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Sufficient Benefit Test: Principles & Practice

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This briefing applies to holders of Legal Aid contracts

This briefing is a resource for your whole organisation. Please ensure that every member of staff involved in Legal Aid work has access to it.

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Making the best use of this briefing

We are aware that some of our briefings are fairly lengthy documents. Please do not feel that you are obliged to read the whole briefing from cover to cover – the headings on our contents page will point you towards the major themes under discussion.

Further sources of support and guidance

If you need further guidance on any of the issues covered in this briefing, please contact your network, the Legal Services Commission or the CLS Support consultancy line – see the pages at the back of this briefing for contact details.

You may come across the telephone symbol ☎ at various points in the text which deal with what we regard to be a complex issue. The symbol is there to remind you that we are able to provide further clarification and/or guidance if you need it.

Please note that the What's New pages on ASA's website www.asauk.org.uk provide guidance that highlights and clarifies both new and existing requirements for Quality Mark and General Civil Contract holders.

Contents

1 Introduction 2
2 What is the Sufficient Benefit Test? 3
3 When do I apply the test? 4
At the outset 4
Whilst a case is in progress 5
4 How should I apply the test? 6
Preliminary points 6
How do I apply the merits element of the test? 7
Must the case have cost benefit? 8
5 Calculating the likely costs of a case 9
6 What does cost benefit mean if the case is about money or property? 11
7 What about cost benefit if issues other than money or property are involved? 12
What about issues of overwhelming importance to the client? 13
8 Operating the test in practice 14
9 Small claims 14
Pre-hearing Legal Help 14
Can I provide Help at Court at small claims hearings? 16
10 Auditing the Sufficient Benefit Test 17
11 How should I evidence that I have performed the test? 19
12 Questions to consider 21
Appendix 1:Case Studies 23
Appendix 2: Operating the test in practice 28

1 Introduction

1.1 This briefing aims to:

- supply information on how the Legal Services Commission (LSC) expect you to apply the Sufficient Benefit Test (the test) to your casework practice;
- provide guidance and interpretation on specific aspects of the test and its application which will supplement the relevant rules and guidance in the Solicitor and Not-for-Profit (NfP) General Civil Contracts and associated documentation;
- assist caseworkers and other relevant staff to integrate the test effectively into their casework practice;
- provide examples of whether and to what extent the test has been met in specific case-study examples to illustrate its proper operation;
- identify how the LSC will audit the Sufficient Benefit Test within the Contract Compliance Audit process;
- provide examples of when and how it may be practical and necessary to evidence the application of the test on case files.

1.2 The documents referred to in this briefing are:

- Funding Code: Criteria and Decision Making guidance (contained within volume 3 of the LSC Manual)
- Guidance on the Assessment of Costs for Controlled Work (Solicitors) May 2002 (now added at Appendix E in the Solicitor Contract)
- NfP Costs [Assessment] Booklet (version 6)
- Not-for-Profit Contract Specification (from April 2003)
- Solicitor Contract Specification (from April 2003)
- Specialist Quality Mark (SQM) Standard (Issue 1 April 2002)

All of the above can be downloaded without charge from the LSC website at www.legalservices.gov.uk.

1.3 This briefing will be relevant to both Solicitor and NfP Contract holders providing Legal Help and Help at Court under the General Civil Contract. It does not cover other merits criteria for other types of work and levels of service such as Legal Representation.

1.4 Please note, whilst the wording of the test is the same in both the Solicitor and NfP Contract, the guidance on the application of the test is slightly different in the respective contract specifications.

1.5 The LSC intend that the guidance sections should as far as possible be seen as complementary. Due to this we have drawn on the guidance sections of both contracts to illustrate how the test should be interpreted and applied whichever contract you work under. Where there is any difference in any aspect of the test between the two contracts this has been highlighted.

1.6 Solicitor Contract holders have been subject to the formal audit of the test for some years. However, whilst it was also a contract requirement for NfP Contract holders prior to April 2003, it is only since this date that it became an auditable rule in respect of the Contract Compliance Audit process, under which time claims may be reduced in cases where the test was not or ceased to be met.

1.7 As a result, it is important that NfP organisations in particular evaluate their application of the test within their current casework practice in order to ensure that caseworkers are fully compliant with all relevant aspects of the test when providing Legal Help to clients.

1.8 Please do not be daunted by the length of this briefing; we have tried to cover as many situations as possible where the test might have an effect on your casework practice and also provide an extensive examination of the relevant parts of the test and the issues that you might need to refer to on an ongoing basis.

2 What is the Sufficient Benefit Test?

2.1 The Sufficient Benefit Test (SBT) is a Funding Code criterion that applies to all Legal Help provided by caseworkers working under either the Solicitor or NfP General Civil Contract.

2.2 The Funding Code criterion 5.3 (3A-025) states that: “Legal Help may only be provided:

- where there is sufficient benefit to the client,
- having regard to the circumstances of the matter,
- including the personal circumstances of the client,
- to justify work or further work being carried out.”

2.3 There is additional general guidance within both Solicitor and NfP specifications (see paragraph 1.2 for a full list of documents referred to in this briefing).

2.4 In the Solicitor Contract specification the general guidance can be found at rule 3.3 (Legal Help) and rule 4 (Help at Court) and also in the category-specific guidance sections of the specification.

2.5 For NfP Contract holders this general guidance can be found in the NfP specification at rules 3.4 to 3.12 inclusive, and also rules 7.3 and 7.5, which concern providing Help at Court. Again, the category-specific sections of the specification contain further useful guidance on the application of the test to particular types of case within individual subject categories.

2.6 The test only needs to be applied when a caseworker is considering providing Legal Help to a client. This means that it does not need to be applied by non-approved personnel, such as generalist caseworkers or any other staff who might take a role in filtering which cases are referred to a specialist before Legal Help is provided.

2.7 It is expected that all caseworkers providing Legal Help to clients apply the test at the appropriate stages of individual cases (see section 3: “When do I apply the test?”).

2.8 The LSC points out at paragraph 3.4(2) in the NfP specification that because the funding of Legal Help comes from a fixed budget, and this budget is public money, then a caseworker must take this into account when providing Legal Help to clients to ensure that the caseworker’s time is used to best purpose.

2.9 The LSC goes on to say, in both Solicitor and NfP specifications, that in practice, the application of the test should weed out those cases that do not merit public funding.

2.10 This does not just mean identifying cases that do not merit funding at the outset; it also covers situations where during the life of a case circumstances arise that should indicate that you should limit or cease further work.

2.11 It is important to remember that the Sufficient Benefit Test does not only apply to the question of whether or not the work should be carried out, but also to the amount of time that it is reasonable to spend in dealing with the matter, including whether any individual item of work was necessary and added some value to the case (see Solicitor specification 3.3(1) and NfP specification 3.12(8); also paragraph 10.15 of this briefing).

2.12 Ultimately, the test should not be applied in such an overly restrictive fashion so as to exclude those clients who might benefit most from your help. Where the LSC is confident from assessing your casework that you are aware of the costs of Legal Help that you provide to clients by working to ensure that you provide an effective cost-efficient service, then it is more likely to appreciate your application of the test on individual cases where any doubt may arise (see 5.15).

3 When do I apply the test?

3.1 "The Sufficient Benefit Test applies at the start of the case when the client first makes the application for Legal Help and also applies as and when further Legal Help is provided throughout the case" (NfP specification 3.5(1)).

At the outset

3.2 As a caseworker you will routinely make decisions on whether or not to proceed with a case when you first see a client and discuss their enquiry with them.

3.3 At this initial stage you will be advising the client on the options available to them and making a professional decision on whether the client has any legal remedy and, if so, how and to what extent it would be reasonable for you to assist the client pursue this remedy.

3.4 Although in exceptional circumstances a situation might arise where you should not provide any Legal Help at all – eg where a client has a non-legal enquiry and this was immediately apparent to you – it is accepted that in order to establish whether there is Sufficient Benefit in providing Legal Help to any particular client, you will need some time to make this evaluation.

3.5 This time needed to make an evaluation is claimable; however, once it becomes apparent to you that the Sufficient Benefit Test is not satisfied, you should stop providing Legal Help to that client (see also paragraph 4.11).

3.6 This does not mean getting up and leaving the interview room as soon as you establish that there is not Sufficient Benefit. The general principles of client care require you to explain the situation appropriately and in language that the client can understand so that they are fully aware why you are unable to help them further.

