

2008 SCHEME

For the ACCOUNTING FOR AND RECOVERY OF COUNSEL'S FEES

Issued by the authority of:-
THE FACULTY OF ADVOCATES

1. Status of counsel's fees

(1) Except in legal aid cases, or as otherwise provided for, every solicitor who instructs counsel has a professional obligation so far as reasonably practicable to ensure payment of counsel's fees, either as agreed or, failing agreement, as taxed by the Auditor of the Court of Session or the auditor of the appropriate sheriff court, as the case may be, on the basis of agent and client, client paying.

It will be good practice, where there is any room for doubt about the ability of the client to reimburse him for payment of counsel's fees for, the instructing solicitor to take an adequate deposit against costs to be incurred. Payment of counsel's fees shall be made in accordance with the provisions of paragraph 7.

Except as provided hereafter "the instructing solicitor" means the solicitor who instructs counsel. Where, however, the letter of instruction in terms of paragraph 2 (d) includes the name of the correspondent firm in Scotland from whom the instruction originates "the instructing solicitor" in this paragraph and in paragraphs 7(3), 7(7) and 7(8) means the correspondent firm in Scotland from whom the instruction originates.

(2) As standard practice, each item of work will be the subject of a proposed fee as it is undertaken. Where it is intended that payment of fees should be deferred, whether for a particular case or otherwise, agreement to such a process must be concluded with counsel's clerk prior to or at the time of issue of instructions. Where such agreement has been concluded, it will be assumed, unless the counsel's clerk has specifically re-negotiated the matter with the solicitor concerned, that any other counsel whom the solicitor instructs in the same case, including other counsel to whom the instructions are passed on, will accept instructions on the same basis.

(3) A note of proposed fee will normally be issued within 30 days of completion of the item of work concerned. If counsel fails to issue a note of a proposed fee within 30 days of completion of an item of work the instructing solicitor may make a request in writing to the counsel for a proposed note of fee to be issued in relation to that item. Unless otherwise agreed, if counsel fails without good reason to issue a proposed note of fee within 6 weeks of such a request, the instructing solicitor shall have no obligation to ensure payment thereof. Any dispute regarding the failure by counsel to issue a proposed note of fee and the obligation of the solicitor in that event shall be referred to the Committee referred to in Paragraph 9. The Committee shall consider the

matter having regard to any representations made by the counsel and the solicitor and shall make recommendations to the Dean of Faculty. The decision of the Dean of Faculty shall be final.

(4) Whilst responsibility for meeting counsel's fees in a legally aided case is assumed by the Scottish Legal Aid Board, it remains incumbent upon the instructing solicitor to take reasonable care to comply with his obligations under the Legal Aid legislation. Where it becomes necessary to instruct counsel before the issue of a legal aid certificate or after its expiry or suspension, the instructing solicitor must be prepared to accept the obligation so far as reasonably practicable of meeting counsel's fees or issue instructions on a speculative basis. In each case the letter of instruction must be clear on the point.

2. Letters of instruction

The letter of instruction shall contain the following information:-

- (a) the name of the counsel instructed;
- (b) the name of the case or an identifying description of the matter to which the letter relates; It should be noted that it is essential that such description should be consistent in succeeding instructions so that case records may be correctly integrated.
- (c) where appropriate, the party for whom counsel is instructed to appear, or whom counsel is instructed to advise or represent
- (d) where appropriate, the name of the correspondent firm in Scotland from whom the instruction originates;
- (e) any reference which the solicitor wishes Faculty Services Limited to quote on counsel's account;
- (f) Faculty Services Limited case reference (except in the instance of the first instructions in a case or where the first fee note has yet to be issued);
- (g) where appropriate, the legal aid reference; and
- (h) where fees are to be paid otherwise than when rendered, a note to that effect.

3. Fee with instructions and retainers

If a solicitor wishes to tender a fee with his instructions, he should do so by means of a cheque for the fee together with the appropriate VAT drawn in favour of Faculty Services Limited. The same applies to fees sent as retainers. A VAT receipt will then be issued by Faculty Services Limited.

