provides that a person shall not be given advice and assistance for the same matter by more than one solicitor without the prior authority of the Area Director.

1.5.2 It is not appropriate to make payment under the LAAR 89 for advice given on the same matter where no authority has been granted, given the mandatory nature of Regulation 16.

1.5.3 If therefore the certification on page 4 of the Claim 10 indicates that help has already been received but no application for authority has been made and granted, either by the Board or a franchisee in exercise of devolved powers (see page 13 of the Claim 10) then the claim must be assessed at nil.

1.5.4 If this part of the client's certification is left blank, the form must be rejected and must be re-submitted with a letter from the client confirming the position. The form should not be amended.

1.5.5 The onus is on the solicitor to satisfy the Board that no Claim 10 has been previously signed and the solicitor must ensure the application is fully completed in that respect before providing advice and assistance. **(see Legal Aid Board Point of Principle LAA11)** Where authority is required, it will not be granted retrospectively. Work done before the authority cannot be remunerated. Therefore any work done before the grant of authority should be disallowed on assessment. The form may however be signed in anticipation of authority being given **(see LAA11.)**

**Note:** If the certification on page 4 of the Claim 10 indicates that help has not already been provided by an another solicitor but where the Board's computer system shows that an extension has been granted and/or a bill has been submitted/paid for what seems to be the same subject matter within the last six months, then it may be appropriate to confirm the position with the previous solicitor (and/or the Claim 10/file submitted by them) before making payment.

Where the claim is assessed at nil attention should be drawn to the possibility of an extra statutory payment. **(see LAA11)**.

### 1.6 Is it a Postal application?

1.6.1 Postal applications may be accepted by franchisees from clients either in or outside England and Wales – (see page 13 of Claim 10).

1.6.2 Non franchisees cannot accept postal applications from clients in England and Wales and they require authority under regulation 15 LAAR 89 to accept a postal application from a client resident outside of England and Wales.

1.6.3 In the case of a non franchisee therefore, if the client's address does not appear to be in England and Wales, the caseworker should confirm whether authority for a postal application has been granted by the area office.

If not, the form should be rejected for the solicitor to give further information as to the circumstances in which the form was signed. If the form was in fact completed through a postal application without authority, then the claim should be nil assessed as the provisions of Regulation 9 LAAR 89 (which requires a personal attendance except in the circumstances set in Regulations 15 and 10) have not been complied with.

### 1.7 Does the Solicitor's Charge apply?

1.7.1 Has any money or property been recovered or preserved for the client (see page 12 of the Claim 10.) ? If so, has the charge been waived (either through an authority or through the exercise of devolved powers)?

1.7.2 If the charge applies but has not been waived, then the amount of money or the value of the property recovered/preserved will be deducted from the amount assessed as payable to the solicitor.

**Note:** the charge will not apply if the property is exempt see Schedule 4 to the LAAR 89 and GEDP General – Advice and Assistance paragraph 6.2.

### 1.8 Are the costs claimed reasonable?

1.8.1 An assessment may be made from the claim for costs contained on pages 12 and 13 of Claim 10. The information contained in the Claim 10 as to costs is limited in detail. Where therefore the claim for costs contains information which raises further issues, and the assessing officer considers he does not have sufficient information to assess the claim, it may be necessary to obtain the file.

1.8.2 The hourly rates of payment for advice and assistance are set by schedule 6 of the LAAR 89.

Current rates for work done on or after 1.4.96 are set below.

| **For non franchisees** | |
|---|---|
| *Class of Work* | *Rate* |
| Preparation | £44.00 per hour – (46.50 per hour for a fee-earner whose office is situated within legal aid area 1) |
| Travelling and waiting | £24.50 per hour |
| Routine letters written and routine telephone calls | £3.40 per item – (£3.55 per item for a fee-earner whose office is situated within legal aid area 1) |
| **For franchisees:** | |
| *Class of Work* | *Rate* |
| Preparation | £45.50 per hour – (£48.25 per hour for a fee-earner whose office is situated within legal aid area 1) |
| Travelling and waiting | £25.50 per hour |
| Routine letters written and routine telephone calls | £3.55 per item (£3.70 per item for a fee-earner whose office is situated within legal aid area 1) |

1.8.3 Remember when carrying out an assessment from the Claim 10 alone that the general principle, that a reasonable amount of time should be allowed for work actually and reasonably done, applies.

The following issues should be considered::

**(a) Is legal advice and assistance available for the work which has been done?** – see paragraph (1.9.1 (b)(i) to (viii)) below). If not, the work is ultra vires and must be assessed at nil.

If the advice and assistance is in relation to the making of a will, check whether the relevant box on page 4 of the Claim 10 has been completed If not, the form must be rejected and may only be accepted with the receipt of a letter from the senior partner confirming the circumstances under which the advice was given.

**(b) Time spent.**

The reasonableness of the time spent can be considered from the Claim 10 in the light of:

i) the breakdown of work prepared by the solicitor. This may show evidence of duplicated work, attendances that seem to be unnecessary or excessive, unnecessary/unreasonable letters/calls and/or claims for travel and waiting.

ii) the terms of any extensions granted (see Paragraph 1.3) above) including checking whether particular disbursements were mentioned in the extension application and/or grant.

iii) the GEDP costs guidelines. If the times recorded exceed those times, it may be appropriate to assess the claim down to the GEDP levels or to call for the file. Remember however that the GEDP costs guidelines are indicators only and where claims conform exactly to the guidelines, or to the upper limit if a range is given, this may indicate that the solicitor has 'claimed up' to those limits rather than recording work actually and reasonably done. If the times exceed the cost guidelines, caseworkers need to consider whether the circumstances of the particular case were such that it was reasonable to exceed the "standard" time for undertaking such work.

If a number of claims from one firm or one fee earner are received which are at the upper limits of the time standard that may be an indication that work is being claimed excessively.

(c) Disbursements.

A reasonable amount will be allowed for disbursements reasonably incurred – see paragraph 1.19 below.

(d) Mathematical calculations.

If the caseworker has not recalculated the costs on assessment, then calculations made by solicitors should be checked for accuracy

**1.9 Basic Principles of Assessment.**

1.9.1 The same legal principles will apply to an assessment from the file as with an assessment from the claim 10; i.e. work should be allowed which is within the Scheme, complies with the regulations and has been actually and reasonably done. The issues can be defined as follows:

(a) Have the regulations been complied with?

The matters referred with in paragraphs 1.1-1.8 inclusive above in relation to assessing the Claim 10 should, if not already considered upon receipt of the claim form, be dealt with on receipt of the file, as should any outstanding points from the Claim 10 (e.g. in relation to attendance notes showing authority for the form to be signed on the client's behalf under

regulation 10.)

(b) Is the advice and assistance given with the scope of the Scheme?

i) In assessing costs the caseworker must consider whether advice and assistance is legally available for the work which has been done. Where it is not, the work is ultra vires and cannot be remunerated. It must be disallowed in full.

ii) The matter must be one of English law. Advice and assistance may be given on matters relating to the application of English law which are not excluded by regulation. Advice cannot be given on matters of foreign law (which includes applications to the European Commission of Human Rights so long as that is not part of English law). Advice is available on transmission applications sent via Legal Aid Head Office to foreign legal aid authorities under the Strasbourg Agreement. Note that European Community Law is part of English law and green form advice and assistance is available.

iii) Where the opinion of counsel or another expert was required on a matter of foreign law this cannot be dealt with under advice and assistance and must therefore be disallowed on assessment. In appropriate cases, an application for full civil legal aid should have been made e.g. for an expert's opinion as to foreign family law to establish the validity of a foreign marriage or divorce where this is relevant to proceedings in England and Wales. Note, however, that in some cases limited advice may have been necessary to establish the most appropriate forum or jurisdiction (when considered and advised upon in the context of the relevant English, rather than foreign, law). The solicitor cannot claim the costs of identifying that the matter is one of foreign law or of advising the client to seek legal advice of the relevant jurisdiction (see **Legal Aid Board Point of Principle LAA8**).

iv) The matter must not be one which is excluded from the scheme. Matters excluded by Part II of the Scope Regulations are:

(a) Conveyancing services,

**except**: rental purchase agreements or conditional sale agreements for the sale of land and any conveyancing necessary to give effect to an order of the court or, in proceedings under the Matrimonial Causes Act 1973 or the Matrimonial and Family Proceedings Act 1984, the terms of an agreement;

and

(b) Wills.

