



Understanding the Legal Aid Contract and LAA COVID-19 Guidance (Version 2)

This guidance is based on the LAA's guidance as at 5pm on the 27th March 2020. All contract references are to the 2018 Standard Civil Contract Specification (unless stated).

You must read and consider the latest COVID-19 Guidance from the LAA at:

<https://www.gov.uk/guidance/coronavirus-covid-19-legal-aid-agency-contingency-response>

Financial Support

The LAA has just published some guidance on financial support for legal aid practitioners. Don't get excited, for now it just reminds providers to make POA applications (in Civil Certificated cases) or apply to make interim claims or request for hardship payments in the Crown Court.

You can find that guidance at:

https://www.gov.uk/guidance/financial-relief-for-legal-aid-practitioners?utm_source=38207ccc-e9ad-4123-93ca-29d6bd16957f&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

It's also worth checking out the main Government guidance on support for employers and business at:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses>

Remember to keep on top of proper file closure and billing as this will help with cash-flow. If you have colleagues who perhaps drag their feet in terms of file closure, now might be the time to ask them to refocus on those tasks.

Your Office

By this stage your office should probably be closed unless there is a very good reason for it to be open. The Government's advice is clear that, where possible, everyone should be working from home. Keeping your office open when it is not absolutely essential puts you, your staff and others at risk as they have to travel to work rather than work from home.

If your office is still open, then you need to ask yourself whether that is necessary. If it is, then are as many staff as possible working from home? Could more staff be working from home?

You should consider the guidance at the end of this document on Key Workers.

For most firms with legal aid contracts, the requirement is that:

“The Office must be open **and physically accessible to Clients and/or members of the public** for at least 7 hours between 8am and 8pm every day from Monday to Friday (excluding Bank Holidays, religious holidays and any unavoidable temporary closures). You must be able to arrange appointments for Clients and to provide face-to-face legal advice in any Category of Law for which you are required to provide a Permanent Presence on all days that the Office is open.

Whenever the Office is open **Clients** must be able to contact a person at the Office by telephone to arrange appointments and, where appropriate, receive advice in emergency cases. Out of hours, Clients who telephone must be able to access information about opening hours and who to contact in an emergency.”

The LLA's Covid19 Guidance says:

“If you have to close your office or work from another location due to the coronavirus (COVID-19) infection and are unable to meet the office requirements as set out in your contract, please notify your contract manager as soon as possible.”

Our view is that in the current situation and given the Government's clear guidance, temporary closure is reasonably unavoidable. The legal aid contract allows for this, but you need to ensure, as far as you can, that:

- a) Your staff, working at home, have necessary access to files and resources (in a way which is reasonably compliant with GDPR and protects client confidentiality) so that they can continue working on open cases;
- b) You have a plan for collecting and distributing correspondence that comes in by post / DX (for instance by a member of staff who lives within walking or easy driving

distance of the office of DX collection point but remember to balance risk and ensure that whoever collects post adheres to social distancing rules);

- c) You have a clear strategy for ensuring that open and active files continue to be worked on and that your clients know how to contact their lawyers;
- d) That your strategy includes the possibility that staff actually become sick with the virus and cannot work (as opposed to just working from home);
- e) You have a clear plan for how you will deal with urgent matters and deadlines (court hearings, key dates, domestic abuse matters etc.);
- f) All of your existing clients know how to contact you when the office is closed – which might involve your calling, writing to or emailing all existing clients explaining how to do this. It might also involve putting contact details on your website and on social media.
- g) A plan for how you will, if you can, remain open to new potential clients and how they can contact you.

We believe that if you take these steps you will be reasonably complying with the terms of the Contract given these exceptional circumstances.

If your office MUST remain open (fully or partially) then you should have regard to the Government's up-to-date position on key workers and ensure that any staff working in the office respect the social distancing rules, staying at least 2 meters apart from each other and not congregating in groups. They should also not travel on public transport at rush hour (if possible).

Progressing Current Cases

Having taken on a case the legal aid contract anticipates that you will actively progress the case for your client. Your professional obligations also require that you do so and that you do not miss deadlines or other key dates.

Hopefully you can manage current open cases with your caseworkers working safely (whether this is in the office or from home) BUT if it becomes clear to you that you cannot properly act for current clients (i.e. because a caseworker becomes ill and you have no alternative cover) then you must immediately speak to your Legal Aid Contract Manager (and, if necessary, with the SRA).

