

COUNSEL feel it may be helpful to the Bar to publish the following *Worst Practice Guide on the Instruction of Counsel*, kindly made available by a well-known firm of solicitors.

## Choice of Chambers and Counsel

1. This firm always goes to one of the six sets of chambers we have used since 1893. In 1967 it was suggested that this might be a short-sighted approach and a Chambers Investigation Sub-Committee was set up. In 1974 the sub-committee's report identified three new chambers to be tried out, but by 1977 none of them had answered the telephone so the idea was dropped.

2. Each of those firms must only be used in its designated area of work, as follows: (1) turbary, (2) piscary, (3) emblements, (4) advowson, (5) disaster litigation (a growth area of this firm), (6) everything else.

3. There is also a set of chambers extensively used by this firm for professional negligence, but we have never actually instructed them on behalf of a client.

4. At least half a day should be set aside to make telephone contact with the clerk.

5. Ask who is available to deal with the matter immediately and say that the papers will be down within a couple of hours. They must not actually be sent for several days, which should ensure that the chosen barrister is up to his eyeballs when they do arrive.

6. Familiarise yourself with the special language of barristers' clerks: "knows about this area of law" (*might have heard of it*); "knows all about it" (*has heard of it*); "does a lot of work in this area" (*has heard of it and even knows what it is*); "expert at this sort of thing" (*once did a case in this area, though has probably forgotten all he ever knew*); "about 10 years' call" (*about 5 years' call*); "very good on his feet" (*useless at paperwork*); "chambers' paperwork specialist" (*useless on his feet*); "can probably squeeze it in" (*has got no work at all*); "one of my best barristers" (*has got no work at all*); "I'm sorry, I thought he was available, but I'm just looking at the diary" (*you should have said it was legal aid*).

## Preparing instructions

7. For many years it was traditional in this firm for instructions to counsel to be in a standard form: "Counsel has papers herewith and will see the nature of problem". That was unnecessarily prolix. "Papers herewith, please advise" is quite sufficient, if excessively polite.

8. It is nearly always a waste of time to sort the papers, or list them in the instructions. There would be little point in a divided profession if we had to do counsel's job for them.

9. If the enclosures are listed, one or two must be omitted from the papers. It keeps counsel on their toes. For example, if counsel is to advise on construction of a document, take care to omit that document. If the instructions are to settle a defence, ensure that the statement of claim is missing (assuming there is one you may always ask counsel to settle a defence to a generally indorsed writ).

10. The physical preparation of the papers is important. Bear in mind the following:

(i) Our red tape specialists are usually able to find a piece of tape of exactly the right length (i.e. not a millimetre to spare) to ensure that when tied with the recommended quintuple granny knot it will burst asunder in counsel's chambers and

scatter papers all over the floor.

(ii) Those spiky things that go through the corners of papers should be used whenever possible. If there is blood on the papers when they come back (in addition to the usual coffee rings and smears of marmalade and chocolate) make sure you report the matter to the senior partner; there have been several instances of employees of this firm failing to get full credit on the annual salary review for even quite serious injuries to counsel.

11. A vital point: If the limitation period is likely to expire in the next few days, draw counsel's attention to the risk by mentioning it obliquely somewhere *inside* the papers.

## Chasing up and collection of papers

12. Contact counsel's clerk (but see 4 above) about 15 minutes after the papers have been delivered to chambers to ask if they have been done yet.

13. After that you have a choice of two approaches: (1) telephone every half hour every day to ask when the papers will be done; (2) do nothing for about two months and then telephone every 15 minutes.

14. The next stage after 13 is as follows:

(1) inflict a barrage of telephone calls on counsel's clerk (or counsel, so that he can't get on with any work at all) complaining that it is now a matter of life and death that the papers are ready that day;

(2) tell counsel's clerk you are making special arrangements for urgent collection from chambers the moment the papers are ready; and

(3) leave it for at least a fortnight before bothering to have them collected.

## Payment of fees

15. Counsel's clerk may never send a fee note, in which case you can forget about the whole thing. Regrettably, many barristers these days are not gentlemen, so we are frequently asked to pay for counsel's work.

16. If a fee note is sent at the end of the case, the firm has three months to pay or challenge it. A challenge should normally be made, but not until the very last day of the three month period (and in the meantime any letters or telephone calls from counsel's chambers should be ignored).

17. The precise form of challenge will depend on the circumstances. A suitable challenge in the case of a fee note for £25,000, for example, is to say that this firm can trace no record of (say) the telephone conference on June 16th. There is not the slightest chance, of course, that this firm would ever have a reliable record of anything.

18. In particularly difficult cases, where it looks as if the firm is in danger of having to part with actual money, it is essential to arrange a letter from a partner. If the case was lost, the letter will make it clear that the outcome was entirely counsel's fault, though avoiding details of how (which might make it too easy for counsel to refute the point).

19. Criticism of counsel's handling of the case is more difficult if the case was won, though there is often scope for suggesting that in the hands of a competent barrister the damages would have been greater or the costs award more favourable.

20. When all else is lost, send the cheque second class - and don't forget to forget to get it signed. □

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