

**CHANCERY BAR ASSOCIATION**

**GENERAL TERMS FOR BARRISTERS CONTRACTING WITH INSTRUCTING SOLICITORS TO  
PROVIDE PROFESSIONAL SERVICES**

Consultation Paper

1. The Association has previously issued guidance on the transition from the non-contractual basis on which barristers supply services to solicitors to the contractual basis, and on the Combar/COLLS standard terms. See website at <http://www.chba.org.uk/for-members/library/professional-guidance/standard-contractual-terms-new-note-jan-2013> and <http://www.chba.org.uk/for-members/library/professional-guidance/chba-guidance-on-the-combar-colls-terms> for this Guidance.
2. Since 1 February 2013, when the transition took place, the Association has been monitoring the way in which sets of chambers have responded to the change, the extent to which contracts are being used and the effectiveness and suitability of standard terms that have been published.
3. In December 2013, the Chairman and a working group met senior clerks and practice managers from a significant number of Chancery sets to discuss how the standard terms that had been published were operating, what difficulties were being encountered and whether or not it would be beneficial if the Association itself published a set of standard terms.
4. The position appears to be that a number of sets have made the transition to using contracts as the standard basis for a law firm instructing a barrister but that an equal number are still continuing to accept instructions on an expressly agreed “non-contractual” basis. It may be the case that some smaller sets or sole practitioners may be operating non-contractually by default, with the risk that contractual terms are implied in law, or are using ad hoc contractual terms that have not been approved by BMIF.
5. Of those sets that do enter into contracts, only two are known to advertise acceptance of instructions on Combar/COLLS Basis B; others advertise Combar/COLLS Basis A, the Bar Council’s Standard Contractual Terms or their own set of terms. In practice, a large

number of smaller firms are happy to use Combar A or the Bar Council Terms, and many instructions are agreed on this basis. Many of the larger firms either require or have a preference for Combar B and some sets are willing to use these terms in appropriate (or even all) cases, but others are not. Bespoke terms are agreed in some cases, and sometimes where agreement cannot otherwise be reached an expressly “non-contractual basis” is agreed.

6. For those sets that operate on an expressly “non-contractual” basis, the payment of barristers’ fees operates as a matter of honour only between the firm and the barrister. The barrister has no right to be paid anything. In most cases, where the set of chambers and the firm have a well-established and mutually beneficial working relationship, this continues to work well for the time being.
7. There are, however, concerns about the obvious risk of possible default, either in a case where the lay client becomes insolvent and the firm (perhaps having suffered substantial losses itself) is unwilling to honour the outstanding fees, or where the firm itself goes into insolvency and the barrister has no right to claim even a dividend or payment by a successor firm. Ultimately, we consider that the honour-based system will cease to operate in the way that it has before, as the use of contractual terms becomes more widely understood and accepted. In the long term, continuing with the “non-contractual” basis perpetuates an unnecessary and unacceptable risk of default.
8. Although Combar and COLLS have addressed some of the problems pointed out by the Association and others by publishing a second (January 2014) edition of their general terms and conditions, a number of the potential problems remain, in particular: the absence of a due date for payment (in connection with termination rights) where no payment schedule has been agreed; the risk of fees being taxed down at a hearing at which the barrister is not represented; the need to join the firm as a defendant to any claim against the lay client, and the overriding risk of lay client default or insolvency, which the barrister is not well placed to assess when accepting instructions. A further concern is that, unless the contrary is expressly agreed, a barrister arguably agrees to accept all subsequent instructions in relation to the same case on the same terms: c.2.1.
9. The Association has therefore reached the provisional conclusion that it would be beneficial to publish its own set of general contractual terms, which would be regarded as suitable for the majority of work undertaken by barristers in Chancery (and other) sets of chambers, regardless of the status of the lay client and the nature of the case. It

recognises that in the largest commercial cases there is likely to be more demand for a bespoke agreement or for the use of Combar B.