**except:** where the client is aged 70 or over, or suffers from a mental or physical handicap or illness (as defined in regulation 4 of the Scope Regulations) or is the parent or guardian of such a person and wishes to provide for them in the will, or is the mother or father of a minor who is living with the client where the client is not living with the minor's other parent and wishes to appoint a guardian for that minor. *Payment for advice and assistance in relation to wills can therefore only be authorised in these circumstances and in those set out in the following paragraph.*

v) Advice and assistance is available in respect of living wills (also known as advance directives about medical treatment decisions) but particular circumstances must have arisen requiring advice to be given. This might be so if it can be shown that such a directive may be needed, i.e. where the individual's current medical state is such that there is a real probability of medical treatment being required in the future or the individual holds a relevant strong religious or moral belief (see **Legal Aid Board Point of Principle LAA17** and its accompanying guidance at Note for Guidance 2 – 29/1).

vi) Some matters are excluded from the availability of full legal aid. This does not of *itself* prevent advice and assistance being given. For example advice can be given in relation to a defamation case although defamation proceedings are specifically excluded from the availability of civil legal aid.

vii) Advice and assistance does not extend to representation. However, the solicitor can advise and assist a client who is a litigant in person. The most common example is in undefended matrimonial proceedings where the client is a litigant in person, advised and assisted by the solicitor. The client's address for service of documents

can be care of the firms address. Similarly, small claims cases may be supported in this way or by irregular pieces of advice when required by the client. The solicitor can, if appropriate, assist in tracing/ interviewing witnesses and in the preparation of written submissions e.g. for Tribunal cases. [See also paragraph (1.26 & 1.27) below regarding Tribunal hearing/ preparation and McKenzie advisors.]

viii) Advice and assistance is not available for obtaining a grant of representation to an estate since a grant is an order of the court for which application must be made to the court. A solicitor may, however, give advice and assistance to a client to enable that client to make a personal application for a grant of representation to an estate but the client will be responsible for the payment of any court fees

(c) What work has been actually and reasonably done?

The caseworker should consider:

i) Is the work claimed on the Claim 10 backed up by an attendance note on the file which has an indication of duration. If not, then the assessor must decide whether the work should be allowed, reduced or disallowed. Where the file is available, the assessment should be based on timed attendances on that file, rather than on the Claim 10 record which will have been compiled after the event.

ii) Does the attendance note contain sufficient information to justify the time claimed and/or is there other supporting evidence of the work done? If so, the time can either be reduced to such time as is considered justified or allowed as claimed. Where the attendance note does not justify the work done it should be disallowed.

iii) Was it was reasonable to perform the work at all and, if so, is the time claimed reasonable?

iv) The onus should be on the solicitor to show that the work has actually and reasonably been done.

v) Would a reasonably competent solicitor have undertaken the work and, if so, would they have spent that amount of time on it?

1.9.2 In practice, caseworkers looking at any particular file or piece of work will need to keep all of these issues in mind and they cannot be completely separated. This part of the guidance is therefore not broken down precisely into the above three issues but into two sections:

1.9.3 **Section A: Items of Work**, deals with the general items of work or expenditure claimed for; namely preparation (including attendances) letters and telephone calls, travel, waiting and disbursements. This section deals with both issues of satisfactory evidence of the work having been carried out and of reasonableness.

(a) There should be a record of work done on the file. This will be of two types:

i) attendance notes of work done; attendances on a client and others and telephone attendances

ii) letters written.

(b) These documents need to be viewed in two ways. The first is that they are the basic information upon which the claim can be arithmetically assessed. Letters written are in general remunerated on an item basis as are the majority of telephone calls. Time spent on more complex letters and telephone attendances may in certain circumstances (see 1.11.2) be claimed as preparation. It should be recorded on attendance notes in addition to notes of personal attendances and preparation. The total time so recorded is calculated by reference to the hourly rate (see paragraph 1.8.2 above.) Where time is claimed for preparing letters or making telephone calls, the item rate should not be claimed as well.

1.9.4 **Section B: Guidance on Reasonableness** deals with other aspects of reasonableness which will apply to all items of work, either generally or in specific situations.

1.9.5 It is important to remember that when considering whether work was reasonably done, the issue should be looked at from the point of view of the reasonable solicitor at the time the work was carried out and not with the benefit of hindsight.

1.9.6 Secondly, attendance notes and the correspondence are the important items to be considered by the caseworker when exercising discretion as to the reasonableness of the work done and the amount claimed. It is by reading the file through, initially quite quickly, that the assessor can make a judgement as to the weight and complexity of the case, the reasonableness of the work done and gain an idea as to matters such as repetition.

### 1.10 Claims for Preparation.

1.10.1 Preparation, includes both preparation of documents and attendances (e.g. on clients and witnesses) and is allowed at an hourly rate (see paragraph 1.8 above).

1.10.2 Remember that as well as looking carefully at individual attendance notes it is important to look at the total time claimed for advising on particular issues or considering or preparing particular documents in order that any duplication of work can be picked up and an assessment made of the overall time spent.

(a) Attendances to provide advice or take instructions.

Standardised attendance notes, without any confirmation or reference to specific instructions obtained from or advice given to the client are not satisfactory evidence of the reasonableness of the work done for any but the briefest of attendances.

In particular, any individual attendance note for providing advice or taking instruction over ***two units (12 minutes)*** should contain some detail showing the instructions taken and/or the advice given and/or how the case was progressed. 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 ***2 units (12 minutes)***.

Appropriate supporting evidence could include:

i) hand-written notes of the interview with the client.

ii) 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.

iii) a letter to the client confirming the advice given in interview.

Where there have been several interviews with the client, it is worth considering whether the later interviews dealt with issues which could have been dealt with within the time allowed for previous attendances or should have been raised earlier or alternatively could have been dealt with by a letter rather than an attendance.

If supporting information is available the caseworker should assess the reasonableness of the time spent.

(b) Preparation of documents.

An attendance note showing the preparation of a particular document (e.g. statement or long letter) should normally be evidenced by the existence of that document or a copy on the file. Further, the length/nature of the document should justify the time claimed in its preparation.

As a rough guide, it would normally take approximately ***one unit (6 minutes)*** to consider and dictate each page of a simple new document.

More complex documents, such as a statement in support of an asylum application, may take longer to prepare per page.

For example, an attendance note may show that the solicitor attended for ***eight units*** on a client to take/prepare a statement. However there is no statement on the file. In those circumstances the claim should be disallowed in the absence of other supporting evidence. Alternatively, if the statement is there and is simply one side of A4 paper, it may be appropriate to reduce the time claimed to ***one unit (6 minutes)***. It should be remembered however that there may be circumstances, e.g. a client with communication difficulties, which may justify additional time spent in preparation even where the document itself appears insubstantial.

No time allowance should be claimed for mechanical preparation of documents including time spent by a typist and the printing of any of the documents, or data input where a document is produced by a computer program. See also paragraph 1.11.4 below.

(c) Other preparation.

Time may be claimed for ‘reading’ or ‘perusals’. Again the caseworker should check the file to see which documentation has been considered.

As a very rough guide it takes approximately 2 minutes per A4 page to read the most simple prepared document to consider its contents and significance. Documents of any complexity may take a longer time either to read or to compare with other documents e.g. experts’ reports. There is no allowance for perusing routine letters received.

### 1.11 Letters.

1.11.1 Generally, letters written are paid at the routine rate set out in Schedule 6 of the LAAR. 89 (see paragraph (1.8) above). Where a letter written is substantial in length (more than one page) and/or content, then it may be reasonable for the preparation rate to be used. If therefore a proper

attendance note exists a claim for the actual time spent calculated at the preparation rate may be allowed instead of the standard rate. *You should not allow both the preparation rate and the routine letter rate in respect of the same letter.*

1.11.2 Any allowance at the preparation rate must be subject to the qualification that the allowance is an average. Some letters will take less than this to prepare – others somewhat more. To make a letter non-routine, the time spent must be outside the range of an average letter (as a benchmark it would reasonable to expect the time taken to exceed ten minutes before the item can be charged as preparation), **and** it must be justified by the need to pay particular attention to an incoming letter or time in drafting the letter itself. The caseworker may still reduce the time claimed (for example to the standard rate) if the content or length of the letter does not seem to justify more. As a rough guide, it would be unusual to allow more than the standard rate for a letter which was not more than one page long, unless the content of the letter was substantial enough to be likely to take considerable preparation.

1.11.3 It should be noted that there is no separate charge for routine letters received. The rate set for routine letters written includes the perusal and consideration of routine letters received and therefore no separate charge can be made for such letters.

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

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

1.11.6 Likewise, letters which are sent to correct errors by the solicitor should be disallowed.

**Example;**

*The solicitor writes to his client to confirm the advice given in an interview and purports to enclose a document. In fact, the enclosure is omitted and after the client calls and points this out , a second letter simply enclosing the document is sent to him. Neither the second letter, nor indeed the telephone call from the client should be allowed on assessment.*

1.11.7 Work that is generally administrative, e.g. making and confirming an appointment with the client, is not usually considered fee earner work as it can be undertaken by a non fee earner or secretary. It would not be reasonable to allow even an item charge for such letters where no specific action has been taken by the fee earner unless it can reasonably be construed as fee earner work, e.g. letter of instruction to an expert.

