

Civil Legal Aid Billing

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Agenda

- Civil High Cost Cases
- Prior Authority - 2 Counsel
- Enhancements
- Hints and Tips
- Useful Guidance



The background of the slide is a solid purple color. On the left side, there are several overlapping, semi-transparent geometric shapes in various shades of purple and blue, creating a layered, abstract effect. These shapes include triangles and polygons of different sizes and orientations.

▶ High Cost Cases

What are Civil High Cost Cases?

- ▶ Civil Legal Aid (Procedure) Regulations 2012, Regulation 54(3)
 - ▶ Actual / likely costs exceed £25,000.00
 - ▶ If the case were to proceed to trial, final hearing, Appeal in the Court of Appeal, likely costs would exceed £75,000
 - ▶ Multi-party action (or potential multi-party action)
 - ▶ Appeal (or proposed appeal) to the Supreme Court
 - ▶ It is necessary to decide whether the case is of significant public interest, or the substance of the case relates to a breach of Convention rights in order to determine whether the individual qualifies for civil legal services
 - ▶ Application relates to a case which satisfies the effective administration of justice test; or
 - ▶ The application relates to a community action

Overview of Process



Registration



Case Plan (within 28 days ideally)



Negotiation



Contract documents (including Counsel Acceptance Forms)



Increase limitation



Update Plan (if necessary)

Case Plans - Notable Points

- ▶ Limitation on certificate bites at the point of registration
- ▶ Case Plans - designed to be predictive, not reactive
- ▶ LAA are strict regarding time frames for submission of Case Plan
 - ▶ Late case plans can cause significant issues e.g.
 - ▶ Moves the effective registration date thus extending the pre-contract stage - could causes significant shortfalls
 - ▶ Partial Costs Orders - could impact on ability to claim LAA costs
- ▶ Extensions of time - can be agreed in advance
- ▶ Plans should be divided into “Key Stages”
- ▶ Individual circumstances of the case will determine what Key Stages are appropriate
- ▶ Can appeal if a Costed Case Plan cannot be agreed

Appeals re Case Plans

- ▶ Negotiations are dealt with by the ECC Team
- ▶ If an “in scope” case plan cannot be agreed - appeal is to an IFA or SCRP (Regulation 59 of the Civil Legal Aid (Procedure) Regulations 2012)
- ▶ If an “out-of-scope” case plan, ECF matter or decision regarding the instruction of 2 Counsel / King’s Counsel cannot be agreed - appeals are dealt with according to the procedures applicable to all appeals in those cases
- ▶ LAA can refuse or withdrawn funding altogether if proposals are not satisfactorily consistent with the Civil Legal Aid (Merits Criteria) Regulations 2013

Risk Rates - Key Points

For cases where the LAA consider that an *inter partes* costs Order can be expected

- ▶ Apply for Solicitor and Counsel for costs in excess of £25,000
 - ▶ £70/hr Solicitor
 - ▶ £50/hr Junior Counsel
 - ▶ £90/hr Senior Junior Counsel and King's Counsel
 - ▶ Travel = $\frac{1}{4}$ of applicable hourly rate
- ▶ Ring fencing
 - ▶ Where first £25,000 of costs includes less than £5,000 Counsel's fees:
 - ▶ £5,000 'ring-fenced' paid as per the Remuneration Regulations
 - ▶ If 2 Counsel - ring fence is split £2,500 to each Counsel
- ▶ No enhancements on risk rates

Amending / Updating Case Plans

- ▶ 5% tolerance per Key Stage (4.4 of the 2018 Individual Case Contract (High Cost Case) Specification)
- ▶ Be specific - any amendment to an agreed Key Stage needs to be justified by setting out exactly what work was originally reasonably unforeseen
- ▶ Case plans should contain sufficient explanation of anticipated work to enable an amendment to be made
- ▶ Any request to amend should be made as soon as practicable
- ▶ Update plan to include additional Key Stages e.g. for appeal