After protecting your staff, your priority is to act in the best interests of your current clients.

Potential New Clients

As set out above, your first priority (after protecting staff) is to protect your existing clients. You should prioritise this over taking on new clients.

It is likely that working restrictions will mean that you have reduced capacity in any event.

Although the Legal Aid Contract, as set out above, expects your Office to be accessible to members of the public we have already discussed temporary unavoidable office closures.

However, the Contract (at Rules 3.50 and 3.52) does allow you to refuse to take on new Legal Help cases where:

- where you do not have the capacity to take on the case or Matter;
- where you do not have the necessary skill or expertise to take on the case or Matter;
or
- other professional conduct reasons such as actual or potential conflict of interest.

It is likely that one or more of these will apply if sickness and working adjustments mean that you must focus on existing clients.

Providing “Remote” Advice and Digital Signatures

The LAA has now confirmed that their approach to digital signatures applies to all legal aid forms and systems that require a signature or client confirmation (including CCMS emergency and substantive applications). They have also confirmed that the same principles apply to prisoners in custody and particularly that:

“a file note is placed in the file, signed by the Supervisor, confirmed that a Determination that your client is eligible for Legal Aid has been made. A note of this should be made on the form itself and should you need to send the form in to the LAA at a later date then both the form and the signed file note should be supplied.”

Rule 3.18 allows you to give advice to a client over the telephone, by email or via other means of remote communication before the client has signed the Application Form where:

- the Client requests and it is not necessary for the interests of the Client or his or her case to attend you in person;
- and the Client meets the criteria in the Merits Regulations and Financial Regulations for the provision of Legal Help,

and the contract allows you to make a claim for the work done but only “provided that the Client subsequently signs the Application Form and provides appropriate evidence in relation to their financial means and identity”.

The LAA’s Covid 19 Guidance now allows for the use of “Digital Signatures. Specifically, it says that:

“We will accept all digital methods which meet the requirements outlined as Simple Contracts in the Law Society practice note.”

The relevant Law Society Practice Note says:

“Simple contracts

These can usually be formed without any signature, for example by an exchange of emails showing appropriate intention.

Emails must:

- show an intention to contract, not just the expectation
- include the guarantor's name, with the intention that it is a signature, contained in the body of the email."

How does a Digital Signature work in this instance

Following the Law Society guidance, the LAA's position is that they will accept as a "signature" an exchange of emails with the client / potential client which shows an "intention to contract".

This means that the client must know what they are agreeing to AND intend to agree to it.

Therefore, if you complete the CW1 form (or other legal aid form) for them online and then email it to them asking that they specifically read and check everything in the form and, in particular, the contact information; means information and the declarations.

The Law Society Practice Note gives some excellent examples of how electronic signatures can work. It says:

"Electronic signatures can take a number of different forms, including:

(a) a person typing his or her name into a contract or into an email containing the terms of a contract

(b) a person electronically pasting his or her signature (e.g. in the form of an image) into an electronic (i.e. soft copy) version of the contract in the appropriate place (e.g. next to the relevant party's signature block)

(c) a person accessing a contract through a web-based e-signature platform and clicking to have his or her name in a typed or handwriting font automatically inserted into the contract in the appropriate place (e.g. next to the relevant party's signature block); and

(d) a person using a finger, light pen or stylus and a touchscreen to write his or her name electronically in the appropriate place (eg next to the relevant party's signature block) in the contract."

TOP TIP

Here's a tip from our friends at PLP. You can do electronic signatures on Apple devices as follows:

- You need to send the document in pdf format via email
- When the pdf is opened on an apple device (in mail) there is a 'markup' pen symbol in the top right corner

- Click the 'markup' pen to draw, write or insert a signature or text into the document, using either the pen symbols at the bottom of the screen or the + button in the bottom right corner to add text or a signature
- When finished editing, press done
- You are then asked to either 'reply all', 'new message' or 'discard changes'. If you pick 'reply to all' or 'new message' it will send the edited pdf (with added text, signature etc) to the recipient(s).

So there are various options:

1. If the client / potential client can print, sign, scan and return the legal help form (or pop it in the post – though going to the post box in this instance is certainly not an essential reason for leaving the house) then they should.
2. If they can't do this then maybe they could sign the form and then take a photo of the signature page on their phone and send that to you by **email** (not text or WhatsApp or other Messenger).

