

Enhanced Fees Policy

Part 1 - Definitions:

“Director” – is the Director, Legal Advice and Representation, or his or her designate

“Enhanced fees” – fees in excess of the tiered rates normally paid to counsel; enhanced fee rate is set by the Society in the *Guide to Legal Aid Tariffs: General Terms and Conditions* or by the court or by agreement with the crown

“Enhanced fee case”- a criminal trial or appeal matter where LSS agrees to pay counsel enhanced fees

“LSS” – is the Legal Services Society

“Manager” – is the Manager, Legal Services, or his or her designate

“Referral” – is a LSS authorization for a lawyer to provide legal services to a client and to bill LSS for legal fees and disbursements for the case according to the tariff contract

“Representations” -material provided to LSS in writing to support an enhanced fee request– does not include an oral hearing

“Senior legal counsel”- as defined in Part 4 of this policy

“Strategic Case Assessment Program (SCAP)” – LSS case management program that applies to all criminal trial cases (regardless of offence category) that are scheduled for a total of more than 20 half days (i.e., ten full trial days)

“Tariff Contract” - the retainer agreement between LSS and referral lawyers, as modified from time to time by LSS, including the contents of the *Guide to Legal Aid Tariffs* (Introduction, General Terms and Conditions, applicable Tariffs, Guides to Billing), and Notices to Counsel and other written instructions that LSS may provide to referral lawyers directly or through the LSS website

“Vendor Number Policies” – are LSS policies including the *Referral Eligibility Policy*, the *Vendor Number Reactivation Policy*, and the *Vendor Number Removal and Modification of Conditions Policy*

Part 2 – General Principles and Objectives:

1. LSS is responsible for ensuring counsel acting in complex criminal legal matters have the expertise to provide quality service to clients.
2. LSS may approve the payment of enhanced legal fees for senior legal counsel in particularly complex criminal legal matters in order to compensate counsel for high quality and effective

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service to clients and to encourage senior legal counsel with criminal law expertise to continue to accept legal aid referrals in complex criminal matters including criminal law appeals.

3. LSS has sole discretion to determine whether enhanced fees will be paid to senior legal counsel.
4. Senior legal counsel, who receive enhanced fees, are expected to bring skill and experience to manage the case efficiently and to work effectively with LSS and the case management process. This includes the capacity and willingness to engage in meaningful trial planning, regular billing of accounts, and periodic reviews of the trial plan and to manage trial resources to best serve the client while recognizing the financial constraints of serving a reasonable person of modest means.
5. LSS is responsible for the monitoring and control of case costs in all enhanced fee cases.

Part 3 –Policy Application:

This policy applies to all cases where LSS is responsible for the administration of the funding for defence services in criminal matters, at trial or on appeal and includes Court ordered appointments of counsel, cases where the court orders enhanced fees and cases administered by LSS pursuant to a funding agreement with the Department of Justice.

Part 4 –Applicant (Counsel) Basic Requirements:

1. To be eligible to apply for enhanced fees counsel must be considered by LSS to be senior legal counsel. LSS defines senior legal counsel as:
 - a lawyer who complies with LSS Vendor Number Policies and the *Guide to Legal Aid Tariffs*; and
 - has 12 years of criminal law experience or has less than 12 years criminal law experience but has demonstrated, to the satisfaction of the manager, that he or she has proven expertise in criminal law; and
 - at least 50% of their practice is in criminal law.
2. In addition senior legal counsel must be able to meet the principles and objectives of this policy.

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Part 5 –Factors Considered by LSS:

1. Enhanced fees may be available for senior legal counsel representing a legal aid client facing what LSS considers a complex criminal matter. The matter must be a SCAP case where the general preparation approved or anticipated to be approved by LSS, should the matter proceed to trial, is in excess of 300 hours or a complex criminal law appeal.
2. LSS takes a number of factors into consideration when determining whether the case is particularly complex and justifies senior legal counsel paid at enhanced fees rates. These factors include:
 - (a) the length and nature of the police investigation,
 - (b) the complexity of Crown case,
 - (c) whether the case is proceeding by direct indictment,
 - (d) whether co-accused have antagonistic defences,
 - (e) whether the client is particularly challenging (e.g. language limitations, mental health issues),
 - (f) whether the case involves new and emerging areas of forensic evidence beyond what would be expected in this type of trial,
 - (g) whether the case raises complex admissibility issues,
 - (h) whether the case involves unique Charter challenges or novel legal arguments,
 - (i) whether the case involves historical charges or historic sections of the *Criminal Code of Canada*,
 - (j) whether the case includes multiple counts involving different facts, and
 - (k) whether the case is receiving intense public attention.
3. In assessing whether the applicant has the skills and experience to meet the principles and objectives of this policy and is eligible for enhanced fees LSS considers:
 - (a) whether counsel has acted as senior legal counsel in a substantial number of serious category IV trials,
 - (b) whether counsel has demonstrated their ability to deal with the complexities in the case,
 - (c) whether counsel brings the skill and experience to manage the case efficiently and to work effectively with LSS and the case management process including:
 - i. the capacity to engage in meaningful case management process,
 - ii. the capacity to engage in meaningful trial planning, including allocating appropriate resources to issues,
 - iii. assessment of disclosure and issues in the case,
 - iv. the ability to submit regular and comprehensive accounts and
 - v. ability to engage in periodic reviews of the trial management plan to ensure that resources are being used to serve the interests of the client while recognizing the financial constraints of a reasonable person of modest means
 - (d) counsel's ability to efficiently use contemporary technology (e.g. electronic disclosure, trial preparation technology).

