Checkmylegalfees.com

South Wales
Metropole Chambers
Salubrious Passage
Swansea
SA1 3RT

London
218 Strand
London
WC2R 1AT
(Appointment Only)

Sheffield
Hydra House
Ecclesfield
Sheffield
S35 9ZX

Tel (all offices) 0300 321 4963
Fax (all offices) 0845 8620230

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Guide to Assessment under the Solicitors Act 1974

We will start with some terminology, which in these cases often causes confusion. The Solicitors Act 1974 and almost of the case law surrounding it refers to "bills", but what it is actually concerned with is what we would refer to in modern parlance as "invoices". A "bill" in the context of the whole spectrum of costs litigation can refer to many things – most usually a bill for use in detailed assessment proceedings under CPR part 47 for recovering costs payable by the losing party. What we are concerned with here however is just the solicitor's bill to his own client – a numbered, dated tax invoice requiring payment – so to avoid confusion I will refer throughout to "invoices".

The amount of profit costs and disbursements invoiced by a solicitor to his own client is regulated by Part III of the Solicitors Act 1974. That is the case whether the costs relate to contentious business (litigation) or non-contentious business (conveyancing, probate and so on). Save in exceptional circumstances there is no other jurisdiction under which the Court can interfere with a solicitor's invoice to his own client.

Until an invoice is delivered by the solicitor to his client that complies with the requirements of various sections of the Solicitors Act, the solicitor cannot sue for his fees (or institute any other sort of enforcement process) and time for the client to dispute the level of fees does not begin to run. Such an invoice is complete, self-contained, and sets out a final figure for the solicitor's charges which cannot be adjusted either upwards or downwards except by agreement or by court intervention. We will call such an invoice a "statute invoice" (because it complies with the statute).

Once a "statute invoice" has been sent (or, more properly "delivered" – we'll come to the distinction between the two in a moment), subject to time limits set out in the Act, the client has an absolute entitlement to invoke the procedure under the Act to dispute the fees and / or disbursements contained within the invoice.

What are the Requirements for a Statute Invoice?

Entitlement

Firstly the solicitor must be entitled to have sent it. A retainer (the contract between solicitor and client) is normally an entire contract under which the solicitor is to do certain

work for the client and, under the law of contract, until the work is completed (or the retainer has been terminated in some other way) the solicitor cannot seek any remuneration. Unless there is an express agreement within the contract of retainer for the solicitor to submit interim invoices, the solicitor is only entitled (and only then in respect of contentious business) to request reasonable payments on account of work done and a reasonable amount for future costs[1]. A request for a payment on account, which is properly made under s.65 of the Act, may have all of the appearance of an invoice, but has three important differences – the solicitor cannot sue upon it, it does not represent a final figure for the solicitor's charges for that part of the work, and time for disputing it under the Act does not begin to run.

So, the solicitor is only entitled to render a statute invoice –

1. Once all of the work under the contract of retainer has been completed. In short – at the end of the case
2. Where there is an express agreement for the solicitor to render interim statute invoices during the case (and the effect of that agreement upon the client's entitlement to assessment has been clearly explained)
3. Where there are "natural breaks" in protracted litigation, such that each portion of work can and should be treated as a separate and distinct part in itself
4. Where the retainer has been terminated for some other reason – for example where the client has decided to dispense with the solicitor's services, where (in contentious business only) the client has failed to comply with a reasonable request for payment on account, or where the solicitor has other "good reason" to terminate the retainer (for example a client failing to provide instructions, or asking the solicitor to act dishonestly)

Signature

The invoice must be signed by the solicitor or by an employee authorised by him to sign. The signature need not be on the face of the invoice – if it is sent as an enclosure to a letter that is signed by the solicitor or his authorised employee that is sufficient to comply with the Act. An electronic signature, whether on the face of the invoice, or in an accompanying email, is only sufficient if it complies with s.7(2) of the Electronic Communications Act 2000, which provides –

[1] Per Vlamaki v Sookias & Sookias [2015] EWHC 3334 (QB) (20 November 2015) for an agreement to deliver interim statute bills to be effective, it must have been explained to the client prior to entering into the agreement what the effect of the agreement would be i.e. in terms of an erosion of the client's rights to assessment

For the purposes of this section an electronic signature is so much of anything in electronic form as—

(a) Is incorporated into or otherwise logically associated with any electronic communication or electronic data; and

(b) Purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both.

