



The Bar Council

## Civil (privately funded) fee scenarios

**Purpose:** To assist barristers in three privately funded civil fee scenarios

**Overview:**

- the solicitor asks the barrister to accept a reduced fee;
- the solicitor declines to take a case to detailed assessment;
- the solicitor keeps interest owed to the barrister.

**Note:** Questions regarding discounted fixed fees are addressed in a separate assistance document:  
<https://www.barcouncilethics.co.uk/documents/discounted-fixed-fees/>

The Bar Council has also provided specific guidance in relation to referral fees:

<https://www.barcouncilethics.co.uk/documents/referral-fee-prohibition/>

The Bar Standards Board has also issued the following guidance:  
<https://www.barstandardsboard.org.uk/uploads/assets/f8e6fe07-8c10-46d2-ac617135ec1bff6f/Referral-and-Marketing-Arrangements.pdf>

**Scope of application:** Self-employed civil barristers

**Issued by:** Remuneration and Ethics Committees

**Issued:** November 2021

**Status and effect:** Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

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## Scenario 1a: the solicitor asks the barrister to accept a reduced fee

1. Counsel for the claimant enters a Conditional Fee Agreement (CFA) with 0% uplift in a multi-track Personal Injury (PI) case. A fee of £1,500 is agreed for a phase of work by counsel in the claimant's budget as approved by the costs judge. Counsel completes the work for the budgeted fee of £1,500. The case settles. Counsel provides a fee note for work done which is for £1,500.
2. The claimant's solicitor asks counsel whether they will accept a reduced fee on the following basis: the paying party has offered 80% of the bill and would counsel agree a 20% reduction in counsel's fees (to 'share the pain') and to avoid the matter going to assessment?
3. Counsel sees the points in dispute and the paying party is not taking an issue with counsel's fee.

### Question:

4. Is accepting a 20% reduction a referral fee?

### Answer:

5. It is not a referral fee. Counsel is not prevented by professional conduct rules from discounting their fees *as charged to the client*. The benefit of the discount is being passed to the client, not the law firm. It is enabling the client to agree the overall costs recovery by applying a 20% discount to all. Even if the client does not really care and the only interested party is the law firm, the law firm is not keeping that 20% differential.
6. Agreeing to apply a 20% discount to the fee which is charged to the client, and recovered from the paying party on that basis, is not the same as agreeing to take 80% of your fee payable by the client and allowing the solicitor to keep the difference: the former is reasonable while the latter is impermissible.
7. There is no prohibition on barristers accepting reduced fees if asked by their professional or lay clients. The acceptance of reduced fees is a commercial norm for most professionals. However, barristers must be conscious of any situation where the acceptance of a reduced fee is detrimental to a lay client or can be seen as a *quid pro quo*.

## **Scenario 1b: the solicitor asks the barrister to accept a reduced fee**

8. Same as scenario 1a. Plus: the Solicitor-Client CFA provides that the claimant will not be liable to pay any costs not recovered *inter-partes*.

### **Question:**

9. Is accepting a 20% reduction a referral fee in these circumstances?

### **Answer:**

10. If the request is to avoid the matter going to an assessment and secure payment for counsel more quickly, that reduction would not be a referral fee. It makes no difference / is of no benefit to the client how the pot is split (or indeed whether the offer is accepted or rejected and whether ultimately a higher or lower sum in costs is recovered). The benefit of such reduction may go to the solicitor, but an agreement to reduce fees will not be a referral fee without something more. For example, if this arrangement were agreed on the basis that counsel would be sent instructions on another case (case B), then the 20% deduction would amount to a referral fee in case B paid by the barrister to the solicitor. Such an arrangement would be adverse to the interests of the client in case B.

### **Further Question:**

11. Is the advice different if there is a collective fee agreement?

### **Answer:**

12. As stated above, if an arrangement were agreed on the basis that counsel would be sent instructions on another case, that would be a referral fee.

13. Counsel can enter into collective fee agreements. This could involve individual counsel entering into an agreement to provide legal services to a number of clients under the same terms, or, as more commonly occurs, a chambers entering into agreement with a union or insurer.

