Factsheet 09: Payment of Expert Witnesses in Criminal Cases

Last reviewed: May 2026

General considerations

When a solicitor instructs an expert on behalf of the defendant in a criminal case, the solicitor is entering into a contract with that expert, just as he would be if the client were a litigant in civil proceedings. One effect of the contract is that, unless there is express agreement to the contrary, **the solicitor becomes contractually responsible for paying the expert's fees and expenses**.

If the expert and solicitor agree a fee for a particular assignment (or the basis on which it is to be calculated), then that is the fee payable. Furthermore, if there is also agreement as to the timing of the payment, then that too becomes a contractual requirement. All this is so whether or not the agreement has been put in writing (although that obviously helps!) and regardless of the source of funding. Neither does it matter if the solicitor has not been paid by the time the expert's fee is due, nor if the solicitor is not in the end fully reimbursed for the expenditure incurred.

It sometimes happens, of course, that experts neglect to stipulate a fee for the services they are being asked to provide, or to say how soon their bills are to be paid. Even so, subject to other relevant factors (such as whether the fee charged is reasonable for the amount of work done), solicitors should pay **in full** the bill of any expert they instruct and they should do so **within a reasonable time** of the bill being presented.

In none of these circumstances is there an implied term that the expert would be prepared to accept whatever amount may be allowed:

(a) on assessment of the costs of the case by the court, or
(b) by the Legal Aid Agency (LAA), should the defendant be legally aided, or
(c) from central funds for giving evidence in court in a criminal case

nor that he would be prepared to wait for payment. If the solicitor should wish to limit his liability to an expert in any of these ways, or to delay payment for any reason at all, that has to be made clear at the outset. It is then up to the expert to decide whether to agree to be instructed on such a basis.

Finally, if the solicitor should default on his contractual obligations, the expert would generally be entitled to sue for the unpaid fees. The only reason the expert might be deprived of that civil remedy is if it can be shown that the contract between them is void and unenforceable because it is contrary to statute law.

Legal aid

Legal aid in criminal cases is divided into several classes. For example, legal aid for a client who has been arrested and charged with an offence may start with the investigation class, move on to the proceedings class and, if convicted, may proceed to the appeals and prison law classes. Each class now has its separate rules and funding regulations. For the purposes of this Factsheet, it is assumed that the great majority of all work carried out by experts will fall into the proceedings class.

Defendants in criminal proceedings have to decide at an early stage whether to apply for legal aid or to rely on private resources to fund their defence. All criminal cases start in the magistrates' court, and it is there that the initial decision is taken on any application for legal aid. This is so even when the defendant has been charged with an indictable offence, i.e. one that can only be tried in the Crown Court.

The granting of a Legal Aid Order will depend in part on the defendant's means[1], but the magistrates (or at any rate their clerk) must also take into account whether public funding is necessary in the interests of justice. It says much for the present system of criminal legal aid that the great majority of applications for it are granted.

Expenses incurred in the course of a client's case are generally permitted when it is in the best interests of the client to incur the disbursement for the purpose of giving advice *and* the amount of the disbursement is reasonable. An expert report may or may not assist a client's case, depending on what it contains. The three-part test of **best interest**, **purpose** and **reasonableness** is not one that is applied with hindsight but is based on *what was known at the time*.

In deciding whether or not an expert's fee is reasonable, it should be remembered that, save in defined 'exceptional circumstances', the rates payable to experts are as prescribed by Schedule 5 of the *Criminal Legal Aid (Remuneration) (Amendment) Regulations 2022* (CLARAR)[2]. This amendment accompanies the *Criminal Legal Aid (Remuneration) Regulations 2013* (CLARR)[3]. (For further details of these regulations, see Factsheet 10.)

Payments to lawyers restricted

The fact that in many criminal cases the defendant will have the benefit of legal aid does not alter the contractual nature of the relationship between the defence solicitor and any expert the solicitor may instruct on the defendant's behalf. It does, however, increase the risk the solicitor runs of not being fully reimbursed for the expenditure he incurs thereby.

