

GUIDANCE ISSUED BY THE DEPARTMENT OF JUSTICE

Remunerating Exceptional Preparation Work in the Magistrates' Courts and County Court Appeals under Criminal Legal Aid

Introduction

1. I am issuing this Guidance to the Legal Services Agency Northern Ireland ("the Agency") under rule 5(1) of the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 ("the 2009 Rules") to explain the purpose and intentions of the Department of Justice ("the Department") in respect of the provision for *Exceptional Preparation* contained in rules 10A to 10E of the 2009 Rules, as amended by the Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2016 ("the 2016 Amendment Rules"). The 2016 Amendment Rules will come into operation on 1 December 2016. Furthermore, pursuant to the provision in rule 13(12) of the 2009 Rules, I also intend that this Guidance should be available to the Taxing Master where a relevant appeal is brought under rule 13 of the Rules, and that it should be applied by the Master with the necessary modifications.
2. The Agency (together with the Taxing Master, where appropriate) will note the provision in Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, as amended, regarding the remuneration payable to solicitors and counsel under criminal legal aid¹. That is, the requirement to have regard, among the matters which are relevant, to the four criteria prescribed in Article 37 applies both to the Department as the rule-making body under Article 36(3) of the 1981 Order and also to any person by whom any amount so payable is determined in a particular case.
3. The Agency will issue separate guidance to the legal profession in relation to this matter. Its guidance will deal with various operational aspects – including the form of applications for additional funding and the determination of representatives' fees under the *Exceptional Preparation* provisions, the internal review and appeal mechanisms, and the requirement to maintain contemporaneous records of any preparation work done.
4. Having regard to the comprehensive and sophisticated matrix of standard fees prescribed under the 2009 Rules, as amended, I would expect it to be extremely unusual for the Agency to authorise *Exceptional Preparation* funding to a representative in an individual case beyond that already provided for under the standard fee provisions. I do however accept that there will be exceptional

¹ <http://www.legislation.gov.uk/nisi/1981/228/article/37>

individual cases which will justify additional funding as provided for under rules 10A to 10E and under the approach described below.

Application for Exceptional Preparation

5. As provided in rule 10A(3) of the 2009 Rules, as amended, the intention is that any application for a *Certificate of Exceptionality* should be submitted to the Agency by the representative at the earliest opportunity after the Public Prosecution Service has settled the charges against the assisted person. However, that requirement is to be construed in the context of the nature of the particular proceedings concerned.
6. Where it is clear from an early stage in a particular case that it is going to be disposed of in the Magistrates' Court (whether that be by way of a plea of guilty or a contest), I expect that the representative should normally be able to apply for a *Certificate of Exceptionality* at an early stage following the grant of the criminal aid certificate.
7. Conversely, where it is clear at the preliminary proceedings stage that the Public Prosecution Service preparation (and / or the police investigation) of the case is on-going, and it is expected that the case will be subject of committal proceedings in due course, I expect that any application for a *Certificate of Exceptionality* could only properly be made after the PPS has settled the charges and served the committal papers on the assisted person. Only at that point will the defence know, in real terms, what case it has to meet.

Prescribed criteria

8. Where a representative applies to the Legal Services Agency under the *Exceptional Preparation* provisions of the amended Rules, the Agency shall consider whether there is a specific element(s) of the case which falls outside of the standard fee approach provided under the Rules. As prescribed in rule 10B(1) of the Rules, the Agency shall consider whether it will be necessary for the representative to do preparation work substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue.
9. In practical terms, the Agency will consider the matter by way of the following steps:
 - (a) whether the case involves a point of law or factual issue (not an issue of fact) that is very unusual or novel; and
 - (b) additional preparation work is reasonably required on the part of the representative in order to prepare the assisted person's defence; and

(c) that work is substantially in excess of the amount normally required for cases of the same type.

