

# CHAPTER 12

## RELATIONS WITH THE BAR

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## Appendices

Circular 00-334 'Counsel — Revised Notes for Guidance in Agreeing Fees with Counsel in Civil Matters'

Circular 97-60 'Joint Tribunal of the Law Society and the Bar Association'

For a statement of the rules of conduct applying to barristers, reference should be made to the *Code of Conduct for The Bar of Hong Kong* published by the Hong Kong Bar Committee (see also Circular 00-334).

### **12.01 Obligations when instructing a barrister**

When instructing a barrister, it is a solicitor's responsibility to ensure so far as practicable that adequate instructions, together with supporting statements and documents are sent to the barrister and that those instructions, in the circumstances, are sent to him in good time.

#### ***Commentary***

1. Where necessary and practicable, a solicitor should arrange conferences with the barrister to enable him to clarify his instructions by direct discussion with the solicitor and the lay client, to discuss the facts, evidence and law with the solicitor; and to give advice more directly than is possible in writing.
2. In legal aid cases, whether civil or criminal, a solicitor should draw the attention of the barrister to the fact that his fees and disbursements will have to be taxed or assessed and that only the taxed or assessed amounts can be paid to the barrister. A solicitor should expressly disclaim personal responsibility for payment of fees beyond those allowed on taxation or assessment.

### **12.02 Duty to deliver brief to appear**

**Whenever a barrister is briefed to appear in court, his instructing solicitor must deliver to him a formal brief or backsheet marked with the fee agreed by the solicitor.**

#### ***Commentary***

1. All initial written instructions (including a brief or backsheet) to a barrister should be personally signed by a named solicitor. In subsequent instructions, if a firm name is used, then the initials of the solicitor who has signed on behalf of the firm should appear on the instructions or covering letter for identification purpose (see Practice Direction F.1).
2. Every backsheet should be marked with the agreed brief fee and any agreed refresher or 'Legal Aid' or 'No Fee' as appropriate.

### 12.03 Solicitor remains responsible

**A solicitor cannot abrogate his responsibility to his client by instructing a barrister (see Principle 6.01 Commentary 6).**

#### *Commentary*

1. A solicitor should take care to recommend to his client a barrister with an appropriate level of competence, suitability and experience (see Principle 5.17 Commentary 3).
2. A solicitor when considering the barrister's advice must ensure that it contains no obvious errors.
3. A solicitor must use his best endeavours to ensure that a barrister carries out his instructions within the time limit specified by the solicitor or within a reasonable time and that the client's cause of action does not become statute barred or liable to be struck out for want of prosecution. Where appropriate a solicitor must ask for the return of his papers in order to instruct another barrister.

### 12.04 Liability of solicitor for barrister's fees

**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.**

#### *Commentary*

1. Save where a barrister has signed an ORFS agreement, a barrister does not have a contractual relationship with his instructing solicitor or the client and therefore cannot sue for his fees. Where a barrister has signed an ORFS agreement, he may sue such party or parties who assume liability to pay his fees under the agreement and cannot take action against anyone else.
2. This Principle applies equally to a solicitor not in private practice (see also Principle 2.08).
3. The liability of a sole principal and of partners for the liabilities of their co-partners is a continuing one and is not cancelled or superseded by any transfer of the practice, without the barrister's express consent. Equally, a partner or partners in a firm remain liable for the payment of barrister's fees incurred on behalf of the firm by a deceased, bankrupt or otherwise defaulting former partner of the firm. If a transfer of a practice is contemplated, consideration should be given to outstanding barrister's fees on files taken over.

amended on  
16/12/2022 as per  
Circular 22-827

4. In normal circumstances it is recommended that agreement be sought from the client that he will make payment on account of disbursements to be incurred (see Principle 4.07). What constitutes a reasonable excuse will be determined by the Solicitors Disciplinary Tribunal on a case-by-case basis. An example of what may be considered reasonable excuse is the unexpected bankruptcy of a client in circumstances where the credit worthiness of the client was considered beyond question and the necessity to obtain funds on account of barrister's fees was not obvious.
5. For guidance on agreeing fees for barristers in civil matters, see Circular 00-334.
6. Where fees are agreed with a barrister under the ORFS or TFA, matters set out in Circular 00-334, shall apply, where applicable. See Principle 1.09.
7. A solicitor may consider advising his client to enter into an ORFS agreement directly with the barrister to cover for the uplifted portion (i.e. the portion of fee the payment of which is dependent on the relevant outcome of the arbitration). See Principle 4.07 Commentary 3.

added on  
16/12/2022 as per  
Circular 22-827

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Circular 22-827

## 12.05 Payment of barrister's fees

**A barrister's fee must be paid or challenged promptly, and in any event, within two months from the submission of a fee note.**

### *Commentary*

1. Save where a barrister has signed an ORFS agreement, a barrister may submit a fee note as soon as any particular piece of work is completed, for example, after the settling of pleadings, the giving of an opinion or the holding of a conference. If a fee note is requested by a solicitor, a barrister shall submit it within two weeks (see paragraph 127 of the *Code of Conduct for the Bar of Hong Kong*). Where a barrister has signed an ORFS agreement, he may issue fee note in accordance with the terms of the ORFS agreement to such party or parties who assume liability to pay his fees under such agreement.
2. In legal aid cases, there should be no delay on the part of a solicitor in submitting his bill and papers for assessment or taxation, which results in a barrister not receiving his fees within a reasonable time after submission of a fee note. In the event that the barrister's fee is assessed or taxed less than the bill amount, the solicitor must inform the barrister immediately so that he may take timely action.

amended on  
16/12/2022 as per  
Circular 22-827

3. The Law Society and the Bar Association have established a Joint Tribunal to resolve disputes between solicitors and barristers in relation to fees (see Circular 97–60).
4. A barrister's fees payable under ORFS or TFA should be included in the agreement with a barrister to the extent applicable and further terms may be considered in addition to matters set out in Circular 00-334 in particular whether there is an obligation to pay where the client is unable to pay because of insolvency, bankruptcy, appointment of another barrister or other reason, see Principle 1.09. For alternatives, see Principle 12.04 Commentary 7.

added on  
16/12/2022 as per  
Circular 22-827

## APPENDICES

### PRINCIPLE 12.04 COMMENTARY 5

**CIRCULAR 00-334**

**23 October 2000**

#### COUNSEL

##### **Revised Notes for Guidance in Agreeing Fees with Counsel in Civil Matters**

1. A copy of the Revised Notes for Guidance is attached for members' reference.

Members should review Paragraph D which sets out the Law Society's views on the payment of Counsel's fees in Legally-Aided cases.

2. Law Society Circular 00-116 is superseded.

#### **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 1st solicitor and specify terms as to the manner in which the agreed brief fee and refreshers should become payable. If the 1st solicitor does not agree to the terms, then counsel will be free to accept the brief from the 2nd solicitor. In such event, the 1st 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 at 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* (Cap. 91 sub. leg. C).

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.'

**PRINCIPLE 12.05 COMMENTARY 3**

**CIRCULAR 97-60**

**3 March 1997**

**JOINT TRIBUNAL OF THE LAW SOCIETY AND  
THE BAR ASSOCIATION**

1. The Society and the Bar Association have agreed to replace the existing Grey Areas Committee with a Joint Tribunal which shall resolve disputes between solicitors and barristers in relation to fees. References to the Tribunal will be mandatory.
2. The Society will be represented by 10 senior practitioners on the panel and is seeking applications from suitably qualified members with:
  - at least 10 years call
  - criminal or civil litigation experience