

## **NOTES FOR GUIDANCE IN AGREEING FEES WITH COUNSEL**

**Experience has shown that many of the disputes between solicitors and counsel over fees arise from a failure by either or both to address potential problems at the time that instructions are delivered. With a view to reducing these problems, the Society has prepared the following Notes for Guidance which solicitors should take into account.**

### **A. HEARINGS**

Matters to be considered when instructing counsel:

1. Have specific instructions preferably in writing been obtained from the client to brief counsel?
2. Counsel may be asked to provide an estimate of the fees. This may be done by sending the full set of papers to counsel in accordance with a prior arrangement with him or his clerk to provide such an estimate.
3. **Marking of Counsel's diary**
  - (a) The marking of counsel's diary does not commit either counsel or solicitor, and no fees are payable.
  - (b) If after the marking of counsel's diary, the counsel is approached by another solicitor offering a brief during the same period in question or part thereof, counsel (who by that time should have agreed the brief as well as refreshers) would be obliged to approach the 1<sup>st</sup> solicitor and specify terms as to the manner in which the agreed brief fee and refreshers should become payable. If the 1<sup>st</sup> solicitor does not agree to the terms, then counsel will be free to accept the brief from the 2<sup>nd</sup> solicitor. In such event, the 1<sup>st</sup> solicitor need not pay counsel anything in relation to the reserved dates.

### **4. Brief Fees**

When a brief fee is quoted make sure that the following points are clarified :

#### **(a) Conferences**

Ascertain :-

- (i) If pre-hearing conferences are included and if so whether there is a limit to the number of conferences.
- (ii) If the agreed fee includes conferences with the lay client and/or expert witnesses.
- (iii) If the brief or refresher fees includes conferences which may take place at the end of the day's hearing or otherwise during the course of the hearing.

- (iv) If conferences are not included in the brief or refresher fees - this should be made clear as should the charging rate to be applied for such conferences. If they are to take place other than in counsel's chambers or the precinct of the court, has agreement been reached on whether counsel is to be paid for the time spent travelling to and from the conference in addition to the time advising in conference and if so at what rate?
- (v) Where leading counsel is engaged are consultations between leading and junior counsel during the course of litigation included in their respective agreed fees?

**b) Refreshers**

Agree :-

- (i) What constitutes a refresher? Is it payable only for a whole day in court or in full for part of a day?
- (ii) Arrangements regarding lost days (e.g. when, during the course of the hearing, the case is adjourned due to the illness of one of the parties or their advisers). Is a refresher payable in such circumstances?
- (iii) Clarify whether refresher fees are payable and at what rate in the event that the case is concluded in a shorter period than that originally reserved in counsel's diary.
- (iv) The arrangements for taking judgment. Will counsel be paid a refresher at the agreed rate or will special arrangements apply?
- (v) Clarify whether any additional preparation fees will be charged if the hearing is adjourned part-heard for a substantial period of time .

**c) Lump sum**

If counsel is to be paid an inclusive fee for conducting the case it is essential not only that solicitor and counsel are agreed as to precisely what work is covered by the lump sum fee but also that both lawyers and lay client are in no doubt what their respective positions will be if the case is not concluded within a specified time.

**d) Trial**

When fees become payable :-

- (i) **Unless otherwise agreed, the brief fee is payable once the brief has been delivered to counsel.**

- (ii) Solicitors and barristers may also consider whether they wish to agree that the brief can be deemed to have been delivered under the "10-day rule" i.e. if the fee has been agreed and counsel has not been released 10 days before the hearing.
- (iii) An express agreement should be made about when counsel fees become payable even if, for whatever reason, the hearing or trial is cancelled or postponed. The parties should remind themselves of the need for counsel to be properly prepared for the hearing.
- (iv) Briefs are as a rule delivered and accepted on the understanding that counsel may be justifiably prevented from attending a Court. Counsel is entitled to return a brief if there is a subsequent commitment in the Court of Appeal even if those dates were fixed after acceptance of the existing brief in which counsel appeared in the Court below.

## B. OPINIONS AND SETTLING PLEADINGS

1. Agreement should always be reached on the fees payable. Instructions may be delivered to counsel with a request for particulars of the charge rate and an estimate of his fees. Once that estimate has been given and the lay client has agreed counsel will be expected to abide by it but may revert back to the instructing solicitor in exceptional circumstances if he realises that the estimated figure is likely to be exceeded.
2. There should be agreement at the outset whether the fees quoted for an opinion include conferences with the lay client.
3. Similarly, there should be agreement as to whether fees are payable for telephone conferences and what the charge rate will be.
4. If the counsel is unable to prepare the documents the instructing solicitor should be advised and a request made for the return of the papers.

## C. FORMULAE FOR COSTS

1. Before agreeing any formula for costs with counsel the solicitor should make sure that the lay client fully understands the terms of the proposed formula. Lay client should be asked to give his consent in writing.
2. Solicitor and counsel should consider and advise the client on all the contingencies that can be reasonably foreseen having regard to the particular set of circumstances, for example when it is that he will become bound by the arrangement; whether there is any likelihood of settlement and, if so, when it may occur and the possibility of illness of the judge, counsel or litigants which may increase the costs to be incurred.
3. Any formula which is to be adopted should be comprehensively set out in a memorandum of understanding.

## D. TAXING OF FEES IN LEGALLY - AIDED CASES

### Fees payable to counsel in Legally - Aided cases

These are governed by the *Legal Aid (Scale of Fees) Regulations*.

Regulation 4 states:

***"The fees payable by the Director to counsel acting for an aided person shall be such as may be allowed on taxation or, in default of taxation, as may be fixed by the Director, not exceeding such amount as in the opinion of the Director would have been allowed if there had been taxation"***

Members' attention is drawn to the *obiter* comments of Seagroatt J. in the case *Chan Shiu Wah v Wu Kwok On* (PI Action No.1123 of 1997). The Judge indicated that where counsel's fees have been taxed off or reduced on the basis that such work was "solicitors' work", counsel should look for payment of those fees from the taxed profit costs of the instructing solicitor.

The Law Society is of the opinion that in relation to the division of work between solicitors and counsel the onus is on counsel to return the papers to the solicitor forthwith if he is of the view that there is a risk that any work done by him will be taxed off or reduced. Where counsel fails to do so then he would be bound by the provisions in Regulation 4.

## E. PAYMENT OF COUNSEL'S FEES

### 1. Time for payment

Counsel's fees must be paid or challenged promptly, *and in any event within 2 months* from the submission of counsel's fee note.

### 2. Failure to pay counsel's fees

Principle 12.04 of the *Hong Kong Solicitors' Guide to Professional Conduct* states:

***"In the absence of reasonable excuse a solicitor is personally liable as a matter of professional conduct for the payment of a barrister's proper fees. Failure to obtain funds on account of a barrister's fees shall not of itself constitute reasonable excuse."***