10. As indicated during the process of consultation leading to the making of the corresponding amendment of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, when developing the prescribed criteria for *Exceptional Preparation* work, the Department had regard to the 'Special Preparation' provisions contained in the Advocates' Graduated Fee Scheme in England and Wales – that is, in paragraph 17 of Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013.
11. Accordingly, pending any decisions by the Taxing Master or High Court as to interpretation and application of the *Exceptional Preparation* provisions in the 2005 Rules, as amended, or any decisions by the Taxing Master on the corresponding provisions in the 2009 Rules, as amended, I intend that the relevant decision-maker(s) under the 2009 Rules shall have regard to any relevant case law in England and Wales.
12. For example, in *R v. Ward-Allen* [2005] 4 Costs LR 745 at paragraphs 17 to 24, it was held that a very unusual or novel point of law is a point of law which has never been raised or decided (novel) or which is outwith the usual professional experience (very unusual). A very unusual or novel factual issue is one which is outwith the usual professional experience. Since every fact is unique, it cannot mean an unusual, novel or unique "fact". For example, if defendant 'X' is charged with committing an offence 'Y' on date 'Z', the case will – necessarily – involve novel or unique issues of fact. That is, that defendant will not previously have been tried with committing offence 'Y' on date 'Z'.
13. It is not possible to precisely define, in advance, the types of circumstances which could come together to mean that a case may come within the *Exceptional Preparation* arrangements. It will be for the applicant to make out their entitlement to enhanced remuneration and to explain why the circumstances in the specific case cannot be appropriately remunerated within the standard fee matrix. I expect that complex cases will not routinely be heard in the Magistrates' Court, but rather they will normally be committed to the Crown Court for disposal. Therefore, the types of scenario in which additional preparation work would be required in the Magistrates' Court are limited. However, some examples of the types of circumstances which might come together to make a case sufficiently complex to warrant consideration by the Agency include:
 - A case where a significant amount of investigative work by the defence representative is required at the Magistrates' Courts level

- A case involving an 'assisting offender' under Part 2 of the Serious Organised Crime and Police Act 2005
 - A case where the number of defendants results in a significant increase in workload for the defence representative concerned
14. In addition to the types of circumstances referred to in paragraph 13 above, an *Exceptional Preparation* payment may be appropriate where it is necessary for the representative to undertake additional preparation work in excess of what would normally be required for a case of the same type. Examples include:
- A very complex abuse of process application
 - An application or hearing for which a fee is not otherwise provided for in the 2009 Rules.
15. The *Exceptional Preparation* provisions allow for an additional payment to be made to a representative for the preparation of a case where the total standard fee payable (made up of the relevant standard fee elements) cannot be considered to appropriately recognise the full extent of the work involved in preparing the individual case. In applying these provisions to an individual case, it will be necessary for the Agency to make an assessment of the complexity of the case based on the specific circumstances of the case, together with the work which the representative will reasonably be required to undertake. As provided in rule 10E(3)(a), the Agency shall also have regard to any standard fees payable to the representative under rule 6 or rule 8 of the 2009 Rules, as appropriate. The *Exceptional Preparation* provisions are not intended to remunerate the same work twice.

Determination of application

16. The exceptional nature of a case bringing it within the potential scope of the *Exceptional Preparation* provisions may impact on only one of an assisted person's representatives. Similarly, in a multiple-defendant case, it may only impact on the representative(s) of one of the assisted persons. On that basis, the 2009 Rules, as amended, provide that an application under these provisions may be made by any of the legal representatives in a case in respect of the additional preparation work which that representative needs to undertake. A *Certificate of Exceptionality*, if granted, will apply to that representative and not to the case as a whole. That is, it will not apply automatically to the other representatives, or to the representatives of any other defendant involved in that case. However, it will be open for the other representatives to submit their own individual application(s) under these provisions.

17. As provided in rule 10A(2), an application may be submitted to the Agency by a representative on behalf of themselves and another representative of the assisted person. However, the Agency shall only grant a *Certificate of Exceptionality* to the representative(s) it deems satisfies the prescribed criteria.
18. Each application for additional funding by way of *Exceptional Preparation* shall be considered by the Agency on its own merits when determining whether or not it satisfies the prescribed criteria. Furthermore, when considering an application in respect of any individual case against those criteria, the Agency shall also have regard to whether the Public Prosecution Service has approved the payment of additional remuneration to the prosecuting counsel instructed in that case under section 6 (Hourly Rate Work) of the *Prosecution Fee Scheme* (August 2015).
19. If exceptionality is considered to apply to one or more representative of a defendant, or the representatives of more than one defendant in a case, the Agency shall seek to avoid unnecessary and inappropriate duplication of additional preparation work.

