

# Guide for Preparing Instructions to Counsel

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## Relevant court forms relating to this chapter

There are no relevant forms specific to preparing either a brief or instructions to Counsel.

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### 1 Introduction

This online Chapter gives guidance on the relationship between legal representatives and Counsel, the types of work that Counsel may be asked to do, and provides guidelines on the drafting of a set of instructions to Counsel.

### 2 What might we use Counsel for?

Using Counsel in an action should never be because the legal representative has insufficient experience to deal with the matter in hand. Using Counsel should always be ‘of benefit’ to the client – thus it may be that Counsel has greater speciality in a matter (and thus it would be quicker and often more cost effective to deal with the matter being asked of him or her), or it may be perfectly clear that Counsel will be used as the trial advocate in a matter if it proceeds to trial and in those circumstances it is sometimes of benefit (to the client) if Counsel is engaged early on to draft the documents that will form the substance of the client’s action.

Whatever reason Counsel is being engaged for, it is vital that the client both understands the reasons for using Counsel at that point and had authorized incurring the expense – this will include not only Counsel’s fee for doing the work but also the

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time charged to the client for the legal representative to draft the instructions or brief to Counsel.

## 2.1 What might you ask Counsel to assist with?

Counsel may be asked to give advice in writing, or by way of a telephone conference both before and after proceedings are issued, or to attend a conference with Counsel on the following matters:

- (a) Seeking advice on liability - do the facts disclose a cause of action/defence?
- (b) Seeking advice on causation – both on liability causation (did the opponent's actions cause the breach?) and quantum causation (did the breach cause the losses claimed?).
- (c) Seeking advice on quantum of damages - what sum should be claimed from the claimant/defendant? Is the sum being offered by the claimant/defendant acceptable?
- (d) Seeking advice on practical steps to be taken in an action. For example, how should evidence be collected?
- (e) Seeking advice on procedural steps. For example, would an application for summary judgment be likely to succeed? Or seeking advice on the likelihood of success of an appeal.

(f) Seeking advice on evidence. For example, what witnesses/experts need to be called? Or what procedural steps need to be taken on matters relating to evidence (for example Civil Evidence Act Notices)?

(g) Seeking advice on different types of offers and counter-offers. For example, guidance on where to pitch offers, or whether to accept or reject an offer.

(h) Asking Counsel for guidance on a settlement or to negotiate a settlement. There may be situations when it would be better for someone other than the legal representative handling the case to try and negotiate a settlement.

(i) Asking Counsel to appear as advocate, to attend interim or final hearings (in which case the written instructions are called a 'Brief to Counsel').

This is not a definitive list.

## 2.2 When?

Some of these tasks fall to be performed at a particular stage of the case, but others will vary depending on the stage the case has reached. For example, an opinion on the merits of a case may be obtained very early on (pre-action), while a review of the evidence may be needed shortly before trial.

## 3 Documents to include in the brief or instructions to Counsel

### 3.1 What does Counsel need?

When Counsel receives a set of instructions or a brief, the documents he or she receives will form the entirety of what he or she needs to deal with the matters being asked of him or her. Unlike legal representatives who have a more 'hands-on' role of the case file as a whole, Counsel will be taking a searchlight view of a particular aspect (that he or she is being asked to deal with) and will have no other information about the case, or documents, other than the information supplied to him or her with the brief or instructions. This applies even when Counsel has been engaged previously in the matter. Each set of instructions must be complete and contain all that Counsel needs for the particular action being asked of him or her.

## 4 Drafting instructions or a brief to Counsel

### 4.1 A set of 'instructions' or a 'brief'?

In order to obtain Counsel's advice on any of the above, a solicitor drafts a set of "Instructions to Counsel". (but see 2.1.i above when counsel is being briefed to appear in court in which case the document is called a 'Brief to Counsel'. These are bound by pink ribbon before being sent to him or her.) Increasingly both Briefs to Counsel and Instructions to Counsel are being sent by e-mail.

### 4.2 The action heading

Instructions to Counsel are headed using the action heading.

An example follows:

IN THE HIGH COURT OF JUSTICE

NO.

