



FACULTY OF ADVOCATES

Scheme for the Accounting for and Recovery Of Counsel's Fees August 2020

1. Status and scope of the Scheme

- 1.1. The Scheme sets out the basis upon which any counsel to whom the Scheme applies accepts instructions.
- 1.2. Advocates hold a public office to which they are admitted by the Court of Session. Nothing in the Scheme affects the professional status or obligations of counsel and, in the event of any conflict between the terms of this Scheme and the professional status or obligations of counsel, the latter shall prevail.
- 1.3. The Scheme applies to any counsel who is a subscriber to Faculty Services Limited.
- 1.4. Counsel who is not a subscriber to Faculty Services Limited may (subject to compliance at all times with the professional status and obligations of counsel) accept instructions on the basis of his or her own terms and conditions. Counsel who has not adopted such terms and conditions shall be assumed to have adopted the Scheme.
- 1.5. An instructing person who instructs counsel to whom the Scheme applies accepts the provisions of the Scheme and accepts a professional obligation to pay counsel's fees in accordance with the Scheme.
- 1.6. The Scheme does not apply to work undertaken or services provided by counsel otherwise than as a practising advocate.

2. Definitions

2.1. In the Scheme, unless the context otherwise requires:-

“counsel” means a practising advocate;

“Fees Committee” is the committee appointed by the Dean of Faculty under paragraph 9 of the Scheme;

“instructing person” means the instructing solicitor, commercial attorney, or person approved under the Faculty of Advocates Direct Access Scheme who instructs counsel. In the case of a solicitor or a commercial attorney, where a correspondent firm is referred to in the letter of instruction, instructing person means that correspondent firm;

“List of Defaulting Solicitors and other Instructing Persons” means a list of solicitors and instructing persons whose name has been placed on the list by authority of the Dean by reason of failure to pay counsel’s fee;

“subscriber” means a subscriber to Faculty Services Limited; and

“the Scheme” means this Scheme.

2.2. In the Scheme, unless the context otherwise requires, the masculine includes the feminine and references to the singular include the plural, and vice versa in each case.

3. Letter of instruction

3.1. Subject to clause 3.4, the instructing person shall send counsel a letter of instruction providing counsel with all the information and documents reasonably required and in reasonably sufficient time for counsel to provide the services requested.

3.2. Where the services are required within a specific timescale, the letter of instruction shall clearly specify that timescale.

3.3. The letter of instruction may state the amount of the fee which the instructing person offers in respect of the services covered by the letter of instruction.

3.4. Counsel is not bound to accept instructions unless he has received a letter of instruction in accordance with clause 3.1 of the Scheme; but is entitled to accept instructions which are given orally by an instructing person or which are the subject of oral arrangement between an instructing person and counsel’s clerk.

4. Acceptance of instructions

- 4.1. Upon receipt of a letter of instructions, counsel shall within a reasonable time decide whether or not to accept the instructions and counsel or counsel's clerk shall intimate counsel's decision to the instructing person. What is a reasonable time for these purposes will depend on the circumstances.
- 4.2. In deciding whether or not to accept or decline instructions counsel shall act in accordance with the Faculty of Advocates Guide to Professional Conduct.
- 4.3. Counsel will be deemed to have accepted instructions if counsel has failed to take any action within a reasonable time.
- 4.4. In accepting instructions in fulfillment of the public office of advocate, counsel does not enter into any contractual relationship with the instructing person or the lay client.
- 4.5. Acknowledgment of receipt of instructions by counsel or counsel's clerk does not constitute the acceptance of instructions. An entry in counsel's diary does not constitute the giving or acceptance of instructions.
- 4.6. Counsel may return instructions previously accepted in the circumstances required or permitted under the Faculty of Advocates Guide to Professional Conduct.
- 4.7. Acceptance of instructions on any particular basis whether it be speculative or deferred will be a matter for that individual counsel and that individual case and will not bind any subsequent or other counsel in the case to accept instructions on the same basis, nor will it be binding on any subsequent proceedings such as an appeal in that case.

5. Amount of fee

- 5.1. Except in legal aid cases or where the amount of the fee is otherwise prescribed by law, the instructing person may, in advance of acceptance of the instruction, agree with counsel the amount or basis of the fee to be paid for the services provided by counsel.
- 5.2. Except in legal aid cases or where the amount of the fee is otherwise prescribed by law, if the amount or basis of counsel's fee has not been agreed in advance, counsel shall be entitled to be paid a reasonable fee for the services provided. If the instructing person wishes to question the fee proposed by counsel they should inform Faculty Services Limited in writing as soon as possible and in any event within 4 weeks of date of issue of the feenote.
- 5.3. In cases falling within paragraph 5.2 hereof, in default of agreement as to the amount of a reasonable fee, the instructing person or counsel may require counsel's fee to be taxed by the Auditor of the Court of Session or, in the case of proceedings in the sheriff court, the Auditor of the relevant sheriff court, on an agent and client, client paying basis.

