Confiscation in Graduated Fee Cases: Protocol for Counsel

[11 August 2008, updated 8 May 2009, last reviewed 1 September 2026]

Introduction to the Protocol

1. This is the Bar Council's Guidance Note and Protocol for counsel who are instructed in a criminal matter on behalf of a person who will or may be involved in confiscation proceedings if convicted.

General Principles

2. A barrister who unconditionally accepts instructions to represent a lay client in criminal proceedings may be expected to conduct all aspects of the case, including any resulting confiscation proceedings. Phrases such as 'Brief for Trial' or 'Brief for the Defence' are understood by general usage to mean that the barrister is accepting all aspects of the case covered by the Representation Order.

3. A barrister must not accept instructions if he lacks sufficient experience and competence to handle the matter in question. Where a barrister is instructed 'generally' as in paragraph 2 above this experience and competence will apply to all parts of the case, including such confiscation issues as may be reasonably anticipated to arise at the time of accepting the instructions.

4. Where it is anticipated that complex confiscation proceedings will or might follow a conviction in an otherwise straightforward contested trial or plea, instructions should be refused unless:

i. counsel has sufficient experience and expertise to conduct the anticipated complex confiscation proceedings; or

ii. counsel is instructed only to conduct the trial and sentence hearing (if any) and the areas to be covered by such limited instructions are within counsel's experience and competence.

5. Where junior counsel accepts instructions in a case which is apparently within his expertise and competence, and subsequently become aware that complex confiscations issues will or are likely to arise which are outwith his expertise and competence, he should:

i. notify his instructing solicitor immediately that he will be professionally embarrassed if he undertakes any confiscation work in the case, and therefore will not undertake such work;

ii. indicate to his instructing solicitor that he can continue to represent the lay client, provided his instructions are limited to the conduct of the trial and sentencing hearing (if any);

iii. offer to withdraw from the case forthwith if required by his solicitor or lay client to do so.

6. For the avoidance of doubt, counsel who is professionally embarrassed and withdraws from undertaking confiscation proceedings because it is anticipated that such proceedings are beyond his expertise or competence, will not thereby offend against the principles set out in Ulcay [2007] EWCA Crim 2379 CA. Counsel should be aware of both the potential existence and the anticipated complexity of confiscation proceedings long before the relevant confiscation hearings begin.

Remuneration

7. A barrister is entitled to refuse to accept instructions in any publicly funded graduated fee criminal case where he believes that the remuneration which he is likely to receive is inadequate having regard to his experience and expertise. A barrister should, however, be aware that he or she may be asked to justify this objectively, particularly in comparison to other work that has been accepted.

8. A barrister who unconditionally accepts general instructions to represent a lay client in a criminal graduated fee case (see para 2 above), is expected to conduct all aspects of that case, including any resulting confiscation proceedings. This obligation applies even if unexpected and unanticipated complex confiscation proceedings arise after instructions have been accepted provided they are still within the barrister's experience and competence. It is immaterial that the barrister would have refused such instructions had he been aware of the length or complexity of such proceedings.

9. A solicitor is free to instruct counsel of choice to conduct any stage of the proceedings, subject to any limitations imposed by the funding regulations or Representation Order. This may involve instructing different counsel to undertake or assist in different parts of the same case. A barrister may properly accept instructions to act in this limited manner.

10. A barrister who is offered a criminal graduated fee case may decline to accept instructions to undertake confiscation work relating to that case provided that:

i. those instructing counsel are aware of the barrister's limitations on what (if any) confiscation work is being accepted by counsel as part of the instructions and the matter is agreed between them in writing; or

ii. where a barrister discovers after accepting instructions generally that he or she would be professionally embarrassed (due to insufficient experience and competence)

a) instructing solicitor is informed of that fact immediately both orally and in writing; and

b) the barrister can and is prepared to justify objectively the decision to decline the instructions in respect of confiscation either in respect the fee not being a proper professional fee or the work in question being beyond the barrister's experience and competence.

Explanatory Note as regards the limited acceptance of instructions.

The purpose of this Protocol is not to provide barristers in graduated fee criminal cases with a means of refusing to undertake confiscation work. Its purpose is to protect barristers who accept a criminal graduated fee case and subsequently find that the work required to prepare and argue a contested confiscation hearing is wholly disproportionate to that required for the antecedent criminal proceedings.

This Protocol does not attempt to identify the factual circumstances in which a barrister should indicate that instructions will be accepted on a limited basis, nor the conditions on which a barrister might seek to accept instructions.

At one extreme, a barrister who refuses to undertake any confiscation work, even where the anticipated confiscation work is likely to be minimal, is likely not only to fall foul of paragraph 10(ii)(b), but is also unlikely to be offered that brief, or indeed any future work.

At the other extreme, a barrister who is offered a small graduated fee case, in respect of which a substantial confiscation hearing is anticipated, would be wholly justified in accepting the brief on the condition that he is not instructed to undertake the confiscation work.

Within those extremes lie an enormous range of circumstances. Where a barrister seeks to accept a brief on a conditional basis, the nature and terms of the conditions will be determined by the nature and extent of the confiscation hearing anticipated by the barrister and the instructing solicitor when the brief is offered. Conditions suggested by a barrister in a graduated fee case where the trial is estimated to last two days (e.g. not to undertake the confiscation work if the confiscation hearing and/or the preparation is likely to exceed 1 day), which might be regarded as reasonable, would clearly be wholly unreasonable if the trial is estimated to last 5 weeks. Every case must be determined on its own facts.

Where limited instructions subject to conditions are agreed, it is essential that such conditions are reduced to writing.

*"***Explanatory note following an April 2009 House of Lords decision**

On 29 April 2009 the House of Lords confirmed that the prosecution are entitled in confiscation proceedings (i) to prove that the defendant had committed offences other than those to which he had pleaded or in respect of which he had been convicted and (ii) to invite the court to estimate the profit that he must have made from those offences: R. v. Briggs-Price [2009] UKHL 19. The opinion effectively entitles prosecuting authorities to raise and prove additional offences at confiscation hearings for the purpose of calculating benefit.

The graduated fee scheme does not cater for what amounts to secondary trials. Unless and until provision for the adequate remuneration for such confiscation hearings are put in place, barristers are reminded that they may accept a brief conditionally, and decline to accept instructions to undertake any related confiscation work if, for example, the prosecution subsequently seek to prove that the defendant committed offences other than those for which he was indicted."