14. Most agreements entered between chambers and unions are Collective Conditional Fee Agreements which provide for payment of fees on a similar basis to commonly used CFA agreements such as the APIL/PIBA agreement. Similar problems may arise as set out in the other scenarios, but specific answers will depend on the terms of the agreement.

15. Chambers entering collective agreements with insurers may include terms by which counsel's fees are charged at a lower rate than those which may be recovered under the Civil Procedure Rules (CPR). It is hard to see how such an arrangement could involve a referral fee.

16. Counsel provides the same service to all clients under a collective agreement, therefore there is no issue of counsel working for a reduced fee for A in order to get case B. Both case A and B are provided under the same terms of retainer, representation of B is not dependent on fees claimed for work for A.

17. Legal services provided by an insurer are usually provided on an indemnity basis to the lay client, entitling it to any recovered costs. In that situation there is no prospect of any shortfall in recovered costs accruing to the benefit of the solicitor.

18. The application of Qualified one-way costs shifting (QOCS) means that there is extremely limited scope for the Defendant to recover costs when fees are fixed under the CPR in any event.

19. Chambers entering into commercial agreements will take many factors into account and it would not be appropriate for the Bar Council to comment either on their desirability or practicality. However, individual barristers continue to express concern about the possibility of such agreements amounting to referral fee. In broad terms we do not consider that such agreements give rise to referral fee issues, but chambers should take steps to inform their members about the practical and ethical issues arising out of such agreements, seeking assistance from the Bar Council's Ethical Enquiries service when necessary.

### **Scenario 1c: the solicitor asks the barrister to accept a reduced fee**

20. Counsel attended a Pre-Trial Review for a Claimant with a brief of £2,500. This was the only involvement in the case. Counsel's brief fee of £2,500 was approved in full for the Pre-Trial Review phase at the costs budget hearing. The brief fee was not challenged in the Points in Dispute.

21. Counsel is subsequently asked by instructing solicitors to take a 10% reduction in the fee. Counsel's clerk recommended agreeing a reduction to keep on good terms with instructing solicitors. Counsel is concerned that taking a reduction in these circumstances might be a referral fee.

### **Question:**

22. Is agreeing a 10% reduction a referral fee?

**Answer:**

23. The same guidance applies as in Scenario 1a.
24. This will not generally amount to a referral fee. A 10% deduction could not be described as an improperly low fee. A larger discount which could be described as an “improperly low fee” could be a referral fee.
25. A situation where counsel’s clerk recommends acceptance of the deduction for commercial reasons to stay on good terms with instructing solicitors does not amount to an agreement to accept the deduction in exchange for further instructions: there is no *quid pro quo*. There is no detriment to the lay client in the barrister accepting a reduced fee.
26. However, if a deduction were agreed between the solicitor and the barrister on the basis that in exchange for accepting a percentage reduction on fees in this case (case A), the barrister would be sent another particular case (case B), then the deduction in case A would amount to a referral fee paid by the barrister in respect of case B. Such an arrangement is adverse to the interests of the client because the barrister is being sent B’s case by reason that s/he accepted a deduction on case A, as opposed to being the barrister recommended to the client by reason of their expertise/suitability for case B.

**Scenario 2: the solicitor declines to take a case to detailed assessment;**

27. Counsel wish to go to detailed assessment or appeal against an assessment decision, but the lay client (or the solicitors) do not want to go to detailed assessment or appeal the decision.

**Question:**

28. What are the appropriate steps for counsel to take, and who should bear the costs of those steps?

**Answer:**

29. It depends on the terms of the retainer between the solicitor and counsel.
30. The problem can only arise in circumstances when counsel has entered into some type of CFA with the solicitor. Under most CFAs counsel will have a contractual

claim to fees which may or may not include fees which are not recovered on an *inter partes* basis.

