

Claiming enhancements for civil
(non-family) legal aid work
Guidance for the Bar



HOUSE OF COMMONS
OFFICIAL REPORT



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The General Council of the Bar of England and Wales (the Bar Council) and the Association of Costs Lawyers has produced this guidance for Barristers, clerks and chambers to support the efficient management of practices. Care has been taken to ensure the accuracy of its contents, but this guidance is not intended to nor can it take the place of legal advice. It is intended to guide, not advise. The Bar Council and the Association of Costs Lawyers and any person working for or with the Bar Council or the Association of Costs Lawyers in the preparation or production of this guidance does not accept any liability in law for any loss or damage howsoever caused, including by any lack of care.

Acknowledgments

This guide has been written by the Bar Council's Remuneration Committee's Civil (Public) Panel and the Association of Costs Lawyers Legal Aid Group. The Bar Council and the Association of Costs Lawyers welcomes any comments or suggestions to improve future revisions of this guidance. Any errors and omissions should be drawn to the attention to the Bar Council's Remuneration Team (Remuneration@BarCouncil.org.uk).



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Key documents

Legislation

Civil Legal Aid (Remuneration) Regulations 2013, SI No 422:

<http://www.legislation.gov.uk/uksi/2013/422/contents/made>

Civil Legal Aid (Remuneration) (Amendment) Regulations 2013, SI No 2877:

<http://www.legislation.gov.uk/uksi/2013/2877/contents/made>

Legal Aid Agency

There are separate Costs Assessment Guides (CAG) produced by the Legal Aid Agency for use with work under the 2010 Standard Civil Contracts and 2013 Standard Civil Contracts. The relevant sections relating to enhancements and Counsel's fees are identical in both documents.

Costs Assessment Guidance – 2010 Contract (sections 11 and 12):

<http://www.justice.gov.uk/downloads/legal-aid/funding-code/costs-assessment-guidance-2010.pdf>

Costs Assessment Guidance – 2013 Contract (sections 12 and 13):

<http://www.justice.gov.uk/downloads/legal-aid/funding-code/costs-assessment-guidance-2013.pdf>

General guidance

Introduction

Since 2 December 2013, Counsel in self-employed practice instructed under a Legal Aid Certificate to undertake Civil (non-family) work have been remunerated at the same rates and by the same process as solicitors. This includes the process of applying for percentage enhancement on hourly rates for “exceptional” cases.

The changes were introduced under the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013, which amended Regulation 7 of the Civil Legal Aid (Remuneration) Regulations 2013.

Enhancements

There is a two stage process for applying for enhancements on hourly fees:¹

- Stage 1:** The work must first meet a defined threshold.
- Stage 2:** If a threshold criterion is met then the amount of the percentage sought is calculated under a further defined set of criteria.

Stage 1: The threshold

There are three factors in the regulations to consider:²

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

Exceptional is defined with regard to the generality of the proceedings to which the relevant rates apply (Regulation 7(5)(a)). In other words, exceptional is anything that is above the average for the work paid at the basic prescribed rate, and this is in comparison to all other proceedings for which Legal Aid is available, not just cases with the same category of law or same set of proceedings, for example, Judicial Review.³

However, in general it must be the facts of the case that demand any of these factors. For example, the threshold cannot be met simply because the case was conducted by an above average barrister, unless the case required it or the elevated capability of the barrister impacted upon the way in which the work was done and outcome of the case.

¹ See paragraphs 3 and 3A of Regulation 7. Further provisions are also laid out in Section 11/12 of the Costs Assessment Guidance (CAG).

² Civil Legal Aid (Remuneration) Regulations 2013, regulation 7 (3), as inserted by Civil Legal Aid (Remuneration) (Amendment) Regulations 2013.

³ CAG, 11.11/12.11

Exceptional circumstances can include the difficulty in taking instructions from the client or witness, as well as the impact of the issues on the client, for example, liberty, right to remain in the country, the roof over the client's head, addressing domestic violence or avoiding destitution⁴.