### 1.12 Telephone calls.

1.12.1 As with letters, these will normally be paid at the standard rate set out in schedule 6 the LAAR 89 (see paragraph 1.8 above). However, where a telephone call is lengthy (e.g. over 10 minutes in length) and of such substance as to replace an attendance and there is a proper record of the call then the preparation rate can be claimed.

1.12.2 Again, one should bear in mind that the standard allowance is an average and many calls will take less time. The mere fact that a particular call takes one or two minutes over the average will not justify departing from the standard.

1.12.3 In practice, any call over ten minutes or more in length may be claimed as a timed attendance, (but not also as a routine telephone call), and will be allowed as such, provided that the time spent was reasonable and that the telephone call was reasonably necessary to advance the client's case (e.g. a telephone attendance was used instead of an interview.) Only fee earners can claim for telephone calls as an attendance – see below. Where, however, the caseworker considers the time spent was excessive it may be adjusted to reflect what the caseworker considers to be a reasonable time spent.

*You should not allow both the preparation rate and the routine rate in respect of the same phone call.*

1.12.4 As with all work the overriding principle of reasonableness will apply. It should first of all have

been reasonable for the fee earner to undertake that call, as opposed to a non fee earner, and secondly only those calls which progress the client's case would be reasonable to allow. Not every telephone attendance or letter claim should automatically be allowed. The test of reasonableness must apply to all work done. The assessing officer needs to make a decision whether it was reasonable to make each call/draft each letter. Telephone calls (or letters) to obtain information which should reasonably have been obtained at an earlier interview (in light of the solicitors state of knowledge at that time) should not be allowed. Similarly, items caused by a reasonable complaint of the client about the failure to supply information or reply to letters etc. should not be allowed.

1.12.5 Administrative telephone calls.

This includes calls arranging appointments and organising attendances by counsel or experts which have no legal content. Such calls would not normally be attributable to a fee earner and should be undertaken by a non fee earner and therefore are generally not allowable even as an item charge. However, in more complex cases it may have been appropriate for the fee earner to undertake these calls if in the long run this would result in a saving of costs.

1.12.6 Abortive telephone calls are where a fee earner attempts unsuccessfully to contact someone. It would not normally be reasonable to allow such calls. Where, however, they actually get through to the number but the person is unavailable, these may reasonably be allowed as a routine call. In such calls there has been a justifiable attempt to progress the case.

**1.13 Travel.**

1.13.1 Where travelling time is incurred a decision will need to be made whether it was reasonable for the solicitor to travel or whether the work could be done in a less expensive way e.g. letter, telephone.

Examples of where travel may be reasonable are:

(a) attending a PAQ interview with a client in an immigration case.

(b) inspecting a pavement in a tripping case.

1.13.2 Travel to client.

Travelling time to take a client's instructions should only be allowed where a solicitor has to travel to the client because of some special reason i.e. because the client is house bound, detained in prison or in hospital. Otherwise it is reasonable to expect the client to attend the solicitor and travelling time to the client should be disallowed. Temporary incapacity is unlikely to constitute sufficient reason where the provision of advice and assistance can be postponed without prejudice to the client. There should be a note of the relevant circumstances on the file.

The position in relation to distant solicitors should be noted (see paragraph 1.15 below). Even where travelling to the client is justified it would rarely be possible to justify a journey of more than two hours each way. Travel time in excess of this should be disallowed.

Since work cannot be carried out before the Claim 10 is signed by the client, a claim for time spent on an outward journey to see a client before signature must therefore be disallowed. Franchisees may however claim the expenses of the outward journey (i.e. mileage or public transport) but would still need to provide justification as to why they had travelled to see the client at all. It should be borne in mind that franchisees may give telephone advice pre signature and can accept applications by post.

Travel time and expenses spent for more than one client should be apportioned.

**1.14 Waiting.**

1.14.1 Most waiting will occur in the context of advice and assistance when attending on interviews with the client e.g. at the Immigration Services. If possible, care should be taken to ensure that the solicitor has not been unduly cautious i.e. arrived too far in advance of the scheduled interview time. It will usually be reasonable to disallow all waiting time over ***5 units (30 minutes)*** in the absence of a note on the file setting out the circumstances, including the time the interview was due to start, the time it was due to start and the reason for the delay (e.g. due to the previous interview overrunning).

1.14.2 Where waiting time has been used to take a client's instructions or give advice, then this may be allowed at the preparation rate subject to the test of reasonableness in the normal way. There should be evidence on the file in the form of an attendance note that the work done was in a form which advanced the case.

1.14.3 Waiting time spent for more than one client should be apportioned.

**1.15 Distant Solicitors.**

1.15.1 Clients may be at a distance from the solicitor/adviser.

1.15.2 Special arrangements are available to franchisees (but not other practitioners) which make it administratively easier to accept an application for advice and assistance where issues of access can be demonstrated. These are postal applications, telephone advice and the payment of outward travel disbursements but not travelling time. General guidance on the use of these special arrangements is given at Section 1, General – Advice & Assistance – paragraph 9.2.

1.15.3 Franchisees considering using one of these arrangements, as well as other practitioners generally, should consider whether it is, in all the circumstances, appropriate to accept instructions having regard to the service to be provided to the client and the costs of providing that service. Factors in favour of accepting instructions will include:

(a) any legitimate expectation of the client of specialist assistance i.e. by an adviser with appropriate expertise, particularly in an unusual subject area;

(b) the lack of availability (including, if necessary, at short notice) of that expertise in the client's geographical area;

(c) the nature, complexity and/or significance of the subject matter such as to justify the involvement of a distant solicitor;

(d) for franchisees only, the possibility of advising without the need for personal attendances; and

(e) significant previous knowledge/dealings with the client such as to justify renewed involvement even though the client is at a distance.

1.15.4 These factors need to be balanced against the distance between the client and solicitor/adviser in terms of accessibility for the client and increased costs of travel/travelling time. The greater the distance the greater the justification which will be required.

1.15.5 It is unlikely to be justified for a solicitor/adviser to travel to attend on a client at a significant distance from his office, involving say a one way travelling time of more than 2 hours, on the basis that it would be more appropriate for the matter to be dealt with by a solicitor/adviser local to the client.

1.15.6 This will, however, depend on all the circumstances of the case. Even where a longer time could be apportioned between a number of clients on a particular occasion this will not justify a longer travelling time because it will not necessarily always be possible to apportion in the same way on all occasions.

1.15.7 Where a franchisee does consider a longer travelling time to be justified in a particular case (e.g. possibly where a client moves (or is moved) away but the franchisee's continued personal involvement is justified) an appropriate note should be made and retained on the file. Where the franchisee does not consider this to be justified he should consider what assistance he can provide in ensuring that the client is referred to an appropriate source of information regarding advisers with relevant expertise, who are more local to the client.

**1.16 Units/VAT.**

1.16.1 Applications should be dealt with in 6 minute units with numbers of letters written and telephone calls made/received calculated by reference to the appropriate remuneration rate (based on **when** the work is undertaken). Costs and limits are exclusive of VAT. See also paragraph 1.10.2 below.

**1.17 Means Assessment not chargeable.**

1.17.1 Time spent carrying out the means assessment and completing the green form are undertaken prior to the signature of the green form and cannot be remunerated.

**1.18 Costs Claims.**

1.18.1 The opening of a file, maintenance of time/costing records and the preparation/submission of extension applications and costs claims are not chargeable work but are overheads and cannot be remunerated. A client care letter can be remunerated.

**1.19 Disbursements.**

1.19.1 Disbursements form part of the solicitor's legal costs. They should be included within the advice and assistance limit and/or the limit of any extension granted. To decide whether a particular disbursement is recoverable the caseworker should consider three questions:-

(a) Is the disbursement recoverable under the advice and assistance scheme;

(b) Was it reasonable for the solicitor to incur the disbursement *(for the purpose of giving advice or assistance)* to the client; and

(c) Was the amount of the disbursement reasonable.

