

**APIL / PIBA VERSION 9 STANDARD TERMS & CONDITIONS, AS AMENDED BY CLOISTERS  
CHAMBERS, FOR CFAs IN PERSONAL INJURIES AND CLINICAL NEGLIGENCE CASES FROM  
1<sup>ST</sup> APRIL 2013 (incorporated into the Short Form CFA)**

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## **1. Introduction and short form CFA**

These standard terms will be incorporated into an agreement called a “short form” conditional fee agreement which will be sent to the Solicitor in each case.

The parties to the agreement and the work to be covered and the fees to be charged by Counsel in any particular claim are defined in the short form conditional fee agreement which will be sent to the Solicitor.

## **2. Binding Nature of the Agreement**

- (1) Counsel will not be not bound to act on a conditional fee basis until he/she has completed and sent to the Solicitor a short form conditional fee agreement.
- (2) Unless they specify otherwise, the delivery of the first instructions to Counsel in an individual case with a request that he/she undertake that case on a conditional fee basis shall constitute an offer to Counsel to undertake that case in accordance with the Cloisters Chambers’ Standard Short Form Conditional Fee Agreement then current (copies of which are available from Chambers on request) with such a success fee between 0% and 100% as Counsel deems appropriate. The return of the short form agreement shall constitute acceptance by Counsel.
- (3) The Solicitor agrees and considers reasonable the normal and the Success fees set out by Counsel in the short form unless the Solicitor challenges the fees within 14 days of receipt of the short form, in which case any new agreed fees will be recorded in hand writing on the short form. Any hand written reductions to fees must be specifically endorsed and dated by Counsel to be valid or otherwise the subject of written agreement with Counsel’s clerk.

## **3. Obligation of Counsel to act diligently**

Counsel agrees to act in accordance with clause 8 of the Bar Council’s (New) Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 which state:

“8.1 The Barrister will exercise reasonable skill and care in providing the Services. The Barrister acknowledges the existence of a duty of care owed to the Lay Client at common law, subject to his professional obligations to the Court and under the Code.

8.2The Barrister will provide the Services by such date as may be agreed between the parties, and in any event will do so within a reasonable time having regard to the nature of the Instructions and his other pre-existing professional obligations as referred to in paragraph 701 of the Code.

8.3 The Barrister may delegate the provision of any part of the Services but will remain responsible for the acts, omissions, defaults or negligence of any delegate as if they were the acts, omissions, defaults or negligence of the Barrister.

8.4 The Barrister will, in addition, provide all information reasonably required to enable the Lay Client and/or Authorised Person to assess what costs have been incurred and to obtain and enforce any order or agreement to pay costs against any third party.”

#### **4. Inappropriate Instructions**

Counsel is not bound to accept inappropriate instructions:

- (1) to appear at any hearing where such instructions would be disproportionate to the nature of the hearing and where it would be reasonable (a) for Counsel to consider that Counsel's fees would not be allowed on assessment; or (b) for the Solicitor to instruct a barrister of less experience and seniority, (albeit that Counsel shall use his/her best endeavours to ensure that an appropriate barrister will act for the Client on the same terms as this agreement);
- (2) to draft documents or advise if a barrister of similar seniority would not ordinarily be instructed so to do if not instructed on a conditional fee basis;
- (3) outside the scope of this agreement;

#### **5. Obligations of the solicitor**

The solicitor agrees:

- (1) to comply with all the requirements of the CPR, the practice directions about costs supplementing parts 44 to 47 of the CPR (PD Costs), the relevant pre-action protocol, and any court order relating to costs budgets and conditional fee agreements;
- (2) promptly to apply for relief from sanction pursuant to CPR part 3 if any default under the CPR occurs and to notify Counsel of any such default;
- (3) to act diligently in all dealings with Counsel and the prosecution of the claim;
- (4) to liaise with or consult Counsel about the likely amount of Counsel's fees before filing any estimate of costs or costs budget in the proceedings, and to provide a copy of any such estimate to Counsel;
- (4A) to ensure that Counsel's fees will be agreed in advance of the preparation and service of the Form H in respect of all Multi Track Work.

