The Bar Council

Discounted Fixed Fees

Purpose:	To advise barristers when they are asked to accept incomplete or discounted fees
Overview:	The issue - what the Court must be told – Conditional Fee Agreements (CFAs) – referral fees – the Young Bar
Scope of application:	All practising barristers
Issued by:	Remuneration and Ethics Committees
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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.**

1. This document addresses scenarios in which you are asked to accept incomplete or discounted remuneration, meaning a lesser amount than is to be claimed from the opposing party for that work.

2. This scenario most commonly arises in the context of fast track trial fees, in which the fee payable for the costs of an advocate for preparing for and appearing at the trial ("trial costs") is stipulated by the Civil Procedure Rules (CPR): see CPR r.45.37. If, for example, there is to be a fast track trial of a claim of more that £3,000 and less than £10,000, CPR r.45.38 (presently) provides for trial costs of £690. But, subject to the discussion below, there is nothing to prevent your clerk agreeing a brief fee for that trial of £500. In the event of success, the Court should still order payment of the fixed fee of £690, leaving an excess of £190 once you have been paid.

3. Three categories of problem can arise in the context of such arrangements:

   3.1. Must the Court be told what you are actually being paid?

   3.2. Is this a Conditional Fee Agreement (CFA)?

3.3. Is the excess a referral fee?

4. It is worth bearing in mind that the fixed fees were, when set, intended to permit advocates to be properly remunerated for fast track trial work, having regard to the fact that not all fast track cases are the same. The underlying logic is that, while some cases are more complicated than others and require more preparation, the differences will even themselves out over time. That logic is undermined if less than the full fixed fee is charged for more straightforward cases, while the fee charged remains capped for the more complicated cases.

5. Nothing in this paper is intended to suggest that the fixed fees for advocates no longer represent reasonable and appropriate remuneration. On the contrary, the Bar Council is concerned to hear that barristers are being asked to work at discounted rates and concerned that the result may be that they are not being properly remunerated for fast track trial work. Inadequate remuneration undermines the viability of practice in this area, but in any individual case, that is an issue for the individual barrister, provided that the Court is not misled and the interests of the lay client are protected. It should be remembered that the "cab-rank" rule does not apply if you are not being offered a proper fee for the work (rC30.8). It is not possible to be prescriptive about whether a discounted fee will amount to a proper fee. That will depend on the individual case.

What must the Court be told?

6. The fixed fee regime abrogates the indemnity principle, which means that fixed fees can be recovered regardless of whether they are payable to counsel. For example, CPR r.45.38(2) makes clear that the Court "*may not award more **or less** than the amount shown in the table*" (emphasis added), save in certain defined circumstances. The fact that you are actually being paid less than the amount shown is not one of those circumstances.

7. However, for the purposes of an assessment of costs following a fast track trial, a written statement of costs must be prepared showing (among other things) counsel's fees.[1] This should follow as closely as possible Form N260 and must be signed by the party or the party's legal representative.[2]

8. It should be noted that the current version of the Form N260 statement of costs which is to be signed reads: "*The costs stated above do not exceed the costs which [the party] is liable to pay in respect of the work which this statement covers. Counsel's fees and other expenses have been incurred in the amounts stated above and will be paid to the persons stated*."

[1] See CPR PD 44 paragraph 9.5(2)
[2] See CPR PD 44 paragraph 9.5(3)

9. If you have agreed to be paid a discounted fee, it is important to ensure that the statement of costs states the true position, and does not just state the fixed fee amount. You should know what fee you will be paid and you have a duty not to mislead the court by putting forward a statement of costs which does not accurately record what your actual fee will be.

10. In practical terms, this means that the statement should say something like: "*Counsel's fee: £500, but the fixed fee of £690 will be claimed*". If it does not do so, you must make the position clear when referring to the statement of costs for the purpose of seeking a summary assessment of costs. In any event, you should be aware of the matters set out under the heading 'Referral fees' below.

11. It seems clear from the rules that your agreement to accept less than the fixed fee is irrelevant (just as it would be if it had been agreed that you would be paid more). However, anecdotal evidence suggests that some District Judges do not understand this. You may want to alert the client to this risk, but must not bow to pressure to negate the risk by concealing the fact of the discounted fee.

