

Direct Access to Advocates: Standard Terms of Instruction

Revised: 13 July 2018

These Standard Terms of Instruction apply whenever the person instructing is neither qualified to practise as a solicitor in Scotland, nor by law authorised to act as a solicitor to a public department in Scotland. The person or body instructing is here referred to as the instructing person, although they may be instructing on their own behalf.

1. Introduction

1.1 Except as otherwise provided hereafter, Advocates will conduct themselves in accordance with the '*Guide to the Professional Conduct of Advocates*' of the Faculty of Advocates and with the Faculty's Direct Access rules, here together referred to as '*the Guide*', and these terms of instruction should be read together with the Guide. If instructions are given by a registered European lawyer, or by a lawyer in a country of the European Union other than Scotland, these terms should also be read with Part 5 of the '*Code of Conduct for Lawyers in the European Union*' issued by the Council of the Bars and Law Societies of the European Union.

1.2 Advocates are holders of a public office, who owe duties to the Court and the public as well as to those who instruct them. They cannot in law, and do not, enter into any contractual relationship with those who instruct them or with their clients, and nothing in these terms should be taken to suggest otherwise.

2. Instructions

2.1 General

2.1.1 Subject to the Guide and the provisions below, an Advocate may accept instructions from any person under the Direct Access rules, without the need for instruction through a Scottish solicitor, in relation to any matter.

2.1.2 Such instructions should be in writing (which includes e-mail). They may be sent directly to Counsel, or to his or her clerk. If formal acknowledgement is required, the instructions should be sent to the Advocate's clerk with a request for such acknowledgement. As an Advocate cannot be responsible for the general conduct of any matter (see paragraph 2.3 below), the instructions should specify the particular services which are required from the Advocate. It is important to specify these services as accurately as possible. An Advocate would not normally be expected to provide services beyond those specified in any particular instructions.

2.1.3 It is the responsibility of the Advocate to satisfy himself or herself that any instruction received may properly be accepted in accordance with rule 4 of the Direct Access rules. Whether or not that is the case, an Advocate may decline to accept instructions under these arrangements.

2.1.4 An Advocate is entitled at any stage to require, as a condition of continuing to act in the matter, that a person qualified to practise as a solicitor in Scotland shall take over the instruction of the work concerned or that the services of such a solicitor shall otherwise be retained to assist in the future conduct of the matter, if he or she considers that this is necessary in the interests of the client or the interests of justice.

2.1.5 As Advocates carry out all their work personally and cannot always predict with certainty their other professional responsibilities, instructions under these arrangements are accepted on the basis that the Advocate may be unavoidably prevented, sometimes at short notice, from attending at any hearing or other engagement in connection with the matter on which he or she is instructed on account of the precedence accorded to instructions for Court appearances, in terms of 8.5 and 8.6 of the Guide. However, an Advocate will not discriminate in this respect between instructions which have been accepted under the Direct Access rules and otherwise.

2.1.6 If an Advocate identifies a clash of commitments which is likely to prevent attendance at any hearing, either the Advocate or the Advocate's clerk will warn the instructing person as soon as possible and will, if desired, suggest the names of other Advocates who are willing and able to take over the instructions. The Advocate will cooperate so far as possible with any other Advocate who takes over. In no circumstances, however, will instructions be passed to any other Advocate without the express agreement of the instructing person.

2.1.7 In any case in which an Advocate accepts instructions from a person in his or her capacity as a director, partner, associate, Member or employee of a company, firm or other body, the obligations of the instructing person under these terms of instruction (and in particular obligations to make payment of fees) shall be the joint and several obligations of him or her and that company, firm or other body.

2.2 Categories of work to which these arrangements apply.

2.2.1 An Advocate may accept instructions under these arrangements in relation to any kind of work except as excluded below. There are, however, circumstances in which it will not practically be possible for this to be done, in particular where the work is in a Scottish Court, where it may be necessary for a Scottish solicitor to be involved.

