

Fees in direct access matters

Barristers who accept direct access briefs should take particular care to protect themselves in relation to fees.

Instructing solicitors provide more than the convenience of a trust account. They are usually skilled communicators in relation to all aspects of fees: the amount to be charged, the scope of work covered, recovery and handling client concerns.

Members are reminded of their obligations under s174 and s175 of the *Legal Profession Act 1987 (NSW)* concerning fee disclosure. Those provisions impose more onerous disclosure requirements on a barrister taking direct access work than is the case where disclosure is made to an instructing solicitor (compare s176). In drafting fee disclosures to direct access clients, consideration should be given to the level of sophistication of the client who will receive the disclosure. It may be prudent to obtain a written acknowledgment that the client understands the basis on which he or she is to be charged. Alternately, a fee agreement should be drafted in plain

language that the client can be expected to understand.

Issues include the work covered by a brief fee and the circumstances in which any cancellation fee will be payable. Barristers should stipulate whether the fee on brief covers some or all preparation, all work done on a given day, or time in court only with conferences extra.

In the New South Wales Barristers' Rules, 'fee' is defined to include any payment for the reimbursement of expenses. Barristers accepting a direct access brief should consider whether it will involve the barrister in expenses for which he or she might seek reimbursement, particularly costs which might otherwise be incurred or borne by an instructing solicitor.

Although barristers must not receive money in trust for fees (Rule 77), they are entitled to receive payment in advance of work to be performed (see advice by Bennett QC below, first published in the October 1998 edition of *Stop Press*).

The time within which fees are to be paid may also be the subject of a fees

agreement. Members are reminded of Rule 99(c) which permits a barrister to return a brief where fees have not been paid promptly or in accordance with a fees agreement, and have remained unpaid after reasonable notice to the client of the barrister's intention to return the brief for that reason.

Rule 99(c) is qualified by Rule 97, which provides that if a barrister wishes to return a brief which the barrister is permitted to return, he or she must do so in enough time to give another legal practitioner a proper opportunity to take over the case. For example, where an advance fee is agreed, the time by which the fee must be paid should be determined by reference to Rule 97, if the barrister may want to return the brief for non-payment of the advance fee.

Attention is also drawn to Rule 100, concerning the circumstances in which a barrister may return a brief accepted under a conditional costs agreement.

All fees received should be promptly and properly receipted to the client, to avoid any dispute as to amounts paid or unpaid.