

## **Remuneration for Exceptional Preparation Work in the Magistrates' Courts and Appeals to the County Court**

**Guidance - December 2016**

### **Introduction**

1. This Guidance is issued by the Legal Services Agency Northern Ireland (the Agency) to provide practical information on the completion and submission of an application for a Certificate of Exceptionality under The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2016 (the 2016 Amendment Rules). It provides guidance on the records to be maintained in cases where a Certificate of Exceptionality has been granted and outlines how to submit a claim for payment.
2. This Guidance should be read in conjunction with the Department of Justice Guidance that has issued in respect of Exceptional Preparation Work for Magistrates' Court or County Court Appeals proceedings. The Departmental Guidance can be accessed on the Agency's website. The Agency will have regard to the Departmental Guidance.
3. A copy of The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2016 can also be accessed on the Agency's website.

### **Commencement**

4. The 2016 Amendment Rules come into operation on 1 December 2016 and this Guidance relates to the provision for Exceptional Preparation contained at rule 10A of The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 as amended by the 2016 Amendment Rules. The Exceptional Preparation provisions apply for the determination of the costs payable. The Rules make provision for the payment of additional remuneration in cases where a Certificate of Exceptionality in an individual case has been granted. The Rules prescribe hourly rates of payment for the additional work authorised on foot of a successful application for Exceptional Preparation.
5. The 2016 Amendment Rules cover a number of scenarios which could engage exceptional preparation work. The details of these scenarios are set out at rule 3 thereof.

## Contents

6. Specifically, this Guidance deals with:
  - Making an Application for a Certificate of Exceptionality;
  - Completing the Application Form;
  - Details of the Preparation Work;
  - Determining an Application for a Certificate of Exceptionality;
  - Record keeping by the Representative;
  - Request for an Extension to the Certificate;
  - Revocation of a Certificate of Exceptionality;
  - Completing and Submitting a Claim for Payment;
  - Review by the Agency; and
  - Appeal to the Taxing Master.

### Section 1 - Making an Application for a Certificate of Exceptionality

7. A representative may make an application for a Certificate of Exceptionality where he considers that a case (or part of case which is the subject-matter of the application) satisfies the statutory criteria as set out in rule 10(A)(1). The application must be submitted at the earliest opportunity after the Public Prosecution Service has settled the charges against the individual.
8. An application for a Certificate of Exceptionality must be made on the prescribed Application Form a copy of which is available from the Agency's website. The Application Form must be fully completed, in typed form, and a copy of the charge sheet or summons must be included. The Application Form should be completed fully and concisely and provide specific details of the additional work to be undertaken which is the subject of the application detailed (see below for further information). Supporting documentation should not be submitted as only the information contained in the application form (and the charge sheet/summons) will be considered.
9. Rule 10A(2) provides that an application may be submitted by a representative on his/her own behalf or on behalf of her/himself and another representative of the assisted person. In circumstances, where the representative is submitting the application on behalf of her/himself and another representative(s) only one application will be required. However, it must be fully completed on behalf of each representative with clear details of the work of that individual which is the subject of the application.
10. Where an application is being made on behalf of another representative(s) the Agency requires confirmation that the single application is made on the behalf of other representative(s) with their prior agreement and that they

support the application as presented. The name(s) of the other representative(s) included in the application must be clearly stated and signed by the other representative(s) confirming that the application is being made on their behalf and at their request.

11. Where a representative is only making an application on her/his own behalf the section marked for completion by other representative(s) should be clearly marked Not Applicable.
12. In a multi-defendant trial, if the solicitor is acting for more than one defendant, a separate application must be made in respect of each defendant (if appropriate). The Application Form must state clearly whether there are other related applications.
13. In all applications made by the instructing solicitor, full details of any other solicitor(s) or other fee earner(s) from the firm who will be involved in the preparation of the case must be provided. For example, full details of the work to be carried out by a Senior Solicitor, Solicitor, or other fee earner must be clearly set out.
14. As noted above, rule 10A(3) requires the representative to submit the Application Form at the earliest opportunity after the Public Prosecution Service has settled the charges against the Assisted Person. The Department's Guidance (paragraphs 5-7 gives further instruction on this issue).
15. It is recognised that there may be exceptional circumstances in which the representative(s) are not in a position to apply for a Certificate of Exceptionality at the earliest opportunity after the Public Prosecution Service has settled the charges against the Assisted Person. Should such circumstances arise, it is for the representative(s) to demonstrate that they have submitted the application at the earliest opportunity.