2.3 Excluded Work

2.3.1 However, an Advocate shall not accept instructions:

- a) To receive or handle clients money; or
- b) To do administrative work normally performed by a solicitor, such as entering into correspondence on the client's behalf (as distinct from assistance in drafting correspondence), or ensuring the attendance of witnesses at a hearing; or
- c) To undertake investigative work normally performed by a solicitor, such as the collection of evidence or the instruction of expert witnesses; or

- d) To take responsibility for the management or general conduct of a client's affairs or litigation; or
- e) Which are inconsistent with guidance given by or on behalf of the Faculty of Advocates.

2.4 Documents

2.4.1 All papers will be returned to the instructing person on the completion of the work instructed.

2.4.2 However, unless agreed otherwise, the Advocate is entitled to keep copies of any documents sent for the Advocate's own professional purposes.

2.4.3 Copyright in any work produced remains with the Advocate who is its author, but the instructing person may publish it to any third party to whom publication was contemplated by the instructions in question.

2.4.4 All documents and other information sent to an Advocate under the Direct Access rules are received in confidence and are subject to legal professional privilege. They will not accordingly be disclosed to any third party except in terms of a statutory or legal requirement on the Advocate to do so; with the express consent of the instructing person to the disclosure; or in terms of the disciplinary rules of the Faculty of Advocates.

3. Payment of Fees

3.1 It shall be the professional obligation of the instructing person to make payment of the Advocate's fees. That is so whether or not the identity of the client is stated. No agreement to the contrary will be of any effect.

3.2 Upon acceptance of instructions, the Advocate will be entitled to payment of a reasonable fee. What is a reasonable fee depends on the whole circumstances of the

particular matter on which the Advocate is instructed. Unless otherwise agreed, an Advocate's fees cover all expenses incurred in relation to the matter instructed, such as travelling expenses. All fees are stated as exclusive of, and are subject to, Value Added Tax at the appropriate rate, if applicable.

3.3 Unless otherwise agreed between the instructing person and the Advocate's clerk, a fee note will normally be submitted at the conclusion of each item of work for which the Advocate is instructed.

3.4 It is often helpful to all concerned to agree the amount of a fee and/or the basis of charging in advance. Discussion about such an agreement must take place with the Advocate's clerk or deputy clerks, because professional rules prohibit discussion or negotiation of fees or associated matters directly with the Advocate. Where such an agreement has been reached, neither the instructing person nor the Advocate is entitled to challenge it later.

3.5 A fixed fee paid in advance is not client money.

3.6 If an Advocate requires an upfront payment to account of fees he must ensure it is a reasonable payment for the work to be done, that the client understands and has been informed in writing that once paid it will not be the client's money and he will not be beneficially entitled to it, and that any difference between the sum paid to account and the Advocate's fees will be repaid.

3.7 If an Advocate makes use of an escrow service for receiving payments of fees he must ensure it will not result in a breach of the prohibition on handling client money.

3.8 Unless otherwise agreed between the instructing person and the Advocate's clerk, an Advocate's fee shall be paid by the instructing person within twenty-one days of submission of each fee note.

3.9 Subject to paragraph 3.4, the instructing person is entitled to challenge the fee proposed or the basis of the charge. In the event of such a challenge, the instructing person should inform the Advocates clerk concerned (or, in the case of fee notes issued by Faculty Services Limited, Faculty Services Limited) in writing as soon as possible and in any event within twenty-one days of the issue of the fee note; and failing such challenge, the instructing person is presumed to agree that the fee proposed is reasonable and becomes responsible to make payment of it.

3.10 If an instructing person challenges the fee proposed, the matter will normally be resolved by negotiation between them and the Advocate's clerk. If they cannot agree, either the instructing person or the Advocate is entitled to require that the matter be determined by a mutually agreed third party, whom failing by the Auditor of the Court of Session, who shall then adjudicate as to what is a reasonable fee in the circumstances on an agent and client, client paying, basis.

3.11 In the case of fee notes issued by Faculty Services Limited, all fees should be paid to Faculty Services Limited, and not directly to the Advocate.

3.12 An Advocate may not accept a general retainer from the instructing person.