Notes for talk bsb

Good evening, it is a pleasure and privilege as chair of the Institute of Barristers Clerks' to be invited to talk to. As you can imagine i am a bit apprehensive of talking to lawyers about contractual terms ; I shall also be speaking on acceptance of instructions and the cab rank rule. When referring to contracts forgive me if I get it wrong. I am sure there is at least one clever lawyer who might start quoting Chitty on contract to me in the Q & A session, but please leave any humiliation until the drinks reception. Actually looking at the audience i can see at least 300 clever lawyers in the room.

Well down to business. I have 10 minutes to complete. I shall actually start first with the cab rank rule

Cab rank rule

It is at Rule c29 in the handbook and applies when you are instructed by a professional client.

The main changes in the bsb handbook relating to cab rank rule are

1. Legal aid is no longer considered a professional fee and you can now refuse to accept work. The handbook does not assume (as the old code did) that legal aid fees are 'proper fees' the effect is that the barrister must decide for themselves whether they are being offered a proper fee , and hence whether they are obliged to act under the cab rank rule. See Rule c30 .9. Ironic that the regulator recognises that you cannot be a fat cat lawyer on legal aid.

2 In Rule c30.7a it states that the cab rank rule does not apply if the professional client is not accepting liability for your fees particularly important in relation to combar clls b.

There is a suggestion that where a barrister advertises [on his web site] acceptance of work on terms that do not impose a liability [for counsels' fees] to a professional client ie terms b c or d, this may not apply but it is clear [in rC30.7a] that if you are offered work under combar b you can refuse.

As a result it is best not to advertise your acceptance [terms B] on your web site but deal with new enquiries for work on a case by case basis.

3. rC26 states You may cease to act on a matter on which you are instructed and return your instructions if: in

.5 you do not receive payment when due in accordance with terms agreed, subject to Rule C26.7 (if you are conducting litigation) and in any other case subject to your giving reasonable notice requiring the non-payment to be remedied and making it clear to the client in that notice that failure to remedy the non-payment may result in you ceasing to act and returning your instructions in respect of the particular matter

But note that on one view, if you agree basis B, and client does not pay the solicitor, so that solicitor does not have to pay barrister, payment is not "due" and the rule does not come into effect. You may wish to consider a clause that whilst the solicitor is not responsible for your fees, failure for any payment in a reasonable period of time may allow you to give sufficient notice for ceasing to act in the case.

Contractual terms

Where reference is made to terms they relate only to Combar clls terms. You may also not be surprised that most mention is made of Combar clls term b.

Im going to approach this simply on the basis of my own experience as a clerk as to some of the difficulties I have seen and also some of the new additional terms that are now creeping into combar b from solicitors, irrespective of the recent useful guidelines issued by combar from their further discussions with clls

As you know the most commonly used terms are the bar council's standard contractual terms, as well as combar clls terms. But of course you are not limited to these, you can agree what you like so long as you comply with your professional obligations under the bsb handbook and that you do not agree any terms that might invalidate your bmif cover. 4 pump court have their own specific terms and indeed the chairman of combar's own chambers have put on their website the 4 pump court terms and not combar clls.

There is also the additional factor that a substantial amount of new work is still accepted by chambers on a non contractual basis. I would actually guess that the majority of new instructions accepted by the largest number of chancery and commercial Chambers are still accepted on this basis.

Many clerks know that the majority of law firms in the city are stating that their policy is to agree combar clls term b only. Firms include, bird and bird, addleshawes, rpc and. Clyde and co to name a few.

But additional terms are also being added for what solicitors consider to be to their advantage under Combar clls. These include

Solicitors requesting the barrister discloses information on whether they have worked for any party involved in their litigation, or what cases the barrister has been involved in which may be contrary to the position the client takes on the new instructions. This obviously falls foul of the barrister's obligation in keeping their own clients affairs confidential – rule c21.4 of the bsb handbook. The best way to deal with this is to state the above and confirm that the barrister will abide by the rules of professional conduct regarding conflicts of interest.

Assignment. Some sols are now taking out the assignment under Combar clls. I suggest that you must be pretty desperate to allow this to happen if you do sign up for term b. In addition some sols are adding to 9.11 in combar clls terms which deals with assignment,: "and subject to the solicitors own insurance arrangements, engagement terms and the lay client and professional obligation" the solicitor shall promptly assign....

I suggest, if you want to go down this road, you ask for a copy of the agreement with the solicitors insurance company and engagement terms. They will not be forthcoming! In any event the guidance from combar and clls for assignment states that "solicitors should ensure that their agreement with their lay client permits assignment."

An important point to consider when agreeing terms is that you should ask what billing arrangements the solicitor has with the lay client. This is very important. If the solicitor bills on the first of each month, you cannot expect payment say within 30 days of billing, if agreed, if you are not aware of the billing arrangements.