3.7 Additionally, even if a case is not going to proceed beyond one-off advice (for example because the test is not satisfied), then clients should still be offered confirmation of advice in writing in order to satisfy the Specialist Quality Mark requirement at F1.2, unless you choose to rely on one of the following exceptions:

- Where to do so would be prejudicial to the case (eg where the client is detained and so confidentiality of written material may be an issue) or
- where advice has been given by telephone.

3.8 Whilst you may claim time for the explanation and any letter confirming or summarising your advice, the total amount of time claimed must still be reasonable and appropriate to the situation (see 4.9).

3.9 This does not necessarily mean in all instances that short interviews mean short letters confirming advice, although this may be more common.

3.10 It could be that the initial advice was brief but the written confirmation took much longer to prepare because it contained detailed information that was both reasonable to provide and which the client needed.

3.11 In some situations you might not be able to fully determine whether a case passes the test at the outset because you need further information in order to decide on whether and to what extent you will assist the client.

3.12 Whether or not it is reasonable or necessary for you to obtain this information will depend on your initial assessment of the client's enquiry and the options that may be available to them.

3.13 If there is reason to believe that the test may be satisfied once you gather this information then it is likely to be appropriate for you to proceed and claim for this work.

3.14 Example:

A client tells you that their application for Disability Living Allowance on mental health grounds has been turned down. The client has a right of appeal, and from your discussion with them you believe that it is possible that the case may satisfy the test.

You are unable to determine, with any accuracy, the strength of the case as the client has not brought in any documentation, including information from their doctor that they tell you they used in preparing their initial application. Due to this you are unable to fully apply the test at this initial point. You ask the client to post you the documents so that you are able to decide whether or not it is worth appealing the decision. Upon receipt of the information you are able to apply the test fully and decide whether and to what extent you will now assist the client further.

Whilst a case is in progress

3.15 "The Sufficient Benefit Test also applies as and when further Legal Help is provided throughout the case" (NfP specification 3.5(1)).

3.16 This does not mean that it needs to be reapplied every time an activity is undertaken, such as each time a letter is sent or a telephone call is made.

3.17 When you applied the test at the outset, and decided to provide further Legal Help, you would have formed an initial view of what work was necessary to get to a certain point in the case or, possibly, to the end of the case.

3.18 You would also have been able to estimate the total likely time you anticipated spending for you to get to this point.

3.19 If you applied the test on this basis and there were no significant changes in circumstances, then the test need not be applied whilst the particular course of action was in progress.

3.20 However, you should always be mindful, not just of how unexpected events may alter how you deal with the case, but also of how these events may affect your original application of the test and flag up that you might need to reapply it.

3.21 Even if things go largely as planned, if the action you originally contemplated takes or now appears likely to take significantly longer than anticipated, then the test should be reapplied.

4 How should I apply the test?

Preliminary points

4.1 The test has two elements, both of which must be applied in all circumstances: the "merits" element and whether there is "cost benefit" in proceeding.

4.2 "Merits" means the chances of the client achieving a successful outcome from their case.

4.3 "Cost benefit" means the balance between the cost of the advice and the benefit to be gained by the client.

4.4 Where a client pays privately it is the client who makes the decision whether or not to proceed. In particular they would decide whether the case had a cost benefit to them. When you are providing Legal Help it is you who must make this decision.

4.5 In practice you will need to consider both elements of the test as soon as you have enough information to do so.

4.6 The Solicitor specification at paragraph 3.3(6) suggests that you should not proceed beyond an initial two hours work (and so should not continue providing Legal Help) unless:

(a) "In your view (on the evidence available to you at the time the Legal Help is being provided) the client's case is not one which will clearly fail (because of, for example, existing precedents or lack of credibility or evidence); and

(b) Where the Legal Help concerns money or property, there is cost benefit to proceeding".

4.7 This guidance is also applicable to NfP Contract holders.

4.8 This two hours work would include time spent interviewing the client and advising them of their options and any other work necessary to get to the point where you were able to fully appreciate their enquiry, decide whether their case had Sufficient Benefit and advise them accordingly (see section 8: "Operating the test in practice").

4.9 This is not a licence to claim two hours work in all cases that do not proceed beyond the initial advice stage due to the case failing the Sufficient Benefit Test and nor is it a strict limit; the two hours is a guide figure and is really a point where the test becomes more strict, particularly in terms of cost benefit. Cases that can be dealt with in a shorter time should be claimed as such!

4.10 Please note that 4.6(a) above is concerned with bringing or defending an action only, and is not intended to stop you attempting to *mitigate* the effect of some order or of its enforcement (see paragraphs 4.17 to 4.21 below).

4.11 Of course, you may decide to continue assisting a client even where it is clear that their case fails the test. This is perfectly acceptable providing you do not claim this additional work as contract time; the file should clearly show what time was claimed for what and at what point the case ceased to be a contract matter and continued under other funding.

How do I apply the merits element of the test?

4.12 "At its most basic level, the [merits aspect of the] test is intended to prevent you starting or continuing to carry out work where there is no real legal issue in relation to which the client will benefit from the provision of Legal Help."

4.13 "This would mean, for example, that you should not be providing Legal Help beyond the point where you establish that the client's claim:

- is clearly hopeless,
- is vexatious,
- would be an abuse of process,

or where a client is seeking advice or assistance on non-legal matters" (NfP specification 3.6(1)).

4.14 Please note that the test is not intended to prevent you from providing any Legal Help merely because the client's case has poor or no prospects of success. For example, a client may be entitled to advice about a benefit claim being rejected, even if it is soon clear that there are no grounds to challenge or appeal the rejection (see NfP specification 3.7(2)).

4.15 Nor does it mean that you are unable to provide any advice on what might be relatively straightforward procedural issues, such as how a client might obtain a copy of their credit reference file information and how this information might affect future applications for credit (see Appendix 1, case study 1 for LSC comments on this issue).

4.16 In such situations, whether because of the poor prospects of success or the fact that the client should be able to pursue a simple remedy on their own behalf, you should usually restrict the amount of help you provide. Your contract work is likely to be limited to advising the client of his or her options and the various issues involved, rather than actively pursuing a course of action with poor or no prospects of success on their behalf (see NfP specification 3.7).

4.17 However, just because you decide not to actively pursue a particular course of action, such as defending or disputing a claim against your client, does not mean that you would be unable to provide further assistance by way of Legal Help or Help at Court mitigating the effect of that claim.

4.18 This is because whilst you may decide that there is no merit in pursuing one course of action such as disputing the claim, there may be merit in pursuing an alternative course of action such as mitigating the effect of that claim.

4.19 If you choose to assist a client to mitigate the effect of some claim order or judgment, or of its enforcement, you must believe that the prospects of succeeding in that mitigation are better than poor and there must be a real benefit to the client of you mitigating on their behalf, such as a reduction or postponement of their liability (see NfP specification 3.7(3)).

4.20 Example:

A client has received a notice that they must pay back immediately a £500 overpayment of housing benefit. You provide initial advice and assistance and establish that the client has no real defence to the claim and that if you were to try to defend or dispute it the prospects of success would be at best poor.

Due to the negligible prospects of success, you do not provide further assistance trying to dispute the claim as to do so would not satisfy the merits aspect of the test. However, you believe that the prospects of mitigating the effect of the claim by agreeing an affordable repayment arrangement over a period of time are better than poor, so there is merit in proceeding on this basis.

Providing the cost benefit aspect of the test were also satisfied, then this would mean that you would be able to provide further assistance mitigating the effect of the claim by negotiating with the third party to postpone or reduce the client's liability, despite there being no defence to the claim.

4.21 (See Appendix 1, case study 4 for LSC comments on this issue.)

Must the case have cost benefit?

4.22 Even where the case passes the merits element of the test, there must always be cost benefit to the work that you are carrying or propose to carry out.

4.23 What the LSC mean by this is that the likely costs to the public purse of you providing the work must be *proportionate* in some way to what is at stake for the client; that is, on the facts available to you at the time, the likely benefit of providing the Legal Help is objectively comparable to what you anticipate achieving for the client.

4.24 This principle of proportionality exists whether the case concerns money or property or other issues.

4.25 Cost benefit at this basic level means that the value of what is at stake must at the very least equal the likely cost of Legal Help. However, the more Legal Help is provided, then the more cost benefit will need to be taken into account (see NfP specification 3.8(2) and 3.9(1)).

4.26 A way of illustrating this would be to consider the amount of further work you might perform following initial advice to a client.

4.27 Whether or not you provide this further work, and the amount of work, should be objectively comparable to the benefit you expect to achieve for the client: the higher the anticipated costs then the more the benefit the client is expected to receive will be an issue.