Once defendants in criminal proceedings have been granted a Legal Aid Representation Order they are relieved of any further responsibility for paying the lawyers who will be representing them. By the same token, regulations made under the CLARR prohibit lawyers from receiving any payment for the work they do other than from public funds.

CLARR 2013 state specifically:

[1] *The government did away with means testing in criminal cases in 2001. Instead, the courts had to enquire into the defendant's ability to contribute to the cost of his defence after he had been sentenced. However, in 2007 the government reintroduced means testing for legal aid applications in the magistrates' court (see https://www.gov.uk/guidance/criminal-legal-aid-means-testing).*
[2] https://www.legislation.gov.uk/uksi/2022/848/schedule/5/made
[3] https://www.legislation.gov.uk/uksi/2013/435/pdfs/uksi_20130435_en.pdf

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'*9. Where representation is provided in respect of any proceedings, the representative, whether acting pursuant to a section 16 determination or otherwise, must not receive or be a party to the making of any payment for work done in connection with those proceedings...*'

In general, this restriction on payments to lawyers also applies to the disbursements a solicitor might make while preparing the case for the defence. It would apply, for example, to the fees and expenses of an expert instructed on the defendant's behalf. The danger for the solicitor is that if that expenditure should subsequently be disallowed, either wholly or in part, on assessment of the costs incurred under the Legal Aid Order, he would then be liable for the deficit. This is because:

(a) the **expert is entitled to be paid in full**, and

(b) the **solicitor is debarred from accepting any contribution from elsewhere** to make good the shortfall.

There is, however, one significant exception to this general rule, and we will come to that shortly.

Obtaining prior authority

Of course, solicitors would much rather not run the risk of having to meet any part of the cost of a client's case themselves. Regulation 13 of the CLARR enables solicitors to seek **prior authorisation** to incur the cost of expert fees when it appears to a litigator to be 'necessary for the proper conduct of proceedings in the Crown Court' for such costs to be incurred. When the Lord Chancellor authorises such a step, he shall, pursuant to regulation 13(2), authorise the maximum to be paid in respect of that step.

'*13.—(1) Where it appears to a litigator necessary for the proper conduct of proceedings in the Crown Court for costs to be incurred in relation to representation by taking any of the following steps –*

(a) obtaining a written report or opinion of one or more experts;

(b) employing a person to provide a written report or opinion (otherwise than as an expert);

(c) obtaining any transcripts or recordings; or

(d) performing an act which is either unusual in its nature or involves unusually large expenditure,

the litigator may apply to the Lord Chancellor for prior authority to do so.

(2) Where the Lord Chancellor authorises the taking of any step referred to in paragraph (1), the Lord Chancellor shall also authorise the maximum to be paid in respect of that step.

(3) A representative assigned to an assisted person in any proceedings in the Crown Court may apply to the Lord Chancellor for prior authority for the incurring of travelling and accommodation expenses in order to attend at the trial or other main hearing in those proceedings.'

Naturally enough, the LAA requires fairly detailed estimates for any expenditure it is being asked to approve in advance, and it will set a **ceiling amount** in any authority to incur costs that it may grant. Providing, though, the bill the expert eventually presents does not exceed the ceiling amount (and, of course, the need for expert evidence still exists when the solicitor gives the expert the go ahead to prepare a report), the solicitor is **guaranteed** full reimbursement by the LAA of the expenditure.

Note, too, that should the expert find that the assignment is taking longer or is more complex than anticipated originally, the solicitor may submit a revised estimate to the LAA and ask for the ceiling amount to be increased accordingly.

... and payments on account

In Crown Court cases (or in proceedings in a magistrates' court which are subsequently committed, sent for trial or transferred to the Crown Court), if a solicitor has prior authority to incur the cost of obtaining an expert report, he may take advantage of another facility provided by legal aid regulations, namely that of claiming an interim payment on account to settle the expert's bill.

