



The Law Society

**Non-contentious costs**  
**Practice Advice Service**  
**July 2012**



# **Non-contentious costs**

## **Practice Advice Service**

July 2012

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## Practice Advice Service

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The Practice Advice Service is staffed by solicitors who deal with enquiries using their own knowledge and a variety of information sources, as well as the experience of colleagues in the Legal Policy Directorate. It deals with enquiries on legal practice in many areas of law including solicitors' costs and Law Society policy.

This publication is available in large print (state size), on audio tape or in Braille Grade 2 on request.

**ISBN 1-85328-914-0**

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## Part 1 - Introduction

This booklet, prepared by the Practice Advice Service, is not intended to be a fully comprehensive guide to non-contentious costs but attempts to cover those areas that generate the most frequent enquiries from solicitors.

The booklet provides information on charging in non-contentious matters. It also discusses billing generally and the procedures available to clients who may wish to challenge solicitors' costs.

Solicitors should in particular familiarise themselves in more detail with:

- The Solicitors' (Non-Contentious Business) Remuneration Order 2009 (SI 2009/1931)
- The Solicitors (Non-Contentious Business) Remuneration (Amendment) Order 2010 (SI 2010/2262) & The Solicitors (Non-Contentious Business) Remuneration (Amendment) Order 2012 (SI 2012/171)
- SRA Code of Conduct 2011, in particular Chapter 1 on Client Care

### **'Costs and customer service in a changing legal services market'**

Solicitors find themselves in an ever changing and increasingly competitive legal landscape. The subject of costs continues to be one of the areas that generates most complaints from clients and on 6 March 2012, the Legal Ombudsman (LeO) published a thematic report entitled "Costs and customer service in a changing legal services market", addressing the issues surrounding costs together with '**An Ombudsman's view of good costs service**' (a guide for lawyers) and 'Ten questions to ask your lawyer about costs' (a guide for consumers). LeO's intention is to give practical advice to assist lawyers improve their service and to give a greater level of specificity to its approach to complaints. The report and guides are available to download at [www.legalombudsman.org.uk](http://www.legalombudsman.org.uk)

For queries or comments on this booklet contact:

- **Practice Advice Service:**  
The Law Society provides support to solicitors on a wide range of areas of legal practice and procedure. The service is staffed by solicitors and can be contacted on 0870 606 2522 from 09.00 to 17.00 on weekdays or by e-mail: [practiceadvice@lawsociety.org.uk](mailto:practiceadvice@lawsociety.org.uk)  
[www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice)
- **Lawyerline:**  
The Law Society provides specific support to solicitors on client care and complaints handling. The service is staffed by solicitors and can be contacted on 0870 606 2588 from 09.00 to 17.00 on weekdays or by e-mail: [lawyerline@lawsociety.org.uk](mailto:lawyerline@lawsociety.org.uk)  
[www.lawsociety.org.uk/lawyerline](http://www.lawsociety.org.uk/lawyerline)

This booklet refers to various cases. Practitioners requiring copies of the relevant cases or information on case law may wish to contact the Law Society library on telephone 0870 606 2511 or by e-mail: [library@lawsociety.org.uk](mailto:library@lawsociety.org.uk).

### **Other Practice Advice Service Booklets**

Booklets on contentious costs (entitled 'Contentious Costs') and conditional fee agreements (entitled 'Payment by Results') are also available at [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice). For advice on solicitors' costs generally, please telephone the Practice Advice Service on 0870 606 2522 or e-mail [practiceadvice@lawsociety.org.uk](mailto:practiceadvice@lawsociety.org.uk).

## Part 2 - Non-contentious costs – what are they?

Non-contentious costs in this booklet are defined as monies payable for legal services in connection with non-contentious business.

Non-contentious business is defined in **s87(1) Solicitors Act 1974** as "any business done as a solicitor which is not contentious business".

Work done **prior to the issue of proceedings** is non-contentious provided that proceedings are not subsequently issued.

**\*Please note** that where proceedings are subsequently issued, it is a moot point as to whether all pre-issue work leading to the action automatically becomes contentious. Please see obiter comment of Lord Justice Brooke in **Crosbie v Munroe [2003] EWCA Civ 350**.

If solicitors in England and Wales are involved in work where proceedings are issued abroad, the work will be regarded as non-contentious.

### Contentious costs

**Section 87(1) Solicitors Act 1974** (as amended by s107(2), Sch 4 Arbitration Act 1996 and s8 Sch 1 para 12(A) Administration of Justice Act 1985) defines contentious business as being:-

‘Business done, whether as a solicitor or advocate, in or for the purpose of **proceedings begun before a court or before an arbitrator**....not being business which falls within the definition of non-contentious or common form probate business contained in **s128 Senior Courts Act 1981**’.

For further information on contentious costs, please refer to the Practice Advice Service booklet ‘Contentious costs’ which is available at [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice).

### Examples of contentious and non-contentious business

Contentious	Non-contentious
1. Proceedings actually begun in the County Court, High Court, Magistrates Court, Crown Court and the Court of Protection.	As a general rule, tribunals work is non-contentious (although there are exceptions, see para 2 in the contentious column).  Please note that work in the Employment Tribunal has its own rules in s58AA of Courts and Legal Services Act 1990 and the Damages Based Agreements Regulations 2010 ( see also <b>Tel-Ka Talk Limited v HMRC [2011]</b> below)
2. There are exceptions to the general rule about tribunals work being non-contentious – for example, section 3(5) of the Tribunals, Courts and Enforcement Act 2007 states that	Planning and other public enquiries including Coroners Court work.

the Upper Tier Tribunal is a “court of record”. Because of this, such work is “business done ... before a court” for the purposes of s87 of the Solicitors Act 1974. For Employment Tribunals, please see the specific rules in s58AA of Courts and Legal Services Act 1990 and the Damages Based Agreements Regulations 2010.	
3. Contentious probate proceedings actually begun.	Non-contentious or common form probate business.
4. Proceedings on appeal to the Court of Appeal, Privy Council and House of Lords.	Conveyancing, company acquisitions and mergers, the administration of estates and trusts out of court, the preparation of wills, statements and contracts, and any other work not included in the ‘contentious’ column.
5. Proceedings in arbitration.	Criminal Injuries Compensation Authority.
6. Motor Insurers Bureau Uninsured drivers’ claims (proceedings issued).	Motor Insurers Bureau Untraced drivers’ claims.  Motor Insurers Bureau Uninsured drivers’ claims (proceedings not issued).
7. Work done preliminary to proceedings covered by 1-5 above including advice, preparation and negotiations provided the proceedings are subsequently begun (although see note above*).	Work done preliminary to the proceedings included in the ‘contentious’ column if such proceedings are not subsequently begun.
8. Licensing (appeals to Magistrates Court)	Licensing (administered by Local Authority)

### **Tel-Ka Talk Limited v The Commissioners of Her Majesty’s Revenue & Customs (HMRC) [2011] STC 497, [2011] STI 267**

In this case, Tel-Ka Talk Limited (the company) had appealed against decisions of HM Revenue and Customs (HMRC) to refuse repayment of VAT input tax credit claimed by the company.

As a result of the withholding of VAT, the company suffered cash flow difficulties, and experienced difficulty in funding the legal costs of the tribunal hearings.

The company’s solicitors agreed to continue to act on a contingency fee basis and entered into a non-contentious business agreement. The contingency fee arrangement enabled the company to continue to pursue its claim and recover the VAT repayment it was owed by HMRC. HMRC argued that a contingency fee was unenforceable as tribunal proceedings were contentious.



The Law Society intervened in this case to protect access to justice. It was essential for the Courts to allow contingency fee arrangements with solicitors to be valid in order to ensure that the right to a fair hearing in a tribunal was not denied.

Master Hurst, Senior Costs Judge in this case ruled that the use of contingency fees in tribunal cases was lawful.

The judge considered whether proceedings before the Tribunal fall within the definition of non-contentious business as defined in **s87(1) Solicitors Act 1974**.