4.28 This decision on whether the cost is proportionate to the benefit must be made objectively by you, not the client; for example, Legal Help should not be used to pursue what are clearly trivial issues, whether financial or otherwise, however strongly the client feels about them (see 10.9(2)).

4.29 (To establish cost benefit where the case is concerned with money or property, see section 6.)

4.30 (To establish cost benefit where issues other than money or property are involved, see section 7.)

5 Calculating the likely costs of a case

5.1 At the outset of a case, in order to determine whether there is any cost benefit in you providing Legal Help, you will have to first think ahead as to the amount of work that you are likely to have to carry out for the client in order to resolve the matter and how much, roughly, this work will cost.

5.2 Once you have determined the likely costs of the case you will then be able to compare this against the expected benefits that the client should receive and so be able to determine whether there is some proportionality and therefore, whether and to what extent you will continue to provide Legal Help.

5.3 In the NfP specification at 3.8(3) the LSC state that in order for you to determine the likely costs of a case: "You should multiply the total likely time [in hours or proportion of hours] to be spent on the case (including travel and waiting) by £50 and add any disbursements (including VAT on those disbursements)."

5.4 Unlike the NfP specification (where the LSC set a rate of £50 per hour for all work, whatever the casework activity), Solicitor Contract holders have different rates for different activities such as travel and waiting, preparation, letters and telephone calls.

5.5 For illustrative purposes: assuming there is a legal issue in relation to which the client needs your advice, and if we take the NfP rate of £50 per hour as our example, then in order to establish the likely costs of a case at the outset we would need to:

- decide upon what work was necessary in order to resolve the client's case or achieve the level or stage in the case you would like to get to;
- total the time you anticipate this work will take for you to achieve this level or stage;
- multiply this figure (as a proportion of hours) by £50;
- add to this the anticipated cost(s) of any disbursements you believe will be necessary.

5.6 Deciding what work might be necessary might at first seem difficult given the fact that nothing is written in stone. However, remember that at this stage you are only estimating costs in order to perform the test. Just because the likely or eventual costs of a case may be different to this initial figure does not automatically mean that you will be unable to claim that additional time.

5.7 When making this estimate of time and cost you might consider:

- Will you have to have two or more interviews with the client and if so how long do you estimate the additional interview(s) taking?
- Does the client have any special needs or are there issues affecting the capacity of the client which will slow down the interview process or mean a greater time will need to be spent than on an average case?
- Do you envisage any travelling and waiting being necessary – for instance, will you have to visit the client at home or attend a court hearing with them?
- How complex is the case and will this affect how you will deal with it?
- Is the case strongly opposed or contentious and to what degree do you think this will delay any case progress and cause additional work?

5.8 It could be that in calculating the costs you find that if you were to provide all the work you originally anticipated then the case would not have a cost benefit as the costs might exceed the benefit by such a degree that it would not be a reasonable use of public funds.

5.9 In such instances this does not mean that you would provide no Legal Help at all; it is more likely to mean that you should limit the work to a level that would result in a cost benefit.

5.10 Inevitably, this may mean, particularly in cases involving small amounts of money, that you limit and plan out the work you intend to do in some detail in order to achieve the best outcome for the client in the shortest possible time.

5.11 However, even in cases involving significant amounts of money you should always think about the most cost-effective and expedient ways of performing the work, such as: would it be more cost effective to update the client by telephone rather than arranging a further interview?

5.12 In might be helpful for you to get some feel for how long it will take you to deal with certain issues or case types within your particular subject category by establishing your average times/costs per case.

5.13 For example, in the Housing category you might wish to monitor the average times that you take on cases in respect of a) possession actions, b) homelessness and c) disrepair.

5.14 This would give you a quick benchmark figure to enable you to compare cost against benefit in individual cases and so decide on the extent of work that will be undertaken.

5.15 Comparing such general estimates of time and cost against the likely benefit is likely to be more appropriate when the normal cases you deal with in your particular subject category are of such a significant value (whether financial or in terms of objective importance to the client) that it is likely that the test would be satisfied providing you were performing efficient casework.

5.16 However, there may be a number of reasons why you decide to make a more involved calculation of the likely costs of the case, such as:

- the amount in issue is significantly lower than the usual cases you deal with or;
- the amount in issue is more or less the same as the general estimate of work you propose to do and/or;
- you haven't dealt with this type of problem before and so want to be clear what you are proposing to do and at what point you should consider applying the test again and/or;
- you do not know the extent to which the case will be opposed so you want to be clear on when you might consider reapplying the test again.

5.17 If you decide to do such a detailed calculation then it might be useful for you to make a quick note of the activities you anticipate taking and the time you think they will take. This will clarify how you intend to proceed and how the work will compare against the likely benefit to the client (see section 11: "How should I evidence that I have performed the test?").

6 What does cost benefit mean if the case is about money or property?

6.1 In the NfP specification at 3.9(1) the LSC state that:

- “Where money or property is at stake, then at its most basic level, cost benefit means that the likely amount in issue must at the very least equal the likely cost of Legal Help” (NfP specification 3.9(1)).
- Further, where the anticipated costs of the action are going to be roughly equal to the amount at stake then you should only proceed with this course of action where the prospects of success are excellent (at least 80%).
- Where the prospects of success are less than excellent then you should only proceed if the likely amount in issue exceeds the likely costs by a level that means that, were the client paying privately, there would be a real benefit to them proceeding.

6.2 Both the Solicitor and NfP specifications state that most people of moderate means would be prepared to pay privately for some advice on their prospects of success in any dispute, but would only be prepared to go further if their prospects of success were at least reasonable and there was proportionality between the likely cost to them and the benefit they anticipate receiving (see NfP specification 3.8(2) and Solicitor specification 3.3(8)).

6.3 This is what the LSC term the “private client test”.

6.4 The LSC give an example in the NfP specification at 3.9(2): “A reasonable privately paying client may be prepared to risk spending £100 on legal advice in order to recover £500 where there were moderate prospects of success. However, in the same scenario the client would be very unlikely to risk spending the £100 if the amount at stake was only £120.”

6.5 In view of this, in practical terms, a common question you might ask yourself when applying the test might be: “Can I do what I want to do within X hours, as if I can this will mean that the test will be satisfied?” or “If I do what I want will the time involved be disproportionate to the benefit?”

6.6 (See section 9, which discusses the private client aspect of the test in relation to cases in the small claims track where you propose to provide Legal Help or Help at Court.)

6.7 The LSC accept that this private client test is a guiding principle only and not an absolute requirement. They point out in the NfP specification at 3.8(2) that “sometimes the nature of the case may make it difficult or impossible to compare the position of the applicant to a private client of moderate means e.g. where the issue is entitlement to a means tested benefit. However, even in these circumstances, costs must still be proportionate in some way to the issues at stake”.

6.8 An example would be a case that involved you providing Legal Help to attempt to obtain a weekly increase in benefit entitlement for a client (for examples with LSC comments, see Appendix 1, case studies 8 and 9).

6.9 In such a case you are entitled to take into account that this increase will continue to be payable over time and that a simple calculation and comparison of costs against amount at stake is not usually possible.

6.10 Clause 3.9(3) of the NfP specification states that: "For a client on long-term benefits, for example, an increase of £10 or even £5 per week could make a significant difference to their life. Nevertheless, whilst it is always relevant to consider the importance of the case to the individual client, costs will still need to be proportionate and reasonable in such cases. Some likely increases or arrears may be too small to justify more than very limited advice." Whilst this is set out in the NfP specification, it also applies to Solicitor Contract holders.

6.11 There are therefore a number of factors here that must be considered when deciding on the extent of Legal Help you will provide in such cases:

- You are entitled to take into account any increase in income that is likely to be continuous.
- What would be a small weekly increase in money (eg £5 or £10) to someone on a moderate-level income could represent a significant increase to someone on subsistence-level income, for example state benefits.
- However, just because a client is on a low income does not in itself automatically mean that you can provide a significant amount of Legal Help in order to achieve a successful outcome; some increases in income or an award or reduction of arrears may be too small to justify more than limited advice and assistance (see NfP specification 3.9(3)).
- For example, some increases in income can be quantified, such as where the case is concerned with obtaining an award of £5 per week for seventeen weeks for a client on means-tested benefit. Here the financial benefit to the client would be £85, and this can be directly compared to the costs of pursuing such a case on a client's behalf.
- In these kinds of cases it is particularly important to make a note of the *full* benefit(s) to the client of pursuing a case, whether these are financial or otherwise, as auditors will not necessarily be aware of the nuances of particular strategies and tactics and their anticipated outcomes.
- This would be particularly relevant where it is known to the adviser that a small weekly award would mean that the client would also become passported to other state benefits, as a result of which the adviser provided a significant amount of Legal Help to secure the award.
- Negotiating a repayment of overpaid benefit over a period of time at a significantly lower rate than that requested would also meet the test. For example, the impact on a client in receipt of a subsistence-level income of achieving a £2.75 per week repayment of a £500 benefit overpayment, as opposed to the £20 per week originally requested, would be significant and amount to a similar positive effect as a receipt of income over an equal period of time (for this example with LSC comments, see Appendix 1, case study 4).

