

# **PERSONAL INJURIES BAR ASSOCIATION**

## **STANDARD TERMS AND CONDITIONS**

### **TREATED AS ANNEXED TO THE CONDITIONAL FEE AGREEMENT BETWEEN SOLICITOR AND COUNSEL**

**FOR USE AFTER 31 JANUARY 2013**

**PLEASE NOTE: THESE TERMS WILL NOT BE APPROPRIATE FOR USE  
ON OR AFTER 1 APRIL 2013**

#### **Definitions**

“The solicitor” is an authorised person as defined in the standard terms as an authorised person for the purposes of s 18(1)(a) of the Legal Services Act 2007 and whose approved regulator under the Act is the Law Society and/or the SRA, and all successors and assignees;

“Counsel” is a barrister as defined in the standard terms, practising as a member of the Bar of England & Wales, who is willing and able in that capacity to provide the Services in connection with the Case and in accordance with the Instructions from the solicitor.

#### **Terms of Work**

Work undertaken by Counsel under this agreement is in accordance with and on the terms set out in The Standard Contractual Terms for the Supply of Legal Services By Barristers, Annexe T, of the Code of Conduct [‘**the standard terms**’] varied under clause 2.2 of the standard terms as set out below.

- (1) Clause 4.5 of the standard terms shall not apply. The agreement between solicitor and counsel comes into effect upon receipt of the instructing solicitor’s signed Conditional Fee Agreement.
- (2) Clause 11 of the Standard Terms shall not apply. The agreement in relation to normal and success fees are as set out in the signed Conditional Fee Agreement between Counsel and Solicitor.
- (3) Clause 12 of the Standard Terms are varied in this agreement as set out in clause 27 below; and
- (4) Clause 13 of the Standard Terms shall not apply. The circumstances in which solicitor or counsel may terminate the agreement or the agreement automatically terminates are as set out in clauses 6, 7, and 8 below.

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**PART ONE  
CONDITIONS PRECEDENT**

**Papers provided to Counsel**

1. The solicitor should have provided counsel with the following documents:
  - 1) a copy of the conditional fee agreement between the solicitor and the client and the Law Society's Conditions as they apply to the claim;
  - 2) written confirmation that "after the event" or other similar insurance is in place, or a written explanation why it is not;
  - 3) all relevant papers and risk assessment material, including all advice from experts and other solicitors or barristers to the client or any Litigation Friend in respect of the claim, which is currently available to the solicitor; and
  - 4) any offers of settlement already made by the client or the defendant.

**Solicitor's Compliance with Statute**

2. The solicitor confirms that the conditional fee agreement between the solicitor and the client complies with sections 58 and 58A of the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 2000.

**PART TWO  
OBLIGATIONS OF COUNSEL**

**To act diligently**

3. Counsel agrees to act diligently on all proper instructions from the solicitor subject to paragraph 4 hereof.

**Inappropriate Instructions**

4. Counsel is not bound to accept instructions:
  - 1) to appear at any hearing where it would be reasonable
    - (a) to assume that counsel's fees would not be allowed on assessment or
    - (b) to instruct a barrister of less experience and seniority (albeit that counsel shall use his/her best endeavours to ensure that an appropriate barrister will act for the client on the same terms as this agreement);
  - 2) to draft documents or advise if a barrister of similar seniority would not ordinarily be instructed so to do if not instructed on a conditional fee basis;
  - 3) outside the scope of this agreement.