Proceedings within the Senior Courts and above are not conclusive of exceptional circumstance.

Stage 2: The criteria

There are seven criteria to determine the percentage uplift provided by the regulations:⁵

- (3A) (a) degree of responsibility accepted by the barrister;
- (b) care, speed and efficiency with which the barrister prepared the case; and
- (c) novelty, weight and complexity of the case.

The amount claimable is capped at 100 per cent for the Upper Tribunal and High Court, and 50 per cent in all other proceedings. These caps must be applied after the amount sought has been considered.⁶

Degree of responsibility may be:⁷

- Where the barrister demonstrates unusually detailed knowledge relevant to the case; or
- Skilfully pursues an unusual or difficult legal argument; or
- Unusual skill in identifying and marshalling evidence in pursuing or defending a case and/or identifying a particularly effective tactic on behalf of the client.

This may be indicated where the case was carried out in a way that required less time than would be expected of a notional reasonable barrister, or a better result was achieved than might usually be expected. Or where skills not expected of a notional reasonable barrister are required in taking instructions from the client, in particular a client who is a child, is seriously mentally ill or is otherwise very vulnerable (including difficulty with communication).

If Counsel's experience is above the minimum, this may be relevant in justifying the enhancement under this limb. But the details of the work carried out must show that that experience was necessary.

⁴ CAG, 11.8(c)/12.8(c)

⁵ Civil Legal Aid (Remuneration) Regulations 2013, regulation 7 (3A), as inserted by Civil Legal Aid Remuneration) (Amendment) Regulations 2013

⁶ CAG, 11.2/12.2

⁷ CAG, 11.8(a)/12.8(a)

Care is defined under paragraph (5)(b) of Regulation 7 as including skill with which the barrister has carried out the work, and, in particular, the care with which the barrister has dealt with a vulnerable client.

Exceptional speed⁸ is where work has to be done at short notice due to urgent deadlines, for example, proposed deportation or obtaining/defending an injunction. It is also where a fast result is obtained and may be where Counsel proactively pursues a case to obtain with unusual speed:

- Re-housing
- Community care support
- Receipt of welfare benefits
- An injunction
- Release from mental health detention
- Or other resolution of the client's problem

Efficiency⁹ means where less time is claimed or less disbursements than might otherwise be expected (e.g. where an expert has not needed to be instructed) are incurred, because of the way particular items of work were carried out or the case has been planned.

Weight is defined under paragraph 5(c) of Regulation 7 as:

- (i) volume of documentation or other material in a case;
- (ii) number of issues arising in a case; or
- (iii) importance of the case to the client

Novelty refers to a novel point of law or legal context

Complexity¹⁰ may relate to:

- Legal issues
- Questions of expert evidence or other evidential issues e.g. seeking or challenging witness evidence in possession proceedings based on allegations of nuisance.
- May also take into account the threshold criterion 'exceptional circumstance(s)' of difficulty in taking instructions from the client or witness.

A case requiring substantial out of hours work may also be considered to fall under this limb or particular work may be considered under care, speed and efficiency.

⁸ CAG, 11.8(b)/12.8(b)

⁹ CAG, 11.9(b)(iii)/12.9(b)(iii)

¹⁰ CAG, 11.8(c)/12.8(c)

Calculating the percentage enhancement

The number of factors that are present and the strength of that presence dictate the amount of enhancement claimable: the more factors and/or the stronger the presence of the factor, the higher the level that can be sought. Very few cases would merit claiming the maximum percentage allowed based on a single factor.

It may be arguable that a hearing of more than two days should attract an enhancement and that a significant enhancement should may be applied to a hearing exceeding ten days.

Also, dealing with a difficult client demands skills far more exceptional to a barrister than it would do for a solicitor, and therefore an enhancement for Counsel may be justified.