7 What about cost benefit if issues other than money or property are involved?

7.1 The LSC states that the cost benefit element of the test should be applied even in cases where there is no money or property involved.

7.2 This means that a caseworker must still evaluate how the likely costs to the public purse of pursuing a case compare with the benefit to be received by the client, having regard to all the circumstances of the matter including the personal circumstances of the client.

7.3 "It is you who should determine the importance of the issues involved and the anticipated outcomes, not the client; it is an objective test – the fact that a client may regard an issue as important should not justify you incurring substantial costs if you think the issue is trivial" (NfP specification 3.11(1)).

7.4 For example, it is not uncommon for a client to approach you because they feel aggrieved by the way that some third party might have treated them and want advice on what they can do about it. However, the decision on whether this treatment merits your professional involvement in terms of the provision of Legal Help further than the initial advice stage should not be made simply on the basis of how the client feels about it.

7.5 Any decision to proceed beyond the initial advice and presentation of options stage should be based both on the client having some legitimate remedy with which you can assist them and the pursuit of this remedy being an appropriate expenditure of public funds – ie that there is both some merit and a cost benefit in you providing further assistance.

What about issues of overwhelming importance to the client?

7.6 The LSC does point out that there are certain issues, beyond money or property, that can justify greater expenditure through the provision of Legal Help.

7.7 The LSC describes these issues as being of "overwhelming importance to the client". They are set out in the Solicitor specification at 3.3(8) and in the NfP specification at 3.11(2).

7.8 They state that: "…greater expenditure may be justified where there are other issues, beyond money or property of 'overwhelming importance' to the client because the case concerns the life, liberty or physical safety of the client or his or her family or the roof over their heads."

7.9 It is important to note that this statement does not say "*such as* the case concerns"; it says: "*because* the case concerns".

7.10 This means that the LSC are prescriptive about which issues are of overwhelming importance to a client – ie only the situations that they describe in the respective specifications can be seen to be overwhelmingly important to a client and so justify you incurring greater expenditure.

7.11 When they say "life" they mean exactly that; they do not mean quality of life. The example they give in the NfP specification at 3.11(3) is of an asylum matter where if the client were to be returned to their country of origin their life would be at risk.

7.12 They go on to say that for the case to concern the client's or their family's physical safety or liberty, that safety or liberty must be capable of being affected by the outcome of the work that you are proposing to do: "Thus an action against the police for damages for false imprisonment will not be of 'overwhelming importance' to the client if that client has already been released. In such a case the client's liberty will no longer be at issue, what will be at issue is the question of retrospective damages" (NfP specification 3.11(3)).

7.13 (See Appendix 1, case studies 5 and 7, for LSC comments on the issue of "overwhelming importance to the client".)

8 Operating the test in practice

8.1 A useful way of understanding the information we have discussed so far and looking at how it can be incorporated into your casework is to consider how the test should be applied in a typical first interview situation. The flowchart in Appendix 2 contains the key questions that you must ask yourself and indicates how you should proceed depending upon your answers to these questions.

9 Small claims

9.1 There is a general presumption that in the small claims track it is expected that litigants will represent themselves (see also 9.18).

9.2 "Legal Help or Help at Court may be given, but when considering cost benefit you should bear in mind that your client can recover only very limited costs in the small claims track" (NfP specification 3.10(1)).

9.3 In addition to the specific guidance contained within this section, as a small claim will be about money or property then the notes at section 6 of this briefing would also apply; that is, you should apply the "private client test".

9.4 With reference to the example we gave earlier at 6.4, the LSC say at paragraph 3.10 in the NfP specification that if the claim were proceeding as a small claim for £120, a reasonable privately paying client would not incur £100 to pursue or defend the claim. This is because the costs cannot generally be recovered from the other side and therefore the likely benefit to the client is £20, which would not be sufficient to justify the costs.

9.5 In terms of how this affects you if you provide Legal Help and Help at Court in relation to small claims, the LSC discuss two stages in any proceedings that are likely to be allocated to the small claims track. First, there is the pre-hearing Legal Help stage where you would be gathering information and possibly negotiating on your client's behalf.

9.6 Second, there are the hearings themselves where you might choose to provide Help at Court: an allocation hearing if ordered by the court and the small claim hearing itself.

Pre-hearing Legal Help

9.7 In matters that are likely to proceed, or have already commenced, in the small claims track, you are able to provide Legal Help to clients in order to determine their prospects of success and, depending upon the prospects of success, attempt to dispose of the matter prior to any attendance at court (see 9.18 to 9.23 for guidance on whether you can provide Help at Court).

9.8 This would generally occur within the initial two-hour general advice and consideration stage we raised here initially at 4.6 and which is included within the flowchart in Appendix 2: "Operating the test in practice".

9.9 "However, once you are in a position to properly assess the prospects of success then you should only continue to provide Legal Help in a small claim matter where those prospects of success are at least moderate (that is, at least 50%) *and* the net value of the likely damages or property in issue exceeds the likely costs of Legal Help" (Solicitor specification 3.3(14)).

9.10 The NfP specification is worded slightly differently in respect of prospects of success; for example, there is no reference to "50%". However, the LSC have confirmed with CLS Support that this Solicitor specification guidance in respect of small claims should also apply to NfP Contract holders.

9.11 If in your professional view the client's prospects of success are less than moderate (less than 50%) then you should advise your client of this (so that they are able to decide whether or not they wish to continue themselves) and cease to provide Legal Help in relation to this particular matter.

9.12 Even if the potential benefit would be significantly higher than the costs should you pursue the claim, you should still not proceed where the prospects of success are clearly less than 50%.

9.13 Presuming you are able to continue because the prospects of success are 50% or higher, then this test should be applied on a sliding scale basis; that is, the higher the prospects of success and the better the damages/costs ratio the more likely it is that further Legal Help may be justified as the case progresses (see Solicitor specification 3.3(14)).

9.14 Example 1:

You provide initial advice and assistance of one hour to a client regarding £2000 they are owed.

Before you go beyond this stage you establish that there are good prospects of success should it go to court as a small claim.

You anticipate that the final costs will be in the region of £150 with an additional £50 should you provide Help at Court.

As the *damages/costs ratio is high* and the *prospects of success are good,* then

it is more likely that you would be justified in providing further Legal Help of £150 to pursue the claim.

If you decided to provide Help at Court you would then need to consider the guidance at 9.18 to 9.23.

9.15 Example 2:

You provide initial advice and assistance of one hour to a client regarding £300 they are owed.

You estimate prospects of success to be moderate if the matter went to court as a small claim.

You anticipate final costs would be in the region of £250, with an additional £50 should you provide Help at Court.

Given that the *damages/costs ratio is low* and the *prospects of success are only moderate,*

it is unlikely that you would be justified in providing any large amount of further Legal Help in order to pursue the claim.

It is more likely that you would limit your work to a level that meant that there was cost benefit – probably one to two hours work in total.

9.16 (See Appendix 1, case study 2, where the LSC have commented on an example of providing pre-hearing Legal Help.)

9.17 It would always be good practice to make a note on the case file (if it is not apparent elsewhere, such as in a letter to the client) of your evaluation of the prospects of success of a case, as this would help the LSC understand the basis on which you decided to proceed should the case file be audited.

Can I provide Help at Court at small claims hearings?

9.18 The NfP specification at 7.5(1) explains that small claims hearings were developed such that representation should not be required. The Sufficient Benefit Test in relation to providing Help at Court in relation to small claims hearings is therefore quite strict.

9.19 Again, there is no difference in how the test should be applied between Solicitor and NfP Contract holders when providing Help at Court in relation to small claims hearings.

