



The Law Society's Practice Note on Barristers' Contractual Terms: Guidance for Barristers

1. From 31 January 2013 the Cab Rank Rule of the Bar Code of Conduct will be amended to replace the previous non contractual Terms of Work with new standard contractual terms ("Standard Conditions of Contract").
2. On 24 January 2013 the Law Society issued the Practice Note "*Instructing a barrister: new standard contractual terms*" (the "Practice Note"), accompanied by some suggested variations to the Standard Conditions of Contract¹.
3. The Bar Council is surprised and disappointed at the tone of the Practice Note issued by the Law Society. The Practice Note asserts that the Standard Conditions of Contract have been introduced "*unilaterally*", and that the "*balance of obligations is weighted strongly in favour of barristers*". The Bar Council disagrees: the Bar Council has sought over a lengthy period to agree terms with the Law Society, though without success. The Standard Conditions of Contract themselves have been introduced by the Bar Standards Board through a process overseen by the Legal Services Board, the umbrella regulatory body for both solicitors and barristers, which considered and approved the Standard Conditions following consultation with interested parties, including the Law Society.
4. Of greater importance, however, than such disagreements is the fact that the Law Society's proposed variations give rise to some serious potential difficulties. For example, some of the variations run counter to guidance already approved by the Law Society, and some might lead to barristers incurring liabilities which are not covered by their professional indemnity insurance, resulting in a risk of professional misconduct and detriment to lay clients. One would give the solicitor absolute discretion about when the barrister should be paid, which could lead to financial hardship for the barrister unless proper safeguards were agreed.
5. The Bar Council's guidance on the points raised by the Law Society on its Practice Note is as follows. This advice should be read with the Bar Council's Standard Contractual Terms Guide² which was published recently.

¹ <http://www.lawsociety.org.uk/advice/practice-notes/instructing-a-barrister/>

² <http://www.barcouncil.org.uk/guidetocontractualterms>

Anti-Money Laundering

6. The Bar Council's guidance on the Money Laundering Regulations³ explains that because barristers in independent practice are not permitted to undertake the management or conduct of their clients' affairs, or to handle client money, they do not generally fall within the ambit of the Money Laundering Regulations 2007, save for those (particularly members of the Chancery and Tax Bar) who may fall within the category of "tax advisers".
7. Solicitors, on the other hand, are almost always obliged to carry out such checks.
8. The Standard Contractual Terms mirror standard practice whereby barristers generally rely on solicitors to carry out proper checks. There is no benefit to anyone in duplicating the same process. Clause 4 provides that the solicitor⁴ (generally the instructing solicitor) will provide the barrister with all reasonable assistance to carry out any necessary customer due diligence including (if required to do so) consenting to the barrister relying upon the solicitor under Regulation 17 of the Money Laundering Regulations 2007.
9. The Law Society has however proposed three variations to clause 4.3. Variation 1 takes the extreme position of requiring the barrister to carry out money laundering checks unilaterally without seeking *any* assistance from the solicitor. It is unclear why the Law Society is, it appears, suggesting that Solicitors should not be prepared to offer reasonable assistance to barristers. Variations 2 and 3 merely give the solicitor discretion (but not an obligation) to assist. If agreed, such terms might require the barrister to repeat the checks already carried out by the solicitor, at inconvenience and probable cost to all – including, most importantly, the lay client - for no good reason at all.

Intellectual property

10. The BSB issued Knowledge Management Guidance, approved by the Law Society, in 2005⁵. That guidance states that Counsel, as author of an opinion is undoubtedly the legal owner of the copyright in it. Clause 9 of the Standard Contractual Terms provides that copyright in the barrister's work product belongs to the barrister; and whilst the solicitor and the lay client have the right and licence to use the work product for the particular purpose for which it is prepared, if it is to be used for other purposes, that requires the barrister's written permission.
11. The Law Society's Practice Note suggests that this may hinder solicitors from placing barristers' work on their knowledge management systems and proposes two variations. The first provides that all intellectual property rights shall be assigned to the solicitor. The second

³ <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/money-laundering-regulations-2007/>

⁴ The defined term "Authorised Person" is used in the Standard Contractual Terms, because people and entities other than solicitors may instruct barristers. Since this note deals with guidance issued by the Law Society for solicitors, the word solicitor is used instead.