10. The principal objectives sought to be achieved by the publication of Chancery Bar general contract terms are the following:

- a. To provide a set of sensible, balanced and uncomplicated terms that will be broadly acceptable to most barristers and most solicitors alike and be suitable for most Chancery work;
- b. To encourage those sets of chambers that have not yet abandoned the “non-contractual” basis to adopt a contractual basis and to advertise and accept instructions instead on the Association’s standard terms;
- c. To provide a set of terms that is more appropriate than Combar B for barristers to use in all but the most substantial commercial cases, when the risk of default by the lay client cannot readily be assessed by the barrister as being acceptably small;
- d. To enable and encourage solicitors who do not wish to take on liability for barristers’ fees to make use of alternative methods of securing the monies for paying the barrister;
- e. To make provision for terms that are necessary, in view of the rules in the new BSB Handbook, to enable barristers to continue to provide their services effectively and efficiently, as has been proven over many years to be in the best interests of their lay clients.

11. It was initially thought that it would be possible and beneficial to devise a set of terms under which the credit risk was to some extent shared by the solicitor and the barrister, with the solicitor accepting liability for the barrister’s fees up to a specified rolling limit. But there are considerable difficulties with such an arrangement in practice. If the terms operate apart from Combar B, there would be no ability to recover fees in excess of the rolling limit: the barrister’s only remedy would be to refuse further instructions or to cease working; and subject to that, the solicitor would have a disincentive to pay the barrister out of its own funds, so effectively it would amount to a “pay when paid” scheme. If the scheme were drafted to operate in parallel with Combar B, again there

would be a disincentive for the solicitor to pay, and it is hard to see that firms would voluntarily agree to Combar B+ rather than Combar B. We therefore came to the view that such a scheme would not work beneficially, if at all.

12. That left us with the aim of seeking to achieve the 5 objectives set out above.
13. As to these, we consider that the draft general terms are fair and balanced. We consider that Combar B terms are unfair to the barrister, and unbalanced, in two respects. First, in expecting the barrister to assume the credit risk of the solicitor's client in relation to his fees, when in many cases he will be unable to assess that risk. Second, in recognising the existence of a duty of care owed to the solicitor in circumstances where the solicitor accepts no liability to pay the barrister. Under the Association's terms, the solicitor either accepts liability for the barrister's fees or facilitates a method of payment that is equally acceptable. In those circumstances, a qualified duty of care towards the solicitor, with any liability capped at the level covered by BMIF and top-up insurers, seems to us to be reasonable.
14. The draft terms do not require the solicitor to accept liability for payment. Instead, the solicitor may arrange for the lay client to pay fees into Barco's escrow account or into the solicitor's client account, with instructions to pay it to the barrister in due course, or in advance to the barrister where the barrister reasonably so requires. In such circumstances, the instructions are not accepted until the fees are paid. Barco has been little used to date except in public access cases, but its service is likely to become a mainstay of such practice, the conduct of litigation (now permitted) and practice by entities (likely to be authorised later in 2014). It is also potentially suitable for cases where the barrister is instructed by a professional client who does not assume responsibility for the barrister's fees. See <http://www.barcouncil.org.uk/for-the-bar/barco/>. However, Barco levies a charge of 2% on gross fees (subject to a cap of £250 per transaction), which amounts to just over 1.3% of the net fees after tax relief at the highest marginal rate.
15. There is accordingly a question about who should bear the cost of the Barco charge. The charge could be added to the fees in whole or in part, although this would act as a disincentive to clients to make use of it. It is anticipated that the Bar will not be willing to accept a 2% gross levy on fees for use of Barco. An obvious alternative is for the client to make irrevocable payment of the fees into the client account, with the solicitor

agreeing to hold the monies on a Quistclose-type purpose trust. Views are invited as to the practicability and effectiveness of these alternatives.

16. Where the solicitor does accept liability for the barrister's fees, there is a generous payment period of 60 days from the first fee note, before any interest can be claimed – if thought appropriate to do so – by notice. It is recognised that many will consider this to be excessively long. However, in order to produce a balanced set of terms that are likely to be attractive to solicitors and barristers, there needs to be some advantage to solicitors in making use of the terms. At a time of low interest rates, a 60-day period is not onerous to the barrister and reflects what generally happened in practice before February 2013; it does give the solicitor ample time to submit a bill to the lay client and secure payment within the 60 day period.
  
