

GUIDANCE ON AUTHORISATION OF COUNSEL IN CIVIL CASES

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1. Scope of this guidance

- 1.1 This guidance is issued by the Director of Legal Aid Casework. It sets out how the Legal Services Agency (“the Agency”) will deal with applications for the authorisation of counsel in civil cases. This guidance applies to applications made from July 2019, coinciding with the Agency’s new online application system. It should be read in the context of the Agency’s general Decision Making Guidance on Civil Representation and the Agency’s guidance on Exceptional Funding. All current guidance is available on the ‘Legal aid legislation and guidance’ page of the Department of Justice’s website.
- 1.2 This guidance replaces all previous guidance on the authorisation of counsel issued by the Legal Services Commission and the Agency, including the Agency’s circulars issued in 2014 and 2015¹. The aim of this guidance is to ensure that the level of representation in publically funded cases is appropriate and proportionate in the circumstances of each case. The guidance does not seek to make substantive changes to the approach taken in earlier guidance, but brings the guidance into a single accessible document, updated to reflect the current legal framework and online application process.

2. Statutory framework

- 2.1 All applications for the authorisation of counsel in civil cases are governed by regulation 11 of the Civil Legal Services (General) Regulations (Northern Ireland) 2015 which provides as follows:

“Counsel

11(1) Where it appears to a supplier that the proper conduct of civil legal services requires the instruction of counsel, the supplier shall apply to the Director for authorisation to instruct counsel under this regulation;

(2) If the Director considers that the proper conduct of the civil legal services requires counsel, the Director may grant authorisation to instruct counsel on such conditions as the Director considers appropriate.”

- 2.2 Note that this test applies across the board, regardless of which court the case is before and regardless of the type of legal aid applied for. The question for the Agency is always: “Does the proper conduct of the case require the instruction of counsel?” The guidance below will refer to a range of issues, for example whether a case is “exceptional” or what level of funding is “appropriate”, but these must all be seen as practical applications of the test in regulation 11, not as modifications or replacements of it.

- 2.3 Remuneration of counsel in civil case is governed by the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015.

¹ LSC Circular 08/14 dated 13th May 2014 and the twelve Annexes to that circular; LSA Circular LSA/15/02 dated 5th June 2015

2.4 It follows that obtaining prior authority for counsel from the Agency is essential in all cases to ensure counsel is paid. This must be done even where the use of counsel is clearly reasonable or where this guidance suggests that the application is unlikely to be refused.

2.5 Solicitors must review the terms of any certificate granted to ensure that the cover, including for counsel, is correct.

3 Appropriate Levels of Representation

3.1 Although authority for counsel is required in all cases, there are many proceedings where the instruction of counsel is relatively routine. The table below lists the levels of representation the Agency will generally regard as appropriate for particular court levels and proceedings types.

Funding provided	Level of court and nature of proceedings	Appropriate level of representation
Representation (Lower Courts)	Magistrates' Court/ Family Proceedings Court (except where listed below)	Solicitor only
	Mental Health Review Tribunal	Solicitor and/or counsel (composite fee)
	Warrants for further detention ²	Solicitor and/or counsel (composite fee)
	Hearing before the Parole Commissioners under the Criminal Justice (Northern Ireland) Order 2008	Solicitor and/or counsel (composite fee)
	All other proceedings (including all other hearings before the Parole Commissioners or Care Tribunal)	Solicitor only
Representation (Higher Courts)	Undefended or "no fault" divorce proceedings (at any court level) ³	Solicitor only
	All other proceedings before the County Court/ Family Care Centre or High Court	Solicitor and Junior Counsel
	Court of Appeal or Divisional Court	Solicitor, Junior and Senior Counsel (but see guidance on more than one counsel below)
	Supreme Court	Solicitor, Junior and Senior Counsel
	Asylum and Immigration proceedings (First tier and Upper Tribunal)	Solicitor and/or counsel (composite fee)
	All other tribunals within the scope of Representation (Higher Courts)	Solicitor and Junior Counsel
Exceptional Funding	Inquests and all other proceedings outside the normal scope of legal aid	Solicitor and Junior Counsel (remuneration is determined on a case by case basis)

² Police and Criminal Evidence (Northern Ireland) Order 1989 and Terrorism Act 2000

³ See guidance on divorce proceedings in the Category Specific issues guidance below

3.2 The significance of the above table is in the amount of detail the Agency will require in support of an application for authority for counsel. Applications seeking authority for junior counsel where that level of representation is generally considered to be appropriate need not provide detailed justifications in the online application, unless requested to do so by the Agency. Prior to the online process, such cases were dealt with using a simplified application form (Form ACC 2). However all applications relating to Senior Counsel or more than one counsel will need justification as explained below.

