

Fee Sharing / Referral Fees

Important guidance for holders
of LSC Crime Contracts
December 2010



Important Guidance: Fee Sharing/Referral fees

Introduction

In response to concerns raised by the Bar, we have agreed to publish this guidance on fee sharing/other payments between providers and advocates under LSC crime contracts. In particular:

- Permitted fee sharing arrangements (and the principle of the Instructed Advocate)
- Payment for advocacy at s51 hearings in the Magistrates Court, including where undertaken by agents.
- Agency agreements between Higher Court Advocates.
- Payments for the introduction of work (referral fees).

Any use of the term advocate is meant to include barristers (independent or employed) and solicitor-advocates / Higher Court Advocates (HCAs) who have rights of audience in the Crown Court.

i) Permitted fee sharing arrangements

Background

The revised Advocates Graduated Fee Scheme introduced in April 2007 required that all case fees should be paid to one named advocate – namely the Instructed Advocate (IA)¹. The IA can be a member of the independent Bar or an in-house advocate (whether HCA or employed barrister). In respect of the latter, the firm employing the advocate will bill and collect the fee on their behalf.

Prior to the introduction of the IA principle, all advocates who worked on a case could make a direct claim to the LSC/HMCS for the work that they had undertaken, whether this amounted to undertaking the trial or simply attending a single hearing such as a mention.

The introduction of the IA principle means that the IA is responsible for:

- Ensuring that all hearings (including the trial) are attended either by the IA themselves or by a Substitute Advocate (SA);
- Making a claim at the end of the case;
- Arranging payment of fees to any SAs that appear in the case; and
- Seeking a re-determination of the fees, or seeking written reasons (where appropriate).

The IA must be identified to the Court in writing on or before the Plea and Case Management Hearing (PCMH). If the court is not informed as to the identity of the IA, the advocate who attends the PCMH will be recorded as the IA. We understand that this may not be happening in practice and will take the matter up with HMCS, however all providers should use their best endeavours to ensure that it is the IA who

¹ Where a Representation Order allows for more than one advocate in a case (i.e. a leader and a junior) then there will be two IAs (a lead IA and a led IA-) – each of whom may make a claim at the end of the case.

bills the case (even when the trial advocate is different) to avoid any undue delays in payment for any other advocate involved in the case.

Negotiation of fees between advocates

The level of remuneration payable to any SA is for agreement between the IA and the SA. This is a contractor/sub-contractor arrangement. The LSC, through the Funding Order, stipulates the total case fee payable (to the IA) in any given case but it does not set out how individual, substitute, advocates should be paid for work that they have done on a case.

Therefore, in practice, the IA/SA provisions allow for negotiation between advocates. Where both the IA and any SA are independent members of the Bar, the remuneration that should be paid to a SA has been set out in the Bar Council's Remuneration Protocol¹. This protocol outlines, in detail, the remuneration that should be paid to a SA for undertaking any specific element of a Crown Court case and the Bar Council recommends that all barristers seek agreement that the terms of the protocol will be adhered to whenever they take on work as a SA.

However, in cases where the IA is an in-house advocate – either HCA or employed barrister– the Bar Council protocol is not binding and the remuneration payable to a barrister acting as a SA is for negotiation between the parties on a case by case basis.

Negotiation on this basis, between the respective members of the defence team, is anticipated and permitted under the regulations. All litigators and advocates are reminded that an Instructed Advocate is to be appointed on the basis that he/she is to conduct the trial. It is not appropriate to designate an Instructed Advocate where there is no intention for that advocate to actually undertake the trial.

The Funding Order defines the Instructed Advocate as “the first barrister or solicitor advocate instructed in the case, who has primary responsibility for the case”² and sets out the limited circumstances in which the IA may withdraw (see Appendix (2(c))). If it becomes clear that the instructed advocate will be unable to conduct the trial then he/she is under a duty to inform the litigator promptly in order that a substitute advocate can be instructed as soon as possible.

ii) Payment for the s51 hearings in the Magistrates Court

Unassigned Counsel / use of agents

In the vast majority of indictable only cases, any advocacy carried out in the Magistrates Court prior to the case being 'sent' to the Crown Court by an advocate (as opposed to a litigator) will be as unassigned counsel. There is no separate payment for this element of casework, regardless of whether it is undertaken by an

¹ This can be found at:

<http://www.barcouncil.org.uk/assets/documents/Graduated%20Fee%20Payment%20Protocol%203%20Oct%202007.pdf>

² Where a Representation Order provides for more than one advocate, 'instructed advocate' means each of (i) the leading instructed advocate and (ii) the led instructed advocate.

advocate or a litigator – this is because the fees for this work have been wrapped up within the Litigator Graduated Fee Scheme (LGFS).

