

Chapter 7

Guidance Notes to Solicitors Handling Civil Cases

1. Purpose

- 1.1 These notes are intended to provide guidance on the salient points that you, as solicitor, 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 solicitor.

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 Director 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 (which include your non-delegable duty to retain overall control and supervision of other solicitor or staff in your firm to act for the aided person) 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 immediately if the aided person is your near relative¹. Should you intend to nominate any counsel, expert or mediator who is your / the aided person’s near relative, you should notify both the aided person and us in writing. In other situations where you are uncertain whether it would be reasonable for you to act for an aided person, 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.

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

- 3.2 The Legal Aid Certificate (“the Certificate”) provides the authority for the Director of Legal Aid (“the Director”) to pay counsel and solicitors for acting for an aided person. Solicitors should check the scope of the Certificate. If the Certificate is limited, payment will not be made for work done outside the scope of the certificate. Prior to undertaking any work outside the terms of the Certificate, you must apply to the Director for extension of the Certificate giving all necessary information justifying the extension by using Form X47 which can be downloaded from the website of the Legal Aid Department (www.lad.gov.hk). Solicitors should make timely application for extension of the scope of the Certificate and give the Director sufficient time to raise queries on the continued merits of the case.
- 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 If authority is given for you to instruct counsel, counsel must be provided with a copy of the Certificate and notice of any amendment or extension of the Certificate, if any, in your instructions. Upon receipt of fee-notes from the assigned Counsel, you should verify if the work stated in the fee notes are within the scope of the Certificate / your instructions and the fees charged are in compliance with the approved quotation. To facilitate timely payment, you should also send the same to the Director within 21 days from the date of receipt.
- 3.6 Counsel should not be instructed to act for an aided person whether for advice work or as advocate without formal assignment by the Director – *Chan Wai Yin v Wong Sau Ping Ada* (11 September 2006, DCEC 97 of 2004).

4. Acknowledgement of Assignment

- 4.1 You should acknowledge receipt of legal aid assignment as soon as practicable and in any event within 7 days.
- 4.2 If for any reason you are unable to accept the assignment, you should return the papers immediately.
- 4.3 You should inform the aided person of your assignment and advise him your office address and contact telephone number within 7 days from the date of your acceptance of the assignment. You should also arrange to meet with and obtain instructions from the aided person regarding the action, cause or matter as soon as possible, and in any event, not later than 14 days from your initial letter to the aided person.

5. Correspondence with the Director

- 5.1 Except for urgent correspondence which can be sent by fax or by hand, you should correspond with the Director either by post, email or through the Document Exchange. You must not duplicate correspondence. Hard copies of correspondence already sent to the Director by fax or e-mail will be returned to the senders upon receipt.

6. Conduct of Proceedings

- 6.1 As stated in the case of *Ngao To Ki v A.G.* (1981) HKLR 259-279, once assigned, you are in control of the case. It is therefore your duty to conduct the proceedings and to decide on what steps to take in the interests of the aided person.
- 6.2 You should familiarize yourself with the provisions of the Legal Aid Ordinance (“the Ordinance”) and its regulations relevant to the conduct of legal aid cases and your duties and obligations as assigned solicitor.
- 6.3 Save for the purpose of carrying out his duties and functions under the Ordinance, it is not for the Director to supervise your conduct of the proceedings or to issue directions in this regard.
- 6.4 Subject to the Ordinance and its regulations, in particular to Reg. 12 and 21 of the Legal Aid Regulations, Cap. 91, whilst the Certificate is in force, you should not seek directions from the Director with regard to the conduct of the proceedings. If in the course of carrying out his duties and functions under the Ordinance the Director expresses any view in relation to the conduct of the proceedings, such views must be taken for reference only. The Director should not be held liable for such views.
- 6.5 If you wish to take any steps in the proceedings or do any act which is either unusual in its nature or involve unusually large expenditure, you must seek the prior approval of the Director pursuant to Reg. 12(2) and (6) of the Legal Aid Regulations.
- 6.6 You should exercise reasonable care and skill in carrying out your duties as solicitor for the aided person and observe the requirements in the Hong Kong Solicitors’ Guide to Professional Conduct.
- 6.7 Once a case is assigned to you, you are personally responsible for the conduct of the case to which the Certificate relates. If any other solicitor in your firm acts for the aided person in any part of the case, you must, nevertheless, retain overall control and supervision of the case.