9.20 The LSC say in the Solicitor specification at 4.3(6) that you should not provide Help at Court in relation to small claims hearings except in the following two circumstances:

1. at an allocation hearing ordered by the court where:

- the matter has not yet been allocated to the small claims track but is within the small claims limit, and
- the client is a child, or
- the client is prevented from adequately presenting their case by reason of physical or mental disability, or language difficulties; or

2. where the matter has been allocated to the small claims track, and:

- there are exceptional circumstances that make the provision of Help at Court in the small claims track reasonable, and
- the prospects of success meet the criteria below:

    i) If the prospects of success are very good (80% or more), likely damages must exceed likely costs.

    ii) If the prospects of success are good (60–80%), likely damages must exceed likely costs by a ratio of 2:1.

    iii) If the prospects of success are moderate (50–60%), likely damages must exceed likely costs by a ratio of 4:1.

9.21 Where you have decided to provide Help at Court in relation to a small claim then any note on file setting out your evaluation of the prospects of success should also include your assessment of the damages/costs ratio above, if it does not exist elsewhere on the file, to justify your advocacy on the client’s behalf.

9.22 Importantly, in order to provide Help at Court in relation to the small claims hearing itself it is important to note that as well as the matter having to meet the prospects of success criteria there must also be “exceptional circumstances”.

9.23 According to the NfP specification at 7.5(4): "An example of exceptional circumstances for the purposes of this guidance would be cases involving violence, intimidation, or harassment, which were not taken into account on allocation, where it may be inappropriate for the client to deal with the opponent without legal representation."

9.24 If you do choose to provide Help at Court in a small claim matter then you must ensure that any exceptional circumstances that influenced your decision to provide Help at Court are identified on your case file along with the note of your client's prospects of success.

9.25 (See Appendix 1, case study 3, where the LSC have commented on an example of a small claim matter that proceeded to the hearing stage.)

10 Auditing the Sufficient Benefit Test

10.1 The LSC will audit the application of the Sufficient Benefit Test within the Contract Compliance Audit process.

10.2 The Sufficient Benefit Test is audited in the same way for both Solicitor and NfP Contract holders (See CLS Support Contracting briefing no. 6: "Controlled Work and Contract Compliance", for a full explanation of the audit process).

10.3 In the NfP Cost Assessment Audit Booklet there are three questions relating to Sufficient Benefit. These are:

- Does the case meet the Sufficient Benefit Test at the outset of the case? (question 12 of the NfP booklet)
- Does the case continue to fulfil the Sufficient Benefit Test during the lifetime of the case? (question 13 of the booklet)
- Help at Court: has the Sufficient Benefit Test been applied in relation to each hearing? (question 18 of the booklet)

10.4 The LSC states that where the guidance contained in the contract specification allows a reasonable amount of latitude or discretion then they will adopt the same approach on audit (see NfP specification 3.12(1)).

10.5 At audit the LSC will re-evaluate your application(s) of the test on the basis of what information was available or should have been reasonably available to you at the time of your application(s).

10.6 This means that they will not apply the benefit of hindsight when auditing your application of the test: "The fact that a particular course of action did not succeed for the client does not of itself mean that it was not reasonable for the adviser to proceed as they did in light of the information that was available at the time" (NfP specification 3.12(1)).

10.7 However, the LSC give two examples that, in clear cases, would be likely to cause reductions in time if identified at audit:

1. where the costs clearly outweigh the benefit at stake;
2. where the auditor has evidence, which was (or ought reasonably to have been) available to the adviser that the prospects of success were clearly poor and yet the matter was pursued without justification.

10.8 The NfP specification at 3.12(1)(a) states that: "[the first circumstance above] will be easier to identify where a particular sum of money is in issue but may also be apparent in less tangible situations where time is spent pursuing a trivial issue".

10.9 Examples where excessive expenditure would *not* be justified:

1. A caseworker provides four hours of Legal Help to pursue a very technical but eventually successful matter in the Consumer category against a mail order company on behalf of a client. The client was seeking reimbursement of the cost of items worth £50 (costs clearly outweigh benefit).

2. A caseworker in the Housing category provides three hours of Legal Help assisting a client living in a block of flats to negotiate with their local authority to replace net curtains in a communal staircase (time spent pursuing a trivial issue).

10.10 In respect of evidence that was (or ought reasonably to have been) available to the caseworker at the time they originally applied the test, the LSC indicate in the NfP specification at 3.12.1(b) that: "This [information] might be apparent from an examination of the file itself; for example, where there were relevant details in the client's own instructions that were ignored by the adviser and very clearly ought to have been taken into account."

10.11 Example:

An auditor identifies a medical report in a client's file from a doctor indicating that the client does not suffer, to any real extent, from a certain medical condition. The caseworker proceeded to assist the client prepare an appeal against refusal of benefit on these same medical grounds without any explanation on file of their assessment of the report and why it was seemingly ignored.

10.12 As well as identifying specific items of evidence that a caseworker may have ignored, the LSC also note that they may identify cases where the tactics of the adviser or supplier were questionable. This may happen as a result of looking at a number of files from the same adviser, or a number of advisers in the same organisation, where the same tactics have been pursued without success or without sufficient benefit to the client(s).

10.13 This may raise practice issues, such as whether or not it is appropriate that the organisation always deal with these kinds of cases in this way, but it may also raise individual competency issues that, if they have impacted on a case in a detrimental manner or have led to excessive time claims, may cause a reduction of time at audit. It could also lead the LSC to look at the effectiveness of supervision in the organisation, which would be covered under SQM requirements.

10.14 Questions that an auditor would consider would be: Did the caseworker deal with the case properly and in a manner that would be expected of a reasonably competent caseworker? Were the appropriate steps for dealing with the case taken?

10.15 A further way of considering these questions would be to ask yourself whether you were adding sufficient value to a client's case. For example, is it necessary that you rather than the client conduct the work following your preliminary advice? Is each individual item of work you perform necessary and geared to achieve the result you have in sight?

10.16 It should be immediately apparent in the majority of instances why any particular activity was performed. However, where it is not clear, an auditor would expect to see some justification as to why the activity was thought relevant to the particular case.

10.17 Importantly, you must consider that your specialist knowledge and intervention in a client's case is necessary and has a real value, such as that the case is complicated and the client would not be capable of achieving the same result him or herself.

10.18 The LSC does recognise that: "In some cases, even where the caseworker is doing little more than putting forward the client's instructions in correspondence, the fact that the letter comes from an adviser may make a difference to the result for the client. However, where correspondence becomes protracted, questions will be asked as to whether the adviser is adding value" (NfP specification 3.12(7)(a)).

10.19 An example might be in a debt matter where an adviser wrote to a client's one outstanding unsecured creditor making an offer of repayment on their behalf, and the creditor refused to accept the terms of payment offered. In such a situation whilst the advisor might make reasonable attempts to come to some agreement, there would probably be a cut-off point where the adviser would decide that there was little else to say, and rather than continue writing further letters (correspondence becoming protracted without any real value), suggest to the creditor that they either accept the terms or pursue their entitlement through the court.

11 How should I evidence that I have performed the test?

11.1 It is not a contract requirement that you complete attendance notes or case records detailing your application of the test, nor would auditors look for or expect such a written evaluation when conducting a Contract Compliance Audit.

11.2 This is because in most instances it should be apparent from the file, whether through reading the case notes or correspondence, that there was merit and a cost benefit in you pursuing a client's case or a particular course of action.

11.3 If you have an Upper Casework Limit in force then you will need to detail your application of the test on the form on which you make your application for a casework extension in addition to any evaluation you might choose to record on the case file.

11.4 Whilst it is not a contract requirement to evidence that you have performed the test on the case file, the LSC do say that in certain situations it would be to your advantage to detail your evaluation and application of the test:

(a) "Where the matter is contentious and opposed, we would expect to see some evaluation of the merits on the file either in attendance notes or in letters to the client; or

(b) Where the costs of a particular case are unusually high, or where the costs may outweigh the benefit, then some recorded evaluation and justification for continuing with the case will be expected."

(NfP contract specification 3.12(3) and Guidance on the Assessment of Costs for Controlled Work (Solicitors) 5.2.6 (May 2002))

11.5 The reason that a written evaluation might be to your advantage is that in its absence, and in these circumstances, it would be less likely that you would be given the benefit of the doubt in the types of situations discussed here at 10.4 and 10.6.

11.6 Please note that 11.4(a) above would include any matter for which you were providing Help at Court, including where you were mitigating on behalf of a client. Additionally, if you attended more than one hearing during the same matter then it would be advisable to evidence your application of the test for each hearing (including the prospects of success) given that this is specifically considered at audit (see paragraph 10.3, bullet point 3).