**PART THREE**  
**OBLIGATIONS OF THE SOLICITOR**

5. The solicitor agrees:
- 1) to comply with all the requirements of the CPR, the practice direction about costs supplementing parts 43 to 48 of the CPR (PD Costs), the relevant pre-action protocol, and any court order relating to conditional fee agreements, and in particular promptly to notify the Court and the opponent of the existence and any subsequent variation of the CFA with the client and of this agreement and whether he / she has taken out an insurance policy or made an arrangement with a membership organisation and of the fact that additional liabilities are being claimed from the opponent;
  - 2) promptly to apply for relief from sanction pursuant to CPR part 3.8 if any default under part 44.3B(1)(c) or (d) occurs and to notify counsel of any such default;
  - 3) to act diligently in all dealings with counsel and the prosecution of the claim;
  - 4) to liaise with or consult counsel about the likely amount of counsel's fees before filing any estimate of costs in the proceedings, and to provide a copy of any such estimate to counsel;
  - 5) to consult counsel on the need for advice and action following:
    - (a) the service of statements of case and if possible before the allocation decision; and (b) the exchange of factual and expert evidence;
  - 6) to deliver within a reasonable time papers reasonably requested by counsel for consideration;
  - 7) promptly to bring to counsel's attention:
    - (a) any priority or equivalent report to insurers;
    - (b) any Part 36 or other offer to settle;
    - (c) any Part 36 payment into Court;
    - (d) any evidence information or communication which may materially affect the merits of any issue in the case;
    - (e) any application by any party to have the client's costs capped;
    - (f) any costs capping order;
    - (g) any other factor coming to the solicitor's attention which may affect counsel's entitlement to success fees whether before or after the termination of this agreement;
  - 8) promptly to communicate to the client any advice by counsel:
    - (a) to make, accept or reject any Part 36 or other offer;
    - (b) to accept or reject any Part 36 payment in;
    - (c) to incur, or not incur, expenditure in obtaining evidence or preparing the case;
    - (d) to instruct Leading counsel or a more senior or specialised barrister;

- (e) that the case is likely to be lost;
- (f) that damages and costs recoverable on success make it unreasonable or uneconomic for the action to proceed;
- 9) promptly to inform counsel's clerk of any listing for trial;
- 10) to deliver the brief to counsel in accordance with the agreement between the solicitor and counsel;
- 11) to inform Counsel promptly if the case concludes 14 days before the date fixed for trial if the claim is allocated to the fast-track or 21 days if allocated to the multi-track;
- 12) if any summary assessment of costs takes place in the absence of counsel, to submit to the court a copy of counsel's risk assessment and make representations on counsel's behalf in relation to his/her fees;
- 13) to inform counsel in writing within 2 days of any reduction of counsel's fees on summary assessment in the absence of counsel and of any directions given under PD Costs 20.3(1) or alternatively to make application for such directions on counsel's behalf;
- 14) where points of dispute are served pursuant to CPR part 47.9 seeking a reduction in any percentage increase charged by counsel on his fees, to give the client the written explanation required by PD Costs 20.5 on counsel's behalf;
- 15) where more than one defendant is sued, the solicitor will write to the "after the event" insurers clarifying whether and when defendants' costs are to be covered if the claimant does not succeed or win against all of the defendants, and send that correspondence to counsel; and
- 16) when drawing up a costs bill at any stage of the case to include in it a claim for interest on counsel's fees.

## **PART FOUR TERMINATION**

### **Termination by Counsel**

- 6. Counsel may terminate the agreement if:
  - 1) Counsel discovers the existence of any document which should have been disclosed to him under clause 1 above and which materially affects Counsel's view of the likelihood of success and/or the amount of financial recovery in the event of success;
  - 2) Counsel discovers that the solicitor is in breach of any obligation in paragraph 5 hereof;
  - 3) the solicitor, client or any Litigation Friend rejects counsel's advice in any respect set out in paragraph 5(8) hereof;
  - 4) Counsel is informed or discovers the existence of any set-off or counter-claim which materially affects the likelihood of success and/or the amount of financial recovery in the event of success;
  - 5) Counsel is informed or discovers the existence of information which has been falsified or should have been but has not been provided by the

- solicitor, client or any Litigation Friend, of which counsel was not aware and which counsel could not reasonably have anticipated, which materially affects the merits of any substantial issue in the case;
- 6) Counsel is required to cease to act by the Code of Conduct of the Bar of England and Wales or counsel's professional conduct is being impugned; provided that counsel may not terminate the agreement if so to do would be a breach of that Code, and notice of any termination must be communicated promptly in writing to the solicitor;
  - 7) A costs capping order is made which counsel reasonably believes may adversely affect the recoverability of his or her normal fees and/or his or her percentage increase.
  - 8) If the opponent receives Community Legal Service funding.

**Termination by the Solicitor**

7. The solicitor may terminate the agreement at any time on the instructions of the client or any Litigation Friend.

**Automatic Termination**

8. This agreement shall automatically terminate if:
  - 1) Counsel accepts a full-time judicial appointment;
  - 2) Counsel retires from practice;
  - 3) the solicitor's agreement with the client is terminated before the conclusion of the case;
  - 4) Legal Services Commission funding is granted to the client;
  - 5) the client dies;
  - 6) the court makes a Group Litigation Order covering this claim.