3. Use another of the options set out in the Law Society practice note (set out above);

4. If not, then the LAA's Covid 19 Guidance allows agreement by email. You would need to send an email to the client which could say:

"I attach the legal aid form which you MUST read. Please ensure you check your contact information and, especially the financial information. If any of it is wrong, then you need to tell me.

However, if it is right then please read the declarations at the end of the form.

If you are happy that the form is accurate and agree that you want your email to be treated as your signature, then please copy and paste the following wording into an email to me:

I have checked the Legal Help form sent to me and have read the declarations on that form. I am happy for this email to be taken as my electronic signature and I understand that I am now applying for legal aid."

What if your Client doesn't have access to email or can't do this?

In situations where it is not possible to get a client signature, digitally or otherwise, you can still sign the client up for Legal Help / Family Help / Legal Aid.

What you **MUST** do is make a note on the file explaining why the client couldn't sign but that the client has agreed and wants legal aid.

This must be signed or counter-signed by a Supervisor. Depending on the supervision arrangements you have in place whilst working remotely, the Supervisor might need to sign at a later date. If so, it will be important to remember that this needs to be done.

The LAA has now confirmed that:

“For avoidance of doubt, supervisor signatures may also be provided digitally to enable effective remote supervision, as long as they are clearly related to the relevant file notes.”

You must also make a note on the application/form when submitted to avoid delays or issues with processing.

In any case where you haven't been able to get a client signature you must try to get the signature at your earlier convenience.

Text Message Signatures?

The LAA Covid 19 Guidance makes absolutely clear that signatures by text message are NOT acceptable.

Contract Rules

Rule 3.17 of the Contract states that the number of matters where you accept a signed Legal Help form through the post must not exceed 25% of your total matters opened in any Schedule period. We hope, in the circumstances, that the LAA will not seek to apply that 25% threshold.

Warning: If you fail to get a valid signature in accordance with the LAA's Covid 19 Guidance then the Contract specifically states:

“No payment will be made in respect of any Matter where your Client has not signed and returned an Application Form and any work you undertake before your Client signs the Application Form is at your risk.”

Means Assessment for Remote Advice

Rule 3.24 allows you to assess means without the accompanying evidence where:

- a) it is not practicable to obtain it before commencing the work;
- b) pre signature remote advice is given; or
- c) exceptionally, the personal circumstances of the Client (such as the client's age, mental disability or homelessness) make it impracticable for the evidence to be supplied at any point in the case.

However, unless paragraph 3.24(c) applies, you must require the Client to provide the evidence as soon as practicable.

If the client then fails to provide any or satisfactory evidence of means then you may still make a claim provided that you have acted reasonably in undertaking work before receiving means evidence and that you have acted reasonably in initially assessing financial eligibility on the information available.

This means that you must make a very clear note of what information was available as the LAA will decide whether it was reasonable, on that evidence, for you to conclude that the potential client was financially eligible.

The LAA Covid 19 Guidance states:

“Where a client is staying at home, it may still be possible to collect evidence by email or post. Reasonable efforts to collect evidence should still be made and recorded, before assessing without evidence if that is not possible.”

If it is possible for the client to send you copies of the means evidence, either in the post (though this does not warrant a reason for the client to leave their house to go to the post box specifically) or, better by email, then they should. Remember they could take a photo of the document on their phone and email / message it to you.

Worryingly the Contract says that where you commence work without means evidence you will not be paid disbursements and are likely only to receive the fixed fee so don't take the case to escape or incur disbursements before you have the means evidence. The LAA has not yet made any concessions on this issue specifically though we hope that they would not seek to or be able to enforce this provision.

Supervision

There contract contains requirements in terms of employing supervisors and about supervisor to caseworker ratios, but the key contract supervision requirements are:

2.18 All Contract Work **must be supervised** by a Supervisor in the relevant Category of Law.

2.21 Arrangements must be in place to ensure that each Supervisor is able to conduct their role effectively including but not limited to:

(a) designating time to conduct supervision of each Caseworker;

(b) ensuring that the level of supervision provided reflects the skills, knowledge and experience of each Caseworker.

2.22 Each Supervisor must conduct file reviews for each Caseworker they supervise. The number of file reviews must reflect the skills, knowledge and experience of the individual. The Supervisor must record the outcome of files reviews, together with the details of corrective action taken (if any).