6.8 You should ensure that the likely benefits to be obtained by the aided person from the proceedings which may include non-pecuniary benefits, justify the costs involved. In this connection, you are under a duty to keep the aided person regularly advised as to the costs of the aided proceedings.

6.9 You should ensure that the case assigned to you progresses in a reasonable manner in compliance with the prevailing rules, directions or court orders. You should also keep the Director and the aided person informed of material progress of the case. If for any reason, a court order made cannot be complied with, apart from notifying the court, you should also duly advise the aided person and report to the Director forthwith, with detailed reasons explaining why the court order could not be complied with.

7. Duty to Report to Director of Legal Aid

7.1 Under Reg. 12(9) of the Legal Aid Regulations, you are under a duty to comply with the Director's requests for information regarding the progress and disposal of proceedings to which the Certificate relates.

7.2 To enable the Director to perform his functions under the Ordinance, you should provide the information mentioned in paragraph 7.1 above in such form and manner as the Director may prescribe from time to time.

7.3 Checklists which you can refer to when conducting legal aid cases are available in divorce, employees' compensation, personal injuries, contract disputes and judicial review cases. You can use the checklists as reference on the time frame to keep track of the progress of the case and as reminders for reporting progress to the Director at key stages of the proceedings. The checklists which can be downloaded from the Department's website (www.lad.gov.hk) are not intended to be sent to the Director in place of progress reports.

7.4 If the aided person requires the proceedings to be conducted or continued unreasonably or in such manner as to incur unjustifiable expense to the legal aid fund, you should immediately report the matter to the Director.

7.5 If, for any reason, you consider that there are no longer any reasonable grounds for the aided person to continue with the proceedings, you should report the matter to the Director without delay.

7.6 You must inform the Director if it appears to you that the aided person has financial resources that exceed the eligibility limits.

7.7 You must report to the Director if it appears to you that the aided person has willfully failed to comply with any regulations as to information to be supplied by him or has knowingly made a false statement or a false representation in furnishing such information.

7.8 You must immediately notify the Director in writing upon becoming aware of the following proceedings being brought against you or any of your firm's personnel if you are a sole proprietor or the senior partner:

- (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.

8. Unusual and Excessive Expenses

8.1 Before incurring any unusual expenses such as making voluminous photocopying or making calls to witnesses who are overseas, you must seek the approval of the Director under Reg. 12(6) of the Legal Aid Regulations, whether or not such expense is recoverable on a party and party basis.

9. Engagement of Experts

9.1 Before you decide to engage any expert, you should consider carefully whether this is necessary for the proper conduct of the proceedings. In this connection, you should familiarise yourself with the provisions of Order 38 of the Rules of the High Court and the District Court.

9.2 The choice of expert is a matter for you. However, to ensure impartiality and guard against perceived or actual conflicts of interest, you should not engage an expert who is a near relative of yours, the aided person or the assigned counsel. You should immediately notify the Director if such family relationship exists between the expert and the aided person or assigned counsel or you.

9.3 You should complete all items in the prerequisite form, namely "Application for Approval to Engage Expert" by providing the maximum fee, including disbursements, to be paid for any report or opinion or expert witness. You should inform the Director if the number of reports or opinions you intend to obtain exceeds one or the maximum number of persons who may be tendered to give expert evidence and the maximum total fee to be paid therefor, if applicable. Should any matter arise which would increase the maximum fee / maximum total fee to be paid or if the maximum fee to be charged could not be provided in the submitted Application for any reason, you must seek the Director's prior written

approval before further engaging the expert and you must also instruct the expert not to incur any costs and disbursements prior to our approval of the maximum fee. The Director reserves the right to reject payment for any work which is either unusual in nature or involves unusually large expenditure unless prior written approval has been obtained from the Director.