4 Applying for higher levels of representation

4.1 Any application to authorise counsel where a higher level of representation is being sought than that set out in the table above will need to be justified in detail in the online application. Each case will be considered on its merits. However as the 2014 ministerial guidance made clear, there are some types of proceedings which are inherently more likely to require counsel than others⁴. It is convenient to divide applications into two categories:

- Cases where the authorisation of counsel will be **exceptional**: the level of representation specified in the table in section 3 will be appropriate for the **majority** of such cases and it will be **unusual** for the Agency to grant authority; however, there may be exceptional individual cases where the authorisation of counsel is justified
- Cases where the authorisation of counsel will be **wholly exceptional**: the level of representation specified in the table in section 3 will be appropriate for the **vast majority** of such cases and it will be **extremely unusual** for the Agency to grant authority; however there may be wholly exceptional individual cases where the authorisation of counsel is justified

4.2 The following table identifies the most common proceedings types:⁵

Court Level	Nature of Proceedings	Level of representation sought	Approach to the application
Family Proceedings Court / Magistrates	Public law children order cases	Junior counsel	Exceptional
	Private law children order cases	Junior counsel	Wholly exceptional
	All other cases	Junior counsel	Wholly exceptional
Family Care centre / County Court	Undefended or “no fault” divorce proceedings ⁶	Junior counsel	Wholly exceptional
	All other proceedings (family or non-family)	Senior or more than one counsel	Wholly exceptional
High Court	Undefended or “no fault” divorce proceedings	Junior counsel	Wholly exceptional
	Other defended divorce proceedings	Senior or more than one counsel	Wholly exceptional

⁴ Department of Justice Guidance, 6th May 2014 see paragraphs 11-14, 17-20, 23-26, 29-30, 34-35, 40-41, 44-45, 46-47

⁵ See the Decision Making Guidance, Part C, for case category definitions

⁶ See guidance on divorce proceedings on the Category Specific Issues guidance below

	Public law children order cases	Senior or more than one counsel	Exceptional
	Private law children order cases	Senior or more than one counsel	Wholly exceptional
	All other proceedings (family or non-family)	Senior or more than one counsel	Exceptional
Inquest proceedings	Exceptional funding	Senior or more than one counsel	Exceptional

5 Issues to consider

5.1 The following factors (where relevant) should be addressed in all applications to authorise a higher level of representation than that which is usually considered appropriate:

- The solicitor applying must clearly demonstrate that the case (or part of the case which is the subject matter of the application) **could not be adequately conducted** without the higher level of representation applied for;
- The Agency must be satisfied from its experience in considering applications, that the specific issues presented in the case are more difficult in terms of **gravity, seriousness or public importance** than the 'norm' for cases of the type and the court tier in question, such that the higher level of representation is merited;
- If the application is seeking a higher level of representation than that engaged by **the opposing party** in the case (or the child in respect of Children Order proceedings) the application is only likely to be granted in exceptional circumstances (see 'Instruction of counsel by other parties' below);
- Authorisation for counsel is unlikely to be granted if to do so would increase costs such that a **reasonable private paying client** would not wish to proceed; or would call into question the cost benefit of the proceedings⁷

5.2 In considering whether the case could not be adequately conducted without additional representation, the Agency will take into account the factual and legal complexity of the proceedings. The existence of a large volume of documentation or the need for extensive expert cross examination will be taken into account but such features are common in litigation; the Agency will be looking for a level of legal complexity which clearly takes the case out of the norm for proceedings of the type and court level in question.

5.3 Arguments as to legal complexity are more likely to carry weight where the client's case requires novel or untested legal arguments to be put forward, or where there are existing legal authorities which are unhelpful to the client's case and need to be distinguished. Such legal difficulties will however prompt the Agency to look at the legal merits of the case to ensure that continued funding is justified.

⁷ See guidance on the private paying client test in Part B of the Decision Making Guidance, section 3, and guidance on cost benefit in section 6

5.4 The ‘gravity and seriousness’ of the proceedings must be looked at primarily from the viewpoint of the client, rather than the proceedings as a whole. Proceedings where the consequences of the case are of “exceptional or overwhelming importance” to the client are more likely to justify authority for counsel.

