

Chapter 9

Guidance Notes to Solicitors Handling Criminal Cases

1. Purpose

- 1.1 These guidance notes are intended to provide guidance on the salient points that you, as solicitor, should pay attention to when acting on behalf of an aided person as solicitor assigned by the Director of Legal Aid (“the Director”).

2. Assignment under a Legal Aid Certificate

- 2.1 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 or expert 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.
- 2.2 The Legal Aid Certificate (“the Certificate”) provides the authority for the Director to pay counsel and solicitors for acting for an aided person. Upon assignment you 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.
- 2.3 You should acknowledge receipt of any assignment as soon as practicable and in any event within 7 days.

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

2.4 You should inform the aided person of your office address and contact telephone number within 7 days from the date of receipt of the assignment letter. You should also arrange to meet with and obtain instructions from the aided person as soon as possible having regard to any trial/hearing dates.

3. Fees for undertaking criminal legal aid work

3.1 Fees for undertaking criminal legal aid work will be assessed before assignment of a case and the amount of fees payable for the case will be stated in the schedule to the assignment letter. To facilitate consideration of acceptance of an assignment, you will be advised of details of the case on matters such as the nature and number of charges, brief facts of the case, venue of the proceedings, date and estimated length of hearing (if known), volume of documents, intended plea of the aided person and any other matters which are relevant to the assessment. Assignment of a case will be subject to your acceptance of the fees assessed by the Director for representing the aided person which will include fees for reading the bundle(s) and preparation pursuant to Rule 21 of the LACCR. Where time and circumstances permit, you may request to view the bundle(s) before accepting the assignment.

3.2 Pursuant to Rule 21(4) of the LACCR, there shall be payable to you the expenses actually and reasonably incurred by yourself and your clerk in travelling to or from the court and to and from any place visited for the purpose of preparing or conducting any trial or appeal; and any other out-of-pocket expenses actually and reasonably incurred.

3.3 Counsel should not be instructed to act for an aided person whether for advice work or as an advocate in court hearings without formal assignment by the Director.

3.4 Pursuant to Rule 21(8) of the LACCR, a re-determination can be sought by you or the Director for reading and preparation time in appropriate circumstances having regard to any changes in the work reasonably expected to be done or work reasonably and actually done.

3.5 Whilst it is not possible to enumerate all the circumstances in which you may request for a re-determination, the following serve as examples of the change in circumstances which may justify re-determination of the agreed fees payable to the assigned solicitor:

- (i) voluminous additional evidence or unused material provided after assignment;
- (ii) unusual or extraordinary investigations or enquiries outside normal expectations

which have to be undertaken;

- (iii) research on specific or novel legal issues which were not previously identified or anticipated;
- (iv) where the agreed fees were assessed on the basis of a guilty plea and the aided person changes his plea to not guilty, or a Newton enquiry becomes necessary (applicable only to solicitor advocates);
- (v) consolidation with other criminal proceedings, joinder or a significant number of additional charges are laid after assignment of case.

3.6 A re-determination of the agreed fees payable to you may also be conducted by the Director under circumstances such as:

- (i) withdrawal from legal aid by the aided person;
- (ii) re-assignment of the case to another counsel;
- (iii) discharge of the legal aid certificate;
- (iv) the aided person has absconded or died;
- (v) the brief is returned by you due to conflict of interest or personal reasons.

3.7 Request for re-determination must be made in writing with justification and in a timely manner either immediately after the change in circumstances or at the conclusion of the case. On re-determination, any increase or reduction of reading or preparation time will be calculated on an hourly basis at the applicable rate depending on the level of court. You will be advised in writing of the result of the re-determination and where appropriate, the adjusted fees.

3.8 A review can be sought in writing in respect of the Director's decisions on re-determination. Such decision will be reviewed by a directorate officer who was not involved in the original decision and who is senior to the directorate officer who made the original re-determination. You will be advised in writing of the outcome of the review.

