

GUIDANCE ISSUED BY THE DEPARTMENT OF JUSTICE

Remunerating Exceptional Preparation Work in the Crown Court

Introduction

1. I am issuing this Guidance to the Legal Services Agency Northern Ireland (“the Agency”) under rule 4(1) of the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (“the 2005 Rules”) to explain the purpose and intentions of the Department of Justice (“the Department”) in respect of the provision for *Exceptional Preparation* contained in rules 11A to 11E of the 2005 Rules, as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment No. 2) Rules (Northern Ireland) 2016 (“the 2016 Amendment Rules”). The 2016 Amendment Rules will come into operation on 16 April 2016. Furthermore, pursuant to the provisions in rules 14(12) and 15(8) of the 2005 Rules, I also intend that this Guidance should be available to the Taxing Master and the High Court where a relevant appeal is brought under rule 14 or 15 of the Rules, and that it should be applied by them with the necessary modifications.
2. The Agency (together with the Taxing Master and the High Court, where appropriate) will note the provision in [Article 37 of the Legal Aid, Advice and Assistance \(Northern Ireland\) Order 1981](#), as amended, regarding the remuneration payable to solicitors and counsel under criminal legal aid. That is, the requirement to have regard, among the matters which are relevant, to the four criteria prescribed in Article 37 applies both to the Department as the rule-making body under Article 36(3) of the 1981 Order and also to any person by whom any amount so payable is determined in a particular case.
3. The Agency will issue separate guidance to the legal profession in relation to this matter. Its guidance will deal with various operational aspects – including the form of applications for additional funding and the determination of representatives’ fees under the *Exceptional Preparation* provisions, the internal review and appeal mechanisms, and the requirement to maintain contemporaneous records of any preparation work done.
4. Having regard to the comprehensive and sophisticated matrix of standard fees prescribed under the 2005 Rules, as amended, I would expect it to be extremely unusual for the Agency to authorise *Exceptional Preparation* funding to a representative in an individual case beyond that already provided for under the standard fee provisions. I do however accept that there will be exceptional individual cases which will justify additional funding as provided for under rules 11A to 11E and under the approach described below.

Application for Exceptional Preparation

5. As provided in rule 11A(3) of the 2005 Rules, as amended, the intention is that any application for a *Certificate of Exceptionality* should be submitted to the Agency by the representative at the earliest opportunity after the assisted person has been returned for trial and not later than the commencement of the trial. However, I accept that in some circumstances it may not have been reasonably practicable for the representative to apply at that stage. For example, if the basis of the application is that the case involved a very high volume of disclosure, and that disclosure was provided by the prosecution during the course of the trial itself, the Agency will be able to accept the application after the commencement of the trial.
6. However, if a representative considers that a case (or part of a case which is the subject-matter of the application) satisfies the *Exceptional Preparation* criteria prescribed in rule 11A(1), I expect that they should normally be able to apply to the Agency in advance.

Prescribed criteria

7. Where a representative applies to the Legal Services Agency under the *Exceptional Preparation* provisions of the amended Rules, the Agency shall consider whether there is a specific element(s) of the case which falls outside of the standard fee approach provided under the Rules. As prescribed in rule 11B(1) of the Rules, the Agency shall consider whether it will be necessary for the representative to do preparation work substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue.
8. In practical terms, the Agency will consider the matter by way of the following steps:
 - (a) whether the case involves a point of law or factual issue (not an issue of fact) that is very unusual or novel; and
 - (b) additional preparation work is reasonably required on the part of the representative in order to prepare the assisted person's defence; and
 - (c) that work is substantially in excess of the amount normally required for cases of the same type.
9. As indicated during the process of consultation leading to the making of the amendment of the 2005 Rules, when developing the prescribed criteria for *Exceptional Preparation* work, the Department had regard to the 'Special Preparation' provisions contained in the Advocates' Graduated Fee Scheme in

England and Wales – that is, in paragraph 17 of Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013.

10. Accordingly, pending any decisions by the Taxing Master or High Court as to interpretation and application of the *Exceptional Preparation* provisions in the 2005 Rules, as amended, I intend that the relevant decision-maker(s) under the Rules shall have regard to any relevant case law in England and Wales.
11. For example, in ***R v. Ward-Allen*** [2005] 4 Costs LR 745 at paragraphs 17 to 24, it was held that a very unusual or novel point of law is a point of law which has never been raised or decided (novel) or which is outwith the usual professional experience (very unusual). A very unusual or novel factual issue is one which is outwith the usual professional experience. Since every fact is unique, it cannot mean an unusual, novel or unique “fact”. For example, if defendant ‘X’ is charged with committing an offence ‘Y’ on date ‘Z’, the case will – necessarily – involve novel or unique issues of fact. That is, that defendant will not previously have been tried with committing offence ‘Y’ on date ‘Z’.
12. It is not possible to precisely define, in advance, the types of circumstances which could come together to mean that a case may come within the *Exceptional Preparation* arrangements. It will be for the applicant to make out their entitlement to enhanced remuneration and to explain why the circumstances in the specific case cannot be appropriately remunerated within the standard fee matrix. However, some examples of the types of circumstances which might come together to make a case sufficiently complex to warrant consideration by the Agency include:
 - A complex terrorist case involving a large number of charges
 - A case involving an ‘assisting offender’ under Part 2 of the Serious Organised Crime and Police Act 2005
 - A case involving a large number of defendants with (potentially) conflicting defence evidence
 - A case where an unusual number of expert witnesses are required, and / or where there is a reliance on a new forensic approach
 - A case where there is a very high volume of disclosure, and it can be shown that it was relied on substantially by the applicant / assisted person.
13. In addition to the types of circumstances referred to in paragraph 12 above, an *Exceptional Preparation* payment may be appropriate where it is necessary for the representative to undertake additional preparation work in excess of what would normally be required for a case of the same type. Examples include:

- A very complex abuse of process application
 - Complex confiscation proceedings
 - An application for an indeterminate custodial sentence under Article 13 of the Criminal Justice (Northern Ireland) Order 2008
 - An application for an extended custodial sentence under Article 14 of the Criminal Justice (Northern Ireland) Order 2008
 - An application or hearing for which a fee is not otherwise provided for in the 2005 Rules – such as an application by the prosecution for a voluntary bill of indictment.
14. The *Exceptional Preparation* provisions allow for an additional payment to be made to a representative for the preparation of a case where the total standard fee payable (made up of the relevant standard fee elements) cannot be considered to appropriately recognise the full extent of the work involved in preparing the individual case. In applying these provisions to an individual case, it will be necessary for the Agency to make an assessment of the complexity of the case based on the specific circumstances of the case, together with the work which the representative will reasonably be required to undertake. As provided in rule 11E(3)(a), the Agency shall also have regard to any standard fees payable to the representative under rule 8 or rule 11 of the 2005 Rules, as appropriate. The *Exceptional Preparation* provisions are not intended to remunerate the same work twice.

Determination of application

15. The exceptional nature of a case bringing it within the potential scope of the *Exceptional Preparation* provisions may impact on only one of an assisted person's representatives. Similarly, in a multiple-defendant case, it may only impact on the representative(s) of one of the assisted persons. On that basis, the 2005 Rules, as amended, provide that an application under these provisions may be made by any of the legal representatives in a case in respect of the additional preparation work which that representative needs to undertake. A *Certificate of Exceptionality*, if granted, will apply to that representative and not to the case as a whole. That is, it will not apply automatically to the other representatives, or to the representatives of any other defendant involved in that case. However, it will be open for the other representatives to submit their own individual application(s) under these provisions.
16. As provided in rule 11A(2), an application may be submitted to the Agency by a representative on behalf of themselves and another representative of the assisted person. However, the Agency shall only grant a *Certificate of Exceptionality* to the representative(s) it deems satisfies the prescribed criteria.

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

Grant of application

19. An underlying principle of the standard fee approach is that it is administratively straightforward and it is not necessary for the legal representative(s) of an assisted person to submit detailed records to the Agency in order to support their claim for fees. However, when a legal representative applies for *Exceptional Preparation* funding for an individual case, the representative shall be required to provide an estimate of the additional work that they will need to undertake, which may include a *Costed Case Plan*.
20. If a *Certificate of Exceptionality* is granted to a representative, as provided in rule 11C(5), they will be required to maintain contemporaneous records of the preparation work they do in the case and to provide periodic reports to the Agency as to the work they have carried out. Non-compliance with any of these requirements will result in the application being rejected or, if already granted, the *Certificate of Exceptionality* being revoked.

Appeals

21. A representative may appeal to the Taxing Master against a decision of the Agency on their application for *Exceptional Preparation*. Where a *Certificate of Exceptionality* has been granted, a representative may also appeal to the Taxing Master against a decision of the Agency to revoke the certificate under rule 11C(7). The decision of the Taxing Master on such an appeal under rule 11D is final.
22. Where a representative is dissatisfied with the Agency's decision on the determination of their fees for *Exceptional Preparation* at the conclusion of the case, they may appeal that decision to the Taxing Master. In such circumstances, there is also a further potential appeal to the High Court.

Determination of representatives' fees for Exceptional Preparation

23. Rule 11E provides for the determination of representatives' fees where a *Certificate of Exceptionality* has been granted under rule 11B and it has not been revoked under rule 11C.
24. As part of that process, in determining the amount payable to a representative in respect of a particular case, the Agency shall have regard to any standard fees payable to the representative under rule 8 or rule 11 of the 2005 Rules, as appropriate. Where it decides that an additional payment is required under Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, it shall allow additional fees for the *Exceptional Preparation* work. However, as provided in rule 11E(5), the Agency shall not allow payment for any additional hours claimed under a *Certificate of Exceptionality* unless it is satisfied by the representative that the additional preparation work was reasonably undertaken and properly done.
25. The Agency shall publish this Guidance on its website.



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