11.7 The four most common places to evidence your application of the test on file are likely to be:

1. as a series of questions that would form part of some client information summary such as a client information form that would be completed on the initial attendance on the client;
2. somewhere on the Controlled Work 1 form (CW1: Legal Help and Help at Court), particularly if your organisation has created its own version of the form;
3. in a letter to the client such as your initial letter confirming advice and instructions;
4. on the case file in the form of an attendance note or case record.

11.8 If you evidence your application of the test by a tick box or equivalent on some form of client information summary that would be kept on file, then it should also include questions which show that you consider how the anticipated costs of a particular case compare to the benefit(s) you expect the client will receive.

11.9 You must also remember how the prospects of success are a factor in pursuing a particular course of action and how this might also be evidenced, whether on a client information form or otherwise. An important example would be when you are considering providing Help at Court, including matters that are in or likely to proceed in court as a small claim (see section 9).

11.10 If you choose to evidence the application of the test on the CW1 then the same would apply.

11.11 Alternatively, you may decide to rely on a letter to the client as evidence of your application of the test. However, you should remember that in the situations described at 11.4 it might be in your interests to add further detail to the case file concerning the anticipated costs of the work compared against the anticipated benefit(s) to the client, and also of the prospects of success where this was necessary.

11.12 If you decide to provide evidence of your application of the test as an attendance note or as part of a case record, then you need to consider how you might actually write it down.

11.13 In the Guidance on the Assessment of Costs for Controlled Work (Solicitors) at 5.2.7, the LSC give the following example of written evidence of performing the test and the time taken to perform it:

- "Two units spent considering merits of pursuing claim further in light of letter from local authority. Decided that further work including applying for Legal Representation was justified at this stage because the timetable suggested did not meet the urgent difficulties caused by client's health problems due to the lack of repair."

11.14 A further example of how to record the test might be:

- "From considering letter dated June 2003 it is apparent that housing department intends to oppose any application to court. Costs estimate including Help at Court is now approximately £250. Amount in issue £2000 and reasonable prospects of success so merit in proceeding still on this basis – 1 unit."

11.15 Both of the examples above indicate a re-evaluation or reapplication of the test; when performing the test and calculating cost benefit at the outset you might, for example, write on your file or attendance note (in addition to any detailed notes on the interview you might make):

- "Client has legitimate claim against ex-employer for £1000 due to non-payment of wages – moderate chances of success – average case so estimate 6 to 8 hours – SBT ok – 1 unit."

11.16 Wherever you choose to evidence the test remember that you also need to think about how you would flag up the need for a reapplication of the test if you thought this might be necessary.

11.17 Where a reapplication of the test is linked to a particular event, such as the expected receipt of information from a client, then this should not be so difficult. However, where it is linked to an amount of work, such as where you decide that you will re-evaluate the test after three hours have been spent on the case, then you need to consider how you might indicate this on the file so that you remembered to reapply it when you get up to three hours work.

11.18 Please note that both NfP and Solicitor Contract holders may claim time for performing the test. However, for either contract holder to claim this time as a separate casework activity it must be apparent from the file what was considered and what conclusion was reached, as described in the examples above.

11.19 Where there has been some decision on the merits aspect of the case and then a further decision on whether there is cost benefit in proceeding (a calculation of likely costs and comparison against likely benefits), this would have taken some time and so should be claimed for where you feel it is appropriate and reasonable to do so.

11.20 It would not be appropriate, nor reasonable, to make such an additional claim for your application of the test where, for instance, you had already discussed the merits of the case with the client and in this discussion decided on the amount of Legal Help you would provide.

11.21 This is because here you would presumably have already claimed time for your full application of the test within the total time you have claimed for the initial interview.

12 Questions to consider

12.1 It may be useful to consider the following questions in relation to how the test is currently being applied by yourself and other casework staff in your organisation and to decide whether any further action needs to be taken to ensure compliance and general understanding of the test:

1. Is there a training need in respect of the use of the test within your organisation and if so, how might it be addressed?
2. How will you develop and monitor your application of the test – can you use your current systems and if so, are any changes

necessary such as developing the File Review procedure, incorporating it into supervision or through discussion at team meetings?

3. Will you provide evidence of the application of the test in all cases or only those where the costs are unusually high or that are contentious or opposed?
4. When providing evidence of the test will you use a pro-forma with specific questions, write it into letters to clients, or detail the application of the test on the case record or CW1?
5. Should you consider your organisation's average case times for each contract category of work as a suitable benchmark when establishing the likely costs of cases?
6. Will you check and familiarise yourself with any category-specific guidance in the contract specification that might have a bearing when thinking about calculating costs and average costs of cases in your particular subject area?
7. Although not in place and not a contract requirement at the time of writing, are there any category-specific time standards that you should also consider?
8. Would it be appropriate to evaluate the types of cases that you currently deal with to ensure that your contract work time is used most effectively and that you are targeting clients who would benefit most from your assistance?
9. Who are the other advice providers in the area – should you be utilising them more depending on the type, nature and level of a client's enquiry, such as through referral?
10. Have relevant staff got ongoing access to written guidance on the test, such as that referred to throughout this briefing (listed in the Introduction section at paragraph 1.2)?
11. If you think it necessary, where could you get some feedback on how you are applying the test – in addition to your network and CLS Support could your LSC Regional Office give you some guidance through discussion, site visit, audit or otherwise?
12. What will you do with this briefing now – if you are unsure about anything or have any questions will you clarify these with CLS Support so that you are clearer about how to apply the test in your casework?

Appendix 1: Case studies

Case study 1

A client is concerned about their credit rating as they intend to apply for a mortgage. The client has had difficulty with credit applications in the past. The caseworker advises the client on reasons why the situation may be occurring and how to obtain information from credit reference agencies to determine whether any further action needs to be taken. A letter confirming advice is drafted.

LSC comment:

This is the sort of matter that we would expect to be dealt with by a short initial interview and letter confirming advice only (see paragraph 3.6(2) NfP contract specification). Therefore, a total time claim of somewhere between 25 and 45 minutes may be reasonable, although it is difficult to be precise without seeing the actual case file and/or the information contained in the letter. For instance, if the client were vulnerable and/or had a complicated history then it may be reasonable to claim the higher amount or extend this amount, providing this justification was apparent on the case file.

The caseworker might choose to deal with this kind of matter as a Level 1 enquiry rather than opening a full matter start, providing the eventual time claim was 35 minutes or less.

Case study 2

A client is owed £200 by a local trader following the purchase of a defective item. The client is on means-tested benefits and there are moderate prospects of success should it go to court. The trader has ignored all requests for payment. The caseworker provides fours hours of Legal Help (£200) (interview, negotiation by letter and telephone, updating client, client care letters at outset and close) and recovers the client’s money prior to court proceedings.

LSC comment:

Because this is a matter that would be or is likely to be allocated to the small claims track, our view is that unless the prospects of success were excellent (80% or over), this example would not meet the Sufficient Benefit Test because we would be spending the same amount in costs as we are likely to recover, and the client will recover only limited costs at best in the small claims track (see paragraph 3.10 of the NfP specification).

If we were to apply the private client test then a reasonable person would be very unlikely to pay for more than one hour’s work in order to pursue this matter, particularly given that the prospects of success are only moderate.

Although the outcome of the negotiation was ultimately successful despite the caseworker stating that the prospects of success were moderate, we would audit the application of the SBT at the outset of the case without the benefit of hindsight. Please see later comments re: legal merits and likelihood of settlement also.

Whilst the personal circumstances of the client are taken into account, the fact that the client is on benefits would not mean in itself that it would be worth spending £200 to recover £200 where prospects of success are only moderate.

Case study 3

A client is owed a £750 deposit from a previous landlord. S/he has learning difficulties and has told the caseworker that s/he feels intimidated by this landlord. The caseworker made the court aware of this after failing in initial negotiation and when assisting the client to issue a small claim; however, the court still allocated the matter to the small claims track as they were aware that this advice provider usually provides advocacy for clients who are unable to present their own case. Prospects of success were good and the caseworker estimated the final costs of the case would be £250. The caseworker ultimately provides initial advice and assistance of three hours (interview, client care letter, negotiation etc) and Help at Court of two hours (travel, waiting and advocacy).

LSC comment:

Sufficient Benefit looks OK if prospects of success were good and the costs were £250 against recovery of £750 and legal representation is not available for such proceedings. We would, however, need the caseworker to briefly record the particular circumstances on the file so that we can see why advocacy was required (client has learning difficulties and is intimidated by landlord).