Some solicitors have also added clauses or amended sections that would invalidate bmif cover as they seek to add unlimited contractual liability to the contract between the barrister and they as professional clients. Remember you are only covered by bmif up to to £100,000 for contractual liability.

If counsel were to agree to remove the £100,000 cap and proceed on an unlimited basis, he is arguably in breach of his practice rules for practicing without insurance .

I also feel that in the majority of cases it would do no harm in asking for limited liability on any claim made by the client up to the barrister's indemnity cover, would it be wrong to add this and to inform the professional client before work is undertaken, or to agree limited liability ? I am sure some would have strong views on this but no doubt that debate can be taken up by others.

Of course some solicitors like to delete paragraphs as well. Ones i have come across include 11.3 being deleted where the barrister will be liable for damages only where a relevant disciplinary panel has decided. There is therefore a very good reason why this paragraph should not be deleted.

I am sure many of you have had many similar dealings with solicitors when dealing with contracts. It would seem that if you agree combar clls you should stick with them , tinkering takes up time and causes many pitfalls in relation to a barristers professional obligations and of course the potential to invalidate bmif cover. My own experience dealing with compliance lawyers at many of the law firms is that they have no understanding of a barristers professional obligations at all, simply as they have not bothered to read the bsb handbook. Quite shocking really. It's almost like a one way street. And it have this to say on a personal level on combar b. no commercial entity would sign such a contract and no solicitor would sign a contract on similar terms with their clients where there is a contract to perform and to supply services with attendant duty of care but no obligation on their clients to be responsible for fees. So you have to ask, of all people, how could lawyers have got contractual terms so wrong.

Acceptance of instructions

I have left this until last as I believe the most important rule in the handbook is r 22. It states "you must, subject to rule 23, (which deals with the scope of work being varied) confirm in writing acceptance of the instructions and the terms and/or basis on which you are acting , including the basis of charging"

This you have to do to your professional or lay client.

Rule c24 , states that you must comply with rule 22 and 23 before doing the work unless that is not reasonably practicable, in which Case you should do so asap. But rule c 22 is the most important one

From the conversations i have had with many clerks it is quite obvious that this rule is not being complied with fully by the majority of chambers both large and small. From the 6th January 2014 it is no longer acceptable to continue to receive instructions where you do not state your basis of charging. Most chambers simply send out a letter stating that they will accept instructions on the terms on their web site or accept instructions under a non contractual agreement where fees are not discussed, particularly from good and regular clients who sometimes merely enquire of counsel's availability

Can i just let you know what the ombudsman states on fees as well.

"A customer should never be surprised by the bill he or she received from a lawyer. However it is clear that some customers who come to the legal ombudsman have failed to understand the basis on which they were billed. This is not helped by the different sorts of charging structures lawyers currently offer ; fixed fee , hourly fee hourly rate conditional fee and so on. Each of these is different and each has advantages and disadvantages from the customer (and lawyer) perspective. Whatever charging structure a lawyer uses, we would expect the lawyer to explain how it works and what it does and does not include. **It must be crystal clear.**

So getting papers through the door and not telling your client s - professional or otherwise - how you will charge is no longer acceptable. Charging by the weight of papers or the experience and what you might consider is the value to the client will no longer works.

If you have not agreed a rate you may want to be entirely transparent and state on your fee note an hourly rate or indeed include hours worked, just to cover any cases that may slip through the door

So why does this matter so much, some of you have not yet taken on board the significance or its importance. The answer simply is supervision. An administrative nightmare may loom if you do not apply rule 22. Can you imagine your chambers name being pulled out of the hat by the bsb for supervision? Just imagine not complying and the bsb examine your fee arrangements and review a substantial matter where there is no clear basis of charging, where no agreement has been reached, and you are be in breach of rule 22. The BSB may well ask you to write to your client explaining the basis of charging for each and every fee line. Indeed they may well then ask to examine each case accepted by that barrister where no clear fee arrangements have been agreed since Jan 6th, line by line. Things can then only get worse; they might examine each and every case in chambers. It becomes even worse if your time keeping records are not kept efficiently available for any supervison check. This as i mentioned would be your worst administrative nightmare.

The reputation of barristers has never been so high. The country benefits from the enterprising nature of chambers that has nurtured good will towards the profession both nationally and overseas. The City of London has suffered its fair share of reputational damage over the years caused by greedy bankers, city regulators, thieving politicians and hacking journalists recently, but barristers can hold their heads high. However this may count for nothing if you do not comply with rule 22!

I saw dr Vanessa Davies last Thursday at the launch of the new bsbs handbook. She specially mentioned supervision and said, we are coming to get you. Joking of course, but was she?

So clerks you have been warned and barristers, you are responsible for your clerk's actions under the handbook.

Thank you for listening to me.

Brian Lee Chair of IBC – 27.1.2014

Joint Chancery/COMBAR/IBC talk