4. Special arrangements as to fees

(1) Solicitors are at liberty to negotiate in advance with counsel's clerk the fees to be paid in any particular case or matter including speculative cases and deferment of fees. Likewise the basis on which fees are to be settled may be agreed by prior negotiation with counsel's clerk. Where agreement of this kind has been made, and in so doing the right to proceed to taxation has not been expressly reserved, it cannot thereafter be altered nor taken to the Auditor for adjudication except by subsequent agreement between counsel and solicitor. It should be noted that the only proper channel of communication regarding counsel's fees is through counsel's clerk or following the issue of a proposed fee note, through Faculty Services Limited. This does not mean that when a case is marked speculative, the only fees liable to be paid to counsel are those which are judicially

recoverable by the solicitor. Counsel can insist in a taxation in any event to protect and preserve his fees.

(2) Counsel may accept instructions on a speculative basis but are not bound to do so. A solicitor may only instruct Counsel to act on a speculative basis in any case where the solicitor is acting on such a basis. (For the avoidance of doubt a speculative case is one where the solicitor is only to be paid a fee if the client is successful in the litigation.) If a solicitor wishes to instruct counsel on this basis, he must state the fact explicitly in every letter of instruction in the case. It may not be assumed that because one counsel agrees to accept such instructions another will also agree to do so. During the course of a speculative action counsel shall raise notes of proposed fee in the ordinary way.

N.B. Counsel are not permitted to accept instructions on a contingency basis i.e. that fees will be based on any quantum measurement of the outcome.

5. Rendering of notes of proposed fees

(1) In normal circumstances, Faculty Services Limited shall send to the instructing solicitor a note of proposed fee in respect of each item of work within a case as it is undertaken.

(2) In respect of criminal legal aid cases, notes of proposed fee may be sent direct to the Scottish Legal Aid Board; but in that event a copy of the note of proposed fee will be sent to the solicitor endorsed to the effect that the fee note has been rendered direct. Notes of proposed fee rendered under this rule and received prior to the solicitor rendering his own account will be included in the solicitor's account and will be dealt with by the Scottish Legal Aid Board in accordance with the relevant arrangements.

(3) If the instructing solicitor wishes to question the fee proposed by counsel he should, inform Faculty Services Limited in writing as soon as possible and in any event within 6 weeks of the issue of the note of proposed fee. Where the instructing solicitor feels that a particular fee is grossly excessive, he may refer the matter to the Dean of Faculty.

(4) Where, following notification to Faculty Services Limited as set out in sub-paragraph (3), the appropriate fee cannot be agreed, the Auditor of the Court of Session or the Auditor of the appropriate sheriff court, as the case may be, shall adjudicate as to what is a reasonable fee. Unless otherwise agreed in advance, this will be on an agent and client, client paying basis. In the event that there is at that time a final taxation disposing of expenses on an agent and client basis, such adjudication shall take place as part of that final taxation. Where there is no such taxation there may be a separate taxation if either the solicitor or counsel so wish. Where the amount of counsel's fee on the basis of agent and client is challenged at taxation, counsel or his representative shall be entitled to appear before the Auditor and make representations, and the diet of taxation may, if necessary, be adjourned for this purpose. In general, the expenses incurred in taxing counsel's fees shall form part of the general expenses of taxation, but if the Auditor considers the fee proposed by counsel to be excessive, and if counsel has exercised the right to appear before the Auditor and make representations, the Auditor may, at his discretion, order that such part of the expenses of taxation as are attributable to the intervention of counsel be borne by counsel.

(5) It should be noted that, unless otherwise agreed in advance, counsel's fees are to be paid on an agent and client, client-paying basis and are not restricted to what may be recoverable on a party and party basis. Counsel may accept instructions for pursuers in personal injury actions on the basis that he will only receive such fees as are recovered in judicial expenses but are not bound to do so. If a solicitor wishes to instruct counsel on this basis he must state the fact explicitly in every letter of instruction in the case. It may not be assumed that because one Counsel agrees to adopt such instructions another will also agree to do so. If such a request is not specified in any letter of instruction counsel who act under said letter will be entitled payment of his fee for the work undertaken in terms of said letter of instruction even if the fee is not ultimately recovered from another party to the action.