3.9 The principles as set out in paragraphs 3.5, 3.6, 3.7 and 3.8 will equally apply to re-assessment of your costs for cases in the Court of Final Appeal.

4. Obtaining instructions from aided person and conferences between aided person and counsel

- 4.1 You should obtain instructions from the aided person and complete all necessary preparation as soon as practicable.
- 4.2 For trials in the District Court or the Court of First Instance and where counsel has been assigned to act for the aided person, you should arrange for counsel to have conference with the aided person before the day of the trial. However, if the aided person requests further conferences with counsel, you should not accede to the aided person's request without first obtaining the Director's approval.
- 4.3 You should report to the Director not later than two weeks before the Pre-trial Review. If there is no Pre-trial Review, you should report to the Director before the trial as to whether statements have been taken from the aided person, witnesses have been interviewed, and where counsel has been assigned, whether counsel has been briefed and conferences held between counsel and the aided person.

5. Duty to Report to the Director of Legal Aid

- 5.1 You should keep the Director informed of the progress of the case.
- 5.2 If the aided person fails to give instructions to you or otherwise acts in a manner that adversely affects the proper discharge of your duties in the conduct or preparation of his defence or appeal, you should immediately inform the Director so that he may consider the appropriate action to be taken.
- 5.3 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.

6. Engagement of Interpreters

- 6.1 Approval of the Director is required before you engage the services of an interpreter.

6.2 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 your request, provide you with such a list. Prior to engaging an interpreter you should notify him/her that the Director will not pay for travelling time and expenses. You should ensure that the interpreter knows about the scale of fees which are chargeable. When submitting the fee note of the interpreter, you should certify in writing the accuracy of the contents of each fee note which should not include travelling time and expenses. You should keep an accurate record of the actual number of hours of work done by the interpreter.

7. Engagement of Translators

7.1 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 the accuracy of the contents of each fee note.

8. Engagement of Experts

8.1 You must seek the prior approval of the Director as to the engagement of an expert, his hourly rate and the maximum fees payable to him. Whenever possible, you should provide quotations from more than one expert for our approval. 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 him to return papers to you if such condition could not be fulfilled. 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. You should also advise the expert that he is paid on the basis of work reasonably and actually done. You should seek further approval if the maximum fees agreed are likely to be exceeded.

8.2 ~~If engagement of an expert has been approved and you do not have a list of the experts normally engaged by the Director, the Director can, upon your request, provide you with such a list.~~—When submitting the fee note for payment, you should certify in writing the accuracy of each fee note. You should keep an accurate record of the actual number of hours of work done by the expert.

- 8.3 Prior to engaging an expert you should notify him that the Director would not pay for an “unused” court attendance appointment if the attendance is cancelled at any time before the day of the appointment. You must inform the expert immediately once it is known that his court attendance will be cut short. You should ensure that an expert’s time is not wasted as a result of poor case management.
- 8.4 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.
- 8.5 In the event 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.
- 8.6 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.
- 8.7 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 paid 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.
- 8.8 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. Other Unusual Expenses

- 9.1 You should seek the Director’s approval before incurring any unusual expenses such as making voluminous photocopying or making calls to witnesses who are overseas.

10. Transcripts

- 10.1 Your attention is drawn to Rules 13 and 63 of the Criminal Appeal Rules, Cap. 221 and Rule 20 of the LACCR which provide that the Court can release transcripts free of charge in legal aid cases.
- 10.2 In respect of appeal cases, requests for transcripts should only be made if you and counsel are satisfied that there are good reasons for so doing. The request should be limited to those portions of the transcript which are necessary for the proper conduct of the appeal. Your attention is drawn to the Court's comments on the request for transcripts in paragraphs 10 to 20 of the Reasons for Decision dated 29.6.2011 in CACC 293/2009.