In accordance with this provision, the Solicitor will:

- a) provide Counsel with a draft copy of the Form H at least 14 days prior to the date for filing and service of the Form H;
- b) ensure that the Form H incorporates fees which are agreed between the Solicitor and Counsel;

(4B) that:

- (a) in the event that the Solicitor fails to comply with paragraph 5(4) or 5 (4A) above (or Counsel is instructed after the filing of the Form H), Counsel will not be obliged to work in accordance with the fees suggested by the Solicitor in the Form H; and
  - (b) Counsel's fees will be those agreed as between Counsel's Clerk and the Solicitor;
  - (c) in the event that the Solicitor fails (or failed) to serve a Form H in accordance with the CPR and/or in accordance with any Court Order, the Solicitor shall pay Counsel's fees on a private basis in accordance with the '*Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012*' .
- (5) to consult Counsel on the need for advice and action:
- (a) within 14 days of receipt of the Defence;
  - (b) not less than 6 weeks prior to any costs budgeting CMC;
  - (c) within 14 days of the exchange of lay witness evidence;
  - (d) within 14 days of disclosure of any medical evidence from the Opponent;
  - (e) within 14 days of receipt of any joint statement of experts;
  - (f) within 14 days of any development which could significantly and adversely affect the prospects of success in the case or the value of the case;
  - (g) within 7 days of any Part 36 offer having been made by the opponent;
  - (h) not less than 4 weeks before the date of the Trial;
  - (i) at any other point reasonably requested by Counsel \_\_\_\_\_
- (6) to deliver within a reasonable time papers reasonably requested by Counsel for consideration;
- (7) promptly to bring to Counsel's attention:
- (a) any priority or equivalent report to insurers;
  - (b) any Part 36 or other offer to settle;
  - (c) any Part 36 payment into Court;
  - (d) any evidence information or communication which may materially affect the merits of any issue in the case;
  - (e) any application by any party to have the Client's costs capped;
  - (f) any costs capping or costs budget order;
  - (g) any other factor coming to the Solicitor's attention which may affect Counsel's entitlement to fees whether before or after the termination of this agreement;
  - (h) the instruction of any Counsel outside of Cloisters Chambers;
- (8) promptly to communicate to the Client any advice by Counsel:
- (a) to make, accept or reject any Part 36 or other offer;
  - (b) to accept or reject any Part 36 payment in;

- (c) to incur, or not incur, expenditure in obtaining evidence or preparing the case;
- (d) to instruct Leading Counsel or a more senior or specialised barrister;
- (e) that the case or a substantial issue in the case is likely to be lost;
- (f) that damages and costs recoverable on success make it unreasonable or uneconomic for the action to proceed;
- (9) promptly to inform Counsel's clerk of any listing for trial or any hearing;
- (10) to deliver the brief to Counsel in accordance with the short form agreement between the Solicitor and Counsel;
- (11) to inform Counsel promptly if the case concludes at any time before the date fixed for trial;
- (12) if any summary assessment of costs takes place in the absence of Counsel, to make representations on Counsel's behalf in relation to his/her fees;
- (13) to inform Counsel in writing within 2 days of any reduction of Counsel's fees on summary assessment made in the absence of Counsel;
- (14) where more than one Defendant is sued, the Solicitor will write to any "after the event" insurers clarifying whether and when Defendants' costs are to be covered if the Claimant does not succeed or win against all of the Defendants, and send that correspondence to Counsel;
- (15) when drawing up a costs bill at any stage of the case to include in it a claim for Counsel's fees and interest on Counsel's fees; and
- (16) to fully investigate the entitlement of the Client to benefit from any 'Before-the-Event' insurance.