- 5.4. In the event of late payment of fees, counsel has the right to request interest in line with current legislation.
- 5.5. Unless otherwise stipulated, counsel's fees cover all expenses incurred by counsel in the conduct of the case.
- 5.6. Where counsel has a clerk, all communications in relation to the amount of counsel's fee shall be between the instructing person and counsel's clerk.

6. Speculative fees

- 6.1. Counsel may accept instructions on a speculative basis but is not bound to do so. An instructing person may only instruct counsel to act on a speculative basis in any case where the instructing person is acting on such a basis.
- 6.2. If an instructing person wishes to instruct counsel on a speculative basis, this must be stated explicitly in every letter of instruction in the case. In the absence of an explicit statement to that effect counsel shall be entitled to be paid a reasonable fee regardless of whether or not any fee has been recovered from the other party to the litigation. Every letter of instruction on a speculative basis must also specify whether or not the client has entered into a success fee agreement within the meaning of sec. 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (asp. 10) with any provider relevant to the instruction (whether or not the provider is the instructing person or another person).
- 6.3. Subject to para 6.5 below, counsel may accept instructions on the basis that counsel will receive only such fees as are recovered by way of judicial expenses from another party to the litigation (the judicial recovery basis) but is not bound to do so.
- 6.4. If an instructing person wishes to instruct counsel on the basis set out in paragraph 6.3 this must be stated explicitly in every letter of instruction in the case. In the absence of an explicit statement to that effect counsel shall be entitled to be paid a fee regardless of whether or not any fee has been recovered by way of expenses from another party to the litigation where successful.
- 6.5. Counsel may not accept instructions on the basis specified in paragraph 6.3 where the client has entered into a success fee agreement within the meaning of sec. 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (asp. 10) with any provider relevant to the instruction (whether or not the provider is the instructing person or another person). In any such case, counsel shall be entitled to be paid a fee, on success, regardless of whether or not any fee has been recovered by way of expenses from another party to the litigation where successful.
- 6.6. Subject to para 6.5 in Sheriff Court proceedings, it is permissible in cases instructed on a speculative or speculative/judicial recovery basis, for counsel to agree with the instructing

person that in the event of success, where sanction for counsel is not granted by the court, a separate fee will be payable.

6.7. In judicial recovery only cases, before the judicial expenses are agreed or determined, the instructing person (or their representative) shall confer with counsel's clerk in order to agree (i) what part or amount of any proposed agreed global sum for judicial expenses is to be attributed to counsels fees; and (ii) the sums for counsel's fees to be included in any account of judicial expenses to be submitted to the auditor for taxation. In the absence of agreement in advance between counsel and the instructing person regarding the part attributable to counsel's fees, the instructing person shall not agree any abatement of counsel's fee or a global agreement which assumes such abatement. If an instructing person does so in the absence of counsel's prior consent, counsel shall not be obliged to abate their fee to the level agreed by the instructing person or implied in the global agreement, the instructing person will be obliged to pay counsel such fees as counsel would otherwise be entitled to recover.

7. Payment of fee

7.1. The instructing person may tender the fee with the instruction to counsel. In such an event, counsel shall issue a feenote for that amount on acceptance of the instruction.

7.2. Where the instructing person has not tendered the fee with the instruction to counsel and counsel has not agreed to deferment of payment under paragraph 7.3 hereof, counsel may render a feenote upon completion of a specific item or items of work encompassed within the instruction or upon completion of all the items of work encompassed within the instruction.

7.3. Counsel may accept instructions on the basis that payment will be deferred but is not bound to do so. Where the instructing person wishes to instruct counsel on the basis that payment will be deferred, agreement to that effect must be reached before the instruction is accepted. Where counsel has agreed to deferral of payment, all subsequent payments to that counsel in relation to the same case or matter will, in the absence of contrary agreement, be deferred on the same basis provided that each letter of instruction states the basis of deferral.

7.4. Where counsel has accepted instructions on the basis that payment will be deferred counsel shall issue a feenote in accordance with the agreement as to deferment of payment.

7.5. If counsel has not issued a feenote within 30 days of completion of an item of work encompassed within the instruction or within 30 days after any period of deferment agreed under paragraph 7.3, the instructing person may make a request in writing to the counsel for the issue of a feenote.

7.6. Unless otherwise agreed, if counsel fails without good reason to issue a feenote within 6 weeks of a request made under paragraph 7.5, the instructing person shall have no obligation to ensure payment thereof.