Exceptional speed due to urgent deadlines, requiring absolute attention to the detriment of other work could attract an enhancement (for example, instructions requiring substantial preparation are received within 24 hours of hearing). An out-of-hours injunction could attract a much higher amount.

Which pieces of work to apply the enhancement to

Enhancements are normally applied to specific pieces of work i.e. the work that has actually been affected by the factors involved. Consequently, enhancement on travel and waiting would probably not be allowed, unless the factor is exceptional speed due to urgent deadlines¹¹. Even then, it should only be the amount caused by that factor that is claimed and not those attributed to other factors that do not affect travel and waiting.

Setting out the justification

The specific facts of the case that cause the enhancement must be set out. Generalised statements such as “this was a complex and extremely arduous case with voluminous paperwork and difficult issues” or that “this was a difficult and complex case in which instructions on the many complex and lengthy reports and statements were not always easy to obtain” are insufficient.

The claim must be specific – what was the complexity? Why was the paperwork voluminous and how much exactly? What were the reports about?

Ideally, the justification should specifically refer to the relevant factors detailed above, namely:

Threshold

- the work was done with exceptional competence, skill or expertise
- the work was done with exceptional speed

¹¹ CAG, 11.12/12.12

- the case involved exceptional circumstances or complexity

Criteria

- degree of responsibility accepted by the barrister
- care, speed and efficiency with which the barrister prepared the case, and
- novelty, weight and complexity of the case
 - volume of documentation or other material in a case
 - number of issues arising in a case, and
 - importance of the case to the client.

Practicalities for Clerks

Final fees

Form CF1 (or the amended version CF1A) should be completed at the end of the case with fees, enhancement details and the justification. The CF1 or CF1A must then be sent to the solicitor for submission with their final claim.

Normal Counsel fee notes will not be accepted.

Payments on Account

Payments on Account (POA) can be submitted at enhanced rates, although it is not recommended due to the risk of the enhancement not being paid on the final bill and the risk of Counsel then being subject to a recoupment. The standard CIVPOA1 form should be used for Payments on Account applications, not form CF1/CF1A.

There needs to be sufficient funding available on the Certificate to cover fees at the prescribed rates plus the enhancement percentage. If Counsel is going to claim for enhancements, the solicitor must be kept up to date to ensure there is sufficient Certificate coverage.

It is envisaged that all claims and appeals will be eventually submitted via the Legal Aid Agency's Client and Costs Management System (CCMS).

Claim forms

The current version of the Counsel Fee Note claim form is available on the Legal Aid Agency website: <http://www.justice.gov.uk/forms/legal-aid-agency/civil-forms/claims>

The following two documents are:

- a copy of the CF1A form as in use at 8 July 2014, and
- an example of a completed CF1 form where the enhancements were successfully claimed.

To: (instructing solicitor)

Professional fees of: _____
 Legal Aid acc no: _____
 Year of Call: _____
 VAT Registration: _____

Chambers address:

4 This form should detail your claim on the case and replaces the requirement for a fee note. It should be sent to the instructing solicitor for inclusion within their final bill, it is not required for payments on account.

Solicitor Reference:	Counsel Reference:
Client Name:	Date:
Certificate Ref:	Date of legal aid grant:
Court:	

Date of work	Code	Description Please use to provide further details if there are unusual circumstances or enhancement claimed	Time taken Hrs:mins	Rate	Base costs (time & rate)	Enhance %	NET £:p	VAT £:p	Total £:p	Office use

4 The applicable rate is that detailed in the civil legal aid remuneration (amendment) regulations 2013 and in the rates calculator. The net costs comprise the hourly rate multiplied by the time taken and any enhancement

Reasons for Enhancement: Where claimed this is a percentage of the hourly rate and must be justified.

Completion Guidance.

- 4 In order to assist in the assessment of your fees the short form code should be inserted into the description box. A more detailed explanation of work undertaken is only required where there are unusual circumstances or "other" is being used or if you feel it would support any reasons for enhancement given above.