## **TERMINATION**

### **6. Termination by Counsel**

Counsel may terminate the agreement if:

- (1) Counsel discovers any fact or document which should have been disclosed to him and which materially affects Counsel's view of the likelihood of success and/or the amount of financial recovery in the event of success;
- (2) Counsel discovers that the Solicitor is in breach of any obligation in paragraph 5 hereof;
- (3) the Solicitor, Client or any Litigation Friend rejects Counsel's advice in any respect set out in paragraph 5(8) hereof;
- (4) Counsel is informed or discovers the existence of any set-off or counter-claim which materially affects the likelihood of success and/or the amount of financial recovery in the event of success;

- (5) Counsel is informed or discovers the existence of information which has been falsified or should have been but has not been provided by the Solicitor, Client or any Litigation Friend, of which Counsel was not aware and which Counsel could not reasonably have anticipated, which materially affects the merits of any substantial issue in the case;
- (6) Counsel is informed of, or discovers the existence of, any information or evidence, of which Counsel was not aware and which Counsel could not reasonably have anticipated, which materially affects either the merits of the claim or the valuation of the claim so as to adversely affect the likely costs outcome of the claim;
- (7) Counsel is required to cease to act by the Code of Conduct of the Bar of England and Wales or Counsel's professional conduct is being impugned; provided that Counsel may not terminate the agreement if so to do would be a breach of that Code, and notice of any termination must be communicated promptly in writing to the Solicitor;
- (8) a costs capping order or costs budgeting order is made which Counsel reasonably believes may adversely affect the recoverability of his or her normal fees
- (9) if the Opponent receives Community Legal Service funding;
- (10) Counsel assesses the prospects of success in the case at or below 50%;
- (11) Counsel advises the discontinuance of a claim for any reason;
- (12) the Solicitor has failed to comply with a Court Order or any provision under the CPR for the preparation and / or filing and / or service of a Form H, where such default has resulted in the Defendant not being liable to pay Counsel's fees;
- (13) where, in circumstances where the Solicitor has failed to comply with a Court Order or the CPR with regard to the filing of a Form H - the Solicitor and Counsel's Clerk are unable to agree fees in respect of any further work to be undertaken by Counsel;
- (14) in the event that the Solicitor fails to comply with any Court Order and/or is unsuccessful with regard to an Application for Relief from Sanction and the result is that the value of the claim and/or the prospects of success in the claim are substantially and adversely affected.

## **7. Termination by the Solicitor**

The Solicitor may terminate the agreement at any time on the instructions of the Client or any Litigation Friend.

## **8. Automatic Termination**

This agreement shall automatically terminate if:

- (1) Counsel accepts a full-time judicial appointment;
- (2) Counsel retires from practice;
- (3) the Solicitor's agreement with the Client is terminated before the conclusion of the case;
- (4) Legal Services Commission funding is granted to the Client;
- (5) the court makes a Group Litigation Order covering this claim.

#### **9. Counsel taking Silk**

If Counsel becomes King's Counsel during the course of the agreement then either party may terminate it provided he/she does so promptly in writing.

#### **10. Errors and Indemnity for Fees**

- (1) If, because of a breach by the Solicitor of his/her duty to the Client, the Client's claim is dismissed or struck out:
  - (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) for breach of any rule of court or the Civil Procedure Rules;or if the claim becomes unenforceable against the MIB for breach of the terms of the Uninsured Drivers Agreements or the Untraced Drivers Agreements: the Solicitor shall (subject to sub paragraphs (3) - (6) hereof) pay Counsel such normal fees as would have been recoverable under the Agreement to the date of strike out.
- (2) If, solely because of a breach by Counsel of his/her duty to the Client (but not otherwise), the Client's claim is dismissed or struck out:
  - (a) for non compliance with an interlocutory order; or
  - (b) for want of prosecution, or
  - (c) for breach of any rule of court or the Civil Procedure RulesCounsel shall (subject to sub paragraphs (3) - (6) hereof) pay the Solicitor such basic costs as would have been recoverable from the Client under the Solicitor's agreement with the Client to the date of strike out.
- (3) If, because of non-compliance by the Solicitor of the obligations under sub-paragraphs (1), (2), (12), (13) or (16) of paragraph 5 above, Counsel's success fee is not payable by the Client then the Solicitor shall (subject to sub-paragraphs (5) to (7) hereof) pay Counsel such success fees as would have been recoverable under the Agreement.
- (4) No payment shall be made under sub paragraph (1), (2) or (3) hereof in respect of any non-negligent breach by the Solicitor or Counsel.