*The fact that a disbursement has been allowed for as part of any extension granted by the area office does not prevent these issues being considered on assessment and the disbursement being disallowed/reduced if appropriate.*

A non-exhaustive list of recoverable and irrecoverable disbursements appears below:

| Recoverable Disbursements | Irrecoverable Disbursement |
|---|---|
| Accident report fees. | Ad Valorem stamp duties |
| Birth and other certificates | Capital duty |
| Counsel's fees | Client's travelling and accommodation expenses |
| Enquiry agents' and interpreters' fees. | Contact centre fees. |
| Experts' fees including for medical reports | Court fees (unless for a search/photocopies/bailiff service). |
| Fees recoverable on oaths. | Discharge of debts owed by the client, e.g. rent or mortgage arrears. |
| Mediators' fees | Fee payable on voluntary petitions in bankruptcy. |
| Newspaper advertisements | Mortgagees' or lessors' solicitors costs and disbursements |
| Photographers' accounts | Passport fees |
| Search fees | Probate fees. |
| Stamp duties of a nominal amount e.g. the fee paid on a power of attorney. | |
| Travelling expenses of a solicitor, including a solicitor in the capacity of McKenzie friend | |

1.19.2 If a disbursement is claimed which appears in neither list then the caseworker must consider whether the disbursement is recoverable or not by reference to its purpose (i.e. is it for the purpose of giving legal advice or assistance). For example, an accountant's fees for the preparation of outstanding accounts will not be recoverable as they are incurred not for the purpose of giving legal advice and assistance but for the purpose of putting the client's outstanding records in order. This contrasts with the position where the accountant is providing a report as an expert because of a legal problem that has arisen.

1.19.3 The cost of the provision of legal advice by a person who is not a lawyer or not supervised by a lawyer cannot be treated as a disbursement. The assistance of a non-lawyer can be sought but the solicitor must absorb this as an overhead rather than charge it as a disbursement. This was confirmed by the decision of the House of Lords in **R v Legal Aid Board ex parte Bruce [1992 ] 3 All ER 321** which concerned cases where the advice of a non legally qualified welfare benefits expert had been obtained by solicitors and then claimed as a disbursement. The Board's practice of disallowing these costs was upheld by the House of Lords, since in effect the expert had been providing legal advice in the place of the solicitor.

1.19.4 A claim for employing a solicitor agent cannot be made under advice and assistance (either as a disbursement or as an element of profit costs) – see **Legal Aid Board Point of Principle LAA18**. If the solicitor is not in a position to undertake work him/herself then any delegation must be in accordance with Regulation 20 LAAR 1989 (i.e. to a partner of him/herself or a competent and responsible representative of him/herself who is employed in his/her office or is otherwise under his/her immediate supervision) – see 1.29 below. In appropriate cases the solicitor can obtain the opinion of counsel, although regard should be had to the availability of legal aid.

1.19.5 Occasionally clients wish to use the legal advice and assistance scheme as a vehicle to obtain the funding of disbursements. Where the only work to be undertaken by the solicitor is incurring the disbursement and passing the service provided (normally a report) to the client the claim should be nil assessed and the disbursement should not be allowed. It would not be reasonable for the advice and assistance system to be used in such a way that the client receives no oral or written legal advice in relation to the particular circumstances that have arisen.

1.19.6 In deciding whether the amount claimed is reasonable regard must be had to all the circumstances including the purpose of the disbursement in the context of the particular case (i.e. having regard to the justification/need for it as against the value/importance of the case), the particular service involved, the extent to which there was a choice of alternative service providers and whether all elements of the service were justified in the particular case/at the particular time (e.g. should proofs or limited prints of photographs have been obtained rather than a larger number of prints).

1.19.7 Advice and assistance cases are most likely to involve enquiry agents, surveyors and environmental health officers and Area Offices will have local knowledge of the rates charged in their geographical area.

1.19.8 Disbursements stand or fall with the advice and

assistance. In other words, if the particular item of advice and assistance in connection with which a disbursement has been incurred is disallowed then the disbursement itself must be disallowed. Thus, for example in an immigration case, if the costs of an attendance by a representative at the asylum screening interview are disallowed then the costs of any interpreter attending with the representative would also be disallowed.

### 1.20 Section B: Guidance on reasonableness.

1.20.1 The costs guidelines in the GEDP

Although each case must be considered on its merits, the costs guidelines which appear in the GEDP and published externally through the Board's publication Focus, must be borne in mind. They are intended to assist caseworkers as to the units of time (and therefore the costs) which are likely to be considered reasonable on granting extensions.

Each case must be considered on its own facts and merits, so the costs guidelines can be no more than indicators when costs are being assessed. There is no suggestion that the exact times indicated will have been reasonable in every case within the particular legal subject area.

(a) There will need to be appropriate evidence that the work was carried out and that the time can recorded will be justified. The factors and guidance referred to in Section A above will need to be taken into consideration.

(b) The issues set out in the paragraphs below will need to be considered where relevant.

(c) In any event, there will be cases where spending less or more time will have been justified, given all the circumstances of the particular case. The guidelines are based on competent and experienced advisers working on cases of average complexity/difficulty for clients without special needs, such as learning difficulties, material physical disabilities or lack of English. Such special needs may increase the time which has to be spent with the client and/or to progress the case.

(d) Guidelines are not given for every area of work but only for those areas which are most common or where there are standard steps or procedures to be taken/followed and costs guidelines may be of particular assistance.

(e) The existence of the guidelines should in no way encourage franchisees (or other firms) to work/claim up or down to them. The costs in each case must be justified in the usual way. The guidelines refer to the units of time considered necessary to undertake the work specified. Where work claimed on a file conforms exactly to the guidelines, this may be an indication that the solicitor has claimed up to them, particularly where claims are regularly submitted to the upper limit of the standard where a range is given. See Paragraph 1.8.3(b).

(f) The guidelines are given in terms of units and time so that they do not have to be updated with changes in the remuneration rates. They have been calculated by reference to 6 minute units as it is recognised that many solicitors' practices use this recording system. Note, however, that the test for the caseworker determining a costs claim is whether the work appears to have been reasonably done and the time as claimed is reasonable. Whilst solicitors may adopt 6 minute units for time recording purposes the caseworker will allow such time as is considered reasonable rather than notional time with reference to units.

(g) The guidelines are intended to include any necessary letters and telephone calls but not disbursements. They do not allow for travelling/waiting or a home visit which would have to be justified in any particular case.

(h) Complexity

i) The costs guidelines which are given are based on competent and experienced advisers working on cases of average complexity/difficulty for clients without special needs; such as learning difficulties or material physical disabilities.

ii) Each case must be considered on its own facts and merits but the following are factors which may set the particular case outside the guidelines so that the costs which would be necessary, and therefore reasonable, would be in excess of the guidelines:

- the complexity of the subject matter itself;
- difficult or novel point(s) of law outside the mainstream of work in that subject area of law;
- the volume of documentation required to be considered;
- difficulty in obtaining standard documentation/ undertaking standard steps, either through practical difficulties such as obtaining papers lost/held by

someone else or the delay/ obstruction/lack of co-operation from the other side or any relevant administrative body such as the Housing Benefit Office or National Health Trust e.g. as to service or progressing the case;

- the nature of the client leading directly to an increase in costs because of his/her particular characteristics/needs. For example, if the client has learning difficulties, is disabled, has insufficient knowledge of English to communicate with the solicitor or is particularly vulnerable or difficult to take instructions from. Where, however, clients are unreasonably demanding, it may be unreasonable for additional costs to be incurred. It may be difficult for the Area Office to judge. It is expected that the solicitor should decline to provide further advice and assistance in such circumstances. Area Offices may wish to make enquiries, where appropriate.

This list is not exhaustive and one or more factors may be present in any particular case. Ultimately, however, the caseworker must decide whether it was reasonable for the advice and assistance to be given and whether the costs incurred were reasonable given the particular circumstances.

The fact that a particular case involves a difficult or novel point justifying either legal research by the solicitor or the obtaining of an opinion from counsel is a factor which may place a particular case outside the guidelines. However, the caseworker is entitled to assume that the work is being undertaken by a competent and experienced adviser and therefore that basic legal research should not be included in any advice and assistance costs but rather treated as a training need (and therefore as an office overhead).

(iii) Cases of less than average complexity

The guideline times are an indication of the figure up to which costs in a case of average complexity/ difficulty would normally be justified. However, just as there are cases where spending more time will be justified there are cases where spending less time may reasonably be expected.

1.20.2 Factors which may justify allowing an amount less than the guidelines include:

(a) economies of scale (resulting for example, from the use of a single expert to provide reports in a number of cases);the use of working methods which reduce the time spent (e.g. the use of questionnaires to establish facts/issues), the use of pro forma's to take instructions, the use of modern technology e.g. to carry out calculations/produce standard documentation. This is common in welfare benefits cases in particular. Where standard pro forma letters are used the "routine letter" rate should still be applied although it is reasonable to expect the solicitors to minimise rather than maximise the number of letters (amalgamating information or requests for information where possible).

(b) Where a computer program is used to generate a calculation or a report, the time spent obtaining and inputting the relevant information to extract the calculation or report can be remunerated but only where it is reasonably undertaken by a fee earner.

**1.21 Prospects of success and cost effectiveness.**

1.21.1 Costs may be disallowed as unreasonable where a fee paying client of moderate means would not have continued to fund the matter. However, where the fee paying client test would not be appropriate (e.g. welfare benefit or immigration cases) if the issue is of such importance to the client that the importance outweighs the likely costs then further work may have been justified.