Grant of application

20. An underlying principle of the standard fee approach is that it is administratively straightforward and it is not necessary for the legal representative(s) of an assisted person to submit detailed records to the Agency in order to support their claim for fees. However, when a legal representative applies for *Exceptional Preparation* funding for an individual case, the representative shall be required to provide an estimate of the additional work that they will need to undertake, which may include a *Costed Case Plan*.
21. If a *Certificate of Exceptionality* is granted to a representative, as provided in rule 10C(5), they will be required to maintain contemporaneous records of the preparation work they do in the case and to provide periodic reports to the Agency as to the work they have carried out. Non-compliance with any of these requirements will result in the application being rejected or, if already granted, the *Certificate of Exceptionality* being revoked.

Appeals

22. A representative may appeal to the Taxing Master against a decision of the Agency on their application for *Exceptional Preparation*. Where a *Certificate of Exceptionality* has been granted, a representative may also appeal to the Taxing Master against a decision of the Agency to revoke the certificate under rule 10C(7). The decision of the Taxing Master on such an appeal under rule 10D is final.

23. Where a representative is dissatisfied with the Agency's decision on the determination of their fees for *Exceptional Preparation* at the conclusion of the case, they may appeal that decision to the Taxing Master. The decision of the Taxing Master on such an appeal under rule 10D is final.

Determination of representatives' fees for Exceptional Preparation

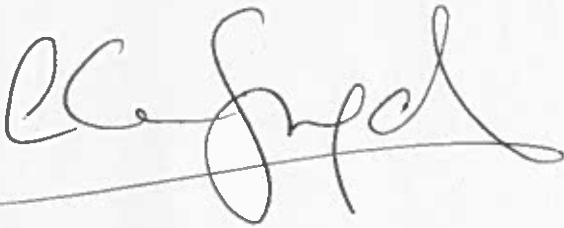
24. Rule 10E provides for the determination of representatives' fees where a *Certificate of Exceptionality* has been granted under rule 10B and it has not been revoked under rule 10C.
25. As part of that process, in determining the amount payable to a representative in respect of a particular case, the Agency shall have regard to any standard fees payable to the representative under rule 6 or rule 8 of the 2009 Rules, as appropriate. Where it decides that an additional payment is required under Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, it shall allow additional fees for the *Exceptional Preparation* work. However, as provided in rule 10E(5), the Agency shall not allow payment for any additional hours claimed under a *Certificate of Exceptionality* unless it is satisfied by the representative that the additional preparation work was reasonably undertaken and properly done.

County Court Appeals and cases returned for trial in the Crown Court

26. Where a person has appealed to the County Court and they have been granted a criminal aid certificate under Article 30 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, if their representative considers that their appeal satisfies the criteria prescribed in rule 10A of the 2009 Rules, as amended, the representative may apply to the Agency for a *Certificate of Exceptionality* under that provision. Such application should be submitted, where appropriate, whether or not the Agency granted a *Certificate of Exceptionality* for the hearing of the case in the Magistrates' Court.
27. As referred to in paragraph 18 above, every application for additional funding by way of *Exceptional Preparation* shall be considered by the Agency on its own merits when determining whether or not it satisfies the prescribed criteria.
28. When considering an application in respect of a County Court appeal case, the Agency shall have regard, among the matters which are relevant, to whether or not a *Certificate of Exceptionality* was granted in respect of the assisted person's case for the hearing in the Magistrates' Court.
29. Similarly, where a person has been returned for trial in the Crown Court and they have been granted a criminal aid certificate under Article 29 of the Legal

Aid, Advice and Assistance (Northern Ireland) Order 1981, if their representative considers that their case satisfies the criteria prescribed in rule 11A of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005, as amended, the representative may apply to the Agency for a *Certificate of Exceptionality* under that provision. Such application should be submitted, where appropriate, whether or not the Agency granted a *Certificate of Exceptionality* under rule 10A of the 2009 Rules for the hearing of the case in the Magistrates' Court.

30. When considering an application in respect of a case in the Crown Court, the Agency shall have regard, among the matters which are relevant, to whether or not a *Certificate of Exceptionality* was granted in respect of the assisted person's case for the hearing in the Magistrates' Court.
31. The Agency shall seek to avoid unnecessary and inappropriate duplication of additional preparation work. The *Exceptional Preparation* provisions are not intended to remunerate the same work twice.
32. The Agency shall publish this Guidance on its website.



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Minister of Justice

21 November 2016