### **Adjudication on disagreement**

- (5) In the event of any disagreement as to whether there has been an actionable breach by either the Solicitor or Counsel, or as to the amount payable under sub paragraph (1), (2) or (3) hereof, that disagreement shall be referred to adjudication by a panel consisting of a Barrister nominated by PIBA and a Solicitor nominated by APIL who shall be requested to resolve the issue on written representations and on the basis of a procedure laid down by agreement between PIBA and APIL (which shall follow the procedure in the Bar Council/Law Society Joint Tribunal Standing orders published in June 2011 and available on the Bar Council's website). The costs of such adjudication shall, unless otherwise ordered by the panel, be met by the unsuccessful party.
- (6) In the event of a panel being appointed pursuant to sub paragraph (5) hereof:
- (a) if that panel considers, after initial consideration of the disagreement, that there is a real risk that they may not be able to reach a unanimous decision, then the panel shall request APIL (where it is alleged there has been an actionable breach by the Solicitor) or PIBA (where it is alleged that there has been an actionable breach by Counsel) to nominate a third member of the panel;
  - (b) that panel shall be entitled if it considers it reasonably necessary, to appoint a qualified costs draftsman, to be nominated by the President for the time being of the Law Society, to assist the panel;
  - (c) the Solicitor or Counsel alleged to be in breach of duty shall be entitled to argue that, on the basis of information reasonably available to both the Solicitor and Counsel, the claim would not have succeeded in any event. The panel shall resolve such issue on the balance of probabilities, and if satisfied that the claim would have been lost in any event shall not make any order for payment of fees or costs.

### **Cap**

- (7) The amount payable in respect of any claim under sub paragraph (1) or (2) or (3) shall be limited to a maximum of £25,000.
- (8) Save as provided at paragraph 10(2) herein, in no circumstances shall any liability that Counsel may have in damages for breach of duty under this contract whether to the Solicitor or to anyone else (including for the avoidance of doubt, the Client) exceed such liability (if any) as Counsel would have had to that person at common law in tort were no contract to exist.
- (9) Nothing in Clause 10(8) shall operate so as to exclude liability where such exclusion is prohibited by law nor to limit or exclude a contribution claim by the Solicitor against Counsel under the Civil Liability (Contribution) Act 1978.

## **COUNSELS ENTITLEMENT TO FEES**

### **On Termination of the Agreement**



## **11. Termination**

### **11.1 by Counsel**

- (1) If Counsel terminates the agreement under paragraph 6 then, subject to sub-paragraph 3 hereof, Counsel may elect either:
  - (a) to receive payment of normal fees without a success fee which the Solicitor shall pay not later than three months after termination: ("**Option A**"), or
  - (b) to await the outcome of the case and receive payment of normal and success fees if it ends in success: ("**Option B**").
- (2) If Counsel terminates the agreement because the Solicitor, Client or Litigation Friend rejects advice under paragraph 5(8) (e) or 5(8)(f) Counsel is entitled only to "Option B".

### **11.2 by the Solicitor**

If the Solicitor terminates the agreement under paragraph 7, Counsel is entitled to elect between "**Option A**" and "**Option B**".

### **11.3 Automatic Termination and Counsel taking silk**

If the agreement terminates under paragraphs 8 or 9 Counsel is entitled only to "**Option B**".

## **12. Challenge to fees**

If the Client wishes to challenge:

- a) the entitlement to fees of Counsel or the level of such fees following termination of the agreement; or
- b) any refusal by Counsel after signing this agreement to accept instructions, the Solicitor must make such challenge in writing within 14 days of termination or refusal.