17. In cases where the barrister reasonably considers that the solicitor is not creditworthy to that extent, the barrister may require payment in advance unless the client agrees an alternative way of advancing the fees. Where fees are not paid in advance but monies on account of fees are provided and held either by Barco or in the solicitor's client account, there is a question about what happens if the estimate of fees proves to be too low. If the fee is an agreed fee for a piece of work then clearly the barrister is required to complete the work for that fee (and the work to be done in return for the fee needs to be carefully agreed at the outset). But if the monies were only an estimate of the likely fee and more are required to cover the work, the position appears to be that the same terms apply and the barrister is entitled to require the payment of more money on account (or paid in advance) before doing further work. In a case where this is obviously likely to arise, it may be that a special term should be added to the contract to cover it. Views are requested on the analysis above and in particular on what happens when monies provided on account are no longer sufficient to cover the work to be done.
  
18. Turning to other regulatory matters, rule rC99 of the BSB Handbook requires barristers (in accordance with a Legal Services Board Directive) either to send a lay client information about their right (and how and when) to make a complaint or to inform the lay client of those matters at the first meeting, in conference or at court. Notification to the professional client (which is also required) is not sufficient. Guidance in the Handbook does however permit a barrister to notify the lay client through the professional client where the professional client agrees to pass on the information. Since the professional client would in most cases be bound to do so in any event, to

discharge its own professional responsibilities, it is thought appropriate to include a term to that effect (clause 10).

19. Where a lay client is not itself funding the case, we consider that a barrister should be entitled to know that fact, including whether the funder is a commercial funder (clause 17). In many cases, the existence of a funding arrangement will be or become obvious, but not in all cases. We believe that it is not generally necessary for the barrister to know the identity of the funder, as opposed to the fact that there is a commercial or non-commercial funder in the picture. On the other hand, might knowledge of such matters create a position of potential embarrassment for Counsel e.g. on a question of what monies should be excluded from the effect of a freezing injunction? We would welcome views as to whether the draft clause is sufficient.
  
20. The Handbook provisions about confidentiality mean that a pupil supervisor cannot even disclose the content of instructions to a pupil, unless such disclosure has been authorised on behalf of the lay client. Under the Handbook a first or second six full time pupil (only) is subject to a parallel duty of confidentiality, but that does not of itself authorise disclosure by the pupil supervisor. Such disclosure is obviously appropriate and in almost all cases unexceptionable. We have therefore included a term permitting such disclosure, extending to secondees and mini-pupils, provided that any such person has signed a confidentiality undertaking. In a rare case where such disclosure is unacceptable, a special term should be agreed to that effect.
  
21. We would be grateful for any comments and suggestions on the draft general terms, but in particular would invite you to address the following questions:
  - a. Is the Association correct in its provisional view (para 9) that the publication of ChBA general terms would be beneficial, or are such terms either unnecessary or potentially harmful?
  - b. Are the objectives that the Association has set itself (para 10) the right objectives? If not, what objectives should it set itself before finalising and publishing a set of general terms?
  - c. Is the Association right in concluding that any attempt to devise a “credit risk sharing” set of terms would be unsuccessful?
  - d. Is the Association right in principle to link any recognition of a qualified duty of care owed to the solicitor with the solicitor’s responsibility to pay the barrister’s fees (para 13), or should there be a duty in any case, or in none?

- e. Is the Barco service attractive to barristers in circumstances where a professional client will not accept responsibility for the barrister's fees, and if so who should bear Barco's fees, or are there other, better alternatives?
  - f. Could irrevocable payments into a solicitor's client account, with agreement that the monies are for the sole purpose of paying the barrister, adequately protect the barrister in the event of insolvency or other funding problems?
  - g. How if at all can one deal satisfactorily in advance with the problem of monies advanced on account proving to be insufficient?
  - h. Are there any good reasons why the professional client should not agree to pass on to the lay client information about how to complain about the barrister?
  - i. Is it appropriate for a barrister to be told if the case is being funded by a third party, and if so is disclosure of the identity of the third party funder necessary or appropriate?
  - j. Is a standard term authorising a barrister to disclose instructions to a pupil, secondee or mini-pupil appropriate?
22. In the event that members of the Association and their clerks and practice managers are supportive of the Chancery Bar Contract Terms, the Association would propose to consult users of the Bar and other interested parties before publishing the terms.