The Law Society was successful in maintaining their long held views that as a general rule, work in Tribunals is non-contentious. Therefore, a Non-Contentious Business Agreement in the form of a contingency fee arrangement under **s57 Solicitors Act 1974** can be lawfully entered into.

Master Hurst also referred to Lord Justice Jackson's review of Civil Costs in which he stated that:

*"The Employment Tribunals jurisdiction is characterised as non-contentious and so the use of contingency fees is not prohibited by either law or professional conduct rules"*

Master Hurst was not persuaded that a Tribunal is a 'court' or that proceedings before a Tribunal are contentious business. He therefore concluded that contingency fees before a Tribunal are lawful.

## Part 3 - SRA Code of Conduct 2011 ('the Code')

The Solicitors Regulation Authority (SRA) implemented a new set of outcomes-focused rules (OFR) on 6 October 2011. The SRA have moved away from prescriptive rules and towards a new more constructive and risk-based approach to work. The emphasis will be on high-level outcomes governing practice and the quality of outcomes for clients.

At the heart of the new regime are ten mandatory Principles. The SRA Handbook advises **"You should always have regard to the Principles and use them as your starting point when faced with an ethical dilemma ....."**.

The Code sets out mandatory outcomes and these are supported by Indicative Behaviours (IBs), which serve to assist in determining how solicitors might achieve compliance. Although the IBs are not mandatory, solicitors who do not follow them may be required to demonstrate how they have nevertheless achieved the outcomes and therefore complied with the Principles.

### Client care

Client care continues to be of paramount importance and the relevant rules are set out in Chapter 1 of the new Code.

In particular, solicitors should familiarise themselves with the following Outcomes:

Outcome	Requirement
1.9	clients are informed in writing at the outset of their matter of their right to complain and how complaints can be made
1.10	clients are informed in writing, both at the time of engagement and at the conclusion of your complaints procedure, of their right to complain to the Legal Ombudsman, the time frame for doing so and full details of how to contact the Legal Ombudsman
1.11	clients' complaints are dealt with promptly, fairly, openly and effectively
1.13	clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter
1.14	clients are informed of their right to challenge and complain about your bill and the circumstances in which they may be liable to pay interest on an unpaid bill

Acting in the following way may tend to show how solicitors have achieved the above Outcomes and therefore complied with the Principles:

Indicative Behaviour	Suggestion
1.4	explaining any arrangements, such as fee sharing or referral arrangements, which are relevant to the client's instructions

<b>1.5</b>	explaining any limitations or conditions on what you can do for the client, for example, because of the way the client's matter is funded
<b>1.13</b>	discussing whether the potential outcomes of the client's matter are likely to justify the expense or risk involved, including any risk of having to pay someone else's legal fees
<b>1.14</b>	clearly explaining your fees and if and when they are likely to change
<b>1.15</b>	warning about any other payments for which the client may be responsible
<b>1.16</b>	discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union
<b>1.17</b>	where you are acting for a client under a fee arrangement governed by statute, such as a conditional fee agreement, giving the client all relevant information relating to that arrangement
<b>1.19</b>	providing the information in a clear and accessible form which is appropriate to the needs and circumstances of the client
<b>1.22</b>	having a written complaints procedure which: <ul style="list-style-type: none"> <li>(a) is brought to clients attention at the outset of the matter;</li> <li>(b) is easy for clients to use and understand, allowing for complaints to be made by any reasonable means;</li> <li>(c) is responsive to the needs of individual clients, especially those who are vulnerable;</li> <li>(d) enables complaints to be dealt with promptly and fairly, with decisions based on a sufficient investigation of the circumstances;</li> <li>(e) provides for appropriate remedies; and</li> <li>(f) does not involve any charges to clients for handling their complaints.</li> </ul>
<b>1.23</b>	providing the client with a copy of the firm's complaints procedure on request
<b>1.24</b>	in the event that a client makes a complaint, providing them with all necessary information concerning the handling of the complaint

## Costs estimates

**Outcome 1.13** provides that "clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter".

Solicitors should therefore give the best estimate possible at the outset of the matter and make it clear that the estimate is not intended to be fixed. Solicitors should also inform the client that if there are unforeseen developments and/or complications that the estimate may need to be revised and update the client as the matter progresses. In protracted matters, it may be advisable for solicitors to give staged estimates, with an overall estimate at a later stage once all the issues have been identified.

## Complaints

A complaint about costs may fall into two distinct parts: **the fairness and reasonableness of a solicitors' charges** and **the adequacy of the client care information** provided to the client.

Where the client is complaining about the fairness and reasonableness of the charges, then this will be a matter for the solicitor to consider under his complaints handling procedure. If the matter cannot be resolved, the client should be informed of his entitlement to seek assessment of the costs by the court under **s70 Solicitors Act 1974 (Outcome 1.14)**.

If alternatively or in addition, the complaint is about the adequacy of the costs information provided, then again this will be a matter for the solicitor to consider under his complaints handling procedure. If the matter cannot be resolved, the client should be informed of his right to complain to the Legal Ombudsman, the time frame for doing so and full details of how to contact the Legal Ombudsman (**Outcome 1.10**).

## Findings from the Legal Ombudsman's Report "Costs and customer service in a changing legal services market" – avoiding complaints about costs

The Legal Ombudsman (LeO) reports that costs have been the most common reason for complaints it has received. LeO believes the majority of cost complaints could have been avoided if lawyers had been more open and transparent about the cost of their services. LeO recommends that lawyers provide clear information in client care letters, cost estimates and bills.

Important messages which can be taken from this report are that a solicitor should explain his costs to the client at the outset, before the client engages the solicitor, including explaining the meaning of such terms as "disbursements" with which many clients are unfamiliar. Further, in most cases only quoting an hourly rate, plus VAT and disbursements is meaningless to a client unless there is a limit on the total costs or an estimate for the overall costs is given. Also, lawyers should attempt to resolve client complaints in-house as early as possible so the client does not feel the need to complain to LeO.

Although LeO has jurisdiction only to deal with complaints from individuals, very small businesses, charities, clubs and trusts, the complaints it receives on problems such as lack of sufficient information about the level of costs at the outset are relevant to dealings with all clients, whether individuals or large companies.

## Client care and probate

Solicitors acting in probate matters often receive complaints from lay personal representatives, and these complaints should be treated the same as those from any other client. Where complaints are received from residuary and non-residuary beneficiaries, although they are not clients per se, the Legal Ombudsman sets out in its Scheme Rules that it will accept complaints from non-client beneficiaries of an estate.

## Residuary beneficiaries

Residuary beneficiaries are able to complain and to expect the solicitor to respond to the matter under the solicitor's complaints handling procedure. This is in line with a residuary beneficiary's ability to seek third party assessment of costs under **s71(1) Solicitors Act 1974**, whether or not the Solicitor is an executor of the estate.

In the circumstances, it is good practice for solicitors to provide residuary beneficiaries with relevant client care information for reference at the outset, together with costs estimates and any later revisions. If a residuary beneficiary complains to the firm at any point in the administration, then this should be dealt with in the same manner as one would handle a complaint from a client.

## **Non-residuary beneficiaries**

Any other type of beneficiary is likely to receive a specific legacy under the terms of a will. He will not be making any contribution to the solicitor's fees, as would a residuary beneficiary, and is not entitled to seek assessment of the solicitor's costs through the court. However, the Legal Ombudsman will accept complaints from non-residuary beneficiaries about a solicitor's poor service.

For further details of how the Legal Ombudsman deals with complaints please see its Scheme Rules, Guide to Good Complaint Handling and Case Studies, which can be viewed at: [www.legalombudsman.org.uk](http://www.legalombudsman.org.uk)

## **Solicitor appointed as Executor**

Where a client is considering naming a solicitor as an executor the solicitor should provide an indication of the likely current costs of both:

- carrying out the administration of the estate, and
- acting as an executor

The solicitor should also inform the client whether the fees quoted are based on:

- an hourly rate, and/or
- a percentage of the estate

It should be clear whether the amount quoted is for the work involved in administering the estate or whether it is simply the fee for acting as an executor and supervising others doing the necessary work.