## **13. Return of Work**

If Counsel in accordance with the Bar's Code of Conduct is obliged to return any brief or instructions in this case to another barrister, then:

- (1) Counsel will use his/her best endeavours to ensure that an appropriate barrister agrees to act for the Client on the same terms as this agreement;
- (2) If Counsel is unable to secure an appropriate replacement barrister to act for the Client on the same terms as this agreement Counsel will not be responsible for any additional fee incurred by the Solicitor or Client.
- (3) If the case ends in success Counsel's fees for work done shall be due and paid on the conditional fee basis contained in this agreement whether or not the replacement barrister acts on a conditional fee basis; but
- (4) If the Solicitor or Client rejects any advice by the replacement barrister of the type described in paragraph 5(8) hereof, the Solicitor shall immediately notify Counsel who shall be entitled to terminate this agreement under paragraph 6(3).

#### **ASSESSMENT AND PAYMENT OF COSTS / FEES**

##### **14. Costs Assessment - interlocutory**

If:

- (1) a costs order is anticipated or made in favour of the Client at an interlocutory hearing and the costs are summarily assessed at the hearing; or
- (2) the costs of an interlocutory hearing are agreed between the parties in favour of the Client; or
- (3) an interlocutory order or agreement for costs to be assessed in detail and paid before the conclusion of proceedings is made in favour of the Client:

Then:

- (a) the Solicitor will include in the statement of costs a full claim for Counsel's normal fees; and
- (b) the Solicitor will promptly conclude by agreement or assessment the question of such costs; and
- (c) within one month of receipt of such costs the Solicitor will pay to Counsel the amount recovered in respect of his/her fees, such sum to be set off against Counsel's entitlement to normal fees by virtue of this agreement.

##### **15. Interest**

The Solicitor will use his best endeavours to recover interest on Counsel's fees from any party ordered to pay costs to the Client and shall pay Counsel the share of such interest that has accrued on Counsel's outstanding fees.

#### **16. Costs assessment – final**

The Solicitor will:

- (1) inform Counsel's clerk in good time of any challenge made to his or her normal fees or success fees and of the date, place and time of any detailed costs assessment the Client or Opponent has taken out pursuant to the Civil Procedure Rules; and
- (2) provide Counsel with the opportunity to make written or oral representations in support of his/her fees at any assessment; and
- (3) place any relevant details and any written representations before the assessing judge and argue Counsel's case for his/her normal fee, at any inter partes assessment hearing, unless Counsel is present or represented.

#### **17. Agreement on Fees with Opponent**

If the Opponent offers to pay the Client's legal fees or makes an offer of one amount that includes payment of Counsel's normal fees at a lower sum than is due under this agreement then the Solicitor:

- (1) will calculate the proposed pro-rata reductions of the normal and success fees of both Solicitor and Counsel; and
- (2) inform Counsel of the offer and the calculations supporting the proposed pro-rata reductions referred to in paragraph (1) above; and
- (3) will not accept the offer without Counsel's express consent; and
- (4) will advise the Client on the Client's liability for Counsel's unrecovered normal fees and success fees; and

If such an agreement is reached on the fees recoverable from the Opponent, then Counsel's fees may be limited to the agreed sum (unless the court orders otherwise). If the short form CFA provides at paragraph 12 thereof that the Solicitor **will not** be liable for any of Counsel's normal fees which are not recovered from the other side then Counsel will recover no further normal fees from the Client. If the short form CFA provides at paragraph 12 thereof that the Solicitor **will** be liable for any of Counsel's normal fees which are not recovered from the other side then the Client will also be liable for the unrecovered fees.

#### **18. Severance**

If any provision of this agreement is found by any competent court to be invalid, illegal or unenforceable in whole or in part for whatever reason, then it shall be deemed to be severed from this agreement to the extent only of such invalidity, illegality or unenforceability and the remaining provisions of this agreement and the remainder of the provision in question shall continue in full force and effect unimpaired by such severance.