5.5 The ‘public importance’ of a case is relevant where the proceedings are likely to have significant consequences which are not restricted to those involved in the current proceedings; for example setting an important new legal precedent. This is a very similar idea to the concept of ‘significant wider public interest’ which can form the basis for a grant of exceptional funding.⁸

Senior or more than one counsel

5.6 Authority can, in principle, be provided for any combination of junior and senior counsel. However, in practice, the three most likely levels of representation are: junior counsel alone; senior counsel alone; senior counsel with junior counsel.

5.7 All applications to authorise senior or more than one counsel must be justified under the guidance, even where the instruction of senior counsel is not considered to be exceptional for the proceedings in question. The following must be addressed specifically in the application:

- Where junior counsel has already been instructed on behalf of the client, the application must specify **the number of years’ standing** of that counsel;
- Whether, on the facts of the particular case involved, it may be appropriate to authorise funding for representation by **senior counsel alone**, rather than by two counsel

Limited authorities

5.8 Authorisation of counsel may be given subject to such conditions as the Agency considers appropriate.⁹ The Agency may limit any grant either to a specific period or to specific steps such as representation at a particular hearing. This is likely to be appropriate where the complex issues justifying the use of counsel are expected to be resolved at that hearing or where a period of time should be allowed for counsel to assist in settling or resolving the proceedings. In those cases where funding for counsel has been granted pending transfer to a higher court, the authorisation for counsel may be limited to a date by which the jurisdiction issue is reasonably expected to have been determined.

5.9 Applications must be clear whether they relate to specific events or hearings or are for the proceedings as a whole. If the application relates to the proceedings as a whole the Agency will need to consider whether the factors relied upon will be applicable throughout the case or only for limited periods. However the Agency recognises that there may be advantages to continuity of representation where this can be shown to be proportionate and cost effective for the proceedings as a whole.

⁸ See the Exceptional Funding guidance on the website – see also the Decision Making Guidance, Part B, section 6, paragraphs 6.32 to 6.36 ‘Public Interest Cases’

⁹ Regulation 11(2) of the General regulations as set out above

5.10 There are also cases where the proper conduct of proceedings requires tactical advice and guidance from counsel, rather than representation. The Agency may grant authority for counsel or senior counsel initially limited to providing advice in consultation or in writing, including drafting settlement proposals or entering into settlement negotiations. Such authorities can subsequently be extended by the Agency to cover representation in the proceedings if necessary.

Instruction of counsel by other parties

5.11 The level of representation of other parties to the proceedings, in particular the level of representation of the client's opponent, is a relevant consideration. As stated above, the Agency is unlikely to authorise a higher level of representation than the opponent. However the fact that the opponent is represented by counsel, or senior counsel, is never sufficient of itself to justify authorising the same for the client. Each application must be considered on its merits, taking into account the gravity, seriousness and public importance of the proceedings.

5.12 The principle of "equality of arms" requires that all parties should have a reasonable opportunity to put their case forward, not that all parties should have the same level of representation. There is no human rights or other legal requirement that the number of lawyers on each side must be matched. Equality of arms is just one aspect of the general requirement of procedural fairness to all parties, including the opponent.

5.13 In some family proceedings where there may be numerous parties represented in the proceedings. The fact that counsel is authorised for one party to proceedings does not imply that all other parties require the same level of representation.

5.14 For Children Order Public Law proceedings, confirmation as to the level of representation of the opposing parties should be provided from their legal representatives, from the Directorate of Legal Services of the relevant Health Trust or from the Northern Ireland Guardian Ad Litem Agency in cases where a guardian ad Litem has been appointed.

Transfer of proceedings

5.15 If the proceedings have been transferred to the current court tier from a higher court,¹⁰ the circumstances and reasons for the transfer must be set out, together with any relevant judicial findings or comments; it must also be clear whether and to what extent those circumstances have changed since the transfer.

¹⁰ This is most likely to arise in Children Order cases under the Children (Allocation of Proceedings) Order (Northern Ireland) 1996

Multiple proceedings on a certificate

5.16 The Agency has power to include more than one set of proceedings on a single certificate.¹¹ In practice this will be restricted to private law family proceedings where a certificate may cover several different elements of a case, such as divorce, domestic violence, private law Children Order, or ancillary relief. Applications for authority for counsel must specify which elements are said to justify the instruction of counsel. Any authority granted by the Agency will identify and may be limited to those elements where the proper conduct of the proceedings require counsel.