With some executorships there may be a continuing role for the solicitor as executor to act as a trustee. In these cases the solicitor should make clear any trustee fees that may be relevant to the estate.

Information about fees should be provided upfront so that the client is made aware of potential charges before deciding who to appoint. The solicitor should also ensure that his client understands that these fees may change in the future.

If a solicitor's services are being provided online or through the post it is important that his fees are clearly and prominently presented in any information provided to the client before the client elects to appoint the solicitor or his firm as the executor(s).

For further information, please see the Law Society's Practice Note on the Appointment of an Executor which can be viewed at : [www.lawsociety.org.uk/practicenotes](http://www.lawsociety.org.uk/practicenotes) .

## **Further Reference on client care and complaints handling**

The SRA Handbook, including the Code of Conduct 2011, can be viewed at [www.sra.org.uk/handbook](http://www.sra.org.uk/handbook)

Solicitors may also find the following Law Society Practice Notes of assistance:

- Client Care Letters
- Complaints Management
- Initial Interviews
- Provision of Service Regulations 2009
- Publicising Solicitors' Charges

These can be downloaded at [www.lawsociety.org.uk/practicenotes](http://www.lawsociety.org.uk/practicenotes)

## Lawyerline

The Law Society's Lawyerline provides specific support to solicitors on client care and complaints handling. The service is staffed by solicitors and can be contacted on 0870 606 2588 from 09.00 to 17.00 on weekdays or by e-mail: [lawyerline@lawsociety.org.uk](mailto:lawyerline@lawsociety.org.uk)

## Risk & Compliance Service

In today's evolving legal environment, risk management will be a key differentiator between providers of legal services. In response to this, the Law Society has created an innovative Risk and Compliance Service, building on the successful delivery of our in-house client care and compliance consultancy service in 2009. This new service will help solicitors:

- understand risk management and legal and statutory requirements
- develop a robust and coordinated approach to compliance

The service provides support and expertise through a comprehensive range of tools and information that can be tailored to solicitors' needs, enabling them to address successfully and respond to changes in regulatory, financial and client expectations.

Our service will help solicitors demonstrate to the SRA, the Legal Ombudsman (LeO) and other key stakeholders that their firm is focused on the following core areas:

- improving client care and complaints handling
- supervision
- risk management
- quality assurance
- the exercise of sound professional principles

The service will help solicitors to assess their firms' appropriate response to regulatory requirements and supervision, based on the SRA's risk analysis of management systems and procedures.

Membership of the service will help solicitors plan ahead, so that their firms are ready to respond proactively to the demands and uncertainties of operating within a fast evolving regulatory framework.

For further information on membership and fees, please email Risk & Compliance at [riskandcompliance@lawsociety.org.uk](mailto:riskandcompliance@lawsociety.org.uk)

## Part 4 - Basis of charging in non-contentious business

The basis upon which solicitors are able to charge in non-contentious matters is governed by:

- (1) The Solicitors' (Non-Contentious Business) Remuneration Order 2009 (SI 2009/1931) (the 2009 Order)\*; and
- (2) the Solicitors Code of Conduct 2011 (see Client care above)

\*Please note also:

- **The Solicitors (Non-Contentious Business) Remuneration (Amendment) Order 2010 (SI 2010/2262)**, which makes minor changes as a result of the specific provisions of the Legal Services Act 2007. The effect of this amendment is that if the Legal Ombudsman makes a direction which restricts or limits a solicitor's fees under section 137(2) of the Legal Services Act 2007, then any applicable interest that is to be charged on the solicitor's unpaid costs is to be calculated by reference to the limited fee that has been directed by the Legal Ombudsman; and
- **The Solicitors (Non-Contentious Business) Remuneration (Amendment) Order 2012 (SI 2012/171)**, which extends the application of the 2009 Order to Licensed Bodies.

### The Order

**Article 3 of the 2009 Order** provides that:

**"A solicitor's costs must be fair and reasonable having regard to all the circumstances of the case and in particular to:**

- (a) the complexity of the matter or the difficulty or novelty of the questions raised;
- (b) the skill, labour, specialised knowledge and responsibility involved;
- (c) the time spent on the business;
- (d) the number and importance of the documents prepared or considered, without regard to length;
- (e) the place where and the circumstances in which the business or any part of the business is transacted;
- (f) the amount or value of any money or property involved;
- (g) whether any land involved is registered land within the meaning of the Land Registration Act 2002;
- (h) the importance of the matter to the client; and
- (i) the approval (express or implied) of the entitled person or the express approval of the testator to—
  - (i) the solicitor undertaking all or any part of the work giving rise to the costs; or
  - (ii) the amount of the costs."

## Part 5 - Methods of charging

The charging options available in non-contentious matters:

- Hourly rate only
- Hourly rate plus value
- Fixed fee
- Contingency fee agreement
- Non-contentious business agreement

### Hourly rate

Traditionally, privately paying clients paid for work as it was carried out. This was on the basis of (i) the cost per hour of the time spent by a solicitor on a matter having regard to the overhead expenses of that solicitor's firm (the 'A' rate) and (ii) the mark-up for care and conduct, usually at 50 per cent of the A rate (the 'B' rate).

It is now common practice to charge the client an inclusive figure incorporating the fee earner's expense rate and any appropriate care and conduct uplift.

### Hourly rate plus value

In certain areas of work, such as probate, it may be appropriate to include a value element in the method of charging.

However, the question of whether a value element is charged is a matter of judgement for the solicitor and for agreement between the solicitor and the client. It is not mandatory. Where a value element is used, practitioners may wish to use the following approach. **It should be noted that this is not Law Society guidance and the information has been taken from historical decisions made by Law Society assessors. The figures below should not be regarded as recommended scale charges in any way and must always be exercised with discretion.**

In all cases the overall consideration must be that the charges are fair and reasonable, having regard to all the circumstances of the matter, in accordance with **Article 3 of the Solicitors' (Non-Contentious Business) Remuneration Order 2009, as amended** (see Basis of charging in non-contentious business above).

### Charging in probate and in the administration of estates

In **Jemma Trust v Liptrott [2003] EWCA Civ 1476**, the Court of Appeal held that a value charge can either be made in addition to an hourly rate, or it can be included in the hourly rate, but the value element must not be reflected in both charges. The comments of the court are reproduced in Appendix 4 below but it is recommended that practitioners read the Jemma Trust judgment in its entirety.

Where appropriate, charges may consist of two elements:

#### 1. Hourly rate

This should be an inclusive figure incorporating the fee earner's expense rate and any appropriate care and conduct uplift.

#### 2. Value element

Account may be taken of the value of the assets in the estate. In calculating the value element of the charge, the following approach may be helpful:



## **First consider the value nature and number of assets**

It is usual to divide the estate (i.e. total value of the assets left after death) into two parts:

### **a) The deceased's residence**

The value of the deceased's home, or as much of it as he or she owned, if it was shared with another person. For example, where the property is jointly owned, the value is reduced by half.

### **b) Value of rest of the estate**

## **Second apply an appropriate percentage**

An appropriate percentage should be considered in the light of the circumstances of the case but the following may be helpful.

### **Solicitor not acting as an executor**

Value of gross estate less residence	1%
Value of residence	0.5%

### **Solicitor acting as sole executor or joint executor with another person**

Value of gross estate less residence	1.5%
Value of residence	0.75%

The final figure should always be reviewed to ensure that the charges are fair and reasonable having regard to all the circumstances.

## **High value estates**

When dealing with high value estates, consideration should be given to reducing the value element percentage charged in order to ensure that the overall level of charge is fair and reasonable. For general guidance on this point, see the case of **Jemma Trust v Liptrott [2003] EWCA Civ 1476**. The Court of Appeal suggested an appropriate charging regime as set out in Appendix 3.

The Court of Appeal further noted that in the appropriate circumstances a regressive scale may need to be applied to the value element relating to the principal residence.

**It is for individual practitioners to exercise their professional judgment as to whether or not to apply a value element when charging for the administration of an estate.**

## Contingency fee agreement

A “contingency fee” is a generic term used to describe all agreements where the fee (whether fixed, or calculated either as a percentage of the proceeds or otherwise howsoever) is payable only in the event of success.