1.21.2 It can be difficult to apply this test from evidence on the file, and it is important to remember that the assessment should be made from the point of view of a reasonable solicitor at the time that work was done rather than with the benefit of hindsight.

1.21.3 Remember that in considering the cost effectiveness of any matter involving money or property, regard must be had to the possible operation of the solicitor's charge as against the exemptions and the limited grounds on which it may be waived.

1.21.4 However where the money or property at stake was capable of quantification and the private client analogy is appropriate it would usually be unreasonable for the solicitor to incur costs (including disbursements) that exceed or are out of proportion to the amount at stake notwithstanding that the prospects of success, including the likely recovery of costs, were good. It will be appropriate to disallow the costs that are considered to be disproportionate.

1.21.5 Where the value of the claim is low, say under £100, there will be costs that are inevitably incurred in taking instructions and providing advice and assistance. It would not generally be reasonable to exceed ***1 hour (10 units).*** Whether that time is reasonably exceeded will depend on the value of the claim and the individual client's impecuniosity. A lower value claim will be of greater importance to the poorest clients and this may justify further work. It will be appropriate in most low value claims to disallow any costs above an hour in the absence of other factors.

1.21.6 Likewise, if the available evidence from the file is that the solicitor was aware (or ought to have been aware) that prospects of success were very poor and/or there was little likelihood of the opponent being worth pursuing then it may be appropriate to disallow any costs which were incurred after that situation became apparent (or ought to have become apparent) In these circumstances, limited work may be done to explain the options available to the client and take any necessary steps to reduce the client's exposure to costs.

1.21.7 For claims where other issues than money were at stake (regarding a right or non-financial benefit such as an injunction or an extension of leave to remain in an immigration case or housing disrepair) then the importance of the case to the client can be taken into account in assessing reasonableness. The issue must be a substantive one however, it would not be reasonable to carry on advising a client in relation to a point of merely technical or academic interest.

**1.22 Advice and assistance and ABWOR/Civial Legal Aid.**

1.22.1 To some extent, the assessment of the reasonableness of the work carried out under advice and assistance will be affected by the availability or otherwise of civil legal aid or ABWOR.

1.22.2 Where ABWOR has been applied for, you should normally allow no more than ***2 units (12 minutes)*** for assisting a client in preparing/submitting the ABWOR application itself bearing in mind that the solicitor will have needed to take instructions and advise the client in any event and the fact that the form is short and easy to complete.

1.22.3 Where civil legal aid has been applied for, you should normally allow no more than 5 ***units (30 minutes)*** for assisting a client in preparing/ submitting a legal aid application form bearing in mind that the solicitor will have needed to take instructions and advise the client in any event. In cases of exceptional complexity or where large amounts of information need to be submitted then more time may be allowed.

1.22.4 Where civil legal aid has been refused, then where the firm was involved in the initial application, in all but the most exceptional of cases no more than ***5 units (30 minutes)*** should be allowed for preparing and submitting the appeal. In exceptional cases the solicitor may be able to justify the costs (including any necessary disbursement) of obtaining information/evidence sufficient to specifically address a particular refusal reason. Where the firm has no prior knowledge of the case the time required to be spent (and thus allowed on assessment) will depend on the issues and will form part of the initial attendance to take instructions.

1.22.5 Where an application has been refused and an appeal is pending, further work on the case itself is rarely likely to be justified, having regard to the refusal and the pending appeal. In urgent cases, the Area Office could have been asked by expediting the area committee appeal hearing. Where, however, urgent work is necessary to protect the client's position it may be reasonable to undertake a limited amount of work to do so.

1.22.6 Where a civil legal aid application has been made and refused *on the merits* following an appeal to the area committee it is unlikely that the solicitor will be able to justify further extensive advice and assistance. The nature of the proceedings, the amount at stake, the prospects of success and/or the particular circumstances of the case will have led to the refusal. Where, however, urgent work is necessary to protect the client's position it may be reasonable to undertake a limited amount of work to do so.

1.22.7 Some civil legal aid applications are refused or no application is made because, although the case has reasonable prospects of success, the amount in issue is such that the case will be dealt with in the small claims track (i.e. simplified court procedures with restricted orders as to costs). In those circumstances it may have been reasonable for the solicitor to assist the client by providing advice and obtaining expert evidence. Cases should be considered on their own facts but it should be remembered that the small claims track now covers claims up to £5,000 and specific performance injunction cases.

1.22.8 However, the smaller the amount involved and the less complex the issues, the less likely it is that extensive work under advice and assistance will have been justified, having regard to the nature of the proceedings and the operation of the

solicitor's charge. In assessing the reasonableness of the work carried out regard must be had to the costs/benefit relationship in cases involving only a monetary claim – see Section B above.

1.22.9 Some civil legal aid applications are refused on the basis that the simple nature of the proceedings is such that the client can deal with them him or herself e.g. suing for recovery of a debt in a fixed amount when there is nothing to indicate the matter will be contested. The factors to be considered are as above.

1.22.10 Where an offer of civil legal aid is made but not accepted it will not generally have been reasonable for further work to be carried out on that matter, beyond advising the client of their options.

**1.23 Administrative Matters.**

1.23.1 It may have been reasonable for the client to deal with some of the steps involved him/herself having regard to all of the circumstances of the case. If so, the costs claimed by the solicitor may be reduced. In deciding this, regard should be had to whether the client could have adequately dealt with some aspects of the matter with a view to avoiding unnecessary costs being incurred for which, in certain circumstances, the client may become liable through the operation of the solicitor's charge. For example, the client will probably be able to complete the Child Support Agency's application and enquiry forms, without assistance, save for advice as to any legal implications .

1.23.2 Form filling should only be remunerated so far as it has a legal element and therefore it is reasonable for the solicitor (as opposed to the client) to do the work e.g. sections of forms dealing with habitual residence or mobility.

1.23.3 The solicitor cannot collect any administration fee e.g. for opening a file. Solicitors may charge for work done on the exercise of devolved powers and the recording of such exercise e.g. self granting extensions. Time spent in supervision and file review are not normally chargeable.

**1.24 Work undertaken as a result of the solicitor's error/omission.**

1.24.1 Where work has to be undertaken as a result of the solicitor's obvious error or omission (e.g. in the light of the solicitors state of knowledge when the work was done, rather than approached with the benefit of hindsight) it would not be reasonable for the costs involved to be met out of the legal aid fund or by the client through the operation of the solicitor's charge. In clear cases of error/ omission it would be reasonable to disallow the costs of such work.

**1.25 Separate matters.**

1.25.1 Guidance on separate matters is contained at paragraphs 2.6 - 2.7 of the General-Advice and assistance section of the GEDP.

1.25.2 Where a separate CLAIM 10 has been used i.e. when a single form should have been used, then the files should be closely scrutinised for evidence of duplication. It will be appropriate to disallow the client care letters on the second file together with any other letters which merely repeat information communicated on the first file. The same principle will apply to attendances where, for example, generic advice on a general matter common to both files has been given, the time claimed should be disallowed on the second file.

1.25.3 The consequences on costs assessment where multiple forms have been used by the same solicitor are:

(a) any duplication will be disallowed

(b) the costs will be amalgamated and assessed but only to the maximum limit for the first act of advice or assistance. Any excess including disbursements will be disallowed.

**1.26 Tribunal Hearing/Preparation.**

1.26.1 Advice and assistance does not extend to representation (no matter what the circumstances of the client and/or the case) and no claim for the costs of representation can be allowed. The definition of "advice" and "assistance" were considered in **R. v. Legal Aid Board ex parte Higgins (unreported, QBD, October 15, 1993)** when the Divisional Court considered that assistance, as defined, extends to all assistance short of actual representation (i.e. advocacy).

1.26.2 Assisting the client in the gathering of evidence may have been justified in the particular case. It may also have been reasonable for the solicitor to advise the client in relation to conducting the hearing him or herself, including preparing a written submission.

1.26.3 Costs which arise directly and only as a result of representing the client at a hearing, should rarely be allowed and it would not be reasonable to meet them in the absence of particular circumstances which would justify them.

1.26.4 Although costs which arise directly out of representation would not normally be met, work such as preparing a chronology, rationalising documents or preparing a written submission suitable for the client's own use at a hearing can

sometimes be justified according to individual circumstances of the particular case.

**1.27 McKenzie Advisors.**

1.27.1 It would not normally be reasonable to allow the costs of a solicitor attending as a McKenzie advisor unless specific approval had been given by extension.