The requirement for a signature is fatal to a claim by the solicitor, but a client can waive the requirement if he or she chooses, and seek assessment of a bill that has not been signed[2].

Narrative

The bill must contain a sufficient "narrative" description of the work done to enable the client to take advice as to whether or not it should be assessed; but lack of information in the bill itself can be redressed by accompanying documents (for example the attachment of a computerized billing guide) or by information that was already in the possession of the client when the bill was received[3].

Lack of such detail is fatal to the solicitor relying on the bill as a "statute bill", but the client can, if she or elects, waive the requirement for such detail and treat the bill as a statute bill in any event[4].

Delivery

This would seem obvious but the invoice must be delivered to the client. It is difficult to consider and then either pay or query something that is not in your possession. Delivery can be in person; it can be by the invoice being sent to the client by post to, or left for him at, his place of business, dwelling-house or last known place of abode, or can be by email (but only if the client has expressly agreed to invoices being delivered in such a way). So an invoice can be "sent" by email, but not "delivered" for the purpose of the Act.

The date of delivery is important. An invoice might be raised by the solicitor on his accounts system but not delivered until a week later. It is the date of delivery from which time runs, not the date of the invoice itself.

Once all of those requirements are met (or the client has elected to waive the requirements for signature and narrative), if he is unhappy with the bill, the client is

[2] In Re Gedye 51 ER 208
[3] Rahimian and Scandiacare -v- Allan Janes [2016] EWHC B18 (Costs)
[4] Barclays Plc v Villers [2000] ADR.L.R. 01/25

entitled, subject to time limits, to an Order for assessment of the costs under s.70 of the Act.

The Time Limits

Time for entitlement to assessment runs from the date of delivery of the invoice, and can differ depending on whether or not the invoice has been paid. It can also be dependent upon whether the payment was active (for example by receiving the invoice and then sending a cheque) or passive (for example by the solicitor deducting payment from funds held on account before delivering the invoice).

Entitlement to Assessment (from date of delivery of the statute bill)			
	Within 1 month	>1 month <12 months	>12 months
Where the invoice has not been paid in full	Absolute	Discretionary (but usually allowed)	Need to show special circumstances
Where the invoice has been paid in full	Absolute	Need to show special circumstances	No entitlement

There is no hard and fast test as to what will amount to special circumstances, but examples include where the client is not given notification of the entitlement to assessment, is given incorrect advice about the procedure, cases where the costs claimed are plainly excessive and therefore worthy of challenge, where illness or other personal difficulties have prevented a client from seeking an assessment sooner, or where there are obvious errors in the bill. An agreement between the parties to allow assessment out of time can also amount to special circumstances.

The Procedure

The procedure is governed by the Civil Procedure Rules (Part 67 deals with the venue and form of proceedings and part 46 sets out the basis of assessment and the fine details of the assessment procedure).

Proceedings are always dealt with under the Part 8 procedure and can be in the High Court or the County Court depending on the nature of the work that is the subject matter of the invoice and the value of the invoice. Historically Solicitors Act cases tend to be dealt with by the Senior Courts Costs Office, which is part of the High Court in London, either because they are issued there or because County Courts tend to see these as specialist proceedings that are best dealt with by specialist judges.