“Contingency fee agreements” are traditionally known to be agreements whereby the fee is calculated as a percentage of the proceeds recovered. Such contingency fee agreements are only lawful in non-contentious matters (**s57 Solicitors Act 1974**) and are commonly used in Employment Tribunal work. The case of **Tel-ka Talk Limited v HMRC [2011] STC 497, [2011] STI 267**, in which the Law Society intervened, confirmed the long held view that Employment Tribunal work is non-contentious. This provides significant advantages to practitioners as contingency fees are considered to be simpler to use than conditional fee agreements - see page \*\* for further information on the case). To be enforceable, a non-contentious business agreement must be in writing and signed by the person to be bound by it ‘or his agent on his behalf’ (**s 57(3) The Solicitors Act 1974**).

**Outcome 1.6** of the 2011 Code provides that “you only enter into fee agreements with your clients that are *legal*, and which you consider are suitable for the client’s needs and take account of the client’s best interests”. Traditional contingency fee agreements remain unlawful in contentious matters under the common law on the basis that they are champertous and contrary to public policy.

However, in matters where proceedings are contemplated but not actually issued, a solicitor would be able to enter into contingency fee arrangement for the period up until proceedings are issued.

At that stage, the matter would become contentious and the contingency fee agreement would need to be terminated and an alternative fee arrangement entered into (for example a conditional fee agreement, fixed costs or hourly rate arrangement). Solicitors should be aware that it is a moot point whether work carried out pre-issue automatically becomes contentious once proceedings are issued. If so, there is doubt about whether the solicitor would be able to recover his pre-issue costs. Please see obiter comment of Lord Justice Brooke in **Crosbie v Munroe [2003] EWCA Civ 350**.

## Damages-based agreement

Damages-based agreements, which are contingency fee agreements used in Employment Tribunal matters, were introduced on 9 April 2010 by **s154 Coroners and Justice Act 2009 (inserting s58AA CLSA 1990)** and must comply with the Damages-Based Agreements Regulations 2010. These are a further statutory form of contingency fee.

For further information, please see the Law Society’s Practice Note on the Damages-Based Agreement Regulations 2010 at: [www.lawsociety.org.uk/practicenotes](http://www.lawsociety.org.uk/practicenotes)

## Non-contentious business agreement

Non-contentious business agreements are governed by **s57 Solicitors Act 1974** as amended by **s98 Courts and Legal Services Act 1990**. Non-contentious business agreements are now extremely rare and difficult to get right. For this reason, in light of the new consumer focused approach advocated by the Legal Ombudsman, **the Law Society recommends that solicitors avoid using them.**

### Form of the agreement

The agreement **MUST**:

- be in writing – s57(3)
- be signed by the person to be bound by it or by his/her agent – s57(3)
- have all the terms contained within the document

see **Chamberlain v Boodle and King (1982) 3 All ER 188 CA**– it must be precise and unambiguous.

The agreement **MAY**:

- i) be entered into before, after or in the course of the transaction – s57(1)
- ii) provide for remuneration by a gross sum, or by reference to an hourly rate, or by a commission, or percentage, or by a salary, or otherwise – **s57(2)**. The reference to hourly rate was added by **s98** of the **Courts and Legal Services Act 1990** which came into force on 1 March 1991
- iii) include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matter s57(2).

### Effect of a non-contentious business agreement

A **s57** agreement can be referred for assessment if the solicitor seeks to rely on the agreement and the client objects on the grounds that it is unfair and unreasonable. The court has the power to enquire into the facts and may set aside or vary the agreement if it is found to be unfair or unreasonable – **s57(5)**.

If a **s57** agreement as to hourly rates is referred to assessment and the client objects to the amount of costs and not that the agreement is unfair or unreasonable, the agreed hourly rate will not be open to challenge but the court may consider the number of hours worked and whether they were excessive – **s57(7)**.

### Enforcing a non-contentious business agreement

**Simple debt recovery proceedings can be commenced – s57(4).**

**Section 69** of the **Solicitors Act 1974** must still be complied with before an action for recovery is brought by a solicitor. See Appendix 4.

## Part 6 - Billing the client

At common law, the retainer is an entire contract so prima facie the solicitor is not entitled to payment until the conclusion of the matter for which he was instructed (see **Underwood, Son & Piper v Lewis [1894] 2 QB 306**). On this basis, if the solicitor wrongfully terminates the retainer, this will have the dramatic consequence that the solicitor is not entitled to receive any fees for the work already done and must repay any sum received on account of fees, although not disbursements.

Therefore, the solicitor should make it an express written term of his retainer at the very outset that the client makes payments on account of costs to be incurred and agrees with the client that the solicitor will render interim bills at various intervals during the retainer, for example on a monthly basis. Further, solicitors should consider making it a term of the retainer that the solicitor has a right to suspend services until paid.

It is important to understand the difference between interim bills and final bills because the status of the bill determines whether a solicitor can sue upon a bill and whether a client has the right to a detailed assessment of the bill.

This section deals with:

- interim bills on account
- interim statute bills
- final bills
- gross sum and detailed itemised bills
- delivery of bills

### Interim bills on account

Interim bills on account are rendered prior to the conclusion of the retainer and are in fact merely requests for payments on account of a "final bill" to be delivered at a later date. It is not possible to sue on this type of bill and a client cannot apply for assessment of it.

In contentious matters, under **s65(2) Solicitors Act 1974**, a solicitor may request the client to pay a reasonable sum on account of the costs incurred and where the client refuses or fails within a reasonable time to make that payment, then the solicitor may terminate the retainer upon giving reasonable notice.

There is no similar provision for non-contentious matters. Therefore, **in non-contentious matters, a solicitor must make any requirement for payments on account of costs a contractual condition of accepting instructions and a further contractual right to suspend services if a client has no reasonable justification for not paying an interim bill**. Without these conditions a solicitor cannot terminate the retainer if the client refuses to make such a payment. This is something that should be considered at the outset of the retainer when terms of business are being agreed.

In **Minkin v Cawdery Kaye Fireman & Taylor [2012] EWCA Civ 546**, the Court of Appeal found that the solicitor had properly exercised a contractual right in the solicitor's terms of business to suspend services until payment of an interim bill and that where it is the client who terminates the retainer, this absolves the solicitor from any further performance of the contract but it does not absolve the client from paying the costs properly incurred to that date.

If the solicitor has taken money on account once he delivers an interim bill to the client, he is usually entitled to transfer funds from client to office account to meet payment of the bill and indeed, in those circumstances, the funds must be transferred out of client account to office account within 14 days (Rule 17 of the SRA Accounts Rules 2011, see [www.sra.org.uk](http://www.sra.org.uk)).

## Interim statute bills

These bills are termed 'statute bills' because they must comply with all the requirements of the **Solicitors Act 1974**. Whilst interim, they are discrete and entire bills in their own right. Consequently, a solicitor may sue on them and a client may apply for assessment of them. These bills are final bills in respect of the work covered and cannot be adjusted at a later date.

Interim statute bills can arise in two ways:

i) Natural break

The Law Society's advice is not to rely on this ground except in the clearest circumstances. For limited guidance on what constitutes a natural break, practitioners should refer to **Chamberlain v Boodle and King [1982] 3 All ER 188 CA**.

ii) Agreement

Practitioners should make it expressly clear in their terms of business letter that they propose to deliver interim statute bills in the event of protracted work.

See the Court of Appeal judgments in **Davidsons v Jones-Fenleigh [1997] Costs LR (Core Vol.) 70** and **Palomo v Turner [2000] 1 WLR 37** regarding the distinction between statute bills and requests for payment on account generally.

## Final bills

Final bills can be rendered in the following circumstances:

- i) where the client has agreed to, or asked for, delivery of a final bill
- ii) at the conclusion of the matter
- iii) on the termination of the retainer
- iv) on an order made by the High Court for the delivery by a solicitor of a bill of costs (see **s68 Solicitors Act 1974**)

Solicitors should prepare a final bill which covers all the solicitors costs and disbursements incurred since the commencement of the retainer and which gives credit for all payments received as a result of the delivery of interim bills on account.