**Client becoming under a Disability**

9. If the client at any time becomes under a disability then the solicitor will:
  - 1) consent to a novation of his Conditional Fee Agreement with the client to the Litigation Friend and
  - 2) where appropriate, apply to the Court to obtain its consent to acting under a conditional fee agreement with the Litigation Friend.  
Thereafter, the Litigation Friend shall, for the purposes of this agreement, be treated as if he/she was and has always been the client.

**Counsel taking Silk**

10. If counsel becomes Queen's Counsel during the course of the agreement then either party may terminate it provided he/she does so promptly in writing.

**PART FIVE  
COUNSEL'S FEES AND EXPENSES**

**Counsel's Normal Fees**

11. 1) Counsel's fees upon which a success fee will be calculated (the normal fees) will be calculated on the basis of the figures contained in the agreement between the Solicitor and Counsel.
- 2) To the extent that the hours of preparation set out in that agreement are reasonably exceeded then counsel's hourly rate will apply to each additional hour of preparation.
- 3) If the case is settled or goes short counsel will consider the solicitor's reasonable requests to reduce his/her brief fees as set out in the agreement.
- 4) Counsel's normal fees will be subject to review with effect from each successive \*anniversary of / \* first day of February from the date of this agreement but Counsel will not increase the normal fees by more than any increase in the rate of inflation measured by the Retail Prices Index.

**Counsel's Success Fee**

12. The rate of counsel's success fee and reasons will be as set out in the agreement between the Solicitor and Counsel.

**Counsel's Expenses**

13. If a hearing, conference or view takes place more than 25 miles from counsel's chambers the solicitor shall pay counsel's reasonable travel and accommodation expenses which shall:
- 1) appear separately on counsel's fee note;
  - 2) attract no success fee and
  - 3) subject to paragraph 16 be payable on the conclusion of the claim or earlier termination of this agreement.

**PART SIX  
COUNSEL'S ENTITLEMENT TO FEES**

**(A) If the Agreement is not Terminated**

**Definition of "success"**

14. 1) "Success" means the same as "win" in the Conditional Fee Agreement between the solicitor and the client.  
2) Subject to paragraphs 15, 18 & 21 hereof, in the event of success the solicitor will pay counsel his/her normal and success fees.  
3) If the client is successful at an interim hearing counsel may apply for summary assessment of solicitor's basics costs and counsel's normal fees.

**Part 36 Offers and Payments**

15. If the amount of damages and interest awarded by a court is less than a Part 36 payment into Court or effective Part 36 offer then:
- 1) if counsel advised its rejection he/she is entitled to normal and success fees for work up to receipt of the notice of Part 36 payment into Court or offer but only normal fees for subsequent work;  
2) if counsel advised its acceptance he/she is entitled to normal and success fees for all work done.

**Failure**

16. Subject to paragraph 17 (1) hereof, if the case is lost or on counsel's advice ends without success then counsel is not entitled to any fees or expenses.

**Errors and Indemnity for Fees**

17. 1) If, because of a breach by the solicitor of his/her duty to the client, the client's claim is dismissed or struck out:
- a) for non compliance with an interlocutory order; or  
b) for want of prosecution, or  
c) by rule of court or the Civil Procedure Rules; or becomes unenforceable against the MIB for breach of the terms of the Uninsured Drivers Agreement:

the solicitor shall (subject to sub paragraphs (3) - (6) hereof) pay counsel such normal fees as would have been recoverable under this agreement.

(2) If, because of a breach by counsel of his/her duty to the client, the client's claim is dismissed or struck out:

- a) for non compliance with an interlocutory order; or
- b) for want of prosecution, or
- c) by rule of court or the Civil Procedure Rules

counsel shall (subject to sub paragraphs (3) - (6) hereof) pay the solicitor such basic costs as would have been recoverable from the client under the solicitor's agreement with the client.

- (3) If, because of non-compliance by the solicitor of the obligations under sub- paragraphs (1), (2), (11), (12) or (13) of paragraph 5 above, counsel's success fee is not payable by the Opponent or the client then the solicitor shall (subject to sub-paragraphs (5) to (7) hereof) pay counsel such success fees as would have been recoverable under this agreement.
- (4) No payment shall be made under sub paragraph (1), (2) or (3) hereof in respect of any non-negligent breach by the solicitor or counsel.