6. Completion

(1) This paragraph refers to cases where payment of fees has been deferred by prior agreement, speculative cases and civil legal aid cases.

(2) "Completion" in this paragraph means practical completion of the litigation up to the point to which it has been agreed that payment of fees should be deferred. The fact of completion shall be notified by the instructing solicitor to Faculty Services Limited as soon as practicable but in any event within one calendar month of that completion. In speculative and Legal Aid cases, and cases under the deferred guidelines in the Appendix hereto, Faculty Services Limited will make enquiry regarding completion one year after the last note of proposed fee is rendered. If no reply is received within one month, the case will be deemed to be completed. Where counsel has reason to believe that completion has been achieved, he may instruct Faculty Services Limited to initiate the process described at subparagraph (3). If completion has not in fact been achieved, the instructing solicitor should so inform Faculty Services Limited as soon as possible and preferably within 14 days of receipt of the statement.

(3) When completion is notified to Faculty Services Limited by the instructing solicitor, he shall indicate the date of the latest item of work undertaken by counsel. Where such date is more than 30 days prior to the receipt of notification of completion, Faculty Services Limited shall normally issue a statement forthwith. If the date of the latest item of work is less than 30 days prior to receipt of notification, issue of the statement may be deferred for a reasonable period having regard to paragraph 1 (3) hereof to allow Faculty Services Limited to obtain the appropriate information from counsel. In Legal Aid cases only notification of the fee by Faculty Services will take place within 60 days of the Solicitor advising them of completion, failing which the solicitor will be entitled to render his account from the Board and, for the avoidance of any doubt will have no further liability to counsel in relation to any fees not yet rendered (unless recovered from the Board) The statement to be sent to the instructing solicitor shall take the form of a computer printout showing all appropriate details of the case including all fees indicating which items, if any, have been paid and shall be accompanied by all notes of proposed fee not already issued.

7. Payment of fees

- (1) Payment of fees in all cases should be made to Faculty Services Limited and NOT to counsel.
- (2) Payment will be expected when the note of proposed fee has been issued or on the issue of a statement in terms of paragraph 6(3) except as otherwise provided or agreed. For the purpose of this scheme the fees shall be regarded as "due" as from this point.
- (3) In criminal legal aid cases, the instructing solicitor shall be responsible for furnishing counsel with such documentation as is required by the Scottish Legal Aid Board. It shall be the further responsibility of both the instructing solicitor and counsel to submit his account to the Scottish Legal Aid Board within three calendar months of conclusion of the trial or appeal as the case may be. Where such prompt submission of the solicitor's account cannot be made, Faculty Services Limited should be advised of the delay and the reasons for this in writing within the three month period outlined above. Where such prompt submission of the solicitor's account is made, Faculty Services Limited may be so advised. Otherwise fees in this category shall be regarded as "due" six months from the conclusion of a criminal case to allow for submission of accounts by the instructing solicitor to the Scottish Legal Aid Board and for processing by the Board
- (4) Fees shall be placed in the "due" category by Faculty Services Limited at the end of the calendar month in which they become "due".
- (5) Where fees have remained unpaid in the "due" category for two full calendar months and there has been no advice of good reason for delay in payment or non-payment, Faculty Services Limited shall place the case in the "overdue" category.
- (6) Where fees have remained unpaid in the "overdue" category for a full calendar month and there has been no advice of good reason for delay in payment or non-payment, Faculty Services Limited shall intimate to the instructing solicitor an intention to refer the matter to the Committee referred to in Paragraph 9.
- (7) If the solicitor has a reason for the non payment of counsels fees, he shall, within 21 days of receipt of intimation of the intention to refer the matter to the Committee, provide for the use of the Committee a brief report explaining that reason and a proposed timescale for payment or an explanation as to why he believes the proposed fee should be withdrawn. This report shall be considered by the Committee along with any representations from the counsel concerned. Thereafter the Committee shall make a recommendation to the Dean of Faculty as to whether in the Committee's view there is a good reason for non-payment. The recommendation of the Committee shall be intimated to the instructing solicitor.
- (8) If no such report is received from the solicitor the matter will be referred by Faculty Services Limited to the Dean of Faculty.
- (9) If the Dean of Faculty does not accept there is good reason for non-payment, he shall write to the instructing solicitor, with a copy where appropriate to the senior partner and to the correspondent Edinburgh firm, in the following terms:-