11. Duty of Assigned Solicitor upon conclusion of assignment

11.1 *Application for costs*

- 11.1.1 You should assist counsel in making an application for costs at the end of the trial or hearing especially where the aided person has paid a contribution or has incurred private legal costs prior to granting of legal aid (Attorney General's Reference (No. 1) of 1994). If there is any doubt whether the aided person paid a contribution, the Director should be consulted.

12. Notice to Defendant as to Right of Appeal

- 12.1 You should advise the aided person of his right of appeal by giving him the notice which is enclosed in the Director's letter of assignment immediately after his conviction or sentence or the dismissal of his appeal as the case may be.

13. Application for a certificate under Section 32 of the Hong Kong Court of Final Appeal Ordinance

- 13.1 In the event that an appeal is dismissed and counsel is of the opinion that "a point of law of great and general importance" is involved in the decision, you should assist counsel in making an application for a certificate in accordance with Section 32(2) and Practice Direction 2.2 or 4.3 as the case may be. Should the Court decline to grant a certificate and counsel considers that this is a suitable case to apply to the Court of Final Appeal, you should advise the aided person to apply for legal aid. You should

also inform the Director by way of a case report as to the particular “point of law of great and general importance”.

- 13.2 In the event that an appeal is dismissed and counsel considers that “substantial and grave injustice” has been done in the case, you should advise the aided person to apply for legal aid to appeal to the Court of Final Appeal. You should also inform the Director by way of case report specifying the circumstances which constitute “substantial and grave injustice”.

14. Case Report and Assessment of Your Costs

- 14.1 You should complete the Case Report Form and return it within 7 days of the conclusion of the case. When completing the Case Report Form, you should bear in mind Rule 9(a) of the LACCR requiring you to give a certificate to the Director as to whether or not in your opinion the aided person has reasonable grounds for an appeal against his conviction and/or sentence, and if so, settling those grounds.
- 14.2 You should adopt the Fees Report in the prescribed form (as uploaded in our website www.lad.gov.hk) to facilitate early processing of payment of your costs. The prescribed Fees Report contains a “no double-claim” confirmation that you have not claimed in any other case(s) assigned to you for conference time, travelling time and/or other disbursements listed in your Fees Report. When submitting the Fees Report Form you should forward such documents and other material to support your claim for payment in respect of reading fees, court attendances and conferences in accordance with the amended Rule 21 of the LACCR.
- 14.3 You can submit the Case Report Form and/or the Fees Report Form and/or the Bill of Costs via the Legal Aid Electronic Services Portal (“LAESP”). To avoid duplication, once you have submitted the Case Report and/or Fees Report Forms and/or the Bill of Costs online, you should not send hard copies to the Director.
- 14.4 You should also provide the Director with copies of any documents which came into your possession through the prosecution since the original bundle was provided to you upon assignment of a case.

15. Retention of Trial/Appeal Bundle

- 15.1 As the trial/appeal bundle are documents which your client, the aided person, is entitled to, you should seek instructions as to whether he/she would like to retain the

trial/appeal bundle after conclusion of the case. In the absence of any instructions to return the trial/appeal bundle to the aided person at the conclusion of the case, you should retain all documents for such period as may be appropriate in the circumstances. In this connection, your attention is drawn to Circular 93-313, Principle 5.23, Chapter 5 of Volume One of the Hong Kong Solicitors' Guide to Professional Conduct and also to Circular 02-384 (PA) and paragraph 24 of Chapter 24(P)(D) of Volume Two of the Guide.

16. Protection of Personal Data

- 16.1 Your attention is drawn to the Personal Data (Privacy) Ordinance, Cap.486 ("PDPO"), in particular, "Principle 4 of Schedule 1 - Security of Personal Data".
- 16.2 Pursuant to Part V of the PDPO your opinions and comments together with those of counsel and experts concerning the applicant or the aided person and the merits of the case may be disclosed to the applicant or the aided person.
- 16.3 You should draw the attention of counsel and experts to Part V of the PDPO in your instructions to them.