Where a litigator instructs an advocate to attend the s51 hearing on an unassigned basis, the advocate is effectively acting as an agent of the solicitor. This does not affect the level of remuneration – the appropriate fee is wrapped up into the LGFS and so any agency fees payable are for agreement between the litigator and the advocate.

The Bar Council has indicated that they believe some litigator firms have been advised to seek a fee of £100 from the Instructed Advocate in cases where the litigator undertook the s51 hearing in the Magistrates Court. The Bar Council believe firms have been told, in error, that this payment reflects the fact that these hearings are governed by the AGF Scheme.

The Bar Council are correct that such a position is erroneous and fees for s51 hearings, with the exception of a minority of cases where counsel is assigned, as outlined below, are included in the Litigator Graduated Fee Scheme.

Further investigation of this issue has indicated that some litigators, aware of the fact that the s51 hearing has been wrapped up within the LGFS, are actually claiming a fee of £100 from advocates as a commercial payment for the introduction of work – this issue is covered under '**referral fees**' below which, for the avoidance of doubt, **are in breach of the LSC Standard Terms.**

Assigned Counsel

Where an advocate (i.e. a barrister or HCA) is assigned to the s51 hearing in the Magistrates Court, the payment for this work is governed by the AGFS.

iii) Agency agreements between Higher Court Advocates

The Bar Council has provided evidence of an agency agreement between HCAs that seeks to exclude the independent bar. The agency agreement sets out the aim that HCAs from a number of different firms should act as agents (effectively, Substitute Advocates) for one another rather than seeking to instruct a member of the independent bar as a SA.

This does not contravene any of the regulations set out in the relevant Funding Order. It is the responsibility of the IA to ensure all hearings, including the trial are attended and to remunerate any SA out of the payment they receive from the LSC/HMCS for the entirety of the case. The identity, or status, of the SA is not relevant provided that the SA is suitably experienced and qualified to undertake the hearing/trial – this test is the same regardless of whether the SA is a barrister or an HCA and is a matter of professional ethics.

The fact that some firms have sought to formalise arrangements to act for one another in these hearings is not a breach of the regulations and, in fact, simply mirrors the close links that currently exists between some firms and individual sets of chambers.

Assuming the HCAs that are acting as Substitute Advocates are of sufficient experience and quality to undertake the case/hearing, then this practice is perfectly acceptable.

iv) **Payments for the introduction of work (referral fees)**

Background

The Bar Council has reported an increase in the number of litigators that are requesting referral fees for introducing new cases to independent barristers. Little empirical evidence has been brought forward and so it is possible that cases reported as 'referral fees' are, in fact, case-by-case negotiations where the Substitute Advocate is not satisfied with the level of remuneration on offer because it is lower than the amount outlined in the Bar Council's guidance protocol. As has been noted above, negotiation over the split of case fees is a required element of the AGFS and, is not, of itself, a breach of the litigator's duties to either the LSC, his professional standards or the client.

Unified Contract terms

The LSC's Unified Contract standard terms explicitly prohibits contract-holders from making or receiving any payment (or any other benefit) for the referral or introduction of a client. The full terms are set out in Appendix 1.

The Bar also asserts that paragraph 11 of the CDS Funding Order (set out in full as Appendix 2) indicates litigators cannot charge a referral fee. This paragraph states that when performing legally aided Crown Court work, no additional payment may be given or received other than the fees stated in the CDS Funding Order, unless they have been given prior authority by the LSC.

Scenario One: £100 for referring cases after the s51 hearing

One issue that the Bar Council have drawn to our attention is where litigators request an advocate to pay £100 as a commercial payment for the introduction of work. This might be linked to the fact that litigators often undertake advocacy at the s51 (Magistrates Court) hearing and, erroneously or otherwise, argue that this entitles them to a payment from the AGFS.

As detailed above, any request for part of the AGFS is wrong in law since funding for these hearings has been wrapped up into the LGFS. **Where a litigator makes a request for such a fee, solely for the purpose of 'introducing' the work to the advocate, it will be a breach of the LSC's UC Standard Terms.**

Scenario Two: "unfair" pricing

The Bar Council have also indicated that there is a practice amongst some litigators to undertake an element of AGFS casework – for example, up to and including the PCMH – and then to seek to instruct a barrister to undertake the substantive trial (as a Substitute Advocate) in return for a fixed percentage of the graduated fee. If the barrister disagrees, the litigator, it is reported, will seek to find an alternative barrister willing to undertake the work for the agreed split of the fees.