The proceedings for assessment are essentially in two stages (although there can be preliminary applications either for delivery of a statute bill, delivery of the papers, or both, for which see later in this guide) –

1. Entitlement to an Order for Assessment
2. The Assessment itself

In many cases where the application is made promptly, because of the automatic entitlement within one month from delivery of the invoice, stage 1 can be dealt with at minimal cost. The Court fee is a fixed fee of (at present) £55 regardless of the amount of the invoice or invoices under dispute.

If the Defendant confirms that the entitlement to assessment is not contested and the Court is satisfied as to entitlement it may make an Order for assessment under s.70 without attendance (though particularly in the SCCO more recent practice seems to be to convene a short hearing in any event, usually by telephone), which will in turn activate the standard directions under CPR 46.10. These are a "streamlined" version of the procedure for assessing costs payable by another party and provide for –

1. A breakdown of the invoice under scrutiny (which will take the form of a standard bill of costs for detailed assessment)
2. Points of Dispute
3. Replies to Points of Dispute
4. Request for Hearing
5. Assessment Hearing

The hearing will then proceed in the same way as any other detailed assessment hearing, with the court determining what was a reasonable amount for the solicitor to have charged. Once that sum has determined the Court will deal with costs of the proceedings and perform a "cash account" exercise, to determine who owes what to whom overall.

Some provincial Courts have, at our suggestion, adopted an even more streamlined version of the directions, allowing the Court to reach a decision on the papers, thus reducing yet further the amount of costs expended and minimising adverse costs exposure.

Costs of the Proceedings

Unlike most other proceedings, where the loser is normally the one who ends up writing a cheque, the fact that (in a case where the bill has not yet been paid) money is payable by the client to the solicitor in respect of the bill has no bearing at all on the liability for costs in these proceedings. The sole factor (unless there are "special circumstances") is the amount by which the solicitor's invoice is reduced on assessment, in fact in Solicitors

Act proceedings there is a statutory definition of a "win" for the purpose of recovering costs, which is set out at s.70(9) of the Act –

Unless—

(a) The order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or

(b) The order for assessment or an order under subsection (10) otherwise provides,

The costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.

This is commonly referred to as the "one fifth rule" – if the client reduces the solicitor's bill by one fifth or more, then, subject to subsection 10, the client is entitled to his costs of the proceedings.

The Court may "otherwise provide" under subsection 10 where there are "special circumstances" which justify a departure from the usual rule. Examples of this include running an argument that puts at risk all or a large part of the solicitor's costs, but then abandoning it, or rejecting but then failing to do better than a settlement offer.

So in Solicitors Act proceedings, subject to ensuring that the case is run sensibly and proper consideration is given to any offers made by the solicitor, the bar for recovering costs is set by statute at a transparent, pre-determined and easily measurable level and a cautious risk assessment at the outset should be capable of weeding out those claims where an adverse costs order is likely.

Common Issues

All of the above sounds like relatively plain sailing, but of course at the point that a solicitor is being taken to task over his fees, the relationship has usually deteriorated already, and there are a number of common issues / disputes that arise. Many of these can be dealt with within the context of Solicitors Act proceedings, but some cannot (and should be dealt with in a different forum in order to avoid a potential finding of "special circumstances" and risking adverse costs).

No Statute Invoice has been delivered, so how do I apply for assessment?

This frequently arises in a situation where the solicitor has had significant money on account, which largely covers the costs incurred. Whilst the client is unhappy with the amounts that he has paid on account so far and wants to dispute them, the solicitor sees

no particular urgency in sending out a statute invoice which will trigger the right to complain.

In this situation the Court can order the solicitor to deliver a statute invoice under s.68 of the Act. There is no defence to such an application (other than an assertion that a statute invoice has already been delivered) and, if the solicitor does not deliver an invoice, he is obliged to pay back the sums paid on account.

Such an application would be made as a separate application prior to any application for assessment, for the obvious reason that, until the invoice has been delivered, the client cannot know whether or not to seek assessment. The costs of the application would be dealt with entirely separately from the costs of the assessment. Ordinarily if the court is satisfied that it should order delivery of a bill, it will order the solicitor to pay costs.