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Part 6 – Application for Enhanced Fees:

1. Senior legal counsel, who has a SCAP case or a criminal law appeal that they believe meets the criteria set out in this policy, may request enhanced fees be paid on that case.
2. To apply for enhanced fees senior legal counsel must provide:
 - (a) a completed SCAP questionnaire, or an appeal opinion letter
 - (b) a letter outlining why the case, for which counsel is applying for enhanced fees, is more complex than other criminal cases with regard to the criteria set out in Part 5, Section 2(a) to (k) and why counsel meets the criteria as set out in Part 5 section 3 (a) to (d).

Counsel should, in particular, address the following information:

 - i. Crown's summary of the case,
 - ii. details of the volume and nature of disclosure,
 - iii. short overviews of any legal argument counsel intends to make,
 - iv. details concerning expert evidence, and
 - v. other information that might be useful to LSS in making a determination if enhanced fees should be available in this case.

Part 7 –Application Processing and Enhanced Fee Decision-Making:

1. Upon receipt of the information listed in Part 6, the Manager will review the information and may, based on material received, make a decision on the application.
2. Prior to making a decision the Manager may consult with experienced criminal legal counsel, as the Manager deems appropriate, to assist in assessing the merits of the application.
3. At the Manager's discretion the Manager may convene a conference call between LSS staff, experienced criminal legal counsel and the applicant to consider the application.
4. The opinions and advice received by the Manager from experienced criminal legal counsel is confidential between LSS and the experienced legal counsel and shall not be released to the applicant.
5. The Manager will consider but is not bound by the opinions or advice received from experienced criminal legal counsel consulted regarding the application.
6. The Manager will decide whether enhanced fees will be paid to the applicant. The Manager will provide the applicant with a written decision with reasons. Where enhanced fees will be paid, the Manager will determine the date from which the enhanced fees will be paid, and the extent to which enhanced fees will be paid. Enhanced fees may be paid for some but not all of the work performed by counsel.

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7. An applicant, who has received a decision under this Part, may request a review of that decision under Part 10 of this policy.

Part 8- Expectations Regarding Counsel Who Are Granted Enhanced Fees

1. Counsel granted enhanced fees must:
 - engage in an ongoing case management process with LSS case management staff,
 - provide LSS with a trial plan to determine such things as the issues in the case, the amount of time allotted to prepare specific issues, resources to be used to prepare the case and the timeframe to complete work on the specific issues in the case,
 - use tariff resources, including preparation time and disbursements, in an efficient way
 - use other resources such as researchers, articling students, junior counsel, where appropriate to increase efficiency,
 - maintain time records and provide records to LSS as required, and
 - keep all LSS tariff accounts current by submitting accounts to LSS at least once a quarter or as requested by LSS.
2. The enhanced fee rate is personal to the approved senior legal counsel and cannot be transferred to another lawyer. Where a counsel, who has not been approved for enhanced fees, acts on an enhanced fee case, that counsel is paid at regular tariff tiered rates.
3. Where enhanced fees are approved and junior counsel is assigned to the case LSS will determine whether junior counsel should receive the regular junior counsel rate or the enhanced fee junior counsel rate as set out in the Guide to Legal Aid Tariffs. In assessing the rate to be paid LSS will consider junior counsel's experience, qualifications and the tasks assigned to junior counsel in the case. Junior counsel does not have to have a specific number years of practice experience to qualify for junior counsel enhanced fee rates.

Part 9-Revoking Enhanced Fees

1. The Manager may, in his or her sole discretion, revoke the granting of enhanced fees if counsel is unable or unwilling to comply with the expectations set out in this policy or in any way fails to meet the principles and objectives of this policy.
2. The revocation of enhanced fees may occur without notice to counsel if counsel fails to reply to any request from LSS including but not limited to a request for information, documentation or to submit accounts.

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3. In all other circumstances the Manager will advise counsel of LSS's concerns and provide counsel with an opportunity to respond in writing prior to making a decision to revoke enhanced fees.

Part 10 – Review by the Director:

1. An applicant, who has been approved for limited enhanced fees, denied enhanced fees, or has had enhanced fees revoked, may request a review of that decision by the Director within 30 days of the Manager's decision.
2. The Director may receive such representations from the applicant as he or she deems appropriate.
3. After completing a review, the Director may confirm or vary the Manager's decision.
4. The Director will notify the applicant of his or her decision in writing. The Director's decision is final and binding.

HISTORY:

February 24, 2009 – EMC Approved Policy: this policy replaces current practice regarding enhanced fees.

November 10, 2009 – Strategic Case Assessment Program (SCAP) definition changed to 20 half days from 10 half days to qualify for the program.

QUESTIONS TO:

Manager, Legal Services