"I am advised by Faculty Services Limited that the fees listed in the attached schedule have been overdue for payment for 3 full calendar months and the Committee and I / I have determined that no good reason has been intimated for non-payment. Under mandate from the Faculty I am obliged to advise you that unless settlement is received within one full calendar month from service of this

notice, the name of your firm and its partners will be advertised within the practising membership of Faculty as defaulting in payment of fees, whereafter members will be permitted to accept instructions which come from you only in legal aid cases or if accompanied by payment of the appropriate fee.”

(10) At the end of one full calendar month after the notice set out in subparagraph (9) has been served and in the event that the overdue fees in question remain unpaid, the Dean of Faculty, except where there is good reason to the contrary, shall advise practising members of Faculty in the following terms:-

"Non-payment of counsel's fees

Heading (Name of firm)

Heading (Partners)

I am advised by Faculty Services Limited that counsel's fees issued to the above firm remain overdue and unpaid without good reason having been given. Having myself applied for payment to the firm in writing in the terms authorised by the Faculty, and having been informed by Faculty Services Limited that payment has not been received despite my application, I now give notice that instructions which come directly or indirectly from this firm or its partners may be accepted only in legal aid cases or if accompanied by payment of an appropriate fee."

A copy of this notice shall be sent to the firm concerned and, where appropriate, to the correspondent Edinburgh firm.

(11) At the time that the Dean of Faculty advises the Faculty as set out in sub-paragraph (10), he shall also write to the Law Society of Scotland as follows:-

"Non-payment of counsel's fees

Heading (Name of firm)

Heading (Partners)

I have to advise you that the above firm has failed to meet its professional obligation to ensure payment of counsel's fees. The Committee has intimated to me that no good reason has been advanced for such failure [or - Notwithstanding the view of the Committee that a good reason has been advanced for non payment I have concluded that I do not accept there is a good reason for such failure]. Having served due notice of my intention to do so, I have today instructed members of Faculty that instructions which come directly or indirectly from this firm or its partners may be accepted only in legal aid cases or if accompanied by payment of an appropriate fee. I leave the Law Society to take such action as it feels appropriate.”

A copy of this letter shall be sent to the firm in question and, where appropriate, to the correspondent Edinburgh firm.

(12) In normal circumstances payment of the fees in question will result in immediate revocation by the Dean of Faculty of his advice to practising members of Faculty in terms of paragraph 7(10), but in exceptional circumstances such revocation may, in the discretion of the Dean of Faculty, be delayed or otherwise withheld. Notice of the decision of the Dean of Faculty will be sent to the Law Society, to the firm concerned and, where appropriate, to the correspondent Edinburgh firm.

(13) Where a case is legally aided and has been placed in the "due" category in accordance with subparagraph (3), Faculty Services Limited may apply for payment direct to the Scottish Legal Aid Board.

8. Monitoring outstanding fees

At the beginning of each month Faculty Services Limited shall provide to each firm of solicitors a statement in the form of a computer printout (analysed by partner where requested) of all cases where fees are regarded as due for payment. The statement will highlight fees that are currently under dispute. There will be no such listing of those cases where by prior agreement payment of fees is deferred and remains deferred. Likewise, uncompleted legal aid cases will not be listed. It is open to a solicitor to seek a full listing of all cases at any time or on a regular basis. Correspondent firms of solicitors will receive a statement of all cases where fees have been issued and remain outstanding

9. Committee

There will be a Committee comprising 3 members of the Faculty of Advocates appointed by the Dean. The remit of the Committee will be:

- (a) To consider the Scheme for Accounting for and Recovery of Counsel's Fees and make recommendations to the Faculty on amendments thereto.
- (b) To carry out regular review of the financial limits for payment of Counsel's fees in terms of Guideline 3 to the Scheme's Appendix and make recommendations on an annual basis.
- (c) To consider cases where a report is made in terms of paragraph 7(7) in connection with a dispute between the instructing Solicitor and Faculty Services Limited as to whether "good reason" exists for non payment of Counsel's fees and make recommendations to the Dean of Faculty.