Adjudication on disagreement

- (5) In the event of any disagreement as to whether there has been an actionable breach by either the solicitor or counsel, or as to the amount payable under sub paragraph (1), (2) or (3) hereof, that disagreement shall be referred to adjudication by a panel consisting of a Barrister nominated by PIBA and a solicitor nominated by APIL who shall be requested to resolve the issue on written representations and on the basis of a procedure laid down by agreement between PIBA and APIL. The costs of such adjudication shall, unless otherwise ordered by the panel, be met by the unsuccessful party.
- (6) In the event of a panel being appointed pursuant to sub paragraph (5) hereof:
  - a) if that panel considers, after initial consideration of the disagreement, that there is a real risk that they may not be able to reach a unanimous decision, then the panel shall request APIL (where it is alleged there has been an actionable breach by the solicitor) or PIBA (where it is alleged that there has been an actionable breach by counsel) to nominate a third member of the panel;
  - b) that panel shall be entitled if it considers it reasonably necessary, to appoint a qualified costs draftsman, to be nominated by the President for the time being of the Law Society, to assist the panel;
  - c) the solicitor or counsel alleged to be in breach of duty shall be entitled to argue that, on the basis of information reasonably available to both solicitor and barrister, the claim would not have succeeded in any event. The panel shall resolve such issue on the

balance of probabilities, and if satisfied that the claim would have been lost in any event shall not make any order for payment of fees or costs.

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- (7) the amount payable in respect of any claim under sub paragraph (1) or (2) or (3) shall be limited to a maximum of £25,000.

**(B) On Termination of the Agreement**

**Termination by Counsel**

18. (1) If counsel terminates the agreement under paragraph 6 then, subject to sub-paragraph 2 hereof, counsel may elect either:
- a) to receive payment of normal fees without a success fee which the solicitor shall pay not later than three months after termination: ("**Option A**"), or
  - b) to await the outcome of the case and receive payment of normal and success fees if it ends in success: ("**Option B**").
- (2) If counsel terminates the agreement because the solicitor, client or Litigation Friend rejects advice under paragraph 5(8) (e) or 5(8)(f) counsel is entitled only to "**Option B**".

**Termination by the Solicitor**

- (3) If the solicitor terminates the agreement under paragraph 7, counsel is entitled to elect between "**Option A**" and "**Option B**".

**Automatic Termination and Counsel taking silk**

- (4) If the agreement terminates under paragraphs 8 or 10 counsel is entitled only to "**Option B**".

**Challenge to fees**

19. If the client or any Litigation Friend wishes to challenge:
- a) the entitlement to fees of counsel or the level of such fees following termination of the agreement ;or
  - b) any refusal by counsel after signing this agreement to accept instructions

any challenge to fees should be made in within 30 days of (a) or (b).

In the event of dispute the parties agree to submit to the exclusive jurisdiction of the Courts of England and Wales in respect of such dispute arising out of or under the terms of the Agreement between Counsel and Solicitor in accordance with paragraph 19.2 of the Standard Contractual Terms.

**Return of Work**

20. If counsel in accordance with the Bar's Code of Conduct is obliged to return any brief or instructions in this case to another barrister, then:
- 1) Counsel will use his/her best endeavours to ensure that an appropriate barrister agrees to act for the client on the same terms as this agreement;  
  
If counsel is unable to secure an appropriate replacement barrister to act for the client on the same terms as this agreement counsel will not be responsible for any additional fee incurred by the solicitor or client.
  - 2) Subject to paragraph 20(3) hereof, if the case ends in success counsel's fees for work done shall be due and paid on the conditional fee basis contained in this agreement whether or not the replacement barrister acts on a conditional fee basis; but
  - 3) If the solicitor or client rejects any advice by the replacement barrister of the type described in paragraph 5(8) hereof, the solicitor shall immediately notify counsel who shall be entitled to terminate this agreement under paragraph 6(3).

**PART SEVEN**  
**ASSESSMENT AND PAYMENT OF COSTS / FEES**

**Costs Assessment**

21. 1) If:
- (a) a costs order is anticipated or made in favour of the client at an interlocutory hearing and the costs are summarily assessed at the hearing; or
  - (b) the costs of an interlocutory hearing are agreed between the parties in favour of the client; or
  - (c) an interlocutory order or agreement for costs to be assessed in detail and paid forthwith is made in favour of the client:  
then
    - (i) the solicitor will include in the statement of costs a full claim for counsel's normal fees; and
    - (ii) the solicitor will promptly conclude by agreement or assessment the question of such costs; and
    - (iii) within one month of receipt of such costs the solicitor will pay to counsel the amount recovered in respect of his/her fees, such sum to be set off against counsel's entitlement to normal fees by virtue of this agreement.