Application of Case Plan to Legal Aid Billing

- ▶ Costs have to be assessed by the LAA - no option for Court assessment
- ▶ Key Stages provide fixed amounts which cannot be exceeded without negotiating an amendment of that stage
- ▶ At the conclusion of each stage Solicitors and Counsel can apply for full payment of that stage (section 25 of the High Cost Cases Solicitors and Counsels Information Pack (Non-Family))
- ▶ Disbursements over £100 paid as they are incurred
- ▶ If a stage is longer than 6 months, POA's can be claimed every 6 months
- ▶ If a case finishes mid-Key stage e.g. because funding withdrawn - amount to be allowed is based on a proportion of work undertaken in the stage
- ▶ Operating within 50% to 99% of the expected specified payment = 'bonus' payment of up to 5% (4.3 of the 2018 Individual Case Contract (High Cost Case) Specification)

4.3 of the 2018 Individual Case Contract (High Cost Case) Specification

Payment is determined by total value of the claim for a Key Stage versus the agreed specified payment for that Key Stage

| Total of Costs Claimed | 95% or more of Key Stage | Between 50% and 95% of Key Stage | 50% (or below) of Key Stage |
|------------------------|---|-----------------------------------|-----------------------------|
| Amount paid | The specified payment for the key stage | Actual cost + 5% of the Key Stage | Actual Cost |

Final Payment Choice Where *Inter Partes* Costs Ordered

- ▶ 5.3 to 5.11 of the 2018 Individual Case Contract (High Cost Case) Specification
- ▶ Can choose to take payment under Costs Order or under the certificate
- ▶ Solicitor's choice doesn't bind Counsel's choice - they are entitled to whichever is higher.
- ▶ Solicitor remains responsible for paying any shortfall between the two amounts where the work was reasonably undertaken to achieve the stated purpose and objective of the litigation
- ▶ Choosing *inter partes* costs = recoupment of any legal aid costs paid
- ▶ Choosing legal aid costs = paying in any *inter partes* costs and assisting with enforcement and costs recovery proceedings (if so instructed by the LAA)

Partial Costs Orders - 100% *inter partes* costs not ordered / unlikely to be ordered

- ▶ Apply to the LAA to recover the costs not covered by the Costs Order on an LAA basis
- ▶ Application can be made at any time however not guaranteed that the LAA will agree - depends on the circumstances
- ▶ Ideally, the Costs Order should expressly indicate which costs not agreed and reason
- ▶ Examples where applications unlikely to be agreed :
 - ▶ Costs deemed by Court to be excessive
 - ▶ Issue(s) unreasonably pursued
 - ▶ Failure to submit a costed Case Plan outlining in sufficient detail the grounds of the claim / defence and arguments
 - ▶ Inclusion of significant arguments superfluous to the main grounds of the proceedings
 - ▶ Solicitors' / Counsel's conduct resulted in failure to recover 100% inter partes costs

Prior Authority -

- ▶ Instructing KC / 2 Counsel

Prior Authority - Basics

- ▶ 5.10(b) and 6.59(d) of the Standard Specification to the 2024 Standard Civil Contract
 - ▶ Prior authority must be obtained to claim fees of King's Counsel or more than one Counsel (at the same time)
 - ▶ Does not preclude a King's Counsel choosing to act and be paid at junior rates
- ▶ Prior authority must be in place prior to the work being undertaken
- ▶ If there is no prior authority, there is no discretion to allow the costs on detailed assessment
- ▶ Prior authority is subject to the overall limitation on the certificate (5.11(a) of the Standard Specification)
- ▶ Keep in mind - prior authority will be disallowed if it was granted on the basis of incorrect information and may be disallowed if circumstances have changed materially between authority being obtained and costs being incurred (5.11 of the Standard Specification)

Prior Authority - Procedure

- ▶ Provider should obtain client's consent to instruct KC or two Counsel (Para 1.1.6 Guidance on authorities and legal aid for cases in courts outside England and Wales)
- ▶ Judicial view will be considered but it won't bind the LAA
- ▶ Application made by the provider who should specify the
 - ▶ Extent of authority sought
 - ▶ Nature of authority i.e. KC alone, KC with Junior or 2 Juniors
- ▶ Applications should be made promptly with enough time and information to enable a decision to be made
- ▶ Applications should be accompanied by a supporting letter and/or note from Counsel providing detail of the substantial novel / complex issues of law / fact etc
- ▶ Factors to be taken into account set out in detail at pages 7 to 12 of the Guidance on Authorities e.g. exceptional complexity / importance / volume of work etc
- ▶ No appeal against the refusal of prior authority