Providing the LAA had authorised expenditure on the report in excess of £100, and providing the invoice was for at least that sum but no more than the amount authorised, the solicitor could claim the money needed from the court office. Moreover, when it makes an advance for this purpose, the court ought also to notify the expert that it has done so.[4]

Rules governing payment are contained in the CLARR. The current rules relating to the interim payment of disbursements are found in Paragraph 14 which states:

(1) A litigator may submit a claim to the appropriate officer for payment of a disbursement for which the litigator has incurred liability in proceedings in the Crown Court, or in proceedings in a magistrates' court which are subsequently committed or sent for trial or transferred to the Crown Court, in accordance with the provisions of this regulation.

(2) A claim for payment under paragraph (1) may be made where –

(a) a litigator has obtained prior authority to incur expenditure of £100 or more under regulation 13; and

(b)the litigator has incurred such a liability.

(3) Without prejudice to regulation 17(4) and (5) a claim for payment under paragraph (1) must not exceed the maximum amount authorised under the prior authority.

(4) A claim for payment under paragraph (1) may be made at any time before the litigator submits a claim for fees under regulation 5.

(5) A claim for payment under paragraph (1) must be submitted to the appropriate officer in such form and manner as the appropriate officer may direct and must be accompanied by the authority to incur expenditure and any invoices or other documents in support of the claim.

(6) Subject to regulation 16, the appropriate officer must allow the disbursement subject to the limit in paragraph (3) if it appears to have been reasonably incurred in accordance with the prior authority.

(7) The appropriate officer must notify the litigator and, where the disbursement claimed includes the fees or charges of any person, may notify that person of the appropriate officer's decision.

(8) Where the appropriate officer allows the disbursement, the appropriate officer must notify the litigator and, where the disbursement includes the fees or charges of any

[4] *For the text of the relevant statutory provisions, see 'Regulations Governing the Payment of Expert Witnesses in Criminal Cases', Factsheet 10 in this series.*

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person, may notify that person, of the amount payable, and must authorise payment to the litigator accordingly.

Interim disbursements and final determination of fees

Payment on account of an interim disbursement does not guarantee that the amount paid will be approved on final determination under regulation 17. Regulation 15 of the CLARR provides that:

(1) On a final determination of fees, regulations 5(2) and 17 apply notwithstanding that a payment has been made under regulation 14.

(2) Where the amount found to be due under regulation 17 in respect of a disbursement is less than the amount paid under regulation 14 ('the interim payment'), the appropriate officer must deduct the difference from the sum otherwise payable to the litigator on the determination of fees, and where the amount due under regulation 17 exceeds the interim payment, the appropriate officer must add the difference to the amount otherwise payable to the litigator.

Effect of fee caps on expert witnesses

With the introduction (in October 2011 and subsequently incorporated into CLARR and CLARAR) of fee caps for expert witnesses paid out of the legal aid fund (see Factsheet 8 and Factsheet 10), payments on account for expert fees will now be rejected if they exceed the codified rate unless **prior authority** has been granted demonstrating that the case is exceptional. Prior authority may be submitted whenever the proposed incurred costs are either unusual in nature or unusually large. If prior authority is not sought and costs exceed the expert rates and fees contained in the Funding Order, then they will be subject to assessment and may be reduced.

Failure to obtain authority

As we have seen, securing prior authority to incur the cost of obtaining an expert report guarantees a solicitor full reimbursement of the expenditure involved – providing, that is, the amount the expert eventually charges for the report does not exceed the ceiling figure set by the LAA. Prior authority is not, however, a precondition for achieving that result. Providing the solicitor can show that the report was necessary for the proper conduct of the proceedings, he may still be reimbursed for it in full when the total costs of the case come to be assessed. The only sure consequence of failure to obtain authority is that the solicitor will be unable to secure a payment on account to settle the expert's bill.