5.17 Whilst proceedings for divorce and for ancillary relief are legally connected (because the right to claim for ancillary relief arises from the divorce proceedings) the two aspects will be considered separately for the purposes of authorising counsel, as is the case with the application of the merits criteria.¹²

Standard Fee cases

5.18 Prior authorities for counsel exist to safeguard the legal aid fund and client from disproportionate or unreasonable costs. In most cases the use of counsel has the potential to increase costs (although the Agency will expect counsel to work to achieve early settlement where appropriate). In some types of case the regulations provide for payment by way of a standard or 'composite' fee for the case – a single fee is payable whether or not counsel is instructed. If the solicitor instructs counsel, the solicitor is responsible for paying counsel an agreed amount out of the standard fee. Examples include proceedings before the Mental Health Review Tribunal and certain Immigration and Asylum proceedings.

5.19 Authority for counsel is still required under the regulations in these cases, but the Agency will not require detailed justification as to the use of counsel. These cases are listed as 'Solicitor and/or counsel (composite fee)' in the table at paragraph 3.1 above.

Client agreement – the statutory charge

5.20 In many cases the decision to grant authority for counsel will have a direct financial impact on the client through the application of the statutory charge. This is unlikely to arise in public law family proceedings but will often be the case for private law proceedings; even those aspects of matrimonial proceedings which do not concern finances may contribute to the amount of the charge when property is subsequently recovered or preserved.¹³ The statutory charge may also arise in non family money claims if, for any reason, costs are not recovered in full.

¹¹ General Regulations, regulation 15(9) and see the Decision Making Guidance, Part A, section 7, paragraphs 7.13 to 7.17

¹² See Decision Making Guidance, Part C, Family Category Specific guidance, paragraph 21.2 onwards

¹³ See *Hanlon v Law Society* (1981) AC 124

5.21 Where the nature of the proceedings is such that additional costs may potentially be recovered from the assisted person by way of the statutory charge, the solicitor must provide the Agency with evidence that:

(a) they have advised the applicant in writing of the additional cost implications, in terms of the potential application of the statutory charge, if authorisation is granted for counsel (or, if applicable, senior counsel); and

(b) the assisted person has confirmed in writing that, if in due course the statutory charge becomes applicable in their case, they agree to bear any additional costs associated with instructing counsel (or, as applicable, senior counsel).

Cases in which costs are not recoverable

5.22 Previous versions of guidance on the authorisation of counsel have concentrated on categories of case where it is unlikely that costs will be recovered from the opponent, for example most family proceedings or cases where both parties are in receipt of legal aid. This guidance makes no such distinction and is applicable to all cases, as is the statutory test for authorisation under regulation 11. Ensuring that costs are kept to reasonable and proportionate levels is equally important in non family cases; counsel should only be authorised where the proper conduct of the proceedings requires it.

Duties of solicitors and counsel

5.23 As discussed in the Decision Making Guidance, solicitors and counsel acting under a legal aid certificate have a duty to safeguard the legal aid fund and to notify the Agency of material changes since funding was granted.¹⁴ Similarly where the Agency grants authority for counsel (beyond the level usually considered appropriate for the proceedings in question) the Agency should be notified if the factors on the basis of which authority was granted have changed or no longer exist. This is particularly important where the continued instruction of counsel may have an impact on the cost effectiveness of the proceedings.¹⁵

5.24 Solicitors must mark all instructions to counsel as legally aided and must include a copy of the legal aid certificate and any relevant authorisations with the brief. It is the responsibility of both solicitor and counsel to check that any necessary authorisation is in place before counsel undertakes work under the certificate. On LAMS this can be achieved by attaching counsel to the case once counsel has been certified.

6 Category specific issues

Children Order proceedings

6.1 Public Law Children Order proceedings are often the most serious and complex cases before the Family Proceedings Court and the most likely to require the instruction of counsel. At higher court levels, senior counsel will sometimes be required. Public Law cases often deal with troubled

¹⁴ See the Decision Making Guidance, Part A, section 12

¹⁵ See guidance on cost benefit, Decision Making Guidance, Part B, section 6

families and are likely to concern serious allegations of abuse or neglect. There may be related criminal proceedings. Nevertheless the application will need to demonstrate that the issues raised in the case are more difficult than the 'norm' for such cases in terms of gravity, seriousness or public importance.