**Interest**

22. The solicitor will use his best endeavours to recover interest on costs from any party ordered to pay costs to the client and shall pay counsel the share of such interest that has accrued on counsel's outstanding fees.

**Challenge to Success Fee**

23. 1) The solicitor will inform counsel's clerk in good time of any challenge made to his success fee and of the date, place and time of any detailed costs assessment the client or opponent has taken out pursuant to the Civil Procedure Rules and unless counsel is present or represented at the assessment hearing will place counsel's risk assessment, relevant details and any written representations before the assessing judge and argue counsel's case for his/her success fee.
- 2) If counsel's fees are reduced on any assessment then:
- a) the solicitor will inform counsel's clerk within seven days and confer with counsel whether to apply for an order that the client should pay the success fee and make such application on counsel's behalf;

- b) subject to any appeal or order, counsel will accept such fees as are allowed on that assessment and will repay forthwith to the solicitor any excess previously paid.

**Disclosing the reasons for the success fee**

- 24. 1) If (a) a success fee becomes payable as a result of the client's claim and
  - (b) any fees subject to the increase provided for by paragraph 12 hereof are assessed and
  - (c) Counsel, the solicitor or the client is required by the court to disclose to the court or any other person the reasons for setting such increase as the level stated in this agreement, he / she may do so.

**Reduction on Assessment**

- 25. If any fees subject to the said percentage increase are assessed and any amount of that increase is disallowed on assessment on the ground that the level at which the increase was set was unreasonable in view of the facts which were or should have been known to counsel at the time it was set, such amount ceases to be payable under this agreement unless the court is satisfied that it should continue to be so payable.

**Agreement on Fees**

- 26. If the Opponent offers to pay the client's legal fees or makes an offer of one amount that includes payment of Counsel's normal fees at a lower sum than is due under this agreement then the solicitor:
  - (a) will calculate the proposed pro-rata reductions of the normal and success fees of both solicitor and counsel, and
  - (b) inform counsel of the offer and the calculations supporting the proposed pro-rata reductions referred to in paragraph (a) above, and
  - (c) will not accept the offer without counsel's express consent.  
If such an agreement is reached on fees, then counsel's fees shall be limited to the agreed sum unless the court orders otherwise.

**Solicitor's Obligation to pay**

- 27. 1) Counsel shall be entitled to deliver an Invoice to the Solicitor in respect of the Services or any completed part thereof and any disbursements at any time after supplying the Services or the relevant part thereof.

2) Counsel shall deliver an Invoice to the Solicitor in respect of the Services or any part thereof and any disbursements as soon as reasonably practicable after and not more than 3 months from the earliest of: (a) a request by the solicitor; (b) notification by the solicitor that the Case has settled or otherwise concluded; or (c) termination of the Agreement.

3) The Invoice must set out an itemised description of: the Services provided by the Barrister and the fees charged; any disbursements incurred and the cost thereof; and VAT (or any tax of a similar nature), if any.

4) The amounts of fees and expenses payable to counsel under this agreement

- (a) are not limited by reference to the damages which may be recovered on behalf of the client and
- (b) are payable whether or not the solicitor is or will be paid by the client or opponent.

5) Upon success the solicitor will promptly conclude by agreement or assessment the question of costs and will pay Counsel promptly and in any event not later than one month after receipt of such costs the full sum due under this agreement.

6) The Invoice must be paid without any set-off (whether by reason of a complaint made or dispute with the Barrister or otherwise), and without any deduction or withholding on account of any taxes or other charges.

7) Where the Barrister has delivered a fee note, on request by the solicitor Counsel will deliver a VAT invoice following receipt of payment.

8) If the Invoice remains outstanding more than 30 days from the appropriate date in accordance with par 22(5) above Counsel is entitled: to the fixed sum and interest in accordance with the Late Payment of Commercial Debts (Interest) Act 1998; to sue the Solicitor for payment; and, subject to Counsel's obligations to the Court and under paragraph 610 of the Code, to refrain from doing any further work on the Case unless payment for that further work is made in advance.