31. For example, in personal injury/clinical negligence cases, Clause 12 of the APIL/PIBA 10 short form agreement provides that Counsel can make an election as to an entitlement to those fees not recovered on an *inter partes* basis:

“12. Counsel’s normal fees

In the event that, after settlement or assessment of costs, some of Counsel’s normal fees are not recovered from the Opponent, the following shall apply:

EITHER: [DELETE AS APPROPRIATE]

1. Subject to clause 13 below, the Solicitor will be liable for and will pay any of Counsel’s normal fees which are not recovered from the Opponent. OR
2. Subject to clause 13 below, the Solicitor will NOT be liable for and will not pay any of Counsel’s normal fees which are not recovered from the Opponent.”

32. If counsel elects 12.1 there is a contractual basis for claiming any non-recovered fees, so counsel’s entitlement to payment from the solicitors is not limited to what is offered or achieved on assessment. If a solicitor were to ask counsel to accept a reduced amount offered or assessed, this would be a matter for counsel. If counsel does not wish to do so, the solicitors have a choice: they can face paying the difference themselves, or proceed to assessment/ appeal.

33. If counsel elects 12.2 counsel’s entitlement to fees is limited to what is recovered on assessment: “An Eat what you Kill Agreement”. This puts more of the risk on counsel.

34. The terms of the CFA may place certain obligations upon the solicitor to maximise counsel’s recovery of fees on assessment. For example, the Standard Terms and Conditions of the APIL/PIBA agreement obliges the solicitor to take steps in preparation for detailed assessment (Clause 16).

35. Further terms may also cover negotiations and agreement with the opposing party before assessment. For example, Clause 17 of APIL/PIBA standard terms contain provisions when fees are agreed with the opponent.

36. If agreement is reached without counsel’s consent before detailed assessment the APIL/PIBA terms give a potential remedy to Counsel as 17(3) provides that the solicitor “*will not accept the [Opponent’s] offer without Counsel’s express consent*”. The effect of this provision may be direct insofar as it provides a remedy, but can also be

indirect in that it can be referenced by counsel in discussion with the solicitor about the risks/benefits of going to detailed assessment.

37. If counsel is not happy with a proposal to settle fees, in most situations counsel will find the answer to the question either in the terms of the agreement between solicitor and counsel or, subject to the terms of that agreement, in simply insisting on payment.

38. If counsel is considering whether to seek to insist or compel a lay client or solicitor to run a case to a final detailed assessment hearing or to pursue an appeal, the issues which arise are often fact sensitive. Counsel may wish to consider:

- Whether counsel can continue to advise the client or whether an independent opinion needs to be sought. The question of who pays for the independent opinion will need to be dealt with.
- Standing to bring the claim or the appeal (as the case may be). Usually only the lay client will have standing.
- Costs consequences. The default position is that an adverse costs order will fall to be paid by the lay client. The client can seek redress against its solicitors or counsel. The court also has the power to make orders for costs against legal representatives in appropriate circumstances.
- Funding arrangements for the detailed assessment/appeal including position of any after the event or costs insurance policy. An appeal against a final costs order, will usually be outside of the scope of the 'standard' CFAs used in personal injury cases and a new CFA may be needed.

### **Scenario 3: the solicitor keeps interest owed to the barrister.**

39. It is not usual for solicitors expressly to account to barristers for interest paid on counsel fees for the period between the order for costs and the payment of costs.

40. In most cases an overall costs figure will be negotiated by instructing solicitors with the paying party and that figure will include an amount for interest. Solicitors then use that figure to calculate the overall percentage recovery on the bill and may seek to negotiate the same or a similar percentage deduction with counsel. If that is done, there is an accounting to counsel for interest (although there is no separate calculation or identification of the sum paid) because the pot includes the sum payable by way of interest on solicitors' and counsel's fees.



41. If a case proceeds to detailed assessment, interest on costs will be separately awarded and counsel should ensure that they are paid their share of the interest on top of their fees as assessed or agreed.

**Question:**

42. Is it acceptable for a solicitor to keep interest paid on counsel's fees by the paying party (for example by excluding the interest sum from the pot available for division between counsel and solicitor)?

**Answer:**

43. No. Such conduct could breach Principle 4 (dishonesty) and/or Principle 5 (integrity) of the Solicitors Regulation Authority (SRA) Principles.