

Chapter 6

Guidance Notes to Counsel Handling Civil Cases

1. Purpose

- 1.1 These notes are intended to provide guidance on the salient points that you, as counsel, should pay attention to when advising the Director of Legal Aid (“the Director”) on the merits of an application for civil legal aid or when acting on behalf of an aided person as assigned counsel.

2. Section 9 of the Legal Aid Ordinance

- 2.1 Under this Section you may be asked by the Director to give an opinion concerning the merits of an application for legal aid and to advise on any question of law arising out of an application. If an application is refused pursuant to your advice, you may be asked to attend any subsequent legal aid appeal hearing.
- 2.2 Under Reg. 3 of the Legal Aid (Scale of Fees) Regulations, the fee payable by the Director shall be such sum as the Director may decide. You may be asked to give an indication of your hourly rate and the likely amount of time required to prepare your opinion before you are instructed.

3. Legal Aid Certificate and Assignment

- 3.1 The assignment of cases to you is made on the condition that you do not have any perceived or actual conflict of interest and it is incumbent on you to return the papers to the instructing solicitors if such condition could not be fulfilled. You should also return the papers immediately if it is foreseeable that you will not be able to perform your duties or you are under situations which render you unsuitable or unavailable for representing an aided person. To protect both the aided person and the public fund, you should return papers or notify us immediately if you have been arrested or charged with a criminal offence. You should also notify us and the assigned solicitor immediately if the aided person is your near relative¹. Should you intend to suggest to the assigned solicitor any expert or mediator who is your near relative, you should notify both

¹ The expression “near relative” in this Chapter includes a spouse, parent, child, brother, sister or spouse of any of them.

the assigned solicitor and us in writing. In other situations where you are uncertain whether it would be reasonable for you to act for an aided person (e.g. due to enduring serious illness, you are incapable of performing your duties with competence or diligence), you shall notify the Director immediately. Failure to timely inform the Director may be referred to the Departmental Committee on Monitoring Assignments to Counsel and Solicitors (DMC) for investigation and consideration of appropriate sanction.

- 3.2 The Legal Aid Certificate (“the Certificate”) provides the authority for the Director to pay counsel and solicitors for acting for an aided person. Counsel should check the terms of the Certificate. If the Certificate is limited, payment will not be made for work done outside the scope of the Certificate.
- 3.3 The Director does not have authority to backdate the Certificate. Payment will not be made for any work done prior to the date of the Certificate or extension.
- 3.4 The Certificate normally relates only to one action, cause or matter.
- 3.5 On receiving instructions from an assigned solicitor to act for an aided person, you should:
 - (a) ensure that you have received a Notice of Assignment or Re-assignment as the case may be specifying that you have been assigned to act as counsel; and
 - (b) check that a copy of the Legal Aid Certificate together with any subsequent extension and/or authority are included in the assigned solicitor’s instructions to ensure that the work you are instructed to carry out is within the scope of the certificate.
- 3.6 As assigned counsel, you should act on the assigned solicitor’s instructions in a timely manner. In this regard, your attention is drawn to paragraph 63 of the Code of Conduct of the Bar of the Hong Kong Special Administrative Region (February 2008). Failure to do this may delay or jeopardize the aided person’s interests and may result in another counsel being assigned in your place.

4. Duty to Report to Director of Legal Aid

- 4.1 When you have reason to believe that the aided person:
 - (a) has required his case to be conducted unreasonably so as to incur unjustifiable expenses or has required unreasonably that the case be continued; or
 - (b) has wilfully failed to comply with any regulation requiring him to provide information or in furnishing such information has knowingly made a false

statement or a false representation, you shall forthwith report the fact to the Director pursuant to Reg. 21(1) of the Legal Aid Regulations.

4.2 If you are uncertain whether it would be reasonable for you to continue acting for the aided person, you should report the circumstances to the Director pursuant to Reg. 21(2) of the Legal Aid Regulations.

4.3 Your attention is drawn to paragraph 115 of the Code of Conduct of the Bar of Hong Kong Special Administrative Region (February 2008).

4.4 You must immediately notify the Director in writing upon becoming aware of the following proceedings being brought against you:
(a) any professional disciplinary proceedings; and/or
(b) any criminal charges.

Failure to timely inform the Director may be referred to the DMC for investigation and consideration of appropriate sanction. Without prejudice to the power of the Director to reassign the case or impose other conditions to protect the aided person and the public fund, you must also inform the Director in writing of the outcome of such proceedings and/or charges whilst you are still on the Legal Aid Panel.

5. Director of Legal Aid's First Charge

5.1 Your attention is drawn to Section 18A of the Legal Aid Ordinance, Cap.91. Any money or property recovered or preserved in the proceedings on behalf of the aided person is subject to Director of Legal Aid's First Charge. This is the case even though the money or property is recovered or preserved after revocation or discharge of the Certificate. For cases under the Supplementary Legal Aid Scheme, your attention is drawn to Reg. 9(10) of the legal Aid Regulations.

5.2 When advising on settlement, you should consider the impact the Director of Legal Aid's First Charge may have on the benefits to be obtained by the aided person from the proceedings.

5.3 At the conclusion of a case, you should send all outstanding fee notes to your instructing solicitors or to the Director promptly so as to enable the Director to work out the amount to be retained out of the money or property recovered or preserved. Failure to do so will delay the release of an interim payment to the aided person and agreement or taxation of costs.