QUEEN'S BENCH DIVISION

STOKE ON TRENT DISTRICT REGISTRY

BETWEEN

MR ANDREW JONES                      Claimant

and

MR PETER BAKER                      Defendant

### **INSTRUCTIONS TO COUNSEL TO ADVISE ON...**

If Counsel is being engaged pre-action then simply the parties' names as a heading, and the words 'In the intended action between' can be used, or the parties can simply be referred to as the 'Proposed Claimant' or 'Proposed Defendant'.

#### **4.3 Documents enclosed within the instructions**

Enclosed within the instructions are all relevant documents that Counsel will need to attend to the task in hand (see paragraph 3.1 above).

These could include witness statements, statements of case, previous instructions to Counsel and Counsel's advice, and expert reports.

These documents are numbered and are listed as enclosures at the beginning of the instructions.

e.g. "Counsel will find enclosed copies of the following documents:

- (1) Claim Form dated...
- (2) Particulars of Claim dated...
- (3) Defence dated..."

It is important to give Counsel all that is needed but not more than is needed.

#### 4.4 The main contents

The main contents of a good set of instructions will normally include the following:

- A brief summary of the relevant facts of the case (in the context of the advice being sought).
- A clear statement of what Counsel is being asked to do: e.g. 'Counsel is asked to advise on liability, and who should be joined as defendant should an action prove necessary. Counsel is also asked to give general advice on damages'.
- A summary of any provisional views the solicitor has formed on the points Counsel is being asked to comment on, together with any steps or arguments that the solicitor feels would be appropriate. (See paragraph 2 above). If the solicitor has given preliminary advice to the client it is good to summarise this so that Counsel can agree with this advice or explain his or her reasons for disagreeing with it.
- Any special points that should be brought to Counsel's attention (e.g. that the limitation period is about to expire).
- All points should be made as succinctly as possible.
- It is useful to make reference to the documents enclosed to indicate their relevance (this acts as a guide for the instructing solicitor – if a document you

plan to enclose with the instructions cannot be commented on, query whether it is relevant to include it at all). This is usually done as follows: 'Counsel is referred to enclosure five for a copy of the contract dated 23 September 201?'.

- Finally, a summary, and a repeat request in that summary, in respect of the matters upon which you are seeking Counsel's advice, and any request for drafting of documents etc.

E.g. Counsel is requested to:

- advise on the liability of the Defendant
  - advise on the question of evidence
  - advise on the question of quantum
  - settle the Particulars of Claim
- 
- As a matter of etiquette, Counsel should be asked if he or she has any queries or if he or she requires any further information. If he or she does then he or she should be asked to contact you as his or her instructing solicitor either by telephone or email.
  - The '**backsheet**'. To complete a set of instructions or brief to Counsel, the documents are collated together, attached, and numbered appropriately, with the instructions or brief at the front. A 'back sheet' is either folded around all the documents or placed on the top. The 'back sheet' should contain the following information:
    - The name of the case.

- The name of the barrister briefed or instructed and the address of the chambers.
- The type of instructions.
- The name and address of the instructing solicitors.
- For a brief to Counsel the brief fee will be endorsed on the back sheet before Counsel enters court. This brief fee will have been agreed with counsel's clerk either when the brief is to be sent to counsel or once it has been received and the clerk is able to judge and set the fee for counsel to attend to the matter. (to show that the fee does not depend on the outcome).

The 'backsheet' also has a formal purpose:

- Once the case is finished, or the advice sought drafted, the Counsel will endorse the 'backsheet' to that effect and date the endorsement.
- On a brief a short summary of the outcome of the case, or order made at court, will be endorsed on the 'back sheet' – it is from this note that the legal representative will draft the order.
- The 'backsheet' can be used to record any special events – e.g. where the client acts contrary to Counsel's advice, or the terms of any agreement reached.

Many sets of instructions to Counsel are also sent by email. It is important to ensure that the enclosures (which will appear as attachments to the email) are easily identifiable and can be seen to relate to the enclosures in the instructions.