It may be, of course, that the solicitor did not seek prior authority in the first place, either through oversight or because he was confident that the LAA's Area Office would in due course sanction the expenditure anyway. Another possibility, though, is that the Area Office turned down the solicitor's application, perhaps on the grounds that the accompanying estimate lacked sufficient detail or the fee the expert proposed charging was too high. There is no right of appeal against such a decision, but the solicitor would be at liberty to resubmit the application with further particulars.

If the application was refused because the Area Office considered the expert's fee excessive, the solicitor could try re-negotiating it with the expert. Or the solicitor could press on with instructing the expert in the hope of being able to justify the expense at a later stage. If, however, the former course fails to secure a sufficient reduction and the solicitor is not prepared to run the financial risk that the latter approach entails, then, in civil cases at least, the only other option available to the solicitor is to find a 'cheaper' expert. In criminal cases, though, there is a further possibility: to utilise private resources to pay for the expert's report.

Payment for expert services and the determination of a litigator's disbursements are governed by regulations 16 and 17 of CLARR. These state:

16.

(1) Subject to paragraph (2), the Lord Chancellor may provide for the payment of expert services only at the fixed fees or at rates not exceeding the rates set out in Schedule 5.

(2) The appropriate officer may, in relation to a specific claim, increase the fixed fees or rates set out in Schedule 5 if that officer considers it reasonable to do so in exceptional circumstances.

(3) For the purposes of paragraph (2), exceptional circumstances are where the expert's evidence is key to the client's case and either –

(a) the complexity of the material is such that an expert with a high level of seniority is required; or

(b) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.

17.

(1) Subject to paragraphs (2) to (5), the appropriate officer must allow such disbursements claimed under regulation 5(2) as appear to the appropriate officer to have been reasonably incurred.

(2) If the disbursements claimed are abnormally large by reason of the distance of the court or the assisted person's residence or both from the litigator's place of business, the appropriate officer may limit reimbursement of the disbursements to what otherwise would, having regard to all the circumstances, be a reasonable amount.

(3) No question as to the propriety of any step or act in relation to which prior authority has been obtained under regulation 13 may be raised on any determination of disbursements, unless the litigator knew or ought reasonably to have known that the purpose for which the authority was given had failed or had become irrelevant or unnecessary before the disbursements were incurred.

(4) Where disbursements are reasonably incurred in accordance with and subject to the limit imposed by a prior authority given under regulation 13, no question may be raised on any determination of fees as to the amount of the payment to be allowed for the step or act in relation to which the authority was given.

(5) Where disbursements are incurred in taking any steps or doing any act for which authority may be given under regulation 13, without such authority having been given or in excess of any fee so authorised, payment in respect of those disbursements may nevertheless be allowed on a determination of disbursements payable under regulation 5.

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(6) Paragraph (7) applies where the Lord Chancellor receives a request for funding of an expert service of a type not listed in Schedule 5.

(7) In considering the rate at which to fund the expert service the Lord Chancellor –

(a) must have regard to the rates set out in Schedule 5; and

(b) may require more than one quotation for provision of the service to be submitted to the Lord Chancellor.

Payment from other sources

This is the exception mentioned previously to the general rule debarring lawyers in publicly funded cases from receiving payment for disbursements other than from public funds. Paragraph 9 of the *Criminal Legal Aid (Remuneration) Regulations 2013* states the position as follows:

'*Where representation is provided in respect of any proceedings, the representative, whether acting pursuant to a s.16 determination or otherwise, must not receive or be a party to the making of any payment for work done in connection with those proceedings, except such payments as may be made –*

(a) by the Lord Chancellor or the Commission; or

(b) in respect of any expenses or fees incurred in –

(i) preparing, obtaining or considering any report, opinion or further evidence, whether provided by an expert witness or otherwise; or
(ii) obtaining any transcripts or recordings,

where an application under regulation 13 for an authority to incur such fees or expenses has been refused by a committee appointed under arrangements made by the Lord Chancellor to deal with, amongst other things, appeals of, or review of, assessment of costs.'