## **19. Jurisdiction**

In the event of dispute, the parties agree to submit to the exclusive jurisdiction of the Courts of England and Wales in respect of any dispute arising out of or under the terms of the agreement between Counsel and Solicitor.

## **20. Trust**

- (1) The Solicitor holds on trust for Counsel such part of the debt that the Client owes the Solicitor as relates to Counsel's fees and expenses and, at Counsel's request, will assign the benefit of that debt to Counsel and do all such things as are necessary to perfect Counsel's title to that debt.
- (2) The Solicitor further holds on trust for Counsel any sum that he recovers from an Opponent in respect of Counsel's fees and expenses and agrees that he will hold such sums in a separate account until he pays it to Counsel.

## **Confidentiality**

### **21. Counsel shall keep confidential all information provided to him in connection with the Claim unless:**

- (1) Counsel is authorised by the Solicitor or the Client to disclose it;
- (2) the information is in or comes into the public domain without any breach of confidentiality on the part of Counsel; or
- (3) Counsel is required or permitted to disclose it by law, or by any regulatory or fiscal authorities, in which case, to the extent that he is permitted to do so, he will endeavour to give the Solicitor and/or the Client as much advance notice as possible and permitted of any such required disclosure.
- (4) Counsel owes the same duty of confidentiality to other clients, and will therefore not disclose or make use of any information that might be given to him in confidence in relation to any other matter without the consent of his other client, even if it is material to providing the Services.

- (5) Unless the Solicitor expressly informs Counsel to the contrary in advance in writing, Counsel may allow the Instructions to be reviewed by another Counsel or by a pupil (including a vacation pupil or mini-pupil) in chambers, on terms that that other barrister or pupil complies with this clause.
- (6) Subject to his obligation under this clause Counsel may make and retain copies of the Instructions and any written material produced by him.
- (7) To the extent such information is already in the public domain, Counsel may disclose in his marketing and similar materials, and to prospective clients and publishers of legal directories that he is or has been instructed by the Solicitor and/or for the Client and the nature of the Case. To the extent any such information is not already in the public domain, Counsel may only refer to it for marketing purposes in a form which sufficiently preserves the Client's privilege and confidentiality and (where the law so requires) with the Client's consent.

## **22. Intellectual Property**

- (1) All copyright and other intellectual property rights of whatever nature in or attaching to Counsel's work product, including all documents, reports, written advice or other materials provided by Counsel to the Solicitor or the Lay Client belong to and remain with Counsel. The Solicitor and the Lay Client have the right and licence to use Counsel's work product for the particular Case and the particular purpose for which it is prepared. If the Solicitor or the Lay Client wishes to use copies of Counsel's work product for purposes other than those for which it is prepared, this will require the express written permission of the Counsel. The moral rights of Counsel in respect of his work product are asserted.
- (2) All copyright and other intellectual property rights of whatever nature in or attaching to the Solicitor's work product, including all documents, reports, written advice or other materials provided by the Solicitor to Counsel or the Lay Client belong to and remain with the solicitor. Counsel and the Lay Client have the right and licence to use the Solicitor's work product for the particular case and the particular purpose for which it is prepared. If Counsel or the Lay Client wishes to use copies of the solicitor's work product for purposes other than those for which it is prepared, this will require the express written permission of the Solicitor. The moral rights of the Solicitor in respect of his work product are asserted.

## **23 Money Laundering**

- (1) Notwithstanding acceptance of Instructions in accordance with paragraph 2.1 above, Counsel shall be entitled to carry out any customer due diligence

required by the Money Laundering Regulations 2007. The Solicitor will provide Counsel with all reasonable assistance to carry out any necessary customer due diligence including (if required to do so) consenting to Counsel relying upon the Solicitor under Regulation 17 of the Money Laundering Regulations 2007.

- (2) In the event that Counsel reasonably considers that the requirements of the Money Laundering Regulations have not been satisfied he may within a reasonable period after receipt of the Instructions withdraw any acceptance of those Instructions without incurring any liability

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