Authorities - Generally

- ▶ “Briefing Counsel” - only covers work done following delivery of the brief (pre-brief conference or other work done, not covered)
- ▶ “Instructing Counsel” - covers instruction of Counsel generally, subject to assessment
- ▶ “Instructing King’s Counsel alone” - allows KC to carry out work which would otherwise be done by a Junior
- ▶ Authorities can be limited in scope e.g. to a conference / specific hearing
- ▶ Where authority limited, further prior authority application required if additional work by KC / 2 Counsel required
- ▶ Make sure to check the terms of the prior authority and the basis of the application



► Enhancements

Enhancements

- ▶ Where risk rates don't apply - enhancements can be claimed.
- ▶ Same rules apply as to non-High Cost Cases
- ▶ Regulation 7 of The Civil Legal Aid (Remuneration) Regulations 2013 sets out a 2 stage process:
 - ▶ First - threshold - is an enhancement justified (Regulation 7(3))
 - ▶ Second - if an enhancement is justified, what percentage is appropriate (Regulation 7(3A))
- ▶ Up to 100% in the Upper Tribunal or High Court
- ▶ Up to 50% for all other proceedings

Threshold - Regulation 7(3)

- ▶ Do any of the following apply?
 - ▶ Work done with exceptional competence, skill or expertise
 - ▶ Work done with exceptional speed; or
 - ▶ Case involved exceptional circumstances or complexity
- ▶ What is exceptional is based on the generality of proceedings to which the relevant rates apply (Regulation 7(5)(a))
- ▶ Each case must be considered on its own merits / circumstances
- ▶ Not considered acceptable to argue that a claim is a certain type of proceedings which inherently justifies an enhancement (12.11 of the CAG)
- ▶ Make it easy for an assessor - be specific as to what exactly is being relied upon e.g. case involved roof over client's head - exceptional circumstances applied

Level of Enhancement - Regulation 7(3A)


- ▶ Regard to be had to:
 - ▶ Degree of responsibility accepted by the barrister
 - ▶ Care, speed and efficiency with which the barrister prepared the case
 - ▶ Novelty, weight and complexity of the case
- ▶ Care = skill employed by the barrister / care in dealing with a vulnerable client (Regulation 7(5)(b))
- ▶ Weight = volume of documentation / number of issues / importance of the case to the client (Regulation 7(5)(c))
- ▶ Not all factors need to be employed to justify enhancement at the higher range - one factor could be particularly strong (CAG 12.10)
- ▶ Again - be specific e.g. how many pages considered, how long to work before hearing, how much documentation was prepared etc.



▶ Hints and Tips

Top 10 Hints and Tips

1. Communicate!
2. Check certificate - scope and limitation
3. Keep an eye on Counsel's costs - are they looking high compared to the certificate limitation?
4. Provide fee notes regularly - allows the Solicitor to keep an eye on costs
5. Give timely information as to likely fees when requested
6. Break down estimates into smaller chunks of time and include information as to the work expected - helps with negotiations / requests for amendments
7. Obtain copies of any Case Plans and prior authority for KC / 2 Counsel along with a copy of the application for the same
8. Sign and return CAF's promptly
9. Regularly check work done against work detailed Key Stages to see if amendment required
10. Generally - make it easier for assessors - include detailed information regarding the time claimed and any enhancement applied for



► Useful Guidance / Legislation

Useful Guidance / Legislation / E-mails

- ▶ [Individual Case Contract \(High Cost Case\) Specification](#)
- ▶ [Guidance on authorities and legal aid for cases in courts outside England and Wales](#)
- ▶ [High Cost Cases Solicitors and Counsels Information Pack \(Non-Family\)](#)
- ▶ [Review Panel Arrangements](#)
- ▶ [Appeals Manual](#)
- ▶ [Costs Assessment Guidance](#)
- ▶ [The Civil Legal Aid \(Procedure\) Regulations 2012](#)
- ▶ [The Civil Legal Aid \(Remuneration\) Regulations 2013](#)
- ▶ Exceptional and Complex Cases Team (ECC Team) - ContactECC@justice.gov.uk
- ▶ <https://www.gov.uk/guidance/legal-aid-high-cost-cases>