My solicitors are claiming that what I thought were just "on account" bills sent each month over the last two years are in fact "statute invoices" and that my time for applying for assessment ran from the date of each one, so in respect of most of them I am out of time

This is a very common argument, and whether or not it is right will depend on the particular circumstances of the case. Many solicitors' retainers contain the following wording or similar –

"Interim billing - to help you budget we will send you a bill for our charges and expenses at the end of each month while the work is in progress. We will send you a final bill after completion of the work".

The difficulty is working out what that actually means. Are the monthly bills "statute invoices" or are they simply requests for payment on account? Can the final invoice supersede the interim invoices, or are they complete and self-contained for the period that they represent, in other words are the charges for that period capable of later adjustment?

The answer to this will usually be found by examining all of the surrounding circumstances, including what other terms are included in the retainer (for example was there a provision to claim an enhancement on charges at the conclusion of the case), what was discussed between solicitor and client at the outset, what was said as the case progressed (for example – "don't worry about my fees at the moment because if you are unhappy with them we can sort it out at the end"), whether or not notice was provided in respect of each invoice of the client's right to dispute it under the Solicitors Act and, two very important factors –

- Did the client understand that the provision for interim billing was intended to mean that his time for disputing each invoice ran from the date of delivery of each invoice?
- What was the client's reaction to the invoice?

It is all very well to include a term but the client must understand its full meaning and effect. The solicitor is at an advantage over a lay client in matters of contract, and it is for the solicitor to show that the client understood.

And if, having understood that that was the intended status of each invoice, the client's reaction is to pay the invoice in full without complaint, then any later application is almost certain to fail.

The position is best summed up by the words of Roskill LJ in *Davidsons –v- Jones Fenleigh (1980) 124 Sol Jo 204, CA* –

"Before a solicitor is entitled to require a bill to be treated as a complete self-contained bill of costs to date, he must make it plain to the client expressly or by implication that that is the purpose of his sending in that bill for that amount at that time. Then of course one looks to see what the client's reaction is. If the client's reaction is to pay the bill in its entirety without demur, it is not difficult to infer an agreement that the bill is to be treated as a self-contained bill of costs to date"

If this aspect it is disputed, it will be resolved one way or another at the "entitlement" stage, so if the court finds against the client the costs of a full detailed assessment will be avoided, minimising adverse costs.

"More than twelve months have passed since I received the invoice", or "I paid the invoice before I realised it was too high"

In these circumstances the client will need to show "special circumstances" justifying an Order that the invoice should be submitted for assessment under s.70 (2). Whether or not there are special circumstances is essentially a value judgment for the Costs Judge hearing the "entitlement" part of the application. Examples of circumstances that have been deemed sufficiently special to justify assessment are –

- Where there is a large charge and a lack of clarity as to how it is calculated
- Where the solicitor had dissuaded the client from having the costs assessed, but there was a large disparity between the invoice and the amount then recovered from the losing party to the subject litigation
- Where, following an informal dispute as to the level of fees which could not be resolved, it was agreed that (in order to secure release of papers) the client would pay the invoice but would then seek to have the costs assessed
- Where the solicitor had agreed to an assessment out of time

- Where the solicitor had given inaccurate and misleading advice about the client's rights to assessment

Again a dispute of this nature will be resolved at the "entitlement" stage, thus minimising the risk of large adverse costs.

My solicitor's fees are too high because he has messed up my case!

This is a common complaint about solicitors' fees, but a Solicitors Act assessment is not the answer. In these proceedings the Court is only concerned with (a) what work was done, (b) what work ought reasonably to have been done, and (c) how much ought reasonably to have been charged for that work. Whilst it might be possible to argue that the cost of a particular item of negligent work (to take a trite example: a solicitor who hasn't checked his diary prepares for and turns up at a hearing that had already been vacated) is unreasonable because, in the context of the case, it was wholly unnecessary. That however is a wholly different argument to saying that, as a result of tactical decisions, bad advice, poor choice of counsel, failure to grasp key issues etc, my case fell apart and I ended up losing so why on earth should I pay?