The guidance on whether you should provide Help at Court, as set out at 7.3(2) of the NfP specification, should be applied. The fact that the client is frightened would be one factor (circumstances of the client) that would be taken into account when assessing whether advocacy is appropriate. The full test has three parts – ie "Advocacy is appropriate and will be of real benefit to the client due to the nature of the proceedings and the circumstances of the hearing and the client." The other two parts of the test are Sufficient Benefit and whether legal representation would be more appropriate.

The specific guidance on providing advocacy in small claims appears to be satisfied in this example, as prospects of success were good and the cost benefit ratio is in excess of 2:1, as described in the NfP specification at 7.5(1) (see paragraph 9.20(2) of this briefing).

Case study 4

A client on a moderate income has been overpaid benefit of £500. DWP originally asked for £20 per week over 25 weeks, but the caseworker negotiates it to £2.75 per week over approximately 182 weeks.

(a) Do you accept that this type of re-negotiation of a debt repayment has a similar benefit to the client as a gain in weekly award such as gain of £2.75 per week following a benefit application/appeal (see NfP specification 3.9(3))?

LSC comment:

Yes.

(b) Does the initial amount requested (£20 per week) and the fact that it has been reduced so significantly have a bearing?

LSC comment:

Yes

(c) If caseworker claimed four hours work (£200) achieving this, would you think this reasonable?

LSC comment:

Time taken is relevant in two ways:

(i) At the outset of the case as part of the Sufficient Benefit Test: how long will it take to get this outcome and is that a reasonable use of funding? We don't have a cast-iron rule saying that you can ***never*** *spend more in costs on the case than you recover, but obviously if that is the case we would be looking for some other additional element of benefit. We also say at 3.12(b) of the NfP specification that we'd expect more detailed attendance notes where the costs of a case are unusually high, or where costs outweigh the benefit.*

(ii) It is also relevant at the end of the case when assessing whether the time claimed accurately reflects work done and is in line with the contract requirements (so we may assess it down from £200 depending on the degree to which work claimed is evidenced on the file/reasonable/direct casework etc and whether the client was vulnerable or not etc).

Whether or not the four hours work was reasonable would therefore depend on the circumstances, but we would not say that just on the face of it the figure of £200 is unreasonable.

Case study 5

A client is referred by their GP for assistance with certain legal problems – the GP feels that legal advice and assistance in relation to these problems will avoid a further suicide attempt. Would the fact that the risk to life came from the client's own behaviour constitute "overwhelming importance" to the client (NfP specification 3.11(2)) as opposed to, say, an asylum matter?

LSC comment:

No, we would apply the same approach as in the Funding Code Decision Making Guidance at 4.10(3), which states: "Although the individual circumstances of the client will be taken into account, the test of whether a case has overwhelming importance must be approached objectively ie whether a reasonable client would regard the case as of overwhelming importance."

The case would still have to meet the usual Sufficient Benefits Test – ie cost of advice vs. amounts to be recovered and prospects of success of recovery. However, you may be able to justify extending this on the basis that the client is a vulnerable client. You would clearly need to treat such a client with more care with normal, and it might therefore take you longer to explain things. This does not mean, however, that you should pursue unmeritorious applications on your client's behalf – that would clearly benefit no one, neither the fund nor the client.

Case study 6

In an employment matter, a client was told at the initial advice stage that it was unlikely that s/he would succeed at any employment tribunal, given the facts concerning their dismissal. This was recorded in the attendance note. However, there were internal appeals still available and the caseworker felt that pursuing these appeals might bring an economic offer of settlement from the employer.

(a) Would the fact that a caseworker had estimated poor prospects of success in tribunal/court preclude them from further work in relation to pursuing the other options described?

LSC comment:

If prospects of success in the tribunal are poor (ie the case has little legal merit) then we would normally expect the amount of work done to be limited to initial advice, regardless of the fact that the client may still be able to negotiate a settlement – the test is based on the legal merits of the case, not whether the other side is likely to settle even a hopeless case for non-legal reasons.

(b) If the caseworker estimated prospects of success in the tribunal as less than moderate yet started proceedings anyway in an effort to secure some settlement during those proceedings would this be acceptable, given that it was likely that the employer would settle purely on commercial grounds?

LSC comment:

See answer to (a) above.

Case study 7

The client has an £80 debt for a Hire Purchase agreement on a cooker. Proceedings have been issued against him. The client is a pensioner who finds it quite difficult to deal with paperwork. He is on Income Support and has no way of paying the debt. The adviser has to write to the Hire Purchase company to get a copy of the agreement, and has to see the client on more than one occasion in order to explain matters to him. The adviser also provides Help at Court and gets an order for payment in instalments. He claims five hours time including time spent at the hearing totalling £250.

LSC comment:

There is sufficient benefit in providing the advice because it is a matter of law and the client is elderly and has difficulty with paperwork. However, the case fails on cost benefit: it is not of overwhelming importance to the client, and the costs claimed are excessive, compared to the issue at stake. We would be likely to limit this to one hour's work, which should be enough to allow mitigation on behalf of the client – initial attendance to give brief advice and a letter to court in mitigation.

Case study 8

A client goes for advice about her application for Disability Living Allowance (DLA) that has been turned down. She is currently on Income Support and the allowance would make a difference to her income of £10 per week. The caseworker takes the case and advises the client on the appeal, which is ultimately successful. The final costs are £375.

LSC comment:

Applications for DLA can be complex. Although in this example the allowance would mean only an additional £10 per week, this could make a significant difference to the client's income as she is on Income Support. The benefit may also be backdated, and amounts to a significant value over time. It appears therefore likely that the Sufficient Benefit Test would be met. We would, however, check that the agency hasn't made a claim for representation or travel and waiting at the tribunal itself, which are outside the scope of the contract.

Case study 9

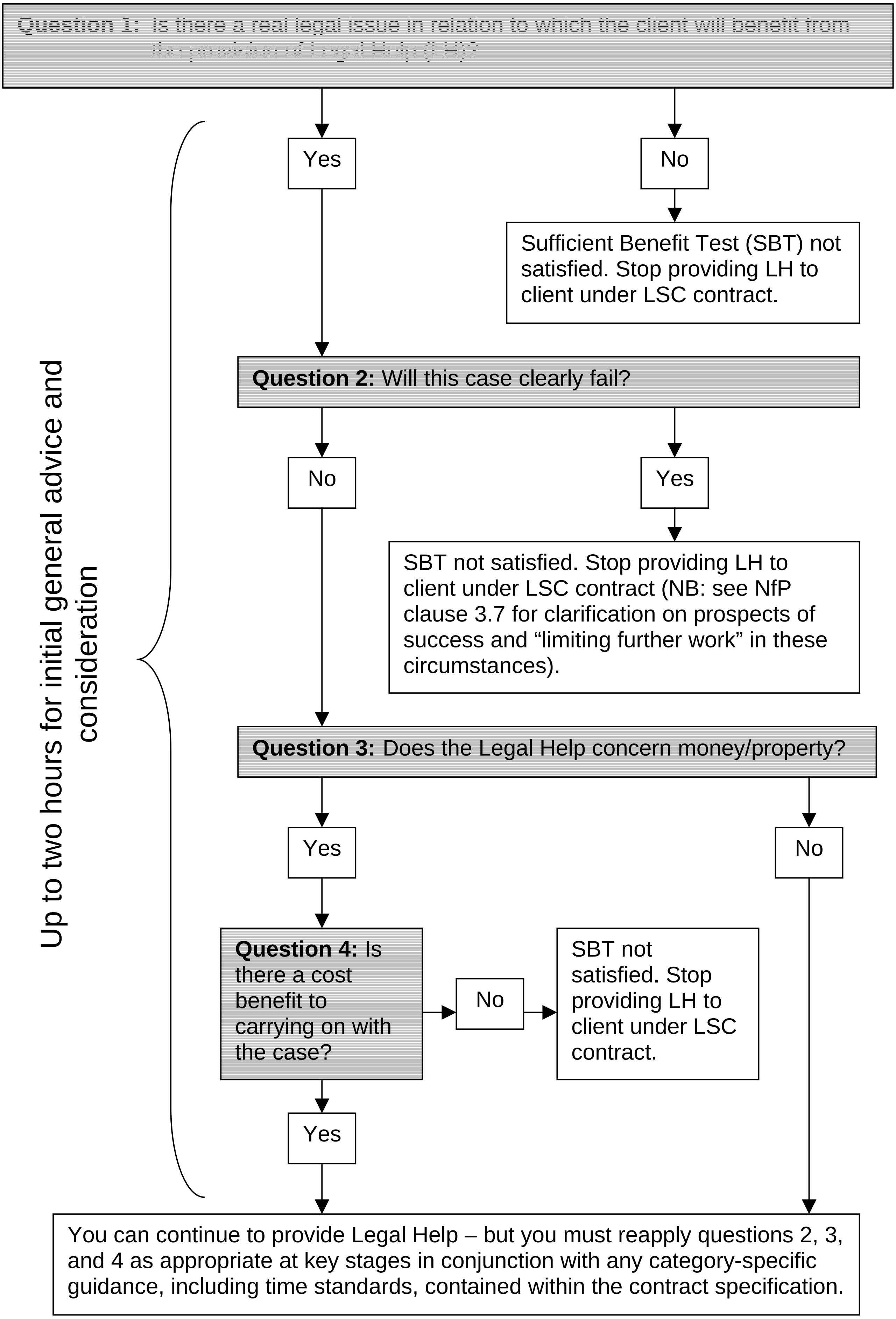
Using the same scenario as case study 8 above, what if the additional income receipt was only £2 per week? Whilst £10 per week would make a significant difference each week to someone on means-tested benefit, £2 per week over time would still mean a success worth over £100 a year to a client – would the costs still be reasonable?