The correct procedure is often not followed in practice and solicitors tend to send a "final" bill for the remainder of the solicitors charges and disbursements due without reference to any previous interim bill on account. However, solicitors should be aware that this is not the correct procedure specified by the Solicitors Act 1974 and such discrepancies may be identified by the court if proceedings to recover payment or detailed assessment proceeding are commenced.

## Gross sum and detailed itemised bills

It is for the solicitor to decide whether to deliver a gross sum bill or one containing detailed items.

In a contentious matter, a client who has received a gross sum bill has the right to require a solicitor to deliver a detailed itemised bill to replace the original bill, see **s64(2) Solicitors Act 1974**.

This right does not apply in non-contentious work.

## Content of bills

A solicitor's bill should contain sufficient information on the work carried out and the period of time to which it relates, so that the client is able to assess the reasonableness of the charges. Please see **Haigh v Ousey (1857) 7 E&B 578** and **Re Kingsley (1978) 122 Sol Jo 457** for further guidance.

The bill may include unpaid disbursements, however, these must be described in the bill as unpaid(**s67 Solicitors Act 1974**).

## VAT

In order to comply with the VAT Regulations 1995, when a third party is paying the solicitor's costs the bill must be made out to the client (i.e. the person to whom the supply of services is made), however, it should state that the bill is *payable by a third party*.

## Delivery of bills

There is an express statutory requirement that a bill must be signed and delivered whether electronically or otherwise. Once the bill has been delivered, a solicitor is bound by it and except by operation of **s64(2) Solicitors Act 1974** or by consent or order of the court he cannot withdraw it, vary, add to it or strike it out see **Rezvi .v Brown-Cooper (a firm) 1997 Costs LR 109**.

If the bill does not comply with the provisions of **s69 Solicitors Act 1974** then **s69(1)** provides that no claim shall be brought to recover costs due, and the bill will be unenforceable in the courts. However, it is worth noting that if a claim is brought on a defective bill the court has a discretionary power to allow the solicitor to withdraw the bill and bring a new claim.

**Schedule 16 Part 1 s64(3) Legal Services Act 2007**, which came into force in March 2008 amended **s69 Solicitors Act 1974**. This amendment allows solicitors to deliver their bills electronically, provided the client has indicated willingness to accept delivery of the bill electronically and has not subsequently served notice that he no longer wishes to accept bills sent in this way.

**Please see Appendix 4 for the full text of S69 Solicitors Act 1974.**

## Part 7 - Client's right to challenge a solicitor's bill

There are three ways that a client can challenge the solicitor's bill:

- (i) Assessment under **s70 Solicitors Act 1974**
- (ii) Challenge under the common law
- (iii) Counterclaim for negligence

### (i) Assessment of solicitor and client costs

The client can apply for an assessment of his solicitor's costs under **s70 Solicitors Act 1974** and may only seek an assessment of a final or interim statute bill.

There are two bases for the assessment of costs, the standard basis and the indemnity basis, and on neither basis will the court allow costs which have been unreasonably incurred or are unreasonable in amount (**Rule 44.4(1) Civil Procedure Rules**).

On an assessment on the *indemnity* basis, there is no reference to proportionality and any doubts as to whether costs were reasonably incurred or were reasonable in amount is resolved in favour of the receiving party. However, on an assessment on the *standard* basis, the court will only allow costs which are proportionate to the matters in issue and will resolve any doubt which it may have about whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

### Time limits under section 70 of Solicitors Act

The client has a right to assessment within one month from the date of the delivery of the bill. If the application is made after one month but before twelve months from the date of delivery of the bill, the court's permission is required for the bill to be assessed.

Except in special circumstances, no order for assessment will be made:

- i) after twelve months from the delivery of the bill or
- ii) after a judgment has been obtained for the recovery of the costs covered by the bill, or
- iii) after the bill has been paid, but before the expiration of 12 months from the payment of the bill.

In relation to the application of **section 70**, practitioners should have regard to the Court of Appeal decisions in **Thomas Watts & Co (a firm) v Smith [1998] 2 Costs LR 59** and **Turner v Palomo [2000] 1 WLR 37**. Both of these decisions appear to allow the client a common law means to challenge a solicitor's bill outside the statutory limitations of **s70**. The practical effect of this is that where a solicitor sues for non-payment of fees, any summary judgment will be for assessment of damages and not for a liquidated amount.

Also note the House of Lords decision in **Harrison v Tew [1990] 2 AC 523**, which stated that the Court had no power to order assessment under **s70** outside the statutory period. This decision was distinguished in **Turner v Palomo** on the basis that there remained a right under the common law for the client to challenge the reasonableness of the solicitor's bill and the Court retained the power to order the bill to be assessed by a costs judge but this would not be by way of detailed assessment (See below **Recovering solicitors' costs**).

## Assessment procedure

**Rule 48.10** of the Civil Procedure Rules sets out the procedure to be followed where the court has made an order under **Part III Solicitors Act 1974** for the assessment of costs payable to a solicitor by his client and is as follows:

The solicitor must serve a breakdown of costs within 28 days of the order for costs to be assessed.

The client must serve points of dispute within 14 days after service on him of the breakdown in costs.

If the solicitor wishes to serve a reply, he must do so within 14 days of service on him of the points of dispute.

Either party may file a request for a hearing date:

- i) after points of dispute have been served; but
- ii) no later than three months after the date of the order for the costs to be assessed.

This procedure applies subject to any contrary order made by the court.

Precedent P showing the breakdown of costs is annexed to the Practice Direction accompanying **Rule 48.10**. This Practice Direction also deals generally with the practicalities of the assessment process.

## Where to apply

**Rule 47.4** deals with the appropriate venue for detailed assessment proceedings. This should be read in conjunction with **s69(3) Solicitors Act 1974**.

## Who should apply?

It is usual for the client to apply for assessment although it is possible for a solicitor to apply to have his own costs assessed. The latter is inadvisable because the solicitor will generally be unable to recover his costs for attending the hearing if the client fails to attend.

## Costs of assessment

The costs of assessment will follow the event. If a solicitor's bill is reduced by one fifth or more, then the solicitor will bear the costs of the assessment. If the bill is reduced by less than one fifth or is not reduced, the party chargeable will pay the costs. See **Solicitors Act 1974 s70(9)**.

The one fifth figure is calculated on the total of the bill *excluding* VAT.

## (ii) Challenge under the common law

Clients may make a challenge under the common law as to the amount charged by the solicitor on the basis that the solicitor is only entitled to recover costs agreed by the client for a reasonable amount for the work carried out.

It was held in **Turner v Palomo [1999] 4 All ER 353** and **Thomas Watts v Smith [1998] 2 Costs L.R. 59** that a solicitor's claim for non-payment of fees should be treated as a claim for an unspecified amount and therefore only judgment in default or summary judgment for an assessment of damages can be entered.



This is on the basis that a solicitor can only charge a reasonable amount for work done and the solicitor has the burden of proving that the costs are reasonable. Therefore, the court will enter judgment in default for an amount to be assessed by the Court. The costs will be assessed by a costs judge but it will not be a detailed assessment.

### **(iii) Counterclaim for negligence**

Where a client suffers loss because of the solicitor's negligence, he may sue the solicitor for damages and claim to set off the damages against the amount of the bill. Further, if as a result of the solicitor's negligence the client has not achieved what was intended, he may be able to bring a claim against the solicitor to recover the sums paid.

### **Removal of the remuneration certificate procedure**

Prior to 11 August 2009 the **Solicitors' (Non-Contentious Business) Remuneration Order 1994** set out the procedure which applied when a solicitor delivered a bill for non-contentious business. This included the right of the client to request the solicitor to obtain a remuneration certificate from the Legal Complaints Service if the client disputed the amount of the bill.

