



The Bar Council

## Fee Disputes and Privilege/Confidentiality

<b>Purpose:</b>	To assist barristers to understand what use they may make of fee notes and other privileged material in fee disputes and claims for fees
<b>Overview:</b>	Unpaid fee notes – confidential and privileged material in fee notes – use of fee notes in seeking payment of fees – limited waiver by clients and solicitors – appropriate redactions – use of debt recovery agencies – suggested terms to add to contracts with clients and solicitors
<b>Scope of application:</b>	All practising barristers
<b>Issued by:</b>	The Ethics Committee
<b>First issued:</b>	July 2016
<b>Last reviewed:</b>	September 2020
<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.</b>

### Introduction

1. Since 31 January 2013, you have been permitted and encouraged to accept instructions on a contractual basis. You are therefore able to sue for unpaid fees. Indeed, the Bar Council will not place solicitors or authorised persons on its advisory list of defaulting solicitors or other authorised persons unless a barrister has obtained a judgment for fees (or there has been a failure to pay a Joint Tribunal or arbitral award). In effect, you are expected to sue for unpaid fees.
2. You are required by the Code of Conduct to provide clear information about your fees and the basis of charging; to keep appropriate records; and to provide sufficient information in your fee notes. Relevant provisions of the Code include rC19 (not misleading clients and potential clients); rrC22-24 (defining the terms or basis on

which instructions are accepted); rC88 (administration and conduct of self-employed practice); and rC125.7 (public access rules).

3. If you do sue for unpaid fees, you may need to consider issues of privilege and confidentiality in relation to the fee note(s) upon which you rely and any work that you have undertaken in the particular case. Such issues raise questions of law upon which you will need to form your own view. What follows are no more than the Bar Council's views on such questions, which are offered merely to assist you in your consideration of the issues. They are neither a binding nor a definitive statement of the legal position.

### **Instructions from a professional or licensed access client**

4. You have a duty to protect the confidentiality of your client's affairs, "*except for such disclosures as are required or permitted by law*"; rC15.5. This confidentiality will usually extend to the contents of fee notes. However, although there is no direct authority on the point, the Bar Council believes that you are permitted to send letters to your professional or licensed access client chasing for fees and enclosing copies of the fee note, even if that letter refers to privileged or confidential matters. Moreover, if any allegation is made by your professional or licensed access client regarding your work, you may send letters to them answering such allegations, referring to or attaching privileged documents.

5. The reason is that although the preponderance of authority suggests that fee notes are privileged to the lay client, and you are required to maintain such confidentiality and privilege as against the rest of the world, there is no confidentiality or privilege between:

- (a) you and your lay client;
- (b) you and your professional client; or
- (c) you and your licensed access client (whether the licensed access client is acting on its own behalf or on behalf of a lay client).

6. Rather, as your professional or licensed access client is contractually liable to pay your fees, it is contractually entitled to see the fee note (as well any documents or advice that you have been instructed to draft or settle).

7. The position is more complex in the event that your professional or licensed access client refuses to pay and you need to initiate court or arbitration proceedings, as you are likely to need to disclose to the court or an arbitrator (i.e. a third party) prima facie privileged and confidential material. Whilst there is no direct authority on the point, the Bar Council believes that such a course is likely to be permissible on the basis of an implied waiver of privilege.

8. If a lay client sues a lawyer, there is an implied waiver of privilege: e.g. *Lillicrap v Nalder* [1993] 1 WLR 94 and *Paragon Finance v Freshfields* [1999] 1 WLR 1183. In the latter case Lord Bingham specifically justified the implied waiver of privilege where a client sues a solicitor as being on the basis that “*he invites the court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since court proceedings are public, the client brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim: or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound.*”.

9. That implied waiver also applies where a client counterclaims against a claim brought by the lawyer for recovery of fees: *Hinchcliffe v Gough* [1999] Manx LR 77 at 90. See also *Hakendorf v Countess of Rosenburg* [2004] EWHC 2821, where the court refused to discharge a freezing injunction obtained by a claimant solicitor in support of a claim for unpaid fees and it rejected the argument that there had been a breach of privilege by the claimant solicitor who had referred to privileged communications. In that case the solicitor justified the conclusion that there was no breach of privilege because “[*privilege*] cannot as a general rule apply to proceedings brought by the solicitor with a view to obtaining payment of her bill or else no solicitor could ever prove her fees were properly incurred”.

10. The Bar Council believes that there is at least a limited implied waiver of confidentiality and privilege where a barrister has to sue a lay client for fees, if and insofar as the barrister needs to rely on the privileged material to sue for the unpaid fees. This is because:

- (a) If there is no such waiver, the barrister will not be able to bring a claim successfully (or overcome any defence to the claim); and
- (b) To the extent that the lay client puts any issue in dispute in the proceedings, for the court to adjudicate on, the client waives that confidentiality and privilege.

11. If there is a limited implied waiver when suing a lay client for fees, this must also apply when suing a professional or licensed access client, who is the lay client’s agent for this purpose.