Appropriate negotiations between the members of a defence team do not, as we have noted above, breach the contract terms relating to referrals. The final ratio of payment between the IA and the SA in a case, as noted earlier, is for agreement between the parties and in the event that a Substitute Advocate believes the remuneration available to him is unacceptably low, he may refuse to accept the instructions on the basis of unreasonable remuneration – the Bar having exempted legally aided work from the cab rank in any event.

As mentioned above, an Instructed Advocate is to be appointed on the basis that he/she is to conduct the trial. It is not appropriate to designate an Instructed Advocate where there is no intention for that advocate to actually undertake the trial.

It has been argued that the quality of representation may be compromised by this scenario. However, quality will only be put at risk where an in-house advocate (acting as IA) seeks to retain a disproportionate proportion of the AGFS fee and so instructs an advocate of a lower quality than is required and such an advocate (whether a member of the independent bar, or other) accepts a brief for which they are not sufficiently capable.

The introduction of Quality Assurance for Advocates (QAA) will, for the first time, provide an objective quality assessment for all advocates and will, in the medium term mitigate against any theoretical risk posed by this scenario.

Appendix 1

LSC Unified Contract Standard Terms:

May you pay referral fees?

20.1 You must not:

- (a) make any payment, or provide any other benefit, to any other provider of publicly funded legal services for the referral or introduction (directly or indirectly) of any Client or potential Client to you;*
- (b) make any payment, or provide any other benefit, to any third party specified by us in writing for the referral or introduction (directly or indirectly) of any Client or potential Client to you.*

May you receive referral fees?

20.2 You must not receive any payment, or any other benefit, from any person or body for the referral or introduction (directly or indirectly) of any Client or potential Client by you unless the services to be provided pursuant to the referral or introduction are not services for which the Client or potential Client would be eligible under Access to Justice Act Legislation.

Does a payment raise a presumption?

20.3 Where you:

- (a) make any payment or provide any other benefit; or*
 - (b) receive any payment or any other benefit;*
- in circumstances that suggest a possible breach of Clauses 20.1 or 20.2, the presumption shall be that the payment or benefit was made, provided or received in breach of this Contract and the onus shall be on you to show that was not the case.*

Appendix 2

CDS Funding Order 2007 paragraphs:

A) Payments from other sources

11. *Where a representation order has been made in respect of any proceedings, the representative, whether acting under a representation order or otherwise, must not receive or be a party to the making of any payment for work done in connection with those proceedings, except such payments as may be made—*

- (a) by the Lord Chancellor or the Commission; or*
- (b) in respect of any expenses or fees incurred in—*
 - (i) preparing, obtaining or considering any report, opinion or further evidence, whether provided by an expert witness or otherwise; or*
 - (ii) obtaining any transcripts or recordings,*

where an application under CDS Regulations for an authority to incur such fees or expenses has been refused by a committee appointed under arrangements made by the Commission to deal with, amongst other things, appeals of, or review of, assessment of costs.

B) Payment of fees to Substitute Advocates

21(3) *Where the representation order provides for a single advocate, the instructed advocate is responsible for arranging payment of fees to the trial advocate and any substitute advocate who has undertaken work on the case.*

21(4) *Where there are two instructed advocates for an assisted person, payment must be made to each instructed advocate individually, and—*

(a) the leading instructed advocate is responsible for arranging payment of fees to the trial advocate and any substitute advocate who have undertaken work on the case of a type for which a leading advocate is responsible; and

(b) the led instructed advocate is responsible for arranging payment of fees to the trial advocate and any substitute advocate who have undertaken work on the case of a type for which a led advocate is responsible.

C) Withdrawal of the Instructed Advocate

(9) *An instructed advocate must remain instructed advocate at all times, except where-*

(a) a date for trial is fixed at or before the plea and case management hearing and the instructed advocate is unable to conduct the trial due to his other pre-existing commitments;

(b) he is dismissed by the assisted person or the litigator; or

(c) he is required to withdraw because of his professional code of conduct.

(10) *Where, in accordance with sub-paragraph (9), an instructed advocate withdraws, he must –*

(a) Immediately notify the court of his withdrawal-

(i) in writing; or

(ii) where the withdrawal takes place at a plea and case management hearing, orally; and,

(b) within 7 days of the date of his withdrawal, notify the court in writing of the identity of a replacement instructed advocate, who must fulfil all the functions of an instructed advocate in accordance with this Order

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