Code	Description		Further details on work to be included in this category	Rate County	Rate High
PREP1	Preparation	Advocacy Prep	Preparation for the hearing	£63.00 (London)	£71.55 (London)
PREP2	Preparation	Brief/Instructions	Perusing and considering brief or instructions upon receipt from solicitor		
PREP3	Preparation	Other	This may include other work as not specified above including drafting particulars of claim or chronology		
PREP4	Preparation	Written Advice/Opinion	Preparing/drafting written advice/opinion	£59.40 (National)	£67.50 (National)
ATT1	Attendance	Oral Advice/Opinion	Attendance (probably instructing solicitor/client) to provide an advice or opinion - this includes advice on the merits of the case		
ATT2	Attendance	Other	Attendance other than to provide advice or opinion. This may include site visits, discussing funding issues other than advice on merits for funding		
ADV1	Advocacy	Conference/Negotiations	Conference or negotiations at a hearing (this is at the attendance/preparation rate)	£59.40	£67.50
ADV2	Advocacy	Final Hearing	The hearing listed by the court for final determination and where the matter is determined		
ADV3	Advocacy	Interim Hearing	Attendance at all interim hearings		
ADV4	Advocacy	Other	Advocacy other than at the interim or final hearing (e.g.their mediation)		
TRAV1	Travel	Travel to court	Time spent travelling to court	£26.28	£29.93
TRAV2	Travel	Other	Other time spent travelling - for example to visit the client or solicitor		
TRAV3	Travel	Expenses	Travel costs - for example mileage or train fares		
WA1	Waiting	Other	Waiting time other than at court		
WA2	Waiting	Waiting at court	Waiting time at court - this is time when counsel is not engaged in attendance on client/instructing solicitor or in negotiations with other parties		

Protect - Personal Information

Counsel Fee Note



Legal Aid
Agency

Professional fees of: _____

Legal Aid acc no: _____

Years of Call: _____

VAT Registration: _____

To: _____

Chambers address: _____

Solicitor ref: _____

Date: _____

Voucher no.: _____

Reference: _____

Case Details: _____

Court: Wandsworth County Court

Legal Aid ref number: _____

Date	Description	Time taken Hrs : mins	Rate £ : p	% Enhance	Net £ : p	Total £ : p	For office use only
28/01/14	(1) Advising on merits Reading papers and considering issues	5 hrs	£63	50%	£472.50	£567.00	
28/01/14	(2) Telephone conference with IS	10 mins	£63	20%	£12.60	£15.12	

Reasons for Enhancement:

- (1) Advising on merits**
- (2) Telephone conference**

Reg 7(3) – Enhancement justified as “work was done with exceptional competence, skill or expertise”/“the work was done with exceptional speed”/ “ the case involved exceptional circumstances or complexity”

Reg 7(3A) – Uplift justified by “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

50% uplift claimed/20% uplift claimed.

The work above consisted of reading papers, advising instructing solicitor (remotely) on whether there was any public law challenge to the Local Authority’s refusal to provide temporary accommodation. The advice needed to consider whether [REDACTED] complex medical history had been properly considered by the LA when deciding whether or not he was in priority need. As such it is very different from the normal run of civil litigation. Counsel is part of a dedicated housing and homelessness team which is ranked Band 1 in Chambers and Partners and in the Legal 500. There are only a handful of such teams in the country. Counsel is recognised as a leading junior in the area and is Band 2 ranked in Chambers and Partners. Counsel has provided CPD accredited training in this area. As a result counsel was able to undertake work quicker and more efficiently than a non-specialist. Work was undertaken significantly quicker than is typical in civil proceedings. The case was factually complex and legally complex. The case required particular care and was of particular importance to the client as ultimately the client was not owed a housing duty by the local authority and any appeal would not succeed.

Outstanding fee:	£485.10		
Outstanding VAT:	£97.02		
Total outstanding:	£582.12		

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