**1.28 Mediation/conciliation.**

1.28.1 The Costs Appeals Committee of the Board has decided that work carried out in advising on, preparing for and, where appropriate, attending a mediation hearing can in principle be allowable on assessment in a non family case. In such cases an appropriate share of the reasonable costs of the mediation may also be claimed as a disbursement. (**Legal Aid Board Point of Principle CLA23**). The decision also applies to advice and assistance and ABWOR. A family case is defined at section 13A(2) Legal Aid Act 1988.

1.28.2 As a starting point it should only be regarded as reasonable to make payments in relation to mediation if either the mediator was affiliated to CEDR, ADR Group or Mediation UK or the mediation is part of a recognised well established mediation scheme, i.e. currently the Central London County Court Mediation Pilot, the Bristol Law Society Mediation Scheme, the Court of Appeal Mediation Initiative and the NHS Mediation Scheme.

1.28.3 In principle, and subject always to an assessment of what is reasonable, work in preparing for, attending at and thereafter advising on a mediation hearing may be covered. Any reasonable waiting time and travel time and costs can be allowed in the normal way.

1.28.4 Preparation time allowed will depend on the nature of the case, but will usually be very limited as the lawyer should already be fully acquainted with the case. Some time to review the issues and to reflect on how mediation may address them could be justified, but it is very unlikely to exceed 20 units (two hours). Attendance time will depend on the nature of the mediation. A substantially longer hearing than three hours is unlikely to be justified, except in a substantial High Court case – see below.

1.28.5 Solicitors should not incur mediation costs unless the total costs of preparation, attendance and the mediator's fees/costs are proportionate to the size and importance of the claim or case and a private client would choose to incur the expenditure. A private client test should be applied, namely asking whether a reasonable client paying privately might be prepared to incur his or her share of the mediator's fees in order to improve the chances of obtaining an early and fair settlement of the case.

1.28.6 In a mediation involving two parties, only half the costs of the mediation should be allowed. If there were three parties only a third of the costs should be paid, and so on. The mediator's fee will normally include a sum for overheads. Only exceptionally would a separate accommodation fee be justified.

1.28.7 Fees payable to a mediator can only be claimed as a disbursement. As a starting point, it should be assumed that a mediator should be paid no more than a solicitor would be paid under the regulations to prepare for and attend the mediation hearing. As a further check on the reasonableness of the fee, one would expect a mediator's fee to be significantly less than what would be considered a reasonable brief fee for junior counsel at the hearing of the action.

1.28.8 In a family case payment should not be made if there is a mediator contracted with the Board under Part IIIA Legal Aid Act 1988 in the region who could have dealt with the mediation. If there was no contracted mediator available payment may be made to a non contracted mediator provided he or she is trained by one of the recognised bodies (i.e. National Family Mediation, Family Mediation Association, Solicitors Family Law Association, Law Wise, Law Group).

1.28.9 The starting point for payment in such cases should be the standard figure of £23.35 for a conciliation report. However, the fixed fee payment should be seen as no more than a guideline. Different payments may be appropriate where reasonable in all the circumstances. Gradually this practice will diminish as the full mediation pilot is extended.

**1.29 Delegation and Supervision.**

1.29.1 Generally

Advice and assistance under Part III of the Legal Aid Act 1988 can only be provided by a qualified solicitor or barrister – see Sections 2(6) and 43 of the Legal Aid Act 1988 and **R v Legal Aid Board ex parte Bruce [1992] 3 A11 ER 321**.

The limited exception to this principle is set out in regulation 20 of the LAAR 1989 which provides that a solicitor may entrust any function under those regulations to "a partner of his or to a competent and responsible representative of his who is employed in his office or is otherwise

under his immediate supervision".

The effect of this is that if representatives who are not qualified solicitors or barristers undertake work under the Legal Advice and Assistance Scheme, they must be competent and responsible, and they must be under the immediate supervision of a solicitor. Irrespective of the exact nature of the individual's employment the regulations require the individual to be under immediate supervision. It is not sufficient for an unqualified person to be working in a solicitor's office as an independent contractor unless the person is also being immediately supervised by a solicitor.

Whether a representative is under the immediate supervision of a solicitor will depend upon all the relevant facts. Caseworkers should note the decision of the Divisional Court in **R. v. Legal Aid Board, ex parte Rafina, February 12, 1998**, **New Law Journal, February 27, 1998** which involved an application for judicial review by a firm of solicitors which specialised in immigration work. The Board had concerns about the use of unsupervised representatives by the firm to provide immigration advice under legal advice and assistance.

The Divisional Court upheld the Costs Appeals Committee's interpretation of Regulation 20 as set out in the point of principle arising from the matter (**Legal Aid Board Point of Principle LAA12** – see also below).The Court adopted an interpretation of "immediate supervision" put forward by the Law Society, which is as follows:

"The Society's interpretation of 'immediate supervision' is that it requires the solicitor to be empowered to direct the work of the clerk and to review it as necessary. If the solicitor is able to direct the work of the representative, is able to monitor its quality, and to take immediate and effective action if the quality is unsatisfactory as well as being able to insist that the representative cease to act as necessary then in the Society's view adequate and immediate supervision has taken place."

This judgement should be read in conjunction with the Board's views below.

The Board considers:

(a) that it may be easier to demonstrate supervision of the representative for the purpose of the regulation when it can be shown to take place on a general, and not merely an individual case, basis;

(b) that it is more difficult to exercise supervision at a distance:

(c) that the less contact the solicitor has with the representative or "welfare officer" the more difficult it will be for him to exercise adequate supervision; and

(d) that "immediate" means that there must be no third party between the solicitor and the representative, i.e. the solicitor's contract must be with the representative and not with an agency or organisation on behalf of the representative.

1.29.2 Effect of failure to comply with regulation 20 on the assessment.

The consequence of a breach of regulation 20; i.e. of work being carried out by an unqualified representative who is either not competent or not under the immediate supervision of a solicitor, is that the work carried out by that representative on the matter must be disallowed in full – see 'Rafina' and LAA 12. Further, any disbursements incurred in connection with that work (e.g. interpreters fees) must also be disallowed.

It is difficult to tell from the file alone whether or not regulation 20 has been breached. The status of the person doing the work and/or the extent of any supervision provided will often not be apparent from the attendance notes. The extent to which all or part of the costs are disallowed under regulation 20 will depend therefore upon the Board's decision made as to the firm's supervision arrangements as a whole. This decision will have been made separately, often after examination of a large number of files and an interview with the firm. Caseworkers should however be prepared to pass on cases to their supervisors where they have concerns e.g. about the quality of the work which may give rise to regulation 20 issues or about methods of work known to them.

In assessment terms, there will be a range of situations. It may have been decided that none of a particular firms' unqualified staff were supervised. In this case, all work on that firms advice and assistance claims should be disallowed except:-

(a) Any work directly carried out by a qualified solicitor.

(b) Any work carried out where it is apparent from the face of the file that a solicitor supervised it e.g. there is a note of a solicitor directing the work or speaking to the clerk before an interview.

In other cases it may have been decided that only certain staff e.g. the outdoor clerks were unsupervised. In those cases only the costs (and associated disbursements) of the work of those staff would be disallowed.

## 2. IMMIGRATION: ASYLUM APPLICATIONS: GUIDANCE ON ASSESSMENT.

The GEDP contains costs guidelines for work in asylum cases – (see GEDP Section 8: Immigration – advice and assistance) and these should be kept in mind when carrying out costs assessments – see paragraph 1.20.1 of the General Assessment Guidance. As in all assessments, a careful check should be made of the work authorised by the extension and the work actually carried out on the file. Particular attention should be paid to the guidance on evidence contained at paragraph 1.10 of the General Assessment Guidance.

### 2.1 Aggregation of Times.

2.1.1 A feature of some claims for advice and assistance in relation to asylum is that clients will have been advised on issues such as interview or appeal procedure several times throughout the case. It is important to look at the total time on the file for advising these issues. This should be linked with the stage the case has reached. In particular, if the claim has been submitted before a substantive decision has been made on the asylum application, ie. before the client has been notified whether or not the application has been refused or accepted, then in general no more than ***two hours (20 units)*** in total on the file should be allowed for explaining the relevant immigration law and procedures, and explaining and preparing for the screening interview (unless the particular attendance notes and/or work on the file justify more).

### 2.2 The Asylum Screening Interview.

2.2.1 Asylum applicants, especially 'in country' applicants are required to attend a short screening interview held at the Asylum Screening Unit at Croydon. The purpose of this interview is to establish a few factual details, eg. whether the applicant has a passport, which country they came from and where they are staying.

2.2.2 Legal representation at this interview, (as opposed to the substantive PAQ interview) is not required. Previously however, there were occasions when the screening interview would be immediately followed by the PAQ interview. The Immigration & Nationality Directorate confirmed in June 1999 that substantive asylum interviews were no longer to be held directly after the asylum screening interviews. In view of that announcement, any attendance by a solicitor or other legal representative is unnecessary.