## 5 Conferences and consultations with Counsel

You may wish to have a 'conference' with Counsel in chambers to discuss matters in detail, or to enable Counsel to meet the client or expert witnesses (but note the position with regard to joint experts). In this event, instructions will be sent to Counsel in good time (at least a week beforehand) to enable him or her to refresh his or her memory of the facts and law, so that a useful discussion can take place at the conference. A conference with Queen's Counsel is called a 'Consultation'.

## 6 Counsel being asked to draft pleadings and other documents

Counsel is often requested to draft pleadings and other documents. In this case it is vital to forward to Counsel all the necessary papers, together with a full narrative of the facts.

## 7 When should a Brief to Counsel be sent?

Prior to a full trial a brief should be sent to Counsel in sufficient time to enable him or her to prepare thoroughly i.e. at least two weeks prior to that. However, it should not be sent too early because late developments may take place which change the course of events e.g. a late offer to settle.

When you are about to deliver your brief to Counsel you should inform the other side of this fact, as the brief fee is payable on delivery and this is a powerful incentive to settle the matter prior to trial.

The brief should set out a discussion of all relevant issues of fact, evidence, and law. It should have all necessary documents enclosed.

## 8 Professional obligations

### 8.1 Duties to the court

A legal practitioner has certain professional obligations when using Counsel. Both solicitors and barristers are under similar duties to the court: solicitors under their 'Code of Conduct', barristers under their 'Code of Conduct of the Bar of England and Wales'. These include a duty not to mislead or deceive the court (solicitors) and a duty 'to assist in the administration of justice and must not deceive or knowingly or recklessly mislead the court' (barristers).

### 8.2 Immunity from suit

The judgment in *Moy v Pettman Smith [2005] UKHL 7* was the first major test case of advocates' duties since immunity from suit was abandoned four years ago in the landmark case of *Hall v Simons [1999] 3WLR 873*. The case of *Awoyomi v Radford & nor [2007] EWHC 1671* set 1991 as the date from which barristers no longer (retrospectively) enjoyed immunity from suit for alleged negligence.

### 8.3 Relying on advice from counsel

The judgment in *D Morgan plc v Mace & Jones* 17 May 2011 considered the extent to which a solicitor can defend a negligence claim on the basis that it relied upon Counsel's advice.

Mr Justice Coulson found that Mace & Jones were negligent in relying solely on Counsel's advice and failing to query discrepancies between two sets of advice given

by counsel in the case. However, the claim failed on causation because even if the advice had been queried it would not have led to a different outcome. Counsel's advice would have been the same: that an application under section 73 of the Town and Country Planning Act 1990 was the appropriate course of action.

This decision is an example of the principle that solicitors are not entitled to rely on Counsel's advice without exercising their own independent judgment on the issue in question. Here there was a clear inconsistency between the advice given by Counsel in 1993 and that given in 1998 and Mace & Jones should have questioned the discrepancy.

*Kevin Hellard, Amanda Wade v Irwin Mitchell [2013] EWHC 3008 (Ch)*, HHJ Cooke rejected a Mr Shore's witness evidence that he had not been advised as to the significant risk on the limitation issue. He also did not accept that Mr Shore's case against SFS had been hopeless, or was so weak that Irwin Mitchell ought to have advised Mr Shore to accept the very low offers in settlement from SFS.

The judge accepted that it was appropriate for Irwin Mitchell to rely on the advice of well-respected, competent and specialist Counsel, whose advice Mr Shore had received in conference, and that Irwin Mitchell was not negligent for failing to advise that Counsel's views were wrong. The Judge concluded that Mr Shore had known what the risks were, having been advised of them in conferences with Counsel and otherwise, and had decided to pursue the claim on his own assessment of the balance of risk and reward.

This judgment should provide some comfort to solicitors who obtain, and rely on, specialist Counsel's advice as to specific issues such as limitation, particularly where such advice is given to a client in conference. However, it is also a reminder that solicitors are not entitled to abdicate responsibility to Counsel but must exercise their own judgement.