The **Solicitors' (Non-Contentious Business) Remuneration Order 2009 (SI 2009/1931)** came into effect on 11 August 2009 and abolished the procedure for remuneration certificates from that date (the Order is set out at Appendix 1). Solicitors must now comply with **Outcomes 1.9, 1.10, 1.11, 1.13 and 1.14** of the Solicitors Code of Conduct 2011 (see Client care and Complaints above).

## Part 8 - Recovering solicitors' costs

Provided that a solicitor's bill complies with the requirements of **s69(2) Solicitors Act 1974** (see Appendix 4) recovery proceedings for costs may be commenced after one month has elapsed from the date of delivery of the final or interim statute bill. However, in circumstances where the client is about to quit England and Wales, to be declared bankrupt or to compound with his creditors or do any other act which tends to prevent or delay the solicitor obtaining payment, a solicitor may seek leave to issue proceedings within a month, see **s69(1) Solicitors Act 1974**.

Often a client may fail to pay a solicitor's costs because they have a complaint. **Outcome (1.9)** of the Code states that solicitors must ensure that clients are informed in writing at the outset of their matter of their right to complain and how complaints can be made. **Outcome (1.11)** states that all complaints, including a complaint about a firm's bill, must be handled promptly and fairly (see **Client Care** above).

It should be noted that a solicitor will be prevented from issuing recovery proceedings for costs where the client has made an application to the court for detailed assessment of the costs within one month of delivery of the bill or where he has obtained an order for the bill to be assessed – see **ss70(1) and (2) Solicitors Act 1974**.

### Interest on costs

**Article 5** of the **Solicitors' (Non-Contentious Business) Remuneration Order 2009** deals with interest payable on unpaid costs in non-contentious matters and entitles the solicitor to charge interest from one month from the delivery of the bill of costs.

Unless otherwise agreed with the client, the rate of interest will be 8% per annum. This has been the interest rate on judgment debts since 1 April 1993 (see **Judgment Debts (Rate of Interest) Order 1993 SI 93/564**).

### Service of a statutory demand

Practitioners faced with a client who will not pay may consider serving a statutory demand on the client. However, solicitors should proceed with caution.

A solicitor can serve a statutory demand within one month of delivery of a bill and can, after the expiration of one month from the delivery of the bill, issue a bankruptcy petition provided 21 days have expired from service of the statutory demand.

A petition, but not a statutory demand, is an 'action' within the meaning of **s69 Solicitors Act 1974**.

In general solicitors should be wary of following this route as there is a power to set aside a statutory demand on the grounds of injustice. See **Re a Debtor (No 88 of 1991) [1992] 4 All ER 301; Marshalls (a firm) v a debtor [1993] Ch 286** (also reported in *The Independent* 10.07.1992) and **Shalson v DF Keane Ltd [2003] EWHC 599**.

Solicitors should be mindful of the decision in **Turner v Palomo (1999) 4 All ER 353 CA**, which held that a solicitor's claim for non-payment of fees should be treated as a claim for an unspecified amount until those fees have been assessed by the court. The same reasoning was applied in **Truex v Toll [2009] EWHC 396 (Ch)**. On this basis, there may be no right to serve a statutory demand until costs have been assessed.

## Part 9 - Assessment of third party costs

**Section 71(1) Solicitors' Act 1974** provides:

Where a person other than the party chargeable with the bill for the purposes of section 70 has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill, that person, or his executors, administrators or assignees may apply to the High Court for an order for the assessment of the bill as if he were the party chargeable with it, and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill.

**Section 71(1)** enables someone who is not the client, but who is liable to pay the solicitor's bill, to have the bill assessed.

This provision may, for example, be of assistance to:

- i) Residuary beneficiaries dissatisfied with the unreasonable costs of solicitors administering an estate
- ii) Mortgagors dissatisfied with the unreasonable costs of the mortgagee's solicitors
- iii) Tenants dissatisfied with the unreasonable costs of the landlord's solicitors

However the bill is assessed as if the party seeking assessment is the "party chargeable with it" ie as if it is the client. In **Tim Martin Interiors Ltd v Akin Gump LLP [2011] EWCA Civ 1574** the Court of Appeal concluded that because of this, an assessment of costs under **s71(1)** "is of limited value" to a third party.

It is clear that only costs properly arising under the terms of the agreement giving rise to the liability to pay the costs will be payable and extraneous matters will be excluded from the bill. However under **s71(1)** the Court has no power to substitute a lower amount for a higher one on the basis that although an item of costs is allowable, the rate claimed is unreasonably high unless such a substitution could have been made if the client itself had challenged the solicitor's bill (**Tim Martin Interiors Ltd v Akin Gump LLP [2011] EWCA Civ 1574 per Lloyd LJ para 82**).

Instead, the Court of Appeal recommended that if the paying party wants to challenge such items as the hourly rate charged or the amount charged for other particular items, a mortgagor should bring a claim against the mortgagee for an account of the sums due under the mortgage and a tenant should bring a claim against the landlord for a declaration as to the amount properly due under the tenancy agreement. In both cases, once proceedings have been commenced, either for an account or a declaration, an application should be made for the matter to be passed to a costs judge to assess the costs.

### Landlords' solicitors' charges

Landlords' solicitors' charges should be fair and reasonable in all the circumstances. In circumstances where the tenant has agreed to pay the landlord's costs and the tenant is of the opinion that the landlord's solicitor is overcharging, the landlord's solicitor should be referred to **Principles 2 and 6**, which state that solicitors must act with integrity and behave in a way that maintains the trust the public places in them and in the provision of legal services, and to **Outcome 11.1** of the Code which states that solicitors do not take unfair advantage of third parties in either their professional or personal capacity. **Indicative Behaviour (11.1)** states that by providing sufficient time and information to enable the costs in any matter to be agreed, this may tend to show that the solicitors have achieved the Outcomes and therefore complied with the Principles.

Where appropriate, solicitors are advised to obtain a fixed figure or agree a cap on a third party's costs.

Where an undertaking is given as to costs, please also see **Outcome 11.2**, which provides that solicitors must perform all undertakings given within an agreed timescale or within a reasonable amount of time.

The landlord's solicitor should inform his client that he may look to him for payment if the tenant does not pay his costs.

Information on precautions which a lessee's solicitors can take to prevent a dispute arising over a landlord's solicitor's bill is contained in a Law Society Council statement printed in the *Gazette* on 19th December 1984 and reprinted in the Law Society publication "An Approach to Non-Contentious Costs" (see Further Reading below).

If the tenant wishes to challenge the Landlord's solicitors' costs, reference is made to the section above "**Assessment of third party costs**" for the procedure which should be used.

## Further Reading

**Law Society Practice Notes** which are available at <http://www.lawsociety.org.uk/productsandservices/practicenotes.page?ref=mainhome>

**SRA Code of Conduct 2011** which is available online at [www.sra.org.uk](http://www.sra.org.uk)

**SRA Handbook** published by the Law Society. Available from the Law Society bookshop (telephone 0870 850 1422)

**Outcomes-Focused Regulation, A Practical Guide** by Andrew Hopper QC and Gregory Treverton-Jones QC published by the Law Society. Available from the Law Society's online bookshop at [www.lawsociety.org.uk/bookshop](http://www.lawsociety.org.uk/bookshop)

**Cook on Costs 2012** - by Michael J Cook published by Butterworths

**The Expense of Time – 5th edition** A concise guide to calculating the annual expense and hourly expense of fee-earners in your firm. Photocopies are available from the Law Society library (telephone 0870 606 2511 or e-mail [library@lawsociety.org.uk](mailto:library@lawsociety.org.uk) )

**An Approach to Non-Contentious Costs – First Edition (revised 1995)** A guide to the key aspects of non-contentious costs. Photocopies are available from the Law Society library (telephone 0870 606 2511)

**Practice Advice Service Questions and Answers** which are regularly published on the Law Society's website at [www.lawsociety.org.uk/practiceadvice](http://www.lawsociety.org.uk/practiceadvice)

Updates and guidance on cases and general developments are provided by the Law Society as appropriate. Solicitors should regularly refer to the Law Society website at [www.lawsociety.org.uk](http://www.lawsociety.org.uk) .