On an assessment under the Solicitors Act the Court will not try an action for negligence and, if that is the sole basis of the complaint, it is the wrong forum. Unless there are distinct issues as to the quantum of fees, disregarding any claim of negligence, the client should instead / in addition be directed to specialist advice on claiming damages for negligence.

The Basis on which a Solicitors Act assessment takes place

Costs between parties to litigation (i.e. when the loser pays the winner's costs) are usually dealt with on the "standard basis", under which costs have to be both (a) reasonable and (b) proportionate to the matters in issue, and the benefit of any doubt as to whether they are reasonable and / or proportionate is given to the person paying the costs. It is quite easy to get some sort of reduction.

Costs payable by a client to his own solicitor however are assessed on the "indemnity basis", which sets the bar at a higher level, because the benefit of any doubt over the amount of costs is given to the solicitor and not the client, and there is no requirement for the costs to be proportionate to the matters in issue.

In addition there are three "presumptions" especially for assessments between solicitor and client, which are –

- *Costs will be presumed to have been reasonably incurred if they were incurred with the express or implied approval of the client*

- *They will be presumed to be reasonable in amount if their amount was expressly or impliedly approved by the client*
- *They will be presumed to have been unreasonably incurred if –*

(1) They are of an unusual nature or amount; and

(2) The solicitor did not tell the client that as a result the costs might not be recovered from the other party.

The presumptions are rebuttable by evidence, so really are just a "starting point", but the combined effect of the different basis of assessment and the above presumptions is that, on a Solicitors Act assessment, objections need to be more focused and clear cut.

By way of example the following type of objections, which are common place on assessments on the standard basis, and the outcome of which is hard to determine on any given case because they come down to the subjective view of the judge, would be unlikely to succeed on a Solicitors Act assessment –

- It was unreasonable to incur the cost of instructing City of London Solicitors on a case that did not require that level of expertise (the client will have chosen the solicitors himself and, if he instructed someone in the City, he will have known that that carried a premium)
- The charging rate is too high (this will in all probability have been set out in the agreed terms of business)
- Counsel was not needed, or was used to too great an extent (the client will invariably have either expressly or by implication have approved the instruction of Counsel)
- It was unreasonable to spend £25,000 pursuing a claim for £1,000 (proportionality does not apply)

The following type of objection would be much more commonplace on a Solicitors Act assessment, and the outcome is much easier to predict in advance in that they tend to be based on either contractual points, or on failures on the part of the solicitor to fulfil his duties under the SRA Code of Conduct, both of which can be determined with a greater degree of objectivity –

- The retainer says I am to be charged £150 per hour, but half way through the invoice goes up to £175 an hour and I was not notified
- I was given an estimate at the outset that the case would cost £75,000. It was never explained to me that that estimate was no longer realistic or why, yet my invoice is for £125,000
- I was not told in advance that the cost of instructing Leading Counsel in a modest case might not be recoverable from the other side. It has not been recovered and now I am being asked to pay for it as well as Junior Counsel's fee, which has been

recovered. If I had known I would not have taken the risk and would have been happy to proceed with only Junior Counsel

Checklist

- Carefully check the terms of business agreed with your solicitor
- Does it include provision for interim billing? If so, did you understand at the time what that meant, and was it explained to you
- Have available all invoices sent to you, whether requests for payment on account or "statute invoices", and the method by which they were "delivered" to you
- Also put together any correspondence from your solicitor which mentions costs
- Consider in particular whether an estimate of costs was provided at the start, whether that was updated, and whether the final invoice exceeds it
- Make sure that you are able to demonstrate what payments, if any, you have made, either on account or against invoices
- Before making an application make sure that you have a definite idea of your reasons for saying that the charges are too high
- Make the application as early as possible, preferably within one month of delivery of the invoice