### **Contemporaneous Records**

16. The representative(s) should maintain full contemporaneous records, in a fully accessible format, of preparation time expended as soon the representative considers that an application for exceptional preparation is going to be made. Full records of all preparation time expended by a representative will be required, in due course, if a Certificate of Exceptionality is granted. Contemporaneous records must be maintained on the prescribed form and in typed format.

## **Submitting the Application**

17. The Agency will make every effort to consider an application in advance of the next court date. Representative(s) should routinely allow 6 weeks to enable the application to be processed; subject to the requisite information having been provided. The Agency will monitor the processing times of such applications. The volume of applications received will impact on the turnaround times for applications received. The Agency will inform the Law Society and the Bar Council of any slippage in the 6 weeks business target.
18. The Agency recognises however, that there may be occasions when the representative(s) may need to make an 'Urgent' application. Such applications will only be considered in exceptional circumstances and the representative must set out full reasons why it is urgent and only being submitted at this time. A 'late' application by a representative(s) will not be regarded as exceptional circumstances and the application will be processed as routine. Applications marked as urgent but without substantive reasons provided to support the urgent request will be treated as routine and processed in accordance with the above.
19. The Application Form, in typed form, should be sent by email to: [criminalauthoritiesunit@lsani.gov.uk](mailto:criminalauthoritiesunit@lsani.gov.uk). Applications can also be submitted by post or hand delivered to the Agency's Reception Desk. Only properly completed Application Forms with the charge sheet/summons attached will be registered. If the application is submitted by email, the representative(s) must retain a hard copy on file. Supplementary documentation will not be considered.

## **Notification of the Agency's Decision**

20. On consideration of the application the Agency will advise the representative(s) as follows:
  - A Certificate of Exceptionality is being issued and the conditions of same;
  - The application cannot be considered as it is incomplete and as such the application is not going forward for adjudication;
  - The application is being refused if it is deemed not to meet the criteria; or
  - The determination is being deferred as it is not clear that there is sufficient evidence to support the application at that time.

## **Change in Legal Representative**

21. If granted, a Certificate of Exceptionality will issue to each named representative who has been granted a Certificate of Exceptionality. The Certificate is not transferable to another representative.

22. If a representative who has a Certificate of Exceptionality comes off record before the end of a case, that representative must advise the Agency immediately that s/he has come off record and specify the date s/he came off record. The representative who came off record must not expend any further preparation time provided for within the Certificate of Exceptionality and must submit her/his claim for payment in accordance with rule 6 or rule 8 as appropriate.
23. If new representative(s) joins the legal aid team a fresh application for a Certificate of Exceptionality may be made by each representative. In these circumstances the new representative will have to demonstrate why they require a Certificate of Exceptionality. The fact that previously a Certificate of Exceptionality was in place is not in itself compelling as the application will be considered on the basis of the factual position of the case at the point of the fresh application.

### **Early conclusion of proceedings in the Magistrates' Court or County Court**

24. Where there is a material change to the way in which the proceedings have progressed e.g. a change in plea or an earlier conclusion to the proceedings than anticipated the representative(s) with Certificates of Exceptionality in place must inform the Agency immediately, in writing, and should cease to expend any of the additional preparation time granted under the Certificate(s).

### **Section 2 - Completing the Application Form**

25. All parts of the Application Form must be fully completed. For an application on behalf of more than one representative, the narrative at Parts 1- 3 must describe clearly how each representative satisfies the statutory criteria as each individual representative's application will be considered separately.

### **Committal to the Crown Court**

26. In cases to be committed to the Crown Court, the representative(s) must clearly set out why the additional preparation work must be carried out in the Magistrates' Court and not under the Crown Court certificate that will issue in due course. Applications that do not make it clear why the work must be done at the preparation of the Magistrates' Court proceedings will not be adjudicated upon until the information is provided.
27. Part 4 is to be completed setting out clearly the description of the work to be undertaken, the representative(s)/other fee earner(s) undertaking the work

and the estimated hours sought for each item of work. Where the application focuses upon one or more discrete aspects of the case this must be clearly stated. Full details of the exceptional preparation time must be provided in a series of costed steps for the work to be undertaken. Generic descriptions of the work to be undertaken with associated blocks of hours e.g. 50 hours, 25 hours etc. will not be accepted as a detailed description of the work to be undertaken.

