

## STANDARD CONTRACTUAL TERMS

A Happy New Year to you all!

The purpose of this e-mail is to offer some further guidance on the imminent changes to the terms on which barristers supply their services to solicitors.

I notified you in September last year of the forthcoming changes to the standard terms on which barristers supply services to solicitors. **They have effect on 31 January 2013.** Please see <http://www.chba.org.uk/for-members/library/professional-guidance/standard-contractual-terms-note-from-chair.pdf> for a Note summarising the changes and their effect, or go to [http://www.barcouncil.org.uk/media/182287/standards\\_contractual\\_terms\\_guide.pdf](http://www.barcouncil.org.uk/media/182287/standards_contractual_terms_guide.pdf) for detailed guidance produced by the Bar Council.

The Bar Council has been working with the Association of Barristers' Clerks and the Legal Practice Managers Association to try to co-ordinate the changes in clerks' room practice needed to accommodate the changes. An important issue is the changes needed to the standard computer software used by most chambers. This is needed to deal with the potential for several different sets of terms of business being used. The latest information from the LPMA is that the main software suppliers will have developed the functionality to deal with and record different sets of terms by the 31 January deadline but not to deal with all necessary reporting and billing functions. Your chambers should order the necessary upgrades in good time in advance of the deadline.

At the same time, COMBAR has been in discussion with the City of London Law Society and BMIF to try to agree a set of standard "commercial" contractual terms that most law firms and most sets of chambers would be happy to use. It is expected that most law firms will not knowingly agree to use the Standard Contractual Terms approved by the Bar Standards Board without changes (the Law Society is understood to be preparing guidance to solicitors on what changes should be sought). The problem that could arise is the need for individual negotiation of terms for each instruction and of each substantial firm and/or set of chambers having its own standard terms.

If and when COMBAR and the CLLS reach agreement, we will let you know. These terms will not be as favourable to barristers as the BSB Standard Contractual Terms but it is hoped that, if agreed, they will become accepted as standard terms across the majority of the profession, thereby avoiding battles of forms and a substantial waste of time for barristers and their clerks.

In the meantime, members of a number of sets of chambers have intimated to me that their chambers would like to be able to continue to operate on the basis of the “old” non-contractual terms, at least for the time being until they see how things are developing and until the new software is fully functioning. As a reminder of the effect of the forthcoming changes, from 31 January 2013 there are no default terms: if no terms are expressly agreed, there are no terms on which the barrister accepts the instructions, except for those that are implied as a matter of law. It may well be that in many cases, if a fee for a piece of work is not expressly agreed, a barrister’s only claim to payment is based on quantum meruit.

Strictly speaking, after 31 January, it is not possible to use the “old” non-contractual terms because the Withdrawal of Credit Scheme, which was a part of those terms, will no longer operate. (In reality, in recent years, that aspect of the Terms has had little if any effect in practice in any event.) However, it seems to us that there is nothing to stop a set of chambers and an instructing law firm agreeing that their duties and rights will be as if the “old” terms applied (with the exception of the Withdrawal of Credit Scheme). This will not of course give a barrister any contractual recourse for payment of his fees, nor any right to have a dispute about fees determined by a joint tribunal, but the “old” terms provided no such rights. From the time that the Law Society started refusing to treat non-payment of Counsel’s fees as professional misconduct and threatened to have the Withdrawal of Credit Scheme declared unlawful, the existing system of Standard Non-Contractual Terms has only really operated as a matter of honour between the barrister and the solicitor.

The advantages of agreeing expressly to continue on that basis can be summarised as: first, not presenting instructing solicitors with a potentially disadvantageous change in the terms of business that might dissuade them from sending instructions; secondly, continuing a system that most barristers and solicitors readily understand and are happy to operate (even if as a matter of honour only), and thirdly, not requiring any significant immediate changes in the administration of chambers. The disadvantage is that, as at present, obtaining a dividend for barristers’ fees in the event of insolvency of the law firm, or of sheer obduracy on the part of the solicitor, would be a struggle. In contrast, proceeding to accept instructions without expressly agreeing any terms, even if that could be achieved (most law firms will be aware of the changes that are taking place), could lead to uncertainty as to what terms are implied and therefore uncertainty about BMIF cover.

It is of course a matter for each set of chambers to decide what it should most appropriately do. But if sets of chambers wish to proceed in this way, as an interim measure pending clarity as to what standard terms may be agreed or how law firms will respond to the changes, we

suggest that inclusion of something like the following in the letter acknowledging receipt of instructions will suffice:

*“From 31 January 2013, the Bar’s Standard Non-Contractual Terms (Annexe G1 to the Bar’s Code of Conduct) are no longer deemed to be the applicable terms on which your instructions are accepted. Nevertheless, for the time being we are willing to accept your instructions on the same basis as if those Terms (other than terms relating to the Withdrawal of Credit Scheme) continue to apply, rather than on contractual terms.*

*Please would you confirm your agreement that your instructions are treated as delivered on this basis by sending an e-mail to .....*”

It will of course be necessary to obtain confirmation from the solicitor that this is agreed.

There are two further complications that you should bear in mind.

First, any firm or employee of a firm regulated by the Solicitors Regulation Authority (so that includes ABSs and non-lawyers as well as law firms and solicitors) will be entitled to instruct a barrister on the BSB Standard Contractual Terms and the cab rank rule applies to any such instructions. In theory, therefore, sets will need to ensure that their clerks’ rooms understand that they have to be ready to do business on the BSB Standard Contractual Terms as well as on any other preferred terms. In practice, it may be doubtful whether any law firm of substance will insist on using those Terms as they are generally perceived to be onerous to solicitors (in relation to liability to pay interest and liability to pay regardless of the lay client’s financial position); however, it is possible that some will seek to do so. Clerks should also be advised of the dangers of agreeing other terms proposed by solicitors without consulting the barrister concerned and, if appropriate, BMIF.

Secondly, as a matter of law (reg. 8 of the Provision of Services Regulations 2009), each barrister (set of chambers) is required to notify recipients of services of the terms on which he or she does business. It is therefore unlawful to say nothing about the terms on which work is accepted. It may be that sets will prefer to publish generally (e.g. on web sites) that they are willing to do business on the BSB Standard Contractual Terms or on such terms as may be agreed, and then agree different terms (replicating the “old” non-contractual terms as suggested) with clients who are known and trusted. The alternative is to publish that the “old” terms will be used generally for the time being and then exercise the right that has always

existed under the “old” terms to require full payment in cash in advance of performance, where there is doubt about the creditworthiness of the professional client.

In the long run, it is likely that adopting contractual terms will be of benefit to barristers generally. Continuing with the old non-contractual terms should be seen as an interim measure. We will continue to be involved in trying to reach agreement on suitable commercial terms. Any such terms (and indeed any terms that individual sets of chambers are minded to introduce) will need to be agreed in advance by BMIF and the top-slice insurers. The Bar Council Guidance referred to above contains a suggested term to include where barristers wish to use different contractual terms that have not been expressly approved by BMIF.

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