2.2.3 Therefore any claim for attending a client at the asylum screening interview (together with any associated interpreter's fees) should be disallowed if the attendance took/takes place after **30 September 1999**, which is the date by which the profession are deemed to have notice of change.

2.2.4 It will also follow that no allowance will be made for travelling to and waiting at the unit simply to take client's instructions at the same time as the screening interview is taking place.

2.2.5 A reasonable period, of no more than ***24 minutes (four units)***, may be claimed for advising the client on the screening interview procedure. Unless the case is complex it will normally be expected that this would be carried out within the two hour limit (see above).

### 2.3 Generic Information.

2.3.1 As part of advising on asylum applications and appeals, it is desirable to obtain information as to the circumstances of the client's country of origin. This could include details of the current political situation, government practices and any relevant Immigration Appeal Tribunal determinations in relation to the country of origin.

2.3.2 However, firms usually deal with a number of clients from the same country of origin and it would therefore be unnecessary to obtain such information afresh each time a new client seeks advice. Similar issues will apply to each client from that country. Therefore, it is unlikely that time spent creating and gathering generic information will be justified on any individual Claim 10 unless that client is the first one the firm has had from a particular country of origin.

2.3.3 However, the time spent considering the generic information and adding any information relevant to the particular client should be allowed. It would be unusual to allow more than ***30 minutes (5 units)*** for this exercise. The solicitor will need to justify why more should be allowed in a particular case (e.g. as above, where the client is the solicitor's first from a particular country). The presence of voluminous documentation on the file comprising the information will not of itself justify a greater time allowance as it is common for the same information to be repeated on numerous files.

2.3.4 Any time spent considering the PAQ questionnaire may be allowed if appropriate in addition to the initial advice given within the two hour limit.

### 2.4 Completion of PAQ Questionnaire.

2.4.1 Completion of the questionnaire and the accompanying statement is an important part of the client's case. The GEDP allows up to ***four hours (40 units)*** for carrying out this task. Where the questionnaire has been thoroughly and properly completed, with an accompanying

detailed statement, an allowance up to the full amount may be reasonable. However, the file must contain evidence of the work done, including attendance notes, and a copy of the questionnaire should be on the file, together with a copy of the statement – (see paragraph 1.10 of Guidance on Costs Assessment on required evidence).

2.4.2 As a general guide where the questionnaire appears to be fully answered, allow up to ***an hour and a half (15 units)*** for the questionnaire itself (excluding the statement). If it is more scantily completed allow less time e.g. ***18-30 (3-5 units) minutes*** for very sketchily completed forms. In relation to the statement (either on the questionnaire or separately) allow ***no more than 40 minutes*** for the preparation of statements of only one or two pages unless justified by evidence on the file.

**2.5 Advising and Preparing for PAQ Interviews.**

2.5.1 When the Immigration Service interviews the client substantively, the GEDP allows up to ***six hours (60 units)*** to include advising the client on the matter raised and preparing for and attending the interview. Reasonable travelling and waiting is allowed in addition.

On assessment the following should be noted:-

(a) Any advice on the PAQ procedure in advance should be separately documented and shown on the file, otherwise it would be expected to be included in general advice.

(b) Repeated claims for advising on interview procedure would not normally be allowed.

(c) Allow the actual time taken for the interview, together with reasonable travelling and waiting. Consideration should be given to the distance between the solicitor's office and the place where the interview was carried in relation to travel time. Allow no waiting time after the interview. If additional advice is given after the interview regarding specific issues raised in the interview, then this must be shown on the file before the time is allowed.

(d) The purpose of attending the interview is not only to be able to assist the client but to ensure that a proper record is taken. This will allow matters not raised, or wrongly raised in the interview to be corrected later on. Therefore no allowance should be made for attending on the interview unless a full verbatim note of the interview is on the file.

(e) If a verbatim note is on the file, compare the extent of the note with the timed length of interview. Compare the times claimed for the interview with those of the representative.

**2.6 Disbursements.**

2.6.1 Where the client does not speak English, it will be reasonable to instruct an interpreter not only when instructions have been taken but to attend on the PAQ interview. However, like any other disbursements, interpreters' fees stand or fall with the advice and assistance. If a particular item of advice and assistance connected with a disbursement has been clearly disallowed, (eg. because there is no verbatim note of the interview) then the disbursement itself must be disallowed.

**2.7 Regulation 20 and Supervision.**

2.7.1 When considering regulation 20 issues the Board's guidance on supervision in immigration cases contained in Focus 26 should be applied.

See also paragraph 1.29 of the Guidance on Costs Assessment for the effect of regulation 20 issues on assessments.

## 3. WELFARE BENEFITS ASSESSMENT GUIDANCE

**3.1 The Need for Welfare Benefit Advice.**

3.1.1 The circumstances in which the need for welfare benefit advice has arisen will be relevant to the amount allowed on assessment. There are three broad situations:

(a) when the client requires general advice regarding entitlement to a particular benefit or range of benefits or wants the solicitor to clarify whether the correct amount is being paid under a particular benefit.

(b) when the client is involved in a different matter e.g. a divorce, or housing, or immigration problem and the solicitor needs to advise additionally as to the client's entitlement to any welfare benefit.

(c) when the client requires advice on a specific welfare benefit problem. For example, he or she may wish to appeal against a decision or need assistance if an agency is refusing to pay benefits.

**3.2 General Advice and Assistance.**

3.2.1 In dealing with the first two situations set out above, the solicitor will take detailed instructions about the client's financial and domestic situation, sometimes by going through a standard questionnaire. Sometimes the information will be fed into a computer software package specifically designed to calculate entitlement and provide a report. Otherwise the report will be prepared manually.

3.2.2 For initial welfare benefits advice falling into the first two categories, the time allowed on assessment for taking instructions, checking any benefit currently paid and providing a written report to the client on entitlement to welfare benefits generally, should normally be no more than ***30 minutes (5 units)*** unless, a longer time is justified, usually on account of the client's mental illness, physical disability, language difficulties or other communication problem. In order for any extra allowance to be made, a notice of circumstances justifying the extra time should be on the file.

**3.3 Further Work.**

3.3.1 If the matter proceeds further and an application for the welfare benefit is made and/or the client goes to the Benefits Agency to apply for the benefit, as a general rule it should normally be possible for the solicitor to deal with more specific issues up to and including requesting a review and lodging (but not preparing for) an appeal ***within two hours (20 units).***

3.3.2 In those circumstances, there must be a proper attendance note of the further advice given and steps taken. General notes such as "further advice" will not justify an allowance above the initial 30 minute level in the absence of further evidence.

**3.4 Filling in Application Forms for Welfare Benefits.**

3.4.1 Legal advice and assistance should not generally be used to assist the client in completing forms. This is an administrative rather than a legal task which should be undertaken by the client even if it means seeking assistance from family or friends. In general therefore, costs will not be allowed for form filling.

3.4.2 There may, however, be cases where an issue of law arises on a section of the form and it is important that that section is completed in the appropriate legal terms. For example, this need might arise when completing certain sections of the disability living allowance claim form, or the pro forma sheet on habitual residence. If there is a specific attendance note dealing with these points explaining what legal issues were used and/or justifying why advice and assistance was requested, then a reasonable allowance of ***12-30 minutes (two to six units)*** may be made within the overall limit. It may be reasonable in some especially complex cases where the circumstances of the client require further advice and assistance to spend a greater amount of time advising on the completion of the forms.

3.4.3 With most benefits, the question of entitlement in general terms can be established fairly quickly, although if the client seems entitled, then further advice should be necessary. It would not, however, be reasonable for solicitors to continuing providing advice on the benefit where it was, or ought to have been, apparent that the client was not entitled.

**3.5 Accompanying a client to an interview at the Benefits Agency.**

3.5.1 Allowance should only be made for accompanying a client to an interview at the Benefits Agency in very exceptional circumstances as justified by the file. This will be where the client is likely to need legal advice in relation to the interview, usually where there is an interview relating to the habitual residence test, or there is an allegation of fraud.

**3.6 Research Questions of Law.**

3.6.1 The solicitor cannot normally justify charging for researching points of law in relation to individual clients. The case would need to centre on a very difficult and novel point before research into the law will be allowed on the advice and assistance scheme. The fact that the entitlement to the benefit may be complex, e.g. disability living allowance, will not in itself justify the charging of research. There must be something in the circumstances of the client's case which is unusual and raises a novel or complex point of law.

3.6.2 Where exceptionally a claim for research was justified, the caseworker would normally expect to see evidence of research on the file, e.g. copies or references to cases.