⁵ <https://www.barstandardsboard.org.uk/code-guidance/knowledge-management-guidance-the-future-use-of-counsel's-opinion-by-solicitors-and-other-intermediaries>

provides that the solicitor may include the barrister's work in its knowledge management system. The first seems entirely unnecessary given the express licence for use which is granted. Both give rise to a number of potential problems. They are discussed fully in the BSB's Knowledge Management Guidance⁶ on the subject (approved by the Law Society), which should be read in detail if the incorporation of such provisions is being contemplated.

Barristers' liability

12. The Practice Note seems to suggest that barristers are seeking to restrict their liability to solicitors and/or lay clients. The Bar Council respectfully disagrees. The Standard Contractual Terms seek to replicate the scope of barristers' liability that existed before 31 January 2013 - neither wider, nor narrower.

13. Clause 3.1(x) of the terms of cover⁷ of the Bar Mutual Indemnity Fund excludes:

"Claims or Disciplinary Proceedings in respect of any liability incurred under any contract, save to the extent that such liability would have been incurred irrespective of the terms of such contract and would otherwise fall within the provisions of these Terms of Cover..."

14. Clause 10 of the Standard Contractual Terms is accordingly designed to dovetail with barristers' professional indemnity insurance. In cases where a barrister is alleged to have been negligent, solicitors will be entitled to seek a contribution under the Civil Liability (Contribution) Act 1978, as before.

15. Significantly, both of the Law Society's two proposed variations could leave the barrister liable for losses which are not covered by BMIF's cover – or any top up cover. This could mean that the barrister would be in breach of clause 204(c) of the Code of Conduct, which states that a barrister may supply legal services to the public only if he is covered by insurance against claims for professional negligence arising out of the supply of his services in such amount and upon such terms as are currently required by the Bar Council. Barristers should therefore not agree to either of these proposed variations.

Fees

16. The Standard Contractual Terms allow barristers to propose reasonable increases in hourly rates, which is in accordance with current practice, and probably mirrors similar provisions in most solicitors' terms of retainer.

17. The Practice Note seems to object to this, and the Law Society proposes three variations, one of which would prevent the barrister from seeking to negotiate an increase in the agreed

⁶ See previous footnote.

⁷ http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Bar_Mutual_Terms_of_Cover_2011.pdf. The terms of cover are in the process of being amended by the Bar Mutual in order to provide (in Clause 3.1(x) of those terms) limited cover for contractual claims in respect of contracts in a form approved in advance by the BMIF.

hourly rate at all. The barrister should think carefully about how long the case could continue before agreeing to any such provision.

Invoices

18. The Practice Note proposes variations to clause 12 which would prevent the barrister from being able to raise an invoice until the solicitor has given authority to do so. No express duty is imposed on the Solicitor to give such authority at any specific time or in any specific circumstance. This is not in accordance with present practice, and could lead to financial hardship for the barrister as it appears to place the question of payment entirely at the solicitor's discretion. A barrister should seek safeguards about circumstances in which the solicitor could reasonably delay the barrister from raising an invoice before agreeing to any such term.

Pay when paid

19. Section 3.2.5 of the Practice Note proposes a further clause which would delay the solicitor's obligation to pay the barrister's fees until the solicitor has been put in funds by the lay client. As explained in paragraph 20.5 of the Bar Council's Guidance on the Standard Contractual Terms⁸, barristers should be very careful to agree proper safeguards before agreeing to any such term.

20. For any queries or further information about the new Contractual Terms, please contact the Fees Collection Office, General Council of the Bar by telephone: 020 7611 1318, email: fees@barcouncil.org.uk or by post: Fees Collection Office, General Council of the Bar, 289-293 High Holborn, London WC1V 7HZ (DX 240 London Chancery Lane)

Implementation Committee
General Council of the Bar
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⁸ <http://www.barcouncil.org.uk/guidetocontractualterms>