The overriding principle of criminal law which gives rise to the exception at (b) is that accused persons should not suffer any statutory constraint in assembling the evidence required for their defence. It means, in turn, that even legally aided defendants in such proceedings are free to pay for expert reports or opinions themselves (or get others to do so for them) should the LAA refuse their solicitor prior authority to incur the necessary expenditure. Of course, whether they are able to pay for them may well be another matter.

Payment for court appearances

It is in the payment of experts for giving evidence in court that confusion arises most often.

In civil cases

With civil proceedings the position is quite straightforward. Assuming the court has given permission for the expert to be called (which nowadays is likely to happen only in multi-track cases), it is the **instructing solicitor** (whether claimant or defendant) who will be responsible for paying the expert's fees and expenses. The solicitor's liability in this respect is no different from that incurred when instructing the expert to prepare a report for the court's use.

Furthermore, if the solicitor agrees a **cancellation fee** (or the basis of its calculation) should the expert not be required in court on the days booked, then the solicitor would become liable for payment of that fee in the event of the hearing taking less time than expected, being postponed or being cancelled altogether. This would be so, regardless of whether the solicitor is able to recover the cancellation fee on subsequent assessment of the costs of the case.

Moreover, in civil cases funded by the LAA, if there should be any shortfall in that respect, it is the solicitor who must pick up the tabs, because regulations paralleling those governing legal aid in criminal cases prohibit the client or anyone else from doing so. See Factsheet 8 for lots more detail on public funding of civil cases.

In criminal cases

The issues regarding payment of experts for giving evidence in criminal cases are more complex. As a matter of public policy, **all defence witnesses in such cases are entitled to be compensated out of central funds** for their **loss of time** and the **incidental expenses** they incur in attending court. **Prosecution witnesses are paid by the relevant prosecuting authority**, usually the Crown Prosecution Service (CPS). For lots more detail, see Factsheet 11.

Defence experts

The Prosecution of Offences Act 1985 assigned to the Lord Chancellor the responsibility for making the necessary arrangements. This was duly done by means of the Costs in Criminal Cases (General) Regulations 1986, Part V (see Factsheet 11) of which is headed 'Guide to Allowances' and contains detailed provisions for their calculation. These provisions apply whether or not the defendant is legally aided.

As far as defence experts are concerned, the 1986 Regulations distinguish between two kinds of witness: 'professional' witnesses and expert witnesses proper.

Professional witnesses attend court to give evidence of fact (although it may well require expertise in its observation), and like other witnesses of fact they are deemed to do so out of public duty. An example might be a doctor from the accident and emergency department of a hospital giving evidence of the injuries sustained by the defendant or the latter's alleged victim. The allowances prescribed for such witnesses are intended solely to compensate them for their inconvenience and incidental expenses, although in the case of GPs the latter might include the cost of locum cover while they are away from their practices.

With expert witnesses of opinion, on the other hand, there is somewhat grudging recognition that they are giving their evidence not out of public duty but in their line of business. Accordingly, while the regulations provide that these experts may receive the same travel and overnight expenses as other witnesses, they do not set a ceiling amount for their attendance in court. Instead, the court personnel, whose job it is to assess claims for witness allowances, are issued with 'guidance' by the Ministry of Justice (MoJ) as to the appropriate levels of their compensation.

The *Guide to Allowances* (see Factsheet 11) under Part V of the Costs in Criminal Cases (General) Regulations 1986, issued by the Public Legal Services Division, Department for Constitutional Affairs in June 2005, provides '*a point*

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of reference on quantum' for those engaged in determining expert allowances under the 1986 Regulations. Appendix 2 of the *Guide* makes it clear, however, that the fee scales contained in it are not intended to provide either a minimum or a maximum limit. They are '*merely a guide to the level of allowances in normal circumstances*'. Appendix 2 goes on to say that '*it may be appropriate, having regard to the particular circumstances of the case, to depart from the guidance scales. Such occasions will, however, arise exceptionally.*' In exercising their discretion, taxing or determining officers are told to bear in mind that **each case must be considered individually**.