28. If the volume of PPE is being presented as an exceptional factor this must clearly be set out and include the number of pages, the nature of the documentation and the estimated time to consider same based on the nature of the documentation. Such applications will be considered against the additional preparation fees already available in the standard fee structure.
29. Part 5 of the Application Form requires details of the estimated additional costs of the Exceptional Preparation Work together with the estimated total costs of the case, based on the trial fees prescribed by The Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) (Amendment) Rules (Northern Ireland) 2009 as amended. This section should be completed relying on the estimated number of days for the contest/committal proceedings according to the court listing. This section must provide full reasons why the standard fees for this case, based on the charges and classification of offence, will not provide fair and reasonable remuneration.
30. Where the representative(s) considers that the proceedings in their entirety cannot be remunerated within the standard fee arrangements a Costed Case Plan must be completed, as required by rule 10A(5). In such circumstances, the representative(s) should complete the Costed Case Plan template (available in the "Legal Aid Forms" section of the Agency's website) setting out the full details of the additional preparation work the representative(s) is proposing to undertake, key stages of the preparation of the defence, together with the estimated hours and the associated costs set out by each representative or other fee earner included in the application.
31. In circumstances, where the representative is submitting the application on behalf of himself and another representative(s) only one Costed Case Plan will be required but it must set out in full the work each representative (including other solicitors and other fee earners) will undertake in the case.
32. Where a Costed Case Plan has not been provided with the application but the Agency considers that it is required to allow a fully informed determination to be made, the representative will be contacted and advised that a Costed Case Plan is required. The Agency's consideration of the application will be held in abeyance pending the submission of a properly completed Costed Case Plan.

### Section 3 - Details of the Preparation Work

33. Rule 10A(4) and rule 10A(6) require the representative to provide full details of the additional preparation work required together with estimated costs (a schedule of work), either by completing Part 4 of the Application Form or a Costed Case Plan. Applications with insufficient detail will not proceed to determination but will be returned to the representative(s).
34. The nature of the additional preparation work and estimated hours to be expended must be shown for each representative e.g. research, reading time, consulting with witnesses including experts, preparing applications etc. This needs to show clearly which representative or other fee earner will be responsible for each piece of the work. It is important to note that the replication of generic task descriptions for each legal representative will not be regarded as providing a detailed description of the work of each representative.
35. When recording reading time, the schedule of work should clearly identify the documentation to be considered including the number of pages of same. This should also identify the release of documentation going forward. Reading time will be allowed based on the nature of the documentation to be considered i.e. witness statements, exhibits, interview transcripts. For other relevant material to be read clarification is required as to the relevance of this documentation in the case.
36. In cases where more than one defendant is being represented the representative should not make an assumption that a generic approach will be accepted with regard to the Exceptional Preparation Time required. The representative will be required to demonstrate the additional preparation work required for each defendant (in an application covering more than one defendant). The representative must also show where a piece of work is common to more than one defendant and indicate how duplication of cost can be removed.
37. Routine administrative work associated with the preparation of the case will not be covered by the Certificate of Exceptionality as these costs are provided for within the standard fees structure. Routine administrative work is considered to be any work that is not directly part of the legal preparation of the defence case.
38. Any other disbursement costs normally associated with the preparation of the defence will continue to be considered and processed through the prior authority process, but for completeness estimated associated costs should be included. In this regard, other disbursement costs are considered to be costs such as interpreting and translation services, travel and mileage etc. Such

costs alone will not be taken into account in the determination of an application for Exceptional Preparation Work.

#### **Section 4 - Determining an Application for a Certificate of Exceptionality**

39. It is not possible to precisely define, in advance, the type of circumstances which could come together to mean that a case, or part of a case, would satisfy the Exceptional Preparation criteria. 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. The Department's Guidance gives further information on this matter (see paragraphs 13-14 of DoJ Guidance).
40. The Agency in considering an application for Exceptional Preparation will have regard to any relevant case law in England and Wales, pending any decisions by the Taxing Master or High Court as to the interpretation and application of the Exceptional Preparation provisions in the 2009 Rules, as amended.

#### **Determination of an Application**

41. Each application will be considered on its own merits and on the basis of the information provided in the Application Form. When considering an application in respect of any individual case against the criteria, the Agency will 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).
42. If the Agency is satisfied that each of the exceptional preparation criterion as prescribed by rule 10A(1) has been met, a Certificate of Exceptionality will be granted to each representative that has been determined to have satisfied the criteria. If exceptionality is considered to apply to one or more representative of a defendant in a case, the Agency shall seek in each case to avoid unnecessary and inappropriate duplication of additional preparation work.
43. In circumstances, where the Agency deems it appropriate to grant a Certificate of Exceptionality but with fewer preparation hours this will be stated and written reasons will be provided.
44. If the Agency is not satisfied that the criteria prescribed in rule 10A(1) have been met it will refuse the application and in so doing provide the representative(s) with written reasons for refusal.