12. Assuming that a limited implied waiver operates, you will need to consider the extent of the waiver. The waiver would only extend to that which is necessary in order for you to protect your interests, so you should take care to ensure that what you disclose, and how, when and where it is disclosed, is only what is necessary for this task.

13. For example, the Bar Council believes that you ought to be able to rely on or to disclose (e.g. to the court or an arbitrator) the fee note in issue (and any privileged material relating to the work on that fee note), if and to the extent that such material is relevant to establishing the claim for unpaid fees or overcoming any defence and is needed for either purpose. Such disclosure may not be relevant if the only anticipated response is that the defendant cannot afford to pay your fees (as opposed to, for instance, an allegation about the quality of your work). This means that it may be relevant to refer to the delivery of fee notes at all stages of litigation (to show demand and non-payment), but not to the contents unless and until the work performed and/or those contents are either denied or at least not admitted.

14. You might also be able to rely on or disclose previous fee notes in respect of the same lay client, provided that the work arises out of the same retainer and such disclosure is relevant. Again, this would be limited to what is necessary to enable you effectively to sue for your fees. If the work arises out of a different retainer then the limited implied waiver is unlikely to extend to such material, although in some cases it might be possible to do so if it is sufficiently relevant: see *Lillicrap* and *Paragon Finance*. You are unlikely to be able to disclose fee notes rendered to the same professional or licensed access client in respect of a different lay client.

### **Debt recovery agencies**

15. Although there is a lack of direct authority on the point, the Bar Council considers that if necessary you are probably permitted to disclose the fee note in issue to a debt recovery agency to recover the unpaid fees, without breaching privilege, as such an agency would be acting as your agent and would be bound by the confidentiality and privilege. Again, however, you should take care to ensure that only that which is necessary to disclose is provided to the debt recovery agency, and it may be prudent to exercise even greater caution than you might when suing for your fees. For example, it might well be sufficient to provide no more than a schedule of fees, or redacted versions of the fee notes. Also, when dealing with debt recovery agencies you should ensure that you have a written contract with them that imposes specific obligations on the debt agency *inter alia*:

- (a) To maintain your lay client's confidentiality; and
- (b) To process any personal data in accordance with your instructions and, for the avoidance of doubt, as though it were a data controller under the Data Protection Act.

16. Whenever you employ someone else to pursue fees on your behalf, it would also be good practice to carry out appropriate due diligence, so as to enable you to be confident that they are suitable, competent and reputable, and likely to comply with confidentiality and data protection obligations.

## **Contractual terms between you and your professional or licensed access client**

17. You may wish to consider inserting contractual terms in your contract for the provision of legal services (i.e. your contract with your professional or licensed access client) that specifically state that:

- (a) Instructions are received from, and correspondence and advice is sent to, the professional client or licensed access client, and that the professional or licensed access client has a right to inspect copies of all fee notes and all advice prepared for the lay client;
- (b) Fee notes may be disclosed to a debt recovery agency to the extent necessary in order to recover unpaid fees; and
- (c) Privileged documents can be referred to, disclosed and adduced as evidence in court or in an arbitration by the barrister or the professional client or licensed access client in the event of litigation or a dispute between them, insofar as may be necessary for the barrister to protect or defend his/her interests.

18. You may also wish to consider providing a note or other explanatory material that explains that the above is in light of the general law that where privileged materials are shared as between A, B and C there is no privilege as between the three of them, albeit the privilege survives as against the rest of the world – citing *USP Strategies v London General Holdings* [2004] EWHC 373 (Ch) – and that since the professional or licensed access client is the lay client’s agent the principles on implied waiver in litigation between the barrister and the lay client also apply in litigation between the barrister and the professional or licensed access client.

19. In the event that the matter proceeds to litigation, there should be consideration of whether any hearing should be held in private pursuant to CPR 39.2(3)(c), particularly if the fact of your being instructed was confidential.

### **Public access cases**

20. The Bar Council believes that the above analysis should apply *a fortiori* in the event that you seek to recover unpaid fees from a public access client given that instead of suing the lay client’s agent, you will be suing the lay client directly. This analysis is expected to apply equally when you seek to recover fees directly from a non-public access client, such as under the Combar/CoLLS standard terms ‘Basis C’: i.e. in cases in which, even though there is a professional client, it is the lay client who is personally and directly liable for your fees.

21. You may wish to consider inserting terms in your contracts with public access clients that specifically state that

- (a) Fee notes may be disclosed to a debt recovery agency to the extent necessary in order to recover unpaid fees; and
- (b) Privileged documents can be referred to, disclosed and adduced as evidence in court or in an arbitration by the barrister or the public access client in the event of litigation or a dispute between them, insofar as may be necessary for the barrister to protect or defend his/her interests.

22. You should also consider providing to your public access clients a note or other explanatory material that explains that the above is in light of the general law that where there is litigation between a lawyer and client there is an implied waiver of privilege.

23. In the event that the matter proceeds to litigation, there should be consideration of whether the hearing should be held in private pursuant to CPR 39.2(3)(c), particularly if the fact of your being instructed was confidential.

### **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).