MoJ guidelines for experts who are to be paid from public funds under the 1986 Regulations provide that expert witnesses are grouped by profession into four categories. For each of these, two fairly wide rate bands are specified, one for preparation and one for attendance. 'Preparation' covers the time spent in preparing oneself for the court appearance, e.g. in refreshing one's memory of the contents of the report on which one is shortly to be cross-examined, while 'attendance' includes an element for the time taken in travelling to and from the court and any spent in the court's precincts waiting to be called.

Prosecution experts

In the case of prosecution experts, these fees are agreed centrally with the major providers of expert witness services, such as the Forensic Science Service. According to CPS guidelines (see Factsheet 67), these should, where possible, be agreed prior to any attendance at court. Once the fee has been agreed, it is, as with any other agreement on fees, a contractual obligation between the expert and the instructing solicitor or the user of the expert service.

Consequently, the court is not normally concerned with the payment of witnesses called by a public prosecutor because such matters are dealt with by the appropriate prosecutor's own witness regulations and payment arrangements (see Factsheet 67).

In those circumstances, the expert's fee will have to be assessed in accordance with guidelines. In assessing such fees, the CPS guidelines state that the determining officer must have regard for:

- the **nature and difficulty of the case**
- the **complexity** of the evidence
- the **work necessarily involved**
- the **choice of experts** available
- the **market rate** otherwise being applied, and
- the **amount of travelling time** involved.

Responsibility for the payment of an expert's fee falls upon either the investigating authority (usually the police) or the CPS. This will depend on the nature of the work. The division of responsibility is as follows:

- tasks completed as part of the investigation (e.g. post-mortems, scientific tests, reports on findings); and
- attendance at court to give evidence, including preparatory work (e.g. revision and further research) and sometimes conference with counsel.

The investigating authority pays the former; the CPS is only responsible for the latter, which will also include such things as allowances for time spent travelling.

For full details of the fees and allowances available to experts working on behalf of the CPS, see Factsheet 67 in this series.

Travel time

The payment of travel time allowances to expert witnesses in criminal cases was unremarkable until the case of *Vogel -v- Leeds District Magistrates Court* CO/2857/2005, with a decision of HJ Calvert-Smith in the Administration Court.

Vogel -v- Leeds District Magistrates Court

This case concerned a vet who attended in his capacity as an expert veterinary witness to give evidence in relation to a cruelty to animals prosecution brought by the RSPCA. The vet lived at some distance from the court and claimed a sum of £100 per hour plus VAT for time spent travelling where this exceeded 1 hour. This, he said, was his usual fee and it had been paid to him in previous cases, apparently without dissent, by the determining officer.

In this case Mr Vogel's application for travelling time was refused. He sought leave for judicial review of this decision to the Administrative Court. In refusing leave, HJ Calvert-Smith, referring to the 1986 Regulations, said:

> '*The Regulations are clear. Payments to an expert… are at the discretion of the court. They may be made as follows:*
> *• For attending to give evidence (Reg 20)*
> *• For work necessary in connection with preparation of that evidence (Reg 20)*
> *• For necessary overnight absences (Reg 21.1)*
> *• For travel in respect of actual fare paid (Reg 24).*'

Professional or expert?

The judge went on to draw a distinction between claims made by a professional witness and those of an expert witness. The former '*which include veterinary surgeons (Reg 15), may claim for travelling time which the court may grant in its own discretion but are subject to a different regime in respect of their other fees.*'

The vet, in this case, was attending court to give expert evidence, not as a professional witness asked to attend as a witness of (technical) fact. It was, therefore, entirely proper that he should have made his claim for payment of fees in his capacity as expert.