This issue has been further considered in *Dunhill v W Brook and Co and another* [2016] EWHC 165 (QB), where the High Court considered a professional negligence claim against a firm of solicitors and a barrister regarding their advice that a personal injury claim be settled just before a trial on liability began. It was alleged that the settlement figure was an under-settlement.

The High Court dismissed the professional negligence claim against solicitors and counsel regarding the settlement.

The court concluded that a solicitor may be liable for professional negligence where he fails to perform his duties to the required standard. In tort, the standard is that of a reasonably, competent solicitor.

When considering the extent to which a solicitor can rely on counsel's advice, the following principles are relevant and confirmed in this case:

- In general, a solicitor can rely on the advice of counsel properly instructed.
- For a solicitor without special experience in a particular field, it is a normal and proper use of the bar to rely on counsel's advice.

The solicitor must not rely on counsel's advice blindly. He must exercise independent judgement.

The general rule is that it is more likely to be reasonable for the solicitor to rely on Counsel the more specialist the advice given (*Ridehalgh v Horsefield and another* [1994] 3 All E.R. 848 CA decision) and that it is only if the advice is glaringly or obviously wrong that the solicitor will be negligent for not challenging it.

## 9 Liaising with Counsel's clerk and fees

Those new to legal practice will need to consult fellow fee earners to ascertain which chambers and which Counsel would be appropriate to instruct. This will depend on the area of expertise required and the post qualification of Counsel, i.e. how much experience Counsel has had since he or she was called to the bar.

The more experience Counsel has, the more expensive he or she will be. Counsel charge on an hourly rate basis and thought must be given in each particular matter as to the proportionality of Counsel's fees. For example, it would be disproportionate to instruct Counsel of ten years calling at £250 per hour for a case that was worth £10,000. It would, however, be proportionate to instruct a more junior Counsel (but one with sufficient expertise and experience) at a lower hourly rate, such as £125 per hour.

In terms of how Counsel is contacted, the starting point is his or her clerk. A good relationship with your Counsel's clerk will ensure that your instructions are dealt with effectively and expeditiously. All contact is made with the clerk, not Counsel. Consequently all instructions or briefs are sent under cover of a letter to Counsel's clerk

confirming which Counsel in the chambers is to deal with the papers and any relevant time limits for the return of the papers or the date of a hearing.

The clerk's most important job, however, is to negotiate Counsel's fees. As a general rule, there are no fees agreed with the clerk in advance of, or at the time of the delivery of, instructions to Counsel. A fee note is sent after the instructions have been completed by Counsel. It is, however, common practice to ask the clerk to give you an estimate of the overall likely fee for the instructions when he or she receives them but before Counsel commences any work on the papers. It is suggested that the estimate be sought as this estimated figure can be passed on to the client giving him or her a clearer idea of the cost implication to him or her. This of course accords with your professional conduct obligations to give your client the best information about costs throughout his or her case.

In respect of the delivery of a brief to Counsel, the brief fee is always agreed in advance of Counsel commencing any work on the brief. The important point to note here is that once a brief fee has been agreed between instructing solicitors and Counsel, should the hearing for which the brief was delivered not proceed for whatever reason, then Counsel is entitled to payment of that brief fee in any event. The client must be made aware of this. If the trial is to last longer than one day Counsel will also charge a 'refresher fee', that is a fee for each continuing day of the hearing.

All Counsel's fees must be sought from the client as a disbursement, preferably in advance of the fee note being delivered by Counsel's clerk. Remember the liability to

pay Counsel's fees rests with the solicitor not the client. Therefore, to ensure that Counsel's fees get paid, it is best practice to seek monies on account from your client.

On submission of papers to counsel expect to receive the chambers standard terms and conditions which the solicitors practice will agree to.

## KEY POINTS SUMMARY

- Seek to prepare concise but informative instructions/brief to Counsel.
- Avoid enclosing documents that are irrelevant with the instructions/brief.
- State clearly what it is you want Counsel to do.
- Be articulate!
- Consider proportionality when instructing or briefing Counsel.
- Keep your client informed as to the likely level of Counsel's fees and seek payment in advance.
- Consider and review the advice of counsel.