6.2 By way of examples, the Agency will be more likely to authorise counsel in cases which have any of the following features:

- (a) where particularly serious abuse, sexual abuse, or non-accidental injury of a child is evidenced or alleged against the client, those allegations are disputed by the client and have not already been admitted or established in other criminal or civil proceedings;
- (b) where there are related criminal or civil proceedings against the applicant, alleging abuse or non-accidental injury, where the allegations are sufficiently grave to distinguish the Children Order proceedings from the 'norm' for such cases for the court tier involved;
- (c) where the proceedings raise complex issues of international law, such as conflict of laws between the law of Northern Ireland and other jurisdictions (the fact that the client is a foreign national or is resident abroad would not in itself justify the authorisation of counsel).

6.3 Private Law Children Order cases are considered less likely to require counsel, but some private law cases involve serious allegations against the parties, akin to those often seen in Public Law cases. The existence of such issues may justify the instruction of counsel in private law proceedings.

Divorce proceedings

6.4 The level of representation appropriate for proceedings for divorce will be considered separately from the level of representation appropriate for any ancillary relief proceedings. Representation by counsel in undefended divorce proceedings will be wholly exceptional, even where the other side has instructed counsel.

6.5 Where divorce proceedings are undefended, the Agency will wish to consider whether a "no fault" ground is available or will become available within a reasonable timeframe. If so, the Agency will deal with applications in the same way as for undefended divorce proceedings.¹⁶ The appropriate level of representation will be by solicitor only and authorisation of counsel will be wholly exceptional.

Ancillary relief

6.6 Solicitor and one junior counsel is usually the level of representation for contested ancillary relief proceedings. The Agency's objective in authorising counsel will be to bring the proceedings to the quickest possible resolution. Authorisation of senior or more than one counsel will be wholly

¹⁶ Department of Justice Guidance, 6th May 2014, paragraph 33

exceptional in the County Court and exceptional in the High Court. Where such authorisation is merited, it may be limited to the steps required to achieve early resolution of the ancillary relief matters.

Damages Claims in the County Court

6.7 In damages claims the gravity, seriousness and public importance of the claim must be considered, but the overall monetary value of the claim, or whether it might previously have fallen within the jurisdiction of the High Court rather than the County Court, is unlikely to be a decisive consideration.

7 Procedures

7.1 From July 2019, applications for authority must be made online under the new application process. The process replaces the various application forms previously required. Applications to authorise the instruction of counsel can be made either at the same time as a certificate is applied for or at any time after a certificate has been granted.

7.2 The online process sets out the detailed information required with each application. The level of justification required will be set out in this guidance – only minimal justification will be needed where only junior counsel is applied for and representation by junior counsel is regarded as the appropriate level of representation under this guidance.

7.3 Because authorities can be granted only in limited form and because, in family cases, there may be several different aspects to the proceedings which may require different levels of representation, it is essential that:

- Every application for authority is clear as to exactly which proceedings the application relates to and whether the application relates to the proceedings as a whole or only to a certain hearing or part of the proceedings;
- Where authority is granted, both solicitor and counsel should check that the authorisation is correct and covers what is required

7.4 Authority for counsel can be applied for as part of an application for emergency representation. The Agency will endeavour to consider the application for the authority at the same time as the determination of the emergency application. See further the guidance on Emergency Applications.¹⁷

¹⁷ Decision Making Guidance, Part A, section 6

7.5 If an application for authority for counsel is refused, the client or solicitor may request a Review of that decision.¹⁸ An application for review can be supported by an opinion from counsel explaining why the proper conduct of the proceedings requires counsel. Such an opinion should address the relevant issues set out in this guidance.

7.6 If an application for authority for counsel is refused and the application relates to Representation (Higher Courts), the client or solicitor may appeal that decision to the Appeal Panel. Since representation by solicitor and junior counsel is already the appropriate level of representation for the vast majority of proceedings covered by Representation (Higher Courts), appeals will relate to the refusal of authority for senior counsel. If the Agency is prepared to grant a certificate and the appeal relates only to the level of representation, the appeal is likely to take place without an oral hearing.¹⁹

¹⁸ General Regulations, regulation 14 and see the Decision Making Guidance, Part A, section 10

¹⁹ Under Civil Legal Services (Appeal) Regulations (Northern Ireland) 2015, regulation 26 and see the guidance on appeals generally: Decision Making Guidance, Part A, section 11