45. It is not anticipated that a further application for a Certificate of Exceptionality will be made for a case on which an application has been refused and where the representative(s) has availed of the statutory appeal process. That is not to preclude a subsequent application if there are significant developments in the case.
46. In certain circumstances the Agency may consider it appropriate to defer its decision on the application until such times as the representative supplies further information to allow the application to be considered more fully; the Agency will provide written reasons as to why its determination of the application has been deferred. In such circumstances, the representative(s) should continue to maintain contemporaneous records of the preparation time expended should a Certificate of Exceptionality be granted in the future.

## **Section 5 - Record Keeping by the Representative**

47. When issuing a Certificate of Exceptionality, the Agency will stipulate:
  - the maximum preparation hours covered by the Certificate;
  - the format for the contemporaneous records; and
  - the format and future date(s) on which the periodic report(s) must be submitted.
48. Only contemporaneous records and periodic reports submitted in the format available in the “Legal Aid Forms” section of the Agency’s website will be accepted. Failure to maintain contemporaneous records in the specified format and/or failure to submit the periodic report in the specified format and in a timely manner, without good reason, will result in the Certificate of Exceptionality being revoked. As each representative will be issued with a separate Certificate of Exceptionality it is for each representative to ensure that he complies individually with the requirements of rule 10C(5). Revocation of a Certificate of Exceptionality will be in respect of the legal representative(s) who fail to provide the contemporaneous records and periodic reports in the prescribed format and the timeline requested.

## **Periodic Reports**

49. Periodic reports will be required in all cases where a Costed Case Plan is required. In fraud cases, where Accountants and/or Forensic Accountants have been authorised periodic reports may also be required from those experts. Other complex cases with multiple defendants may also require periodic reports from expert witnesses; the Agency will notify the instructing solicitor at the time.

## Case Management Conferences

50. For the more complex cases involving substantial preparation time Case Management Conferences may be arranged at appropriate intervals to which the instructing solicitor and/or counsel will be invited (depending on which representative(s) have received Certificates of Exceptionality). Remuneration will not be available for preparation for, or attendance at Case Management Conference(s).

## Section 6 - Request for an Extension to the Certificate

51. Representative(s) should not exceed the maximum number of hours specified under the Certificate of Exceptionality. Rule 10C(4) provides for the representative to seek an extension to the hours granted under the Certificate of Exceptionality.
52. Any request for further preparation hours must be sought in advance of the total number of hours already granted under the Certificate of Exceptionality being expended. The representative(s) should not carry out any further preparation work in excess of the maximum hours already in place without receiving confirmation from the Agency that the Certificate of Exceptionality will be extended as any such work will be disallowed when the fees are being assessed should the Agency refuse the extension request.
53. There will be two categories of requests for extensions to the Certificate of Exceptionality.
  - a. **Category 1** – the representative(s) has not completed the preparation work as estimated within the additional preparation time already requested and authorised. In such circumstances, the practitioner must provide a full explanation as to why the work is uncompleted providing a copy of the contemporaneous record(s) of the work carried out to date for each representative to be covered by the extension request. The representative must also set out clearly the remaining work to be carried out and the estimated hours required by each representative.
  - b. **Category 2** – where an issue has emerged which is new and separate to the issue(s) detailed in the original application and are already covered by the Certificate of Exceptionality in place. For such cases, the representative(s) will be required to complete a new Application Form as outlined above. A copy of the contemporaneous record(s) maintained to

date must be submitted with this new application. It is anticipated that a Category 2 request will not be required when an application under paragraph 30 above has been made and a Costed Case Plan is in place.

54. If the Agency grants an extension to the Certificate of Exceptionality this will be confirmed in writing, by way of a 'Letter of Extension' and should be submitted with the claim form and the Certificate of Exceptionality at the conclusion of the proceedings.

## **Section 7 - Revocation of a Certificate of Exceptionality**

55. Each representative is responsible for complying with the statutory requirement to keep records as prescribed by the Agency as each representative is being provided with a separate certificate.
56. Only in exceptional circumstances would the Agency anticipate exercising its discretion to accept a representative(s) explanation as to why it was not possible to maintain the contemporaneous records in the format specified and/or to submit the periodic report(s) by the date(s) specified. Detailed written reasons would be required from the representative explaining why the representative had failed to comply with rule 10C(5). If the Agency considers the representative has shown that there was 'good reason' for his/her failure to comply with these requirements, the Agency will confirm in writing that 'good reason' has been shown and the Certificate of Exceptionality will remain in place.
57. If however, the Agency consider that 'good reason' has not been shown it will proceed to revoke the Certificate of Exceptionality in accordance with rule 10C(7).
58. In circumstances where the Agency considers that the representative has failed to comply with rule 10C(5), and the representative has not provided written reasons for so doing, the Agency will write to the representative and note that it is minded to revoke the Certificate of Exceptionality. The representative will be invited to provide, in writing, details of 'good reason' for the Certificate of Exceptionality to remain in place within 21 days of receipt of the Agency's letter.
59. If the practitioner replies to the Agency within 21 days, providing written reasons the Agency will proceed to consider those reasons and will confirm in writing whether it considers that 'good reason' has been shown. The Agency will confirm whether the Certificate of Exceptionality remains in place or has been revoked.