Taken together, this really means that however you work (whether from an office or with your staff working at home) you need to ensure that you have effective supervision in place. We advise that you ensure that:

- a) Casework staff are able to communicate with their Supervisor on an ongoing basis. This could be by phone calls; video meetings; email;
- b) The Supervisor actively contacts supervised caseworkers and schedules regular discussions;
- c) That casework staff know to email critical correspondence to supervisors for checking if they would normally ask the Supervisor to check that in person;
- d) The Supervisor can check relevant correspondence (incoming and outgoing) where appropriate;
- e) Continue doing file reviews, albeit remotely, if at all possible (and it may not be possible if you rely on paper files that are located with the relevant non-Supervisor caseworker). Remember that if this isn't possible then you might want to consider increasing checks on emails / correspondence or other ways of maintaining quality and compliance;
- f) Ensure Supervisors have face to face supervision meetings with supervised caseworkers at least once each month (but better weekly). These meetings can take place via video conference or, where that is not possible, by phone.

If you do all of these things you will, in our view, be complying with the specific contract requirements.

Supervisor Absence

If your Supervisor becomes unwell and is physically unable to undertake day to day supervision, then Rule 2.24 says that if your Supervisor is, for any reason, temporarily unable to act you may for a period of up to 6 weeks either:

- a) nominate a Caseworker who does not meet all the Supervisor requirements to supervise; or
- b) nominate an external Supervisor to supervise.

Therefore, if your Supervisor becomes unwell you **MUST** ensure that supervision continues (as set out above) by either nominating a caseworker to act as Supervisor or through appointing an external.

If you think that this temporary arrangement is to last for longer than 6 weeks, then you will need to speak to your Legal Aid Agency Contract Manager. In the circumstances we hope that they would allow the temporary arrangements to continue provided that they are sufficiently robust and ensure proper supervision.

Key Workers

The Government's current list of key workers in the context of the legal services sector includes:

- Advocates (including solicitor advocates) required to appear before a court or tribunal (remotely or in person), including prosecutors;
- Other legal practitioners required to support the administration of justice including duty solicitors (police station and court) and barristers, solicitors, legal executives, paralegals and others who work on imminent or ongoing court or tribunal hearings;
- Solicitors acting in connection with the execution of wills; and
- Solicitors and barristers advising people living in institutions or deprived of their liberty.

Therefore, **ONLY** legal practitioners who work on the types of matters, cases and hearings on this list will be classified as a key worker.

There is a helpful article on this in the Gazette at:

<https://www.lawgazette.co.uk/coronavirus-moj-lists-lawyer-key-worker-categories/5103591.article>

Speak to the LAA

If you are having to significantly change the way you work to cope with the Covid 19 situation or if you think that staff absence or sickness will adversely impact your current work then you should keep your LAA contract Manager informed. Drop them an email outlining your plan and how you are addressing the issues set out above. Make sure you keep all correspondence between you and your Contract Manager. If they know what you are doing and have discussed it with you then you should confirm your understanding by email so that there is a clear record to be referred to if required.

The LAA's Covid 19 Guidance states:

“It remains important that you please keep your contract manager informed of any issues so we can maintain an overview of the impact coronavirus is having on provision of legal aid services, and so we can better understand how we can continue to support you and other parts of the justice system.

We do not expect you to consult with your contract manager when you are taking reasonable action to balance supporting your clients with wider Government advice, and no reasonable action you take to appropriately protect the health and safety of your staff in line with Government advice will result in contract action by your contract manager.”

Remember that Clause 30.6 of the Contract Standard Terms says:

“Neither of the parties to this Contract is responsible to the other for any delay in performance, or for any non-performance, of its obligations and duties under this Contract due to any cause beyond its reasonable control. Causes beyond reasonable control are confined to...:

(c) epidemic,

... For the avoidance of doubt, nothing in this Clause shall relieve you from implementing and complying with the Business Continuity Plan.”

Clause 30.7 goes on to say:

If any cause within Clause 30.6 occurs the affected party must immediately:

(a) inform the other party in writing of such cause and of what obligation or duty it has delayed or prevented being performed; and

(b) take all action within its power to comply with the terms of this Contract as fully and promptly as possible,

and, unless the affected party takes such steps, this Clause must not have the effect of absolving it from its obligations under this Contract.”

We hope that this will influence the LAA’s future approach to contract management for work undertaken during this period.

Drafted with the assistance of Matthew Howgate (DG Legal Ltd and Matthew Howgate Consulting)

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