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# Instructing a barrister: new standard contractual terms

24 January 2013

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## 1. Introduction

### 1.1 Who should read this practice note?

All solicitors who instruct barristers.

### 1.2 What is the issue?

The Bar Standards Board has made significant amendments to the terms of engagement on which barristers offer their services to solicitors and it has also cancelled the withdrawal of credit scheme.

The arrangements will now be on a contractual basis and there are many areas in the proposed new terms which may cause concerns to solicitors.

### 1.3 Professional conduct

The following sections of the SRA Code of Conduct 2011 are relevant to this issue:

[Chapter 6: Your client and introductions to third parties](#)

[Chapter 11: Relations with third parties](#)

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### 1.4 Status of this practice note

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## 1.5 Terminology in this practice note

**Must** - a specific requirement in legislation or of a principle, rule, outcome or other mandatory provision in the SRA Handbook. You must comply, unless there specific exemptions or defences provided for in relevant legislation or the SRA Handbook.

### Should

- Outside of a regulatory context, good practice for most situations in the Law Society's view.
- In the case of the SRA Handbook, an indicative behaviour or other non-mandatory provision (such as may be set out in notes or guidance).

These may not be the only means of complying with legislative or regulatory requirements and there may be situations where the suggested route is not the best possible route to meet the needs of your client. However, if you do not follow the suggested route, you should be able to justify to oversight bodies why the alternative approach you have taken is appropriate, either for your practice, or in the particular retainer.

**May** - a non-exhaustive list of options for meeting your obligations or running your practice. Which option you choose is determined by the risk profile of the individual practice, client or retainer. You may be required to justify why this was an appropriate option to oversight bodies.

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## 2. The contractual terms for instructing a barrister

### 2.1 The new arrangements

The new standard conditions of contract for the supply of legal services by barristers to authorised persons 2012 have been announced. These rules come into effect from 31 January 2013.

[View the new standard conditions \(PDF 389kb\)](#)

Unlike the previous default arrangements, these new arrangements are contractual and barristers (and solicitors) will be able to sue on the contract in the courts (although the existing joint tribunal arrangements will remain as a form of alternative dispute resolution).

The cab rank rule will apply only to work undertaken on the new standard conditions of contract or on any standard terms which barristers or their chambers have published as their standard terms. Barristers will only be required to accept work if it is on these terms.

Although the new standard conditions are not formally default terms and barristers will be free to agree different terms or to adapt the new standard conditions, it is very likely that most will seek to adopt them. Barristers will still be free to agree different terms or to adapt the new standard conditions of contract.

The Withdrawal of Credit List will be replaced by an advisory List of Defaulting Solicitors. Barristers will no longer be required under the Bar's code of conduct to refuse work on credit from solicitors named on the Withdrawal of Credit List. Instead under the amended cab rank rule, barristers will have the right to refuse instructions on credit from solicitors named on the new List of Defaulting Solicitors.

The new standard contractual terms have been adopted by the Bar unilaterally. The Law Society is concerned that, under the terms, the balance of obligations is weighted strongly in favour of barristers. It is our view that the relationship between solicitors and barristers is a commercial one, the terms of which ought to be agreed between themselves. It is, however, open to solicitors to negotiate alternative terms.

It is not clear how the Bar will adapt to the new arrangements or publicise their adoption. It is likely that the majority of chambers will adopt the new terms wholesale. However, some barristers may seek to make their own variations of them.

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## 2.2 Establishing a contract

You should establish the contractual basis of your relations with barristers in future. If barristers have standard terms which they have agreed with you and they continue to offer their services on those terms, there is no issue. This is likely to be a small minority of cases.

You should, therefore, familiarise yourself with the new standard conditions of contract and, from 31 January 2013, ensure that you are aware of and agree to these terms or any other terms that barristers may adopt.

If you are unhappy with the new terms, you should seek to reach agreement with barristers/chambers on terms which are more acceptable to you.

However, you must be aware that barristers will have the right to decline instructions which are not issued under either the new terms or barristers' own standard terms.

It is for each solicitor to consider whether it is in their interests to accept the particular terms in the contract. Solicitors may wish to look particularly at:

- The addition of intellectual property rights to the contractual terms
- The addition of an exclusion from liability for the barrister
- The addition of an exclusion of rights of third parties
- The right of the barrister when providing services on an agreed hourly rate to seek a variation and, if no agreement can be reached with the instructing solicitor, to terminate the contract

You should be aware that, whatever agreement is entered into, it is likely that it will be contractually binding.

Download a [template letter for variation of standard terms \(Word 52kb\)](#).

Download a [schedule of variations \(PDF 113kb\)](#) to the bar's new standard contractual terms for the supply of legal services by barristers to authorised persons.

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## 3. Detailed comments on new standard contractual terms

Below we have set out comments on clauses which differ from the existing arrangements and propose additional or alternative terms that you may wish to negotiate with the barrister. You may consider that many of the clauses are appropriate or that you are content to be bound by them, but you should ensure that their effect on you and your client are properly understood.

### 3.1 Clauses that solicitors need to be aware of

#### 3.1.1 Clause 4 - receipt and acceptance of instructions

Clause 4.3 of the new agreement requires you to provide the barrister with all reasonable assistance to carry out any necessary due diligence check on the client, including, if so required, consenting to the barrister relying upon you to undertake the due diligence check in accordance with regulation 17 of the Money Laundering Regulations 2007.

You should consider how far you are willing to provide this comfort to barristers. In practice, much of this work may well have been undertaken by the firm in any case, but the firm may wish to consult its insurers and consider how appropriate this is in individual cases before agreeing to it.