- 9.4 Before seeking the Director's approval to engage an expert, whether local or overseas, you must advise the aided person on the reasonableness of the fees to be charged by the expert and obtain the aided person's consent that if the fees of the expert is not recovered from the opposite party for whatever reason, the fees shall be paid out of his contribution and/or money or property to be recovered or preserved in the proceedings. Prior to giving approval, the Director may require sight of the *curriculum vitae* of any expert whom you may wish to engage. The Director may also need your confirmation that the expert will, if necessary, attend Court to give evidence on behalf of the aided person in relation to the reports prepared and his estimated charges for doing so.
- 9.5 When engaging an expert to handle a legal aid case, you should advise the expert that the instruction is sent on the condition that he does not have any perceived or actual conflict of interest and it is incumbent on the expert to return papers to you if such condition could not be fulfilled.
- 9.6 If it is necessary for the proper conduct of the proceedings to engage an overseas expert, you will be required, when seeking approval from the Director, to furnish him with a copy of the expert's *curriculum vitae* together with all relevant details such as:
- (a) fees proposal including estimate of the fees for preparing a report;
 - (b) the time likely to be required to prepare a report;
 - (c) availability and willingness to come to Hong Kong and give evidence in Court, if necessary; and
 - (d) accommodation and passage requirements if applicable.
- 9.7 In the event that an overseas expert is required to travel to Hong Kong for a purpose relating to the proper conduct of the legally aided proceedings, the Director may specify conditions relating to air passage and accommodation in Hong Kong and any other incidental expenses.
- 9.8 You should note that if an overseas expert is required to perform services in Hong Kong, he needs an employment visa from the Immigration Department.
- 9.9 You should inform the overseas expert that a percentage of his fees for work done in Hong Kong will be kept by the Director and pay to the Inland Revenue in settlement of the overseas expert's liability for Hong Kong tax. The tax payable is charged upon the

prevailing rate of Hong Kong profits tax applicable to an unincorporated and incorporated business or profession.

- 9.10 You should submit the fee note from the expert to the Director within 21 days for payment. In submitting the fee note you should confirm that the fee claimed by the expert is as agreed.
- 9.11 If you consider an expert's performance unsatisfactory, you should report it to the Director. In appropriate cases, the Director will request you to take aided person's instructions with a view to referring the matters to the relevant professional bodies for investigation.
- 9.12 For personal injuries and employees' compensation claims you should take note of Part I of Practice Direction 18.1 and Part G of Practice Direction 18.2 which set out the protocol for commissioning experts.

10. Engagement of Interpreters

- 10.1 Approval of the Director is required before you engage the service of an interpreter.
- 10.2 You should engage an interpreter registered with the Registrar of the High Court. If you do not have a list of these interpreters, the Director can, upon request, provide you with such a list.
- 10.3 You should keep an accurate record of the actual number of hours of work done by the interpreter. When submitting the fee note of the interpreter for payment, you should certify in writing as true and correct the work done and the amount claimed as detailed in the fee note.

11. Engagement of Translators

- 11.1 Approval of the Director is required in respect of the engagement of the translator as well as the fees to be incurred. You should obtain quotations for the Director's approval. When submitting the fee note for payment, you should certify in writing as true and correct the work done and the amount claimed as detailed in the fee note.

12. Engagement of Mediators

- 12.1 For suitable cases ready for mediation, you should write to the Director promptly to obtain approval so that timely mediation sessions can be arranged.
- 12.2 The information which the Director needs in order to approve your request for the engagement of a mediator includes the name of the mediator, the qualification and experience of the mediator, the hourly rate of the mediator, the estimated number of hours required for mediation and any other incidental expenses such as hiring of venue for

mediation, the terms of payment of the costs of mediation and whether the aided person has been advised of the 1st charge implications.

12.3 If the aided person recovers or preserves property in the proceedings, mediation costs will form part of the 1st charge. It is your duty to explain this to the aided person and to obtain from the aided person written confirmation of such explanation.

12.4 Upon receipt of fee-note from the mediator, you should submit the same to the Director within 21 days for payment. You should also confirm that the fee claimed by the mediator is as agreed.

13. Director of Legal Aid's First Charge

13.1 Your attention is drawn to Section 18A of the Ordinance. Any money or property recovered or preserved in the proceedings on behalf of the aided person is subject to the Director of Legal Aid's First Charge (the "First Charge"). This is the case even though the money or property is recovered or preserved after revocation or discharge of the Certificate.

13.2 You should take note of Sections 18A (3A) and (3B) of the Ordinance and ensure that advice will be given to the aided person in appropriate cases that, where the Director defers enforcing the First Charge, simple interest at prescribed rate is payable by the aided person on the amount of the First Charge from the date of registration of the charge until payment. In addition, the aided person will be responsible for payment of the costs of the Department for registering the charge as well as all the incidental expenses including the subsequent release of the charge.