## Membership Networks

### Risk and Compliance Service

The Risk and Compliance Service provides key benefits and discounts on existing and new Law Society products and services that will help you to get up to speed and stay up to date on requirements, best practices and important changes that firms need to prepare for and monitor on an ongoing basis.

[www.lawsociety.org.uk/riskandcompliance](http://www.lawsociety.org.uk/riskandcompliance)

### International

For law firms, solicitors, and foreign lawyers seeking to develop their international business and build global relationships and profile, our innovative International Division provides the contacts, tools and information your firm needs and opportunities to progress your international career.

[www.lawsociety.org.uk/international](http://www.lawsociety.org.uk/international)

### Junior Lawyers Division

Launched in January 2008, the Junior Lawyers Division provides a clear voice for student members of the Law Society enrolled through the SRA, trainees, and solicitors with up to five years' active PQE.

[www.lawsociety.org.uk/juniorlawyers](http://www.lawsociety.org.uk/juniorlawyers)

### Lawyers with Disabilities Division

After twenty successful years, the Group for Solicitors with Disabilities has relaunched as Lawyers with Disabilities Division and aims to promote equal opportunities for people with disabilities within the legal profession. Members can benefit from a shared platform to exchange views and further mutual interests, networking opportunities, mentoring scheme and a free regular newsletter.

[www.lawsociety.org.uk/specialinterest/disabilities.page](http://www.lawsociety.org.uk/specialinterest/disabilities.page)

### Competition Section

The Law Society's European Group has relaunched and will provide competition practitioners with a range of opportunities to engage in dialogue and debate, including evening seminars, an annual conference and an annual dinner.

[www.lawsociety.org.uk/competition](http://www.lawsociety.org.uk/competition)

### Law Management Section

Established in 1998, the Law Management Section focuses on the full range of practice management disciplines, including HR, finance, marketing, IT, business development, client care, quality and risk.

[www.lawsociety.org.uk/lawmanagement](http://www.lawsociety.org.uk/lawmanagement)

### Private Client Section

Established in 1997, the Private Client Section, formerly known as the Probate Section, focuses on wills, financial planning, trusts, tax planning, Court of Protection, care planning and estate administration.

[www.lawsociety.org.uk/privateclient](http://www.lawsociety.org.uk/privateclient)

### Property Section

The Property Section focuses on areas including e-conveyancing, housing, land registration, money laundering, planning and environment, as well as tax and revenue.

[www.lawsociety.org.uk/property](http://www.lawsociety.org.uk/property)

### Civil Justice Section

Formerly called the Dispute Resolution Section, the Civil Justice Section focuses on all areas of civil justice including arbitration, litigation and mediation.

[Civil justice section](#)

**Advocacy Section**

The Advocacy Section is a dedicated Law Society service to create and facilitate a community of solicitor advocates.

[www.lawsociety.org.uk/advocacy](http://www.lawsociety.org.uk/advocacy)

**Solicitor Judges**

This Division is open to any solicitor holding a judicial appointment in either the courts or the tribunals. It enables members to connect with other solicitor judges and become more involved in the profession through events and networking opportunities.

[www.lawsociety.org.uk/specialinterest/solicitor judges](http://www.lawsociety.org.uk/specialinterest/solicitor_judges)

**Other groups**

The Law Society also maintains a list of [useful practitioner associations and groups](#).

# Appendix 1: The Solicitors' (Non-Contentious Business) Remuneration Order 2009

## STATUTORY INSTRUMENTS

2009 No. 1931

LEGAL PROFESSION, ENGLAND AND WALES

### The Solicitors' (Non-Contentious Business) Remuneration Order 2009

*Made*

16th July 2009

*Laid before Parliament*

20th July 2009

*Coming into force*

11th August 2009

The Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Law Society, the president of Surrey law society and the Chief Land Registrar (in respect of business done under the Land Registration Act 2002<sup>(1)</sup>), together constituting the committee authorised to make orders under section 56 of the Solicitors Act 1974<sup>(2)</sup>, in exercise of the powers conferred on them by that section and having complied with the requirements of section 56(3), make the following Order:

#### **Citation, commencement and revocation**

1.—(1) This Order may be cited as the Solicitors' (Non-Contentious Business) Remuneration Order 2009.

(2) This Order comes into force on 11th August 2009 and applies to all non-contentious business for which bills are delivered on or after that date.

(3) The Solicitors' (Non-Contentious Business) Remuneration Order 1994<sup>(3)</sup> is revoked except in its application to non-contentious business for which bills are delivered before this Order comes into force.

#### **Interpretation**

2. In this Order—

“client” means the client of a solicitor;

“costs” means the amount charged in a solicitor's bill, exclusive of disbursements and value added tax, in respect of non-contentious business;

“entitled person” means a client or an entitled third party;

“entitled third party” means a residuary beneficiary absolutely and immediately (and not contingently) entitled to an inheritance, where a solicitor has charged the estate for his professional costs for acting in the administration of the estate and the only personal representatives are—

(a)

solicitors (whether or not acting in a professional capacity);

(b)

solicitors acting jointly with partners, managers or employees in a professional



capacity;

(c)

employees of a solicitor sole practitioner acting in that capacity; or

(d)

managers or employees of a recognised body acting in that capacity;

“manager” has the same meaning as in the Legal Services Act 2007(4) (see section 207 of that Act);

“paid disbursements” means disbursements already paid by the solicitor;

“recognised body” means a body recognised by the Law Society under section 9 of the Administration of Justice Act 1985(5);

“registered European lawyer” means a registered European lawyer within the meaning of the European Communities (Lawyer’s Practice) Regulations 2000(6) who is registered with the Law Society;

“residuary beneficiary” includes a person entitled to all or part of the residue of an intestate estate; and

“solicitor” includes a registered European lawyer and a recognised body.

### **Solicitors’ costs**

**3.** A solicitor’s costs must be fair and reasonable having regard to all the circumstances of the case and in particular to—

(a) the complexity of the matter or the difficulty or novelty of the questions raised;

(b) the skill, labour, specialised knowledge and responsibility involved;

(c) the time spent on the business;

(d) the number and importance of the documents prepared or considered, without regard to length;

(e) the place where and the circumstances in which the business or any part of the business is transacted;

(f) the amount or value of any money or property involved;

(g) whether any land involved is registered land within the meaning of the Land Registration Act 2002;

(h) the importance of the matter to the client; and

(i) the approval (express or implied) of the entitled person or the express approval of the testator to—

(i) the solicitor undertaking all or any part of the work giving rise to the costs; or

(ii) the amount of the costs.

### **Security for costs**

**4.** A solicitor may take from his client security for the payment of any costs, including the amount of any interest to which the solicitor may become entitled under article 5.

### **Interest**

**5.—(1)** A solicitor may charge interest on the unpaid amount of his costs plus any paid disbursements and value added tax, subject to the remainder of this article.

(2) Where an entitlement to interest arises under paragraph (1), and subject to any agreement made between a solicitor and client, the period for which interest may be charged runs from one month after the date of delivery of a bill.

(3) Subject to any agreement made between a solicitor and client, the rate of interest must not exceed the rate for the time being payable on judgment debts.

(4) Interest charged under this article must be calculated, where applicable, by reference to—

(a) the amount specified in a determination of costs by the Law Society under Schedule 1A to the Solicitors Act 1974;

(b) the amount ascertained on taxation if an application has been made for the bill to be taxed.

*Judge, C.J.*  
*Sir Anthony Clarke, M.R.*  
*Paul Marsh*  
*John Perry*  
*Peter Collis*  
*Jack Straw*  
Lord Chancellor

16<sup>th</sup> July 2009

EXPLANATORY NOTE  
(*This note is not part of the Order*)

Section 56 of the Solicitors Act 1974 (c. 47) establishes a committee which may make orders about the remuneration of solicitors in respect of non-contentious business. Paragraph 54 of Schedule 16 to the Legal Services Act 2007 (c. 29) amends that section, altering (among other changes) the purposes for which orders may be made. This Order prescribes the general principles to be applied when determining the remuneration of solicitors in respect of non-contentious business.