- 7.7. Any dispute arising in relation to paragraphs 7.5 and 7.6 shall be referred to the Fees Committee.
- 7.8. Unless otherwise agreed, counsel's fee will be due for payment from the date of issue of the feenote. The instructing person shall pay counsel's fee whether or not the instructing person has been put in funds by the lay client and without any set-off, deduction or withholding.
- 7.9. In the event that counsel's fee has not been received within 40 days of the feenote issue date or, if a date for payment has been agreed, within 40 days of that agreed date, and the instructing person has not intimated a reason acceptable to counsel for delayed payment or non-payment, intimation shall be given on behalf of counsel, to the instructing person that, if the instructing person does not pay the full amount within a further 30 days, the matter may be referred to the Fees Committee.
- 7.10. If the instructing person has a reason for non-payment of counsel's fee, he shall, within 21 days after receipt of intimation of counsel's intention to refer the matter to the Fees Committee, provide a report explaining that reason and a proposed timescale for payment or an explanation as to why the instructing person believes the proposed fee should be withdrawn.
- 7.11. If the instructing person provides a report in accordance with paragraph 7.10 the Fees Committee shall consider the report along with any representations from counsel.
- 7.12. If the instructing person does not pay the amount due or provide a report within the periods of notice mentioned in clauses 7.9 and 7.10, intimation will be made to the instructing person on behalf of counsel that the matter has been passed direct to the Dean of Faculty.
- 7.13. Where counsel has a clerk all communications in relation to payment of counsel's fees shall be with counsel's clerk or (where counsel is a subscriber) with Faculty Services Limited.
- 7.14. In the case of a subscriber, payment of counsel's fee shall be made to Faculty Services Limited. In the case of counsel who is not a subscriber, payment of counsel's fee shall be made to counsel's clerk or, if counsel does not have a clerk, to counsel.

8. Legal aid

- 8.1. Where counsel is instructed under the legal aid legislation, the instructing person shall comply with any requirements of the Scottish Legal Aid Board which fall to be met in order that counsel may be paid the appropriate fee.
- 8.2. In civil legal aid cases where an instructing person proposes to accept judicial expenses in lieu of a claim against the legal aid fund, before those judicial expenses are agreed or determined the instructing person shall confer with counsel's clerk in order to agree (i)

what part of any proposed agreed global sum for judicial expenses represents counsel's fees; (ii) the sums for counsel's fees to be included in any account of judicial expenses to be submitted to the Auditor for taxation. In the event of non-agreement regarding the part attributable to counsel's fees, the instructing person shall not agree any abatement of counsel's fee or a global agreement which assumes such abatement. If an instructing person does so in the absence of counsel's prior consent, counsel shall not be obliged to abate their fees to the level agreed by the instructing person or implied in the global agreement and the instructing person will be obliged to pay to counsel such fees as the counsel would otherwise be entitled to recover.

- 8.3. In legal aid cases, the instructing person shall furnish counsel or counsel's clerk with such documentation as may be required to enable counsel to submit counsel's fee.
- 8.4. In criminal legal aid cases the instructing person and counsel shall each submit his account to the Scottish Legal Aid Board within Board within four calendar months of conclusion of the relevant hearing. Where the instructing person's account cannot be submitted within this timescale, the instructing person shall advise counsel or counsel's clerk of the delay and the reasons for it in writing within the four month period.
- 8.5. In civil legal aid cases the instructing person will submit his account, including counsel's fees to the Scottish Legal Aid Board within four calendar months of conclusion of the relevant hearing. Where the instructing person's account cannot be submitted within this timescale, the instructing person shall advise counsel or counsel's clerk of the delay and the reasons for it in writing within the four month period.

9. Dispute resolution

- 9.1. The Dean of Faculty shall appoint three members of the Faculty of Advocates to be the Fees Committee.
- 9.2. The Fees Committee shall consider any matter referred to it under paragraph 7.7, 7.9, 7.10, and 7.11 and shall make a recommendation as to the disposal of that matter to the Dean of Faculty.
- 9.3. Upon receipt of a recommendation from the Fees Committee under paragraph 9.2 or referral of a matter under paragraph 7.12 the Dean of Faculty shall determine the matter. The Dean's determination shall be final and conclusive.
- 9.4. Upon determining the matter, the Dean shall intimate his determination to counsel and to the instructing person.
- 9.5. In the event that the Dean determines that the instructing person is obliged to make payment to counsel but has failed to do so, the Dean shall take such further steps as he considers appropriate. Such steps may include (with or without such further warning as the Dean may consider appropriate): (i) a complaint to the Scottish Legal Complaints Commission or any other professional body to which the instructing person belongs; and

(ii) inclusion of the instructing person and the instructing person's firm on the List of Defaulting Solicitors and other Instructing Persons.

9.6. The powers of the Dean under the Scheme are without prejudice to the freedom of counsel to complain to the Scottish Legal Complaints Commission in respect of the failure of a solicitor to pay or to take reasonable steps to ensure payment of counsel's fee or to take equivalent steps in the case of any instructing person who is not a solicitor who has failed to pay counsel's fee.

9.7. Any dispute as to the meaning or effect of the Scheme will be determined by the Dean of Faculty whose decision shall be final.