**3.7 Disability Living Allowance.**

3.7.1 The special position of disability living allowance should be noted. This benefit has particularly complex conditions of entitlement. The application form itself runs to forty pages. The way the form is completed will very often determine entitlement to the level of benefit claimed. The regulations relating to the benefit themselves centre on the definition of certain words such as 'regular' or 'substantial'. In borderline cases the way questions are answered can make all the difference. Whilst the solicitor cannot complete the client's form on the client's behalf, the client may require advice concerning how best to answer certain questions. e.g. in relation to habitual residence or mobility.

3.7.2 If therefore application is made for disability living allowance by the client after legal advice, the solicitor may sometimes be able to justify up to the full two hour initial limit to provide such advice. Again, however, general attendances such as advising on "disability living allowance" will

not justify the full two hours unless there was evidence on the file with specific advice given to the client and where appropriate an application being made by the client.

**3.8 Reviews and Appeals to the Tribunal.**

3.8.1 Where advice has been provided on a particular benefit (or on general welfare benefit advice including that particular benefit), then advice on a review or appeal should be dealt with on the same CLAIM 10 – see paragraph 14 below. When the Social Security Act 1998 comes into force, terminology will change and this is reflected by the terms used in brackets below.

3.8.2 The distinction between an appeal to the Social Security Tribunal (Appeals Service) and a 'review' needs to be noted here. A benefit applicant can ask for a decision to be reviewed by simply writing to the Benefits Agency. Reviews are carried out by adjudication officers (decision makers) and there is no right of attendance.

3.8.3 If the claimant is unhappy with the decision of an adjudication officer (decision maker), then s/he generally has the right to appeal to a tribunal (appeals tribunal) run by the Independent Tribunals Service Appeals Service and there is a right of attendance.

3.8.4 Note that in Housing Benefit and Council Tax Benefit cases the appeal is by way of a further review to the Housing Review Benefit Board but the process involved is similar to an appeal to the tribunal.

3.8.5 The amount which will be justified will depend on the legal issues in question and what is at stake for the client.

3.8.6 If advice has already been given by the solicitor on the benefit, it should normally be possible to advise a client on this aspect including lodging a review and appeal within a further ***two hours (20 units)*** bearing in mind the expertise of the solicitor and the fact that the same legal issues tend to arise as on the initial advice.

3.8.7 If a request for a review only is lodged (i.e. the matter does not proceed to appeal) then it is likely that no more than ***one hour (10 units)*** would be justified save in an exceptional case.

3.8.8 However, as with other work, the work involved in a review or appeal must be evidenced on the file. For example, writing a short letter to the DSS and asking for a review of a benefit currently paid to a client would not justify a further hour in the absence of other evidence of preparatory work. Since the grounds for review or appeal will involve specific legal advice, the caseworker would expect detailed attendance notes on what work was carried out rather than generalised notes such as "advising client on appeal".

3.8.9 Note that if an appeal is required in an expedited hearing, e.g. because the client's benefit has been suspended pending the appeal, and the solicitor has negotiated with the Tribunal, then a further allowance of up to ***30 minutes (5 units)*** may be made for this.

3.8.10 Once the notice of appeal is lodged, then further allowance may be made for assisting the client in preparing it subject again to the appropriate evidence being on the file. The guidance in the GEDP – Welfare Benefits – Advice and Assistance section provides that extensions of up to ***three hours (30 units)*** may be given for this purpose.

3.8.11 Note: if a solicitor has not been advising previously on the matter, ie. the first instructions are to lodge a review or appeal, then this work could be undertaken within the initial two hour limit. An extension would only be required if the solicitor had been involved in applying for the benefit, or providing general welfare benefit advice (see above). The caseworker should therefore clarify the work undertaken within the initial two hour limit before allowing costs above this.

**3.9 Medical Reports in Support of the Appeal.**

3.9.1 Allowance may be made for a medical report which was required to support the claimants appeal. Care should be taken, however, to ensure that the solicitor has provided substantive advice on the issue and that the Claim 10 has not simply been used as a vehicle for obtaining the report.

**3.10 Appeals from the Tribunal to the Social Security Commissioner.**

3.10.1 Provided the appropriate evidence is on the file e.g. a copy of the Tribunal's decision, a copy of the appeal submitted to the Social Security Commissioner then ***two to four hours (20 to 40 units)*** may be generally appropriate for considering the appeal body's decision, taking instructions from the client and submitting an appeal including drafting the grounds for appeal to the Social Security Commissioner.

**3.11 Representation at Tribunals, Review Boards and before the Social Security Commissioner.**

3.11.1 No allowance should be made for representation unless the solicitor is able to justify attendance as a McKenzie friend.

**3.12 Further Advice after an Appeal.**

3.12.1 If the appeal is successful, the client will not

normally require further assistance. However, an allowance may be made if arrears of benefits have been involved and the client requires assistance to recover the money. ***Thirty minutes to one hour (5 to 10 units)*** may be justified in these circumstances by the evidence on the file.

**3.13 Referral to Specialist Agencies for a Welfare Benefits Check.**

3.13.1 Where a solicitor has been advising on another matter, e.g. matrimonial and has referred the client to a specialist agency for welfare benefits advice, the time spent in making arrangements for the client to see a specialist should be disallowed on the CLAIM 10. Nor should the welfare benefit report fee from the other agency be claimed as a disbursement see ***R-v-Legal Aid Board ex parte Bruce*** (paragraph 1.29 of Assessment Guidance).

3.13.2 The adviser to the client who is referred for separate welfare benefits advice may obtain the client's signature to a fresh Claim 10. However, the referring solicitor should not obtain a client's signature to a separate additional form before making the referral as the referral work is not claimable. Any limited work undertaken to identify need and generally discuss benefits available should be dealt with under the original form.

**3.14 Separate Claim 10s and further advice and assistance.**

3.14.1 *A single form should* be used to provide general, preliminary advice, including checking any benefit currently paid, providing a report on entitlement to welfare benefits generally and advising on applying for particular benefits. Where a separate problem is identified or subsequently arises this *may* justify the use of a separate, additional form e.g. general benefits advice followed by a particular housing benefit problem such as a specific query regarding the particular client's entitlement, including an appeal (two forms unless the original form continued to be used) or followed by particular housing benefit and income support problems (three forms unless the original green form continued to be used).

3.14.2 However in order to justify the use of a separate form, the query or problem raised must be substantive i.e. there must be evidence that the benefit in question has been miscalculated or wrongfully refused.

3.14.3 Where preliminary, general advice as to welfare benefits is triggered by advice in another legal subject area (e.g. for the solicitor to recognise the need for benefits advice or to indicate benefits available to the client in the particular matrimonial or personal injury context) this will not normally constitute a separate matter justifying the signature of a fresh green form unless/until more specific detailed advice is given as to a specific substantive problem (see above.)

3.14.4 Benefit entitlement advice which arises from advice on a child maintenance assessment by the Child Support Agency (and vice versa) should be dealt with under one form unless/until they become separate matters.

3.14.5 If separate Claim 10's have been signed in circumstances outside this guidance then the danger is that duplication of work has been claimed.

3.14.6 On the second or subsequent, unjustified Claim 10 form, caseworkers should disallow:-

(a) All generic letters and client care letters

(b) Any advice covered under the previous Claim 10.

For example no allowance should be made under the second form for general advice on the benefit and on entitlement as this should have been covered within the 30 minutes allowance for the first form (see paragraph 2 above).

3.14.7 Difficulties also arise where solicitors advise clients subsequently on the same welfare benefit after the conclusion of the initial advice. This may or may not be on a separate form. Some solicitors have developed the practice of contacting clients six months after the original claim has been submitted so that a fresh Claim 10 form can be signed.

3.14.8 However, subsequent advice on the same welfare benefit will not be justified whether under a separate form or otherwise unless there is evidence on the file of a material change in circumstances in the interim period which is likely to affect the client's entitlement to that benefit. This will include a material change in either the client's financial circumstances or other relevant circumstances which could affect their entitlement (e.g. deterioration in the client's health or disability) and/or in the rules relating to the entitlement of that benefit.

3.14.9 The evidence relating to this should be on the file in the form of attendance notes. The change must be material. Minor adjustments to the client's finances or adjustments which are unlikely to affect the benefit would not justify the granting of further advice and assistance and the work carried out in this connection should be disallowed. If a separate Claim 10 had been allowed then the costs of this form would be disallowed in full. ■

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There are two payment dates for solicitors and counsel each month. The proposed payment dates for the remainder of 1999 are set out below. These dates may be subject to amendment, but we will inform you of changes in advance where possible.

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## Proposed Payment Dates for September 1999 – December 1999

| First Payment of the Month | Second Payment of Month |
|---|---|
| Thursday, 9 September 1999 | Friday, 24 September 1999 |
| Monday, 11 October 1999 | Tuesday, 26 October 1999 |
| Wednesday, 10 November 1999 | Wednesday 24 November 1999 |
| Thursday, 9 December 1999 | Friday 24 December 1999 |

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