12. Having disclosed the fee, it will then be necessary to address who is to retain the excess if the Court grants it. You will need to consider whether it might be a referral fee. This topic is considered further below.

Conditional Fee Agreements (CFAs)

13. Agreements can be structured so that you will be paid the full fixed fee if the claim/defence succeeds, but paid nothing or a reduced fee, if it fails. Regardless of whether it is all or part of the fee that is contingent on success, the agreement is a CFA.

14. There is no objection to such CFAs in principle, but you are not obliged to enter into a CFA by the cab-rank rule or for any other reason. You would be well advised not to take on work on this basis unless you are happy to take the risk of being under-remunerated. Accordingly, chambers should not put pressure on others (e.g. junior members) to undertake work on this basis (see also below).

15. If you decide to take a case on a CFA, that agreement must:

    15.1. be in writing, and

    15.2. not permit an uplift on the basic fee of more than 100%, or an uplift exceeding 25% of general damages and past losses in Personal Injury (PI) cases.

16. You need to bear in mind that, if these requirements are not complied with, any agreement to pay fees may be unenforceable. As well as meaning that the client would not be obliged to pay, it seems likely that seeking payment pursuant to an agreement which is known to be unenforceable would constitute professional misconduct, at

least if you were aware of the point and did not ensure that the client and the court were informed that the agreement was unenforceable. Paragraphs 6-11 above are applicable to an unenforceable CFA.

Referral fees[3]

17. Rule C10 of the BSB Handbook reads as follows: "*You must not pay or receive referral fees.*" Guidance at gC29 goes on to explain that, "*Making or receiving payments in order to procure or reward the referral to you by an intermediary of professional instructions is inconsistent with your obligations under CD2 and/or CD3 and/or CD4 and may also breach CD5*".

18. You must also not offer, promise or give to any client, professional client or intermediary any commission or referral fee, or any gift (other than items of modest value), as these compromise your independence, or can reasonably be seen as doing so: see CD4 and gC18.

19. It is not improper to agree to work for a discounted fee, or, indeed, to work for no remuneration.

20. It **is** improper and professional misconduct to agree to work for a discounted fee if in doing so you intend to enable your professional client (or a funder) to obtain a benefit (e.g., in the example above, to retain the £190 excess) without the lay client receiving the equivalent benefit (e.g. by way of a credit of the full £190 excess against solicitors' fees that the lay client would otherwise have to pay). This is because you are not just agreeing a lower brief fee: you are also intentionally enabling your professional client (or the funder) to obtain £190 in return for giving you the brief. Any such payment would be a disguised referral fee or commission payment (and, thus, prohibited), and, in an extreme case, might even be regarded as being a bribe and, as such, a criminal offence (see gC30.2).

21. It is not possible therefore to say that working for a discounted fee is always a breach of rC10, or that it never could be. Each agreement or arrangement must be considered on its merits. The more complex an arrangement, the more cautious practitioners should be.

22. If you are aware that another barrister is making a disguised referral fee payment, in breach of rC10 of the BSB Handbook, you may be under a duty to report this matter to the BSB under rC66. You should first consider giving the barrister the opportunity to explain their conduct under gC97.2.

[3] See the Bar Council guidance on referral fees: http://www.barcouncilethics.co.uk/documents/referral-fee-prohibition/

Further issue: Young Bar

23. The Bar Council takes the view that the provision of junior barristers for a fee clearly below the market rate, or below that prescribed by regulation or subject to an applicable protocol, is capable of amounting to a disguised referral fee or commission payment.

24. In addition, the Bar Council takes the view that the provision of junior barristers at discounted fees, in return for securing instructions for other members of chambers, particularly more senior members, is also prohibited. This involves a serious abuse of the most vulnerable in the profession.

25. Barristers who are unsure about any of the issues raised in this paper and other issues of professional ethics should contact the Bar Council's Ethical Enquiries Service on 020 7611 1307, or by email at Ethics@BarCouncil.org.uk.

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 refer to the professional practice and ethics section of the Bar Council's website here.