13.3 Pursuant to Section 19A of the Ordinance and subject to Order 80 of the Rules of the High Court, you must remit to the Director all monies received on behalf of the aided person. You should also ensure that the person responsible for payment does not make payment to the aided person direct unless the Director instructs otherwise since only the Director is capable of giving a good discharge for monies payable to an aided person. Failure to comply with these requirements may result in payment of your own costs and charges being deferred or withheld.

13.4 Where property is likely to be recovered or preserved in the proceedings, you must explain the operation and the implications of the First Charge fully to the aided person at the first interview. You should remind the aided person during the course of proceedings especially when discussing settlement proposals that the money recovered on his behalf may be reduced by the amount of his unpaid contribution, if any, and the costs incurred in the proceedings which are not recovered from the opposite party. It is also important that you

keep the aided person informed of the costs incurred and likely to be incurred on a regular basis.

13.5 You have a responsibility to the legal aid fund not to manipulate the destination of any money or property recovered/preserved so as to avoid the First Charge – *Manley v The Law Society* (1981) 1WLR 335). If you do so and the legal aid fund is deprived of a charge, you may be precluded from making any claim on the fund for your costs in respect of the case assigned to you.

13.6 Upon recovery of monies, you should as soon as practicable submit to the Director an estimated ceiling of all costs and disbursements so as to enable the Director to make an interim payment to the aided person. Your estimate should include all the fees payable to assigned counsel, experts, mediator and other service providers (such as interpreters). The aided person may suffer financial hardship if you delay in submitting an estimated bill.

14. Costs and Taxation

14.1 Throughout the course of proceedings, you must seek costs orders in favour of the aided person especially in cases where the aided person has paid a contribution or where property has been recovered/preserved for the aided person giving rise to the First Charge. If there is any doubt whether the aided person paid a contribution, the Director should be consulted. Any settlement which does not specifically provide for costs to the aided person to be paid by the opposite party can only be entered into with the written consent of the aided person signifying his understanding that such costs will be met out of his contribution and/or property recovered or preserved, if any, and with the written approval of the Director.

14.2 Your attention is drawn to Principle 4.01 and its Commentary of the Hong Kong Solicitors' Guide to Professional Conduct. You should keep the aided person informed of the costs incurred or likely to be incurred in the proceedings on a regular basis.

14.3 Where costs are awarded in favour of an aided person at the conclusion of the case, you must agree party and party costs (including disbursements and court fees and any former assigned solicitor's costs) with interest or commence taxation proceedings within 3 months after the completion date as provided for in Order 62 Rule 22(9) of the Rules of the High Court and Rules of the District Court. You should also bear in mind that the aided person is not entitled to commence taxation proceedings after the expiry of 2 years from the completion date unless such period is extended by the court.

14.4 Where the court intends to make or has made a wasted costs order against you or the assigned counsel, you must notify the aided person and the Director forthwith.

- 14.5 Before seeking costs payment, you should ascertain from the Director details of all disbursements incurred by the Director for inclusion in the bill of costs. If costs and disbursements have been incurred by another firm of solicitors previously assigned or by the Legal Aid Department's own Litigation Section, you should obtain full details of such costs and disbursements from the former assigned solicitor or from the Director and incorporate those costs in your bill of costs.
- 14.6 You should ask the Director to assess the common fund costs only after party and party costs have been agreed.
- 14.7 You should not instruct a law costs draftsman to prepare a bill for taxation without the approval of the Director.
- 14.8 The amount of costs payable to you is assessed pursuant to Regulation 5 of the Legal Aid (Scale of Fees) Regulations (Cap.91C) and will not exceed such amount as in the opinion of the Director would have been allowed if there had been taxation or would have applied if there had been an election to take fixed costs where fixed costs are applicable.
- 14.9 As the Solicitors' Hourly Rates ("SHRs") for party and party taxation approved by the Chief Justice provide only guidance in taxation and are not binding on Taxing Masters, the Director is therefore not bound by the SHRs when assessing your costs. Each assessment is to be considered on its own merits and particular facts and the Director may make such adjustments as he sees fit taking into account matters contained in paragraph 1(2) of Part II of the First Schedule of Order 62 and § 62/App/22, Hong Kong Civil Procedure, Vol. 1. For instance, if the Director is of the opinion that the work can be and should have been done by a more junior solicitor or unqualified staff, the hourly rate applicable to the junior solicitor or unqualified staff may be adopted when assessing your costs.
- 14.10 If the prospects of recovering party and party costs are slim or there is no order as to costs against the opposite party, you should prepare a narrative bill for agreement with the Director. The Director does not normally give approval for engaging a law costs draftsman to prepare the narrative bill.
- 14.11 If your bill of costs involves common fund costs which will be paid out of the aided person's contribution and/or property recovered or preserved, you should notify the aided person in writing of the taxation hearing and serve him with a copy of the bill of costs.
- 14.12 Prior to taxation, the Director may make an advance payment of your profit costs. 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 shall not preclude the Director from making any representations in subsequent taxation hearings as to the proper level of the costs payable to you.