APPENDIX
GUIDELINES TO COUNSEL IN RESPECT OF
DEFERMENT OF FEES UNDER THE NEW SCHEME
FOR THE ACCOUNTING FOR AND RECOVERY
OF FEES IN CIVIL CASES

In terms of paragraphs 1(2) and 4(1) of the Scheme, deferment of payment of fees is permitted under an agreement reached by the solicitor with counsel's clerk. In order to preserve the main aims of the Scheme as a whole, however, deferment will be permitted, except in cases of the kind mentioned in the Note annexed hereto, only in one or other of the following circumstances: -

1. Upon an agreement between the solicitor and counsel's clerk in relation to a particular case or in relation to cases in a particular category or for a particular client or in relation to all cases, whereby it is agreed that fees should be rendered and payable at each of the following stages in the case, viz., at the closing of the Record, after completion of a Procedure Roll Debate, Proof or Jury Trial and after completion of a Hearing in the Inner House.
2. Upon an agreement between the solicitor and counsel's clerk in relation to a particular case or in relation to cases in a particular category or for a particular client or in relation to all cases, whereby it is agreed that fees should be rendered and payable at certain prearranged periods in time, subject to a maximum of six months in relation to any such period.
3. Upon an agreement between the solicitor and counsel's clerk in relation to a particular case or in relation to cases in a particular category or for a particular client or in relation to all cases, whereby it is agreed that fees should be rendered and payable at every point when a prearranged total of rendered and unpaid fees net of VAT has been reached in that case, subject to a maximum total sum at any one time net of VAT of £5,000 in relation to senior counsel and £3,500 in relation to junior counsel.
4. Upon an agreement between the solicitor and counsel's clerk in relation to a particular case, that the case will be subject to a block fee to be rendered at its termination.
5. Upon an agreement between the solicitor and counsel's clerk in relation to a particular case, that counsel wishes for personal reasons payment of all or part of the relevant fees in that case to be delayed.

It is emphasised that except in cases of the kind mentioned in the note annexed hereto, the Scheme and these Guidelines do not permit any agreement to be reached between counsel or his clerk and a solicitor whereby all fees for work in any case are to be deferred until its completion. If an advocate wishes to achieve deferment in circumstances other than those covered by these Guidelines he should consult first with the Chairman of Faculty Services Limited whom failing any other Faculty officer.

As aids to interpretation:-

1. Examples of "completion" as defined in paragraph 6(2) of the Scheme are: -

(a) In relation to paragraph 1 above - the date of the Interlocutor closing the Record OR the date of the Interlocutor making avizandum at the end of a Procedure Roll Debate, Proof or Jury Trial or Hearing in the Inner House.

(b) In relation to paragraph 2 above - the expiry of the agreed period in time.

(c) In relation to paragraph 3 above - the issue of the proposed fee note which results in the agreed total being reached.

(d) In relation to a case of the kind mentioned in the Note annexed hereto – the date of the final Interlocutor.

(e) In relation to cases settled extra judicially – the date of authority being interposed to the Joint Minute.

2. "Good reason" in terms of paragraph 7 of the Scheme will depend on the particular circumstances of the case but may, for example, include a situation where a solicitor has had to instruct counsel in an emergency situation and has been assured at the time that adequate funds would be forthcoming to meet counsel's fees, but in the event this proves not to be so. On the other hand mere unwillingness on the part of the solicitor to obtain funds to meet counsel's fees would not be likely to amount to "good reason".

3. "Exceptional circumstances" in terms of paragraph 7(12) of the Scheme will depend on the particular circumstances of the case but may, for example, include a situation where a firm has persistently been the subject of action in terms of paragraph 7(10) and (11).

NOTE ANNEXED

1. Petitions for the appointment of and work instructed on behalf of liquidators, trustees in bankruptcy, curators bonis, judicial factors, curators ad litem and the like.

2. Multiple poidings.

3. Speculative cases.