(1)

2002 c. 9. Back [1]

(2)

1974 c. 47. Section 56 was amended by the Land Registration Act 2002, section 133 and paragraph 12(1) and (2) of Schedule 11, and the Legal Services Act 2007 (c. 29), section 177 and paragraph 54 of Schedule 16; and modified by the Administration of Justice Act 1985 (c. 61), section 9 and paragraphs 22 and 23 of Schedule 2, and S.I. 2000/1119, regulations 1 and 37(3) and paragraph 7(2) of Schedule 4. Back [2]

(3)

S.I. 1994/2616. Back [3]

(4)

2007 c. 29. Back [4]

(5)

1985 c. 61, as amended by the Legal Services Act 2007 (c. 29), section 177 and paragraph 81 of Schedule 16. Back [5]

(6)

S.I. 2000/1119. Back [6]

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## Appendix 2 : High Value Probate Cases

In *Jemma Trust v Liptrott* [2003] EWCA Civ 1476, the Court of Appeal held that there should be a regressive charging regime in respect of high value non-contentious cases and that the following bands would be applicable to cases such as this in 1993 (see paragraph 31):

- (1) Up to £750,000
- (2) £750,000 – £3m
- (3) £3m – £6m
- (4) above £6m

That would suggest that the appropriate figures for bills rendered for work done in 2003 would be:

- |     |            |         |
|-----|------------|---------|
| (1) | Up to £1m  | 1.5%    |
| (2) | £1m – £4m  | 0.5%    |
| (3) | £4m – £8m  | 0.1666% |
| (4) | £8m – £12m | 0.0833% |
| (5) | Over £12m  | 0.0416% |

The appropriate percentages should be  $1\frac{1}{2}\%$ ,  $\frac{1}{2}\%$ ,  $\frac{1}{6}\%$ ,  $\frac{1}{12}\%$  and  $\frac{1}{24}\%$  (1.5%; 0.5%; 0.1666%; 0.0833% and 0.0416%).

Thus for an estate worth £11,500,000 in 2003, the appropriate value element would be:

£1m x 1.5% =	£15,000
£3m x 0.5% =	£15,000
£4m x 0.1666% =	£6,664
£3.5m x 0.08333% =	£2,915.50
Thus total value element =	£39,579.50

Solicitors calculating all or part of their bill on a value basis should, therefore, ensure that they calculate the amount using appropriate bandings for the year in which the work was done.

## Appendix 3 : Extract from *Jemma Trust v Liptrott*

In *Jemma Trust v Liptrott* [2004] EWCA Civ 1476, the Court of Appeal said at paragraph 33 of the judgment:

### “THE FUTURE

33. We have been asked to give the profession such guidance as we can for the future in the light of the issues to which the appeal has given rise. This is difficult and, for our part, we cannot do better than to suggest that it would be appropriate for solicitors to adhere to the following principles:

1. Much the best practice is for a solicitor to obtain prior agreement as to the basis of his charges not only from the executors but also, where appropriate, from any residuary beneficiary who is an entitled third party under the 1994 Order. This is encouraged in the 1994 booklet [An Approach to Non-Contentious Costs] and letter 8 of Appendix 2 to the 1999 booklet [Practice Advice Service booklet called Non-Contentious Costs] provides a good working draft of such agreement. We support that encouragement;
2. in any complicated administration, it will be prudent for solicitors to provide in their terms of retainer for interim bills to be rendered for payment on account; this is, of course, subject to the solicitor's obligation to review the matter as a whole at the end of the business so as to ensure that he has claimed no more than is fair and reasonable, taking into account the factors set out in the 1994 Order [Solicitors' (Non-Contentious Business) Remuneration Order 1994];
3. there should be no hard and fast rule that charges cannot be made separately by reference to the value of the estate; value can, by contrast, be taken into account as part of the hourly rate; value can also be taken into account partly in one way and partly in the other. What is important is that
  - a) it should be transparent on the face of the bill how value is being taken into account; and
  - b) in no case, should it be taken into account more than once;
4. in many cases, if a charge is separately made by reference to the value of the estate, it should usually be on a regressive scale. The bands and percentages will be for the costs judge in each case; the suggestions to the costs judge set out in paragraph 30 may be thought by him to be appropriate for this case but different bands and percentages will be appropriate for other cases and the figures set out in paragraph 30 cannot be any more than a guideline;
5. it may be helpful at the end of the business for the solicitor or, if there is an assessment, for the costs judge, when a separate element of the bill is based on the value of the estate, to calculate the number of hours that would notionally be taken to achieve the amount of the separate charge. That may help to determine whether overall the remuneration claimed or assessed is fair and reasonable within the terms of the 1994 Order.
6. it may also be helpful to consider the Law Society's Guidance in cases where there is no relevant and ascertainable value factor which is given in the 1994 booklet at paragraph 13.4. If the time spent on the matter is costed out at the solicitors' expense rate (which should be readily ascertainable from the Solicitors' Expense of Time calculations) the difference between that sum (the cost to the solicitor of the time spent on the matter) and the final figure claimed will represent the mark-up. The mark-up (which should take into account the factors specified in the 1994 Order including value) when added to the cost of the time spent must then be judged by reference to the requirement that this total figure must

represent “such sum as may be fair and reasonable to both solicitor and entitled person”.

## Appendix 4: Section 69 Solicitors Act 1974

### Action to recover solicitor's costs

(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered in accordance with the requirements mentioned in subsection (2); but if there is probable cause for believing that the party chargeable with the costs--

- (a) is about to quit England and Wales, to become bankrupt or to compound with his creditors, or
- (b) is about to do any other act which would tend to prevent or delay the solicitor obtaining payment,

the High Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the solicitor be at liberty to commence an action to recover his costs and may order that those costs be *taxed* [assessed].

[(2) The requirements referred to in subsection (1) are that the bill must be--

- (a) signed in accordance with subsection (2A), and
- (b) delivered in accordance with subsection (2C).

(2A) A bill is signed in accordance with this subsection if it is--

- (a) signed by the solicitor or on his behalf by an employee of the solicitor authorised by him to sign, or
- (b) enclosed in, or accompanied by, a letter which is signed as mentioned in paragraph (a) and refers to the bill.

(2B) For the purposes of subsection (2A) the signature may be an electronic signature.

(2C) A bill is delivered in accordance with this subsection if--

- (a) it is delivered to the party to be charged with the bill personally,
- (b) it is delivered to that party by being sent to him by post to, or left for him at, his place of business, dwelling-house or last known place of abode, or
- (c) it is delivered to that party--
  - (i) by means of an electronic communications network, or
  - (ii) by other means but in a form that nevertheless requires the use of apparatus by the recipient to render it intelligible,

and that party has indicated to the person making the delivery his willingness to accept delivery of a bill sent in the form and manner used.

(2D) An indication to any person for the purposes of subsection (2C)(c)--

- (a) must state the address to be used and must be accompanied by such other information as that person requires for the making of the delivery;
- (b) may be modified or withdrawn at any time by a notice given to that person.

(2E) Where a bill is proved to have been delivered in compliance with the requirements of subsections (2A) and (2C), it is not necessary in the first instance for the solicitor to

prove the contents of the bill and it is to be presumed, until the contrary is shown, to be a bill bona fide complying with this Act.

(2F) A bill which is delivered as mentioned in subsection (2C)(c) is to be treated as having been delivered on the first working day after the day on which it was sent (unless the contrary is proved).]

(3) Where a bill of costs relates wholly or partly to contentious business done in a county court and the amount of the bill does not exceed [£5,000], the powers and duties of the High Court under this section and sections 70 and 71 in relation to that bill may be exercised and performed by any county court in which any part of the business was done.

[(4) . . . ]

[(5) In this section references to an electronic signature are to be read in accordance with section 7(2) of the Electronic Communications Act 2000 (c 7).

(6) In this section--

"electronic communications network" has the same meaning as in the Communications Act 2003 (c 21);

"working day" means a day other than a Saturday, a Sunday, Christmas Day, Good Friday or a bank holiday in England and Wales under the Banking and Financial Dealings Act 1971 (c 80).]