- 14.13 If the opposite party does not appear at any taxation hearing, the Director may, subject to the leave of the Taxing Master, make representations in respect of the party and party costs.
- 14.14 You should use your best endeavour to ensure that a proper fee for the work done by counsel or expert is allowed on taxation. You should immediately inform counsel of any objections concerning counsel's fees and of the hearing date of the taxation and seek a narrative of the work counsel has done, the time taken and any other details or comments in support of the disputed fees which should be drawn to the Taxing Master's attention.
- 14.15 Where your costs after taxation fail to beat a properly drawn up Calderbank offer, the Director will seek an order from the Taxing Master that the additional costs including those of the opposite party arising from your non-acceptance of the Calderbank offer will be paid by you.
- 14.16 If you are dissatisfied with any decision on taxation, you should immediately notify the Director and seek authority to review.
- 14.17 You must inform counsel immediately should any fees charged by counsel be reduced or disallowed on a taxation to enable counsel to decide if he wishes to seek the Director's authority for a review pursuant to Reg. 12 of the Legal Aid (Scale of Fees) Regulations.
- 14.18 Once the costs of the proceedings have been agreed or taxed, you should immediately demand payment of such costs from the opposite party. If you have any difficulties in recovery, you should notify the Director.
- 14.19 Unless directed otherwise by the Director, you are under a duty to seek interest on taxed costs against the opposite party and to account to the Director for the interest received.
- 14.20 If there are objections on the ground that the fees charged for work that counsel was instructed to do could have been done by a solicitor, you should not agree your profit costs leaving counsel's fees to be taxed. If you nevertheless agree your profit costs in such circumstances and the disputed counsel's fees are disallowed on taxation, you will be responsible for payment of such fees – *Cheng Ma Choi v Tai Fong Finishing Work Ltd* (1995, No. PI 563) *Seagroatt J* and *Chan Shiu Wah v Wu Kwok On* (13 July 2000, HCPI 1123/1997) *Seagroatt J*.

15. Cases under the Supplementary Legal Aid Scheme (SLAS)

- 15.1 You should note that the SLAS is a self-financing scheme.

15.2 If the aided person is granted legal aid under the SLAS and he is successful in recovering damages, he is required to pay all costs incurred on his behalf in the proceedings. In addition he is required to contribute a percentage of the amount recovered to the SLAS Fund. The rate of contribution is as stipulated in the “Offer and Acceptance” of legal aid. Credit will be given for any costs recovered and the interim contribution as well as the application fee paid by the aided person. You should advise the aided person throughout the course of the proceedings especially when discussing settlement proposal.

15.3 You must explain to the aided person that unlike the ordinary legal aid scheme, he is liable to repay the Director all the costs and expenses incurred in the whole of the legally aided proceedings in the event the Certificate is revoked or discharged by virtue of Reg. 9(5) of the Legal Aid Regulations.

16. Re-assignment upon change of firm

16.1 If you change firm and wish to continue handling the cases assigned to you after the change, you should submit a request to the Senior Law Clerk II, Office Support, Applications and Processing Division. Your request should be accompanied by a list of the cases to be re-assigned together with the aided persons’ written consent and a letter signed by the managing partner confirming that the firm has reached satisfactory arrangements with you regarding payment of costs earned in the cases to be re-assigned. The Director will not pay for any extra work done in relation to the re-assignment.

17. Protection of Personal Data

17.1 Your attention is drawn to the Personal Data (Privacy) Ordinance (“PDPO”), in particular, “Principle 4 of Schedule 1 - Security of Personal Data”.

17.2 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.

17.3 In your instructions to counsel and experts, you should draw their attention to Part V of the PDPO and inform them that their opinion and comments may similarly be disclosed to the applicant or the aided person.