6. Costs

- 6.1 Throughout the course of proceedings, you must seek costs orders in favour of the aided person, where appropriate, especially in cases where the aided person has made a contribution or where property has been recovered/preserved for the aided person giving rise to the First Charge.
- 6.2 When advising on settlements or making submissions to the Court for an appropriate order for costs, you should consider the liability of the Director and the aided person under Section 16C of the Legal Aid Ordinance and in particular sub-section (1)(c). In this connection your attention is drawn to the case of *Common Luck Investment Limited v Director of Legal Aid* (2002) 5 HKCFAR 467.
- 6.3 Where the court intends to make or has made a wasted costs order or an order disallowing the aided person's own costs to be taxed in accordance with the Legal Aid Regulations (commonly known as "No Legal Aid Taxation Order") against you or the assigned solicitor, you must notify the Director forthwith.

7. Counsel's Fees

- 7.1 When rendering your fee notes, you should provide a breakdown of the items of work done and the time spent as well as your hourly rate.
- 7.2 You must ensure your claim of fees to be true, accurate and reasonable. To facilitate the Director's timely assessment and payment of your fees, you should include on your fee notes sufficient particulars, rather than a general description, of your work done. In the case of interim bills, you must state the period covered. You must avoid making duplicate claim on your work which had already been covered by previous interim bill(s).
- 7.3 You should submit your fee notes to the Director through the assigned solicitor in a timely manner or within the period of time requested by the Director. Although it is the primary duty of the assigned solicitor to submit the supporting documents as requested by the Director within the specified period for assessment of fees, you may expect direct requests from the Director for such supporting documents from you, if the assigned solicitor fails to provide any or all of the requested documents (e.g. due to cessation of practice). Hence, you are advised to retain the case papers until the final disposition of the case and its subsequent appeal or re-trial. Failure to submit your fee notes and/or the supporting documents in time will be regarded as unsatisfactory performance on your part, especially in the event that such failure caused or may cause a delay to our timely

assessment on the amount of interim or final payment which could be made to the aided person. Presentation of further fee notes subsequent to the release of interim or final payment(s) to the aided person, made upon considering the assigned solicitor's estimate of the ceiling of all costs and disbursements incurred and to be incurred in the proceedings or upon an agreement on such costs and disbursements, is highly unsatisfactory as it would be extremely difficult to recover the shortfall from the aided person and the Director does not have any separate fund to settle the same.

- 7.4 Where any item of costs is to be claimed on more than one assigned case and/or you had been representing an aided person as well as other non-legally aided parties, this fact must be spelt out on your fee notes, together with the proportion of the time and costs attributed to each matter/party.
- 7.5 For cases where the Director acts as instructing solicitor, you may submit your fee notes to the Director via the Legal Aid Electronic Services Portal ("LAESP"). To avoid duplication, once you have submitted a fee note online, you should not send a hard copy to the Director.
- 7.6 Full assessment of your fee claimed under common fund basis will be made only after the party-and-party costs had been agreed between the parties, on the conclusion of the assigned case. In the event that the aided person had made a contribution and/or where any recovered or preserved property is subject to the Director's first charge in the assigned case, the Director's final payment of your fees, assessed and agreed by the Director, is subject to the express consent of the aided person. Hence, you should not expect that payment of the said fees will be made immediately after reaching an agreement with the Director.
- 7.7 The fees payable to you as counsel for acting in a legally aided case is governed by Reg. 4 of the Legal Aid (Scale of Fees) Regulations which provides that the fees payable shall be such as may be allowed on taxation, or in default of taxation as may be fixed by the Director, not exceeding the amount as in the opinion of the Director would have been allowed if there had been taxation.
- 7.8 Prior to taxation, the Director may make an advance payment of your fees. The advance payment shall not exceed 75% of the amount which in the opinion of the Director would have been allowed if there had been taxation. The fact that advance payment has been made and the amount of any or all advance payments made shall not preclude or prejudice the Director from making any representations in subsequent taxation hearings as to the proper level of fees payable to you.

- 7.9 Your instructing solicitors are under a duty to inform you immediately when your fees are disallowed or reduced on taxation under the Reg. 8(2) of the Legal Aid (Scale of Fees) Regulations. Upon such notification and subject to paragraphs 7.5 and 7.6 you should refund the excess to the Director without delay.
- 7.10 If you are dissatisfied with a decision on taxation, you should immediately notify the Director through your instructing solicitors and ask for authority to review either before the Taxing Master or a Judge as the case may be.
- 7.11 If the Director gives authority for the review, the costs of the review, if any, shall be paid by the Director pursuant to Reg. 14 of the Legal Aid (Scale of Fees) Regulations. If the Director does not give authority for the review, he will notify you of the reasons why authority is refused. If you wish to proceed with the review, you may do so on condition that you bear the costs of the review, if any.

8. Protection of Personal Data

- 8.1 Your attention is drawn to the Personal Data (Privacy) Ordinance (“PDPO”), in particular “Principle 4 of Schedule 1 – Security of Personal Data”.
- 8.2 Pursuant to Part V of the PDPO, your opinions and comments concerning the applicant or the aided person and the merits of the case may be disclosed to the applicant or the aided person.