LSC comment:

We would look at the value over time, not just on the basis of any single payment – so even £2 a week can add up, provided the benefit is not time-limited (eg only available for 28 weeks etc due to an anticipated change in circumstances). We are not sure how far into the future you would take this as the circumstances of the client may change, but there needs to be some proportionality.

Please cross-refer to our comments on these issues at questions 4 and 8 above.

Appendix 2: Operating the test in practice



Written by Patrick Torsney CLS Support Project Consultant November 2003

Network contacts

Management Helpline DIAL UK St Catherine's Hospital Tickhill Road, Balby Doncaster DN4 8QN ☎ 01302 310123	James Kenrick Youth Access 1a Taylors Yard Alderbrook Road London SW12 8AD ☎ 020 8772 9900	Law Centres Federation 18-19 Warren Street London W1P 5DB ☎ 020 7387 8570
John Mulligan Advice UK 12th Floor New London Bridge House 25 London Bridge St London SE1 9ST ☎ 020 7407 6611	JJ Costello Shelter Cymru 25 Walter Road Swansea SA1 5NN ☎ 01792 469400	Citizens Advice Myddelton House 115-123 Pentonville Road London N1 9LZ Bureau Management Consultancy Line ☎ 0845 120 2035 CLS Consultancy Line ☎ 020 7833 7046/7134
John Edwards Age Concern England 1268 London Road London SW16 4ER ☎ 020 8765 7468	Shelter 3rd Floor, Ludgate Chambers Ludgate Hill Leeds LS2 7HZ ☎ 0113 2455030	

Legal Services Commission Regional Office contacts

You can also contact your regional LSC office. If you aren't sure which area you are in, any regional office should be able to direct you to the one for your area. For queries about the Quality Mark **only**, you can email the LSC at sdg.issues@legalservices.gov.uk.

London 29-37 Red Lion Street London WC1R 4PP ☎ 020 7759 1500	North Western 2nd Floor, Elisabeth House 16 St Peter Square Manchester M2 3DA ☎ 0161 244 5000	South Western 33-35 Queens Square Bristol BS1 4LU ☎ 0117 302 3000
South Eastern 3rd-4th Floor Invicta House Trafalgar House Brighton BN1 4FR ☎ 01273 878800	North Eastern Eagle Star House Fenkle Street Newcastle NE1 5RU ☎ 0191 244 5800	East Midlands Fothergill House 16 King Street Nottingham NG1 2AS ☎ 0115 908 4200
Southern 80 King's Road Reading RG1 4LT ☎ 0118 955 8600	Yorkshire & Humberside City House New Station Road Leeds LS1 4JS ☎ 0113 390 7300	Wales Marland House Central Square Cardiff CF1 1PF ☎ 029 2064 7100
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Office of the Immigration Services Commissioner (OISC) 6th Floor Fleetbank House 2-6 Salisbury Square London EC4Y 8JX ☎ 020 7211 1500 www.oisc.gov.uk	**The Office of the Information Commissioner** Wycliffe House Water Lane Wilmslow Cheshire SK9 5AF ☎ 01625 545 745 www.dataprotection.gov.uk

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www.asauk.org.uk
Fax: 020 7407 6822

Telephone and email consultancy

Consultancy line: 0870 7700 447
cls.support@asauk.org.uk

The line will be open at the following times:

Monday	3 pm – 5 pm
Tuesday	10 am – 12 pm
Wednesday	10 am – 12 pm
Thursday	10 am – 12 pm

Consultancy will be provided to individual agencies on issues relating to Quality Mark and Community Legal Service Partnerships. We will be able to advise agencies that have applied, or are considering applying for the Quality Mark, with the focus being on issues relating to the General Help level and above. We will also be able to advise on CLS General Civil Contracts. Our intention is to tailor our support as closely as possible to the nature and requirements of individual agencies.

The consultancy line is operated by the project staff, who will answer enquiries at first contact wherever possible. Where further research needs to be carried out in order to answer an enquiry, callers will be informed when they are likely to receive a reply and will be contacted at that time for an update if a full response is still not possible. The project advisers will aim to send any further written information to enquirers within five working days.

Training and Seminars

CLS Support provides training and seminars on both Quality Mark and contracting issues. For further information, including details of costs, please either contact us on the consultancy line or log on to our website.

Briefings

Our current programme of briefings is listed on the following page. Quality Mark briefings will deal with requirements at all Quality Mark levels to which the briefing topic relates. The order of priority of briefings is subject to consultation with subscribers – please complete and return the attached briefings feedback form to give us your views.

The LSC has agreed to subsidise the cost of briefings initially. Currently therefore, briefings will be free to Not-for-Profit organisations who are members of the major advice networks, while private solicitors, non-networked organisations and local authorities will be required to pay a subscription fee.

Email and Internet

You can also send your enquiries by email. A project adviser will respond to you within five working days. We request that you include a contact telephone number with your enquiry so we can call you back to obtain further information if necessary.
The ASA website includes a What’s New page with Quality Mark and contracting updates, access to electronic versions of a limited number of our briefings, and details of our current training courses.

Briefings

Series 1: The Quality Mark

1	**Introduction to the Quality Mark**
2	**Client Feedback**
3	**Independent File Review**
4	**Conflict of Interest**
5	**Service Planning**
6	**People Management – Sample Procedures**
7	**Signposting and referral**
8	**Case Management and Client Care**

Series 2: The General Civil Contract

1	**Separate matters and Work that can count against contracts**
2	**Contract reporting arrangements – SPAN**
3	**Changes to Eligibility**
4	**Disbursements**
5	**Employing a solicitor for the first time**
6	**Controlled Work and Contract Compliance**
7	**Sufficient Benefit Test**

Please note that the titles in italics are not yet published. Both the running order and the titles themselves are subject to alteration. We aim to respond to the changing priorities and needs of our readers as identified from any feedback received. We will also take into account any new developments in the Quality Mark.

Franchising Support Project Briefings

A limited number of the following briefings published by the Franchising Support Project are still available. When current stocks run out, they will not be reprinted, as they will be superseded by the CLS Support briefings listed above.

<u>Not for Profit Sector Briefings</u> – all of these are correct as at date published

No. 9 General Civil Contract: the Framework – The Access to Justice Act 1999
No. 10 Funding Code and Other Levels of Service

*** These briefings are only applicable to agencies who have, or are applying for, a CLS fund contract*

BRIEFING FEEDBACK SHEET
CLS Support Project Contracting Briefing No. 7

Please let us have your views on this briefing and whether there are other aspects of the Quality Mark , General Civil Contracts or the Community Legal Service on which you would like more briefings. Feedback from your organisation will help us make future briefings as relevant and easy to follow as possible.

Did you find this briefing helpful?...... ....

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Do you have suggestions for any changes that might have made it more useful to you?
If yes, please specify:

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Were there issues that you expected to be covered in this briefing and about which you want to know more? If yes, please say what these are:

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Are there other aspects of the Quality Mark, General Civil Contracts or the Community Legal Service on which future briefings would be useful?
If yes, please list below in order of importance:

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Your name:... Tel: ....

Email:..

Name/address of your agency: ....

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Please return to: Advice Services Alliance, CLS Support Project, 12th Floor New London Bridge House, 25 London Bridge Street, London SE1 9ST or email **cls.support@asauk.org.uk** subject line " Contracting Briefing No. 7 Feedback”