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### 3.1.2 Clause 9 - intellectual property rights

You should be aware that clause 9.1 refers to the fact that if a solicitor or lay client wishes to use copies of the barrister's work product for purposes other than those for which it has been prepared, this will require the express written permission of the barrister.

You may wish to consider how far this clause may affect your firm's knowledge management systems and how it works with the existing general law with regard to intellectual property.

You may wish to agree reasonable rights with the barrister to contain advice in your firm's knowledge management systems for internal guidance only. In addition, you should discuss this clause with the client and your insurers before agreeing to it.

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### 3.1.3 Clause 10 - liability

This clause excludes liability for loss or damage caused to any person other than the lay client and would appear to prevent solicitors suing for loss caused to themselves. In practice, this may be of relatively little significance. However, you may wish to negotiate with the barrister for this clause to be deleted or to add the words 'or solicitor' at the end of clause 10.1.1.

In addition, the contract seeks to exclude liability for loss or damages arising out of inaccurate, incomplete or late instructions. This provision appears to be unnecessary since the existing law will establish whether or not it is appropriate for liability to be found in such circumstances and it is hard to see how such a provision can be in the client's interests.

You should discuss this clause with your insurers and consider whether it is in your client's interests before agreeing to it and should consider whether to exclude this provision from the contract.

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### 3.1.4 Clause 12 - billing, payment and interest

Under the new standard contractual terms, the barrister is entitled to present an invoice to the solicitor in respect of services or any completed part thereof and any disbursements at any time after supplying the services or the relevant part thereof.

The barrister shall deliver an invoice to the solicitor in respect of services or any part thereof and any disbursements as soon as reasonably practicable after and not more than **three months** from the earliest of: (a) a request by the solicitor; (b) notification by the solicitor that the case has settled or otherwise concluded; or (c) termination of the agreement [*emphasis added*].

You should consider how far this will affect your existing procedures for dealing with bills from suppliers and sub-contractors and whether you wish to propose changes.

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## 3.2 Clauses which may create difficulties for solicitors and suggested alternatives for discussion with barristers

### 3.2.1 Increased fees

Clause 11 provides for an agreed hourly rate to be subject to reasonable periodic review by the barrister and entitles the barrister to treat an agreement as terminated if the solicitor does not agree to any variation of the hourly rate.

There may well be obvious difficulties with this and you should discuss with your client whether they are content for this to be agreed. In addition, you may wish to consider the addition of the following clause:

'Where a charging rate and an estimated time for the work have been agreed, the Barrister shall notify the Authorised Person promptly if more work than had been

estimated is required, and shall give the firm a reasonable opportunity, taking into account the urgency of the matter, to accept or refuse the performance of such additional work'.

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### 3.2.2 Payment

Clause 12.4 requires the solicitor to pay the barrister's invoice within 30 days irrespective of whether or not the solicitor has been put in funds by the client. While this broadly reflects the existing position whereby solicitors are liable for a barrister's fees whether or not the barrister has been put in funds, it is open to you to agree that the barrister should not be paid until the solicitor has been paid by the client. Any such agreement should be recorded in writing and you should include the following passage in the contract:

'If the Barrister and the Authorised Person expressly agree in writing that the Authorised Person shall not be liable for the Barrister's fees until the Authorised Person has been put in funds by the Lay Client, the payment provisions of the Agreement shall apply only from the date upon which the Authorised Person has been put in funds by the Lay Client in respect of the Barrister's fees.'

Clause 12.4 also refers to time being of the essence as regards payment and excludes any set off, for example as a result of a complaint by the client or dispute over the fees charged, and any deduction or withholding on account of any taxes or other charges. If you do agree to that clause, you should seek agreement to delete those references.

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### 3.2.3 Retention of papers

While barristers do not currently have a common law lien on papers, you may wish to consider requesting the barrister to agree to add the following clause to make this clear:

'The Barrister shall not be entitled under any circumstances to exercise any lien over all or part of his Instructions.'

### 3.2.4 Payment of fees where the client has made a complaint against the barrister

You may wish to consider seeking the addition of the following clause to deal with situations where a complaint or other litigation has been raised against the barrister.

'Where the Lay Client has made a complaint to the Legal Ombudsman or any other regulatory body or has indicated that he will be issuing proceedings against the Barrister in respect of all or part of the service that is the subject of this Agreement, the fees charged in the fee note in respect of that service shall not be payable to the Barrister until the complaint, proceedings or pre-action process have been resolved by agreement, disciplinary proceedings, arbitration award, or court order, have been withdrawn or confirmed by the Authorised Person to have been abandoned, or, following the giving of a formal written notice, the pre-action process, complaint, or proceedings have not been brought or commenced within 4 (four) months after the date of such notice, whichever is the earlier.'

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### 3.2.5 Payment of fees where the solicitor challenges the fees charged

In those circumstances payment of the fees should not be required until the issue has been resolved. You may wish to consider the addition of the following clause:

'If a fee note or part of it is the subject of a challenge, the Authorised Person shall be under no obligation to pay to the Barrister all or any of the fees specified (save for those fees not the subject of the challenge) or all of any interest on such fees until payment is ordered by a tribunal or the challenge is withdrawn, abandoned or compromised by the Authorised Person.'

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## 4. More information

### 4.1 Further products and support

#### 4.1.1 Practice Advice Line

The Law Society provides support for solicitors on a wide range of areas of practice.  
Practice Advice can be contacted on 0870 606 2522 from 09:00 to 17:00 on weekdays.

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