60. If the representative does not reply, in writing, within 21 days the Agency will assume that the representative does not intend to avail of the opportunity to demonstrate 'good reason' and the Agency will proceed to revoke the Certificate of Exceptionality.
61. Where a Certificate of Exceptionality has been revoked the representative fees will be assessed in accordance with rule 6 or rule 8 as appropriate and as if the Certificate has never been issued. Practitioners are also reminded of the requirement to comply with the statutory time limit for the submission of claims in accordance with rule 6 and rule 8 as appropriate.

### **Section 8 - Completing and Submitting a Claim for Payment**

62. Rule 10E provides for the fees payable under a Certificate of Exceptionality. The prescribed hourly rates for preparation hours granted under a Certificate of Exceptionality are set out in the table following rule 10E (7). Fees allowed on assessment under the Certificate of Exceptionality shall be paid together with the standard fees allowed under Schedule 1.
63. All claims, including claims under these provisions for Exceptional Preparation Time must be submitted in accordance with the statutory time limit provided for by rule 6 and rule 8 as appropriate.
64. Claims which include Exceptional Preparation Time must be made on Claim Form MCEP. The claim form should be submitted in the normal way and should be supported by legible copies of:
  - (a) the Certificate of Exceptionality (and any letters of extension in place);  
and
  - (b) the contemporaneous records.
65. As each representative will be issued with a separate Certificate of Exceptionality it will be for each representative to submit his claim in a timely manner, properly completed and supported. Incomplete claims will not be registered for assessment.
66. The claim for additional preparation hours will be assessed on the basis that the work was reasonably undertaken and properly done. The Agency may require the representative to provide further information to allow the assessment of fees to be carried out.
67. As noted, above any material change to the proceedings should be noted immediately to the Agency and will be taken into account when the work

carried out under the Certificate of Exceptionality is being assessed for payment.

68. The Agency would expect to assess all claims in respect of a defendant and co-defendants (in respect of which Certificates of Exceptionality have been granted) at the same time. As such it will be important that all representatives with a Certificate of Exceptionality submit their claims in a timely manner.

## **Section 9 – Review by the Agency**

### **Request for a review of a refusal to grant/reduced grant**

69. A request for a review of the Agency's decision not to grant a Certificate of Exceptionality, or the Agency's decision to grant a Certificate but with a reduction in the additional preparation time requested by the representative(s) should be made in writing to the Agency within 21 days of receiving notification of the Agency's decision. Any such request for a review will be considered by a Review Panel comprising senior managers of the Agency.

### **Request for a re-determination of fees payable**

70. Any request for a re-determination of the fees authorised for payment against the Certificate of Exceptionality that is in place should set out the full reasons as to why the fees should be re-determined. A request for a re-determination of fees payable will be considered in the normal way (that is, the process in place for any request for a redetermination of fees payable under the 2009 Rules). Requests for a re-determination of Magistrates Court fees are considered by a Review Panel comprising senior managers of the Agency.

### **Revocation of a Certificate**

71. Any appeal against the Agency's decision to revoke a Certificate of Exceptionality should be made directly to the Taxing Master (see below).

## **Section 10 – Appeal to the Taxing Master**

72. If a representative is not content with the outcome of the Agency's review in respect of the refusal of a Certificate of Exceptionality, rule 10D(1) provides for an appeal to the Taxing Master. In addition rule 10D(1) also provides an appeal to the Taxing Master in respect of a decision by the Agency to revoke a Certificate of Exceptionality.

73. In accordance with rule 10D(3) the decision of the Taxing Master is final in respect of the Agency's refusal of a Certificate of Exceptionality or the amount of Exceptional Preparation authorised by the Agency as part of the Certificate of Exceptionality.
74. 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, including the Agency's redetermination of those fees, they may appeal that decision to the Taxing Master in the normal way. In such circumstances, there is also a further potential appeal to the High Court.
75. Subject to rule 15, any appeal to the Taxing Master should be instituted within 21 days of receiving notification of the Agency's decision. Any appeal to the Taxing Master is required to be made in writing.