Justices' Clerks' Society – Take I

The decision of HJ Calvert-Smith was circulated to all members of the Justices' Clerks' Society (JCS) in their News Sheet No: 16/2005. It seems that the effect of this circulation was to remove the whole question of travelling allowances (other than the cost of tickets, etc.) from the determining officer's discretion. According to the judge, the exercise of discretion must necessarily be limited to those areas specifically identified in Regulations 20, 21 and 24. As these do not mention travel time, any claim made for such time will be refused.

Whilst this may be a correct interpretation of the rules, albeit on a strict construction, we do not think that this can have been the intention of the draftsman. The general discretion permits (indeed, requires) the determining officer to consider each case individually and to have regard to 'particular circumstances'. The published Guide makes it clear that the

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scales are not intended to fix either a minimum or maximum allowance, and that they may be departed from as necessary (although it is acknowledged that such cases will be rare).

Justices' Clerks' Society – Take II
It comes as no surprise to us to learn that the way in which the JCS interpreted the decision in *Vogel* has caused them lots of problems. So much so that in March they published News Sheet No: 05/2006 in which they tell us that such were the problems that they approached the MoJ with a view to addressing the issue.

The MoJ response was that the application for judicial review was rightly refused on the grounds that payments to experts are at the discretion of the court under Reg. 20 but that:

> '*... it would be wrong to adduce from [the Vogel] case that payment for time spent travelling to and from court should not be claimed.*'

The MoJ went on to say that in its view attendance at court to give evidence under Reg. 20 can extend to time spent travelling because this is within the terms of guidance given in para. 4.4 of the MoJ *Guide to Allowances*. This states:

> '*The attendance fee should reflect the total time involved that day, that is, including travelling and waiting time, and also any extended hearing time. The scales of guidance reflect attendance based on the normal court day and local travel, and should be adjusted upwards if longer journeys are undertaken or the attendance stretches significantly beyond the usual court sitting time.*'

With this reply in hand the JCS felt able to offer courts the following alternative take on the importance of the *Vogel* case:

> '*Courts may therefore conclude that the decision in Vogel could be narrowly construed as simply upholding the right of determining officers to use their discretion under the Regulation, rather than as determining that time spent travelling to and from court cannot be claimed.*'

Fetid but not fettered!
So, if you have trouble claiming travel allowances in respect of attending a criminal court to give expert evidence, be sure to find out whether the determining officer is labouring under the mistaken impression that his discretion is fettered by *Vogel*. If so, refer the officer to JCS News Sheet No: 05/2006 for chapter and verse on why your travel claim deserves full consideration.

Conclusion

The amount of compensation actually allowed by determining officers is entirely within their discretion, although they are expected to keep within the appropriate band in all but the most exceptional circumstances. Furthermore, there is no facility for appeal or review of a determining officer's decision.

For lots more detail, see Factsheets 8, 10 and 11.

'The Debilitating Paradox'

Until 1999 it was generally held, not least by solicitors, that the combined effect of the regulations referred to previously in this factsheet prevented them from paying expert witnesses for giving evidence in court in criminal cases if the defendant was legally aided. This, so the argument ran, was because:

(a) lawyers in legal aid cases were prohibited from making any 'payment for work done' other than may be made from public funds
(b) the limited exception that allowed them to utilise private funds to pay for an expert's report did not extend to tendering evidence in court, and in any case
(c) allowances were available from central funds to remunerate expert witnesses for attending court in criminal cases.

If this line of reasoning was correct, it meant that experts were free to negotiate a fee for the reports they wrote for criminal proceedings, but had to accept whatever payment an MoJ official allowed them for turning up in court to be cross-examined on it. Could it really be that this was what Parliament intended when enacting the primary legislation or the subsequent secondary legislation? It was a conundrum or, as the Court of Appeal termed it, 'a debilitating paradox' that was only finally resolved in July 1999, 10 years after the regulations that gave rise to it had taken effect.

Goulden -v- Wilson Barca

The case that resolved matters was brought by Roger Goulden, a dentist who acted regularly as an expert witness. The defendant firm of solicitors had instructed him to write a report and attend court to give evidence on behalf of a client in criminal proceedings for whom they were acting under a Legal Aid Order. No issue arose over payment for the report, but Mr Goulden had to sue for the fees due to him for giving evidence in court. He alleged that the solicitors had contracted to pay him £720 for each day that he was in court or was booked to be there. He attended court on one day but the request for him to attend on four others was cancelled at less than 2 weeks' notice. Accordingly he claimed a total of £3,600.

The solicitors both denied the existence of a contract and maintained that in any event they were precluded by law from entering into one. Mr Goulden was initially awarded summary judgment in his favour, but on appeal it was held that it was at least a triable issue whether the solicitors had entered into a contract at all. The case was duly remitted for trial in the county court. However, the judge hearing the solicitors' appeal was also invited by their counsel to rule on the question of law raised in the second limb of their defence, namely that even if they had entered into a contract it would have been illegal and unenforceable. The judge rejected that submission, and it was this ruling of his that the solicitors sought to have overturned by the Court of Appeal.

Court of Appeal ruling[5]

The solicitors' further appeal turned on the proper interpretation of Regulation 55 of the Legal Aid in Criminal and Care Proceedings (General) Regulations 1989, the salient passages of which have already been quoted in this factsheet. Counsel for the solicitors submitted that the regulation prohibited their clients from making any payment to Mr Goulden other than from public funds. Furthermore, they submitted that because the fees he was claiming had not been

[5] *See Goulden -v- Wilson Barca (a firm) [2000] 1 All ER, 169.*

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incurred in 'preparing, obtaining or considering any report', the exception allowed in sub-paragraph (b) did not – indeed, could not – apply.

The Court, on the other hand, fastened onto the illogical results to which this line of argument gave rise. The judges had little trouble in concluding that the payments by the Lord Chancellor referred to in Regulation 55 were the *costs* the Lord Chancellor might be required to pay by order of a court, not the allowances to witnesses provided for under the Prosecution of Offences Act 1985. Moreover, because the Legal Aid Act 1988 specifically excludes the funding of witness allowances from criminal legal aid, it followed that the prohibition in Regulation 55 of the subordinate legislation cannot have been intended to apply to such allowances in the first place. This, in turn, explains why the tendering of evidence in court is not mentioned in sub-paragraph (b) of the regulation: it falls outside the prohibition and so does not need to be excepted from it. The Court, having rejected so comprehensively the submissions made on the solicitors' behalf, duly dismissed the appeal.

Outcome for expert witnesses

As the Court of Appeal's judgment in *Goulden -v- Wilson Barca* made abundantly plain, solicitors acting for legally aided clients in criminal proceedings are not precluded by law from paying an expert's fee and expenses for giving evidence in court, any more than they are prohibited from paying for an expert's report from private funds should the LAA refuse them prior authority to incur that cost under the Legal Aid Order. In other words, don't allow yourself to be fobbed off with that line of argument.

What is equally certain, though, is that it can only benefit the expert if the solicitor has access to the necessary funds to pay the stipulated fee, and that will no doubt depend largely on the client's financial circumstances.

In any event, experts are free to negotiate their payment for giving evidence in court, regardless of the nature of the proceedings. However, in a criminal case, experts may well make the commercial decision to accept instructions on the basis that they will rely for their remuneration on whatever witness allowances they are able to claim from the court.[6]

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[6] *For further details of these allowances and some hints on how to maximise them, see 'Expert Witness Allowances in Criminal Cases', Factsheet 11 in this series. This factsheet also tackles the vexed problem of compensation for hearings that have been cancelled or postponed at short notice.*

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