



Licensed Access Guidance - Handbook for Clients

Introduction

1.1 This handbook, which is provided to existing or potential licensed access clients, comprises the following sections:

- (1) Guidance for those seeking recognition under the licensed access scheme. The purpose of this section is to set out, in general terms, the principles which govern the grant of licences to use the licensed access scheme and the nature of such licences.
- (2) A check list for licensed access clients who are proposing to instruct a barrister under the terms of their licence.
- (3) Guidance notes for licensed access clients. This section is designed to be of assistance to clients who are proposing to instruct a barrister under the terms of their licence. It covers matters such as the type of cases in which it is appropriate to instruct a barrister, choice of barrister, the manner in which a barrister should be instructed, the steps following the initial instruction and billing.

1.2 There are also attached to this handbook a number of appendices, as follows:

- (1) An application form for those seeking recognition as licensed access clients.
- (2) The Licensed Access Terms of Work.
- (3) The Licensed Access Rules.
- (4) The Licensed Access Recognition Regulations.

1.3 To apply for a licence, to amend an existing licence, or to receive further details of the scheme, please visit the [Bar Standards Board's website](#), or contact Joanne Dixon, Manager, Qualification Regulations: 020 7611 1444.

Members of the Bar or clerks seeking guidance on Licensed Access issues should contact the Ethical Enquiries line on 020 7611 1307, or by [email](#).

Guidance for those seeking Recognition under the Licensed Access Scheme

2.1 Licensed access recognises that Solicitors are not alone in having the skills and knowledge to benefit from the legal services offered by the Bar. Licensed access provides the opportunity for the widest diversity of organisations and individuals to be licensed to instruct a barrister directly whether in the commercial, profit, non-profit or voluntary sector and irrespective of size or of type of work. These Guidance Notes use the generic term 'organisation' to describe the full range of bodies from large public limited companies to small charities and advice centres.

2.2 A fundamental principle of licensed access is that access under its provisions is licensed. An organisation or individual must be licensed by the Bar Council to use the scheme and the licence will govern who in the organisation may use the scheme and the type and scope of work in respect of which the organisation or individual is licensed to instruct a barrister directly. Within the Bar Council the licensing functions will be carried out by the Access to the Bar Committee (see LARR Regulation 1). The organisation or individual seeking a licence must apply to the Bar Council and for this purpose must complete an Application Form and provide such further information as may be required.

2.3 Whilst there is no limitation to the type of organisation that can seek authorisation the Access to the Bar Committee will ensure that the body is equipped to provide direct instructions to Counsel. The Committee will examine a wide range of criteria in determining whether a proposed organisation or individual should be granted a licence, including for example the type of work which it wishes to refer directly to a barrister, its expertise or experience, its familiarity with any relevant area of law, its ability to obtain and prepare information and to organise papers and information for the barrister and in a contentious matter for the court, its ability to take charge and have the general conduct of the matter on which it wishes to instruct the barrister directly, the extent to which it has arrangements for holding in separate accounts and maintaining as trust monies any monies received from third parties, the extent to which the affairs and conduct of the person or organisation or its members are subject to professional, disciplinary, regulatory or other organisational rules and have professional indemnity insurance (see LARR Regulation 6).

2.4 The scope and type of work embraced by the licence will depend on the expertise, skills and knowledge of the organisation or individual applying for the licence. For example, whilst some organisations may be licensed simply to use licensed access to obtain written advices on policy matters, others may be permitted to approach counsel for a wide range of services including advocacy (see LARR Regulation 3).

2.5 The terms of a licence specifying the name of the person or organisation, the period for which the licence has been granted, the limitations or conditions on which the licence has been granted are within the complete discretion of the Access to the Bar Committee. Such limitations and conditions may for example define the matters upon which they may instruct counsel through licensed access, set out the tribunals or courts in which a barrister may be instructed to exercise a right of audience and/or provide that unless otherwise first agreed in writing all instructions will be deemed to be given and accepted on the terms of

the Licensed Access Terms of Work as approved by the Access to the Bar Committee (see LARR Regulation 4(b)). A copy of the Licence must be sent to the Barrister at the time of instruction enabling the barrister to ensure that the licence covers the instructions (see LAR Rule 4(c)).

2.6 The status of an organisation can be considered by the Access to the Bar Committee. Approval can be given to an organisation or an individual, or to all or some of the members of an organisation or to all or some of the employees of an organisation or its members or of the individual (LARR Regulation 3(c)). Approval can be on a provisional or full basis and can be limited in time (LARR Regulation 3(a) (b)).

2.7 The Access to the Bar Committee may from time to time, approve additional persons or organisations, withdraw approval either in whole or in part from any person or organisation who has been licensed, increase reduce or otherwise alter the period for which a licence has been granted, alter or revoke the conditions or limitations which have been imposed under the licence and cancel and demand surrender of any licence which has been issued (see LARR Regulation 5).

2.8 Instructions under licensed access can only be accepted where the client is properly authorised for the type of work sought to be offered (see LARR Regulation 3(e) and LAR Rule 1).

2.9 A barrister is not required to accept work from a licensed access client and should not do so if the barrister considers it in the interests of the lay client or the interests of justice that an intermediary be instructed together with or in place of the barrister. Such intermediary may be a solicitor or other authorised litigator or some other appropriate person or organisation (see BDR Rule 5(b)). If a barrister having accepted instructions from a licensed access client considers it in the interests of the lay client or the interests of justice that an intermediary be instructed together with or in place of the barrister the barrister must forthwith advise the licensed access client in writing to instruct such intermediary and unless such intermediary is as soon as reasonably practicable instructed the barrister must cease to act and must return any instructions to the licensed access client (see LAR Rule 8).

Checklist for Licensed Access Clients Proposing to Instruct Barristers

- Is my case an appropriate case for instructing a barrister: see guidance notes in section 3, paragraphs 3.2 to 3.5.
- How do I choose the right barrister for my case: see guidance notes in section 3, paragraphs 3.6 to 3.8.
- How do I go about instructing a barrister: see guidance notes in section 3, paragraphs 3.9 to 3.10.
- How are a barrister's fees calculated and how should they be agreed: see guidance notes in section 3, paragraphs 3.6(4) and 3.10(4).

- What should I send to a barrister: see guidance notes in section 3, paragraphs 3.11 to 3.15.
- What happens after I have instructed a barrister: see guidance notes in section 3, paragraphs 3.16 to 3.20.
- How will I be billed: see guidance notes in section 3, paragraphs 3.21 to 3.22.
- What do I do if I am unhappy about the service which has been provided: see guidance notes in section 3, paragraphs 3.23 to 3.24.

Guidance on Instructing Barristers under the Licensed Access Scheme

Introduction

3.1 These guidance notes are intended for use by licensed access clients who are considering instructing a barrister or barristers direct, whether for the purposes of obtaining their advice or for the purposes of obtaining representation in court under the new arrangements for direct licensed access.

In which cases is it appropriate to instruct a barrister?

3.2 The overriding consideration when deciding whether it is appropriate to instruct a barrister alone, or whether to instruct a solicitor (whether that solicitor in turn instructs a barrister or not), is whether to do so would be in the best interests of the client. This means that it is essential to have a proper understanding of what a barrister can and cannot do.

3.3 The following is an outline of those things which a barrister is normally expected and entitled to do:

(1) Advisory work (e.g., giving advice on the law generally and/or on the merits of any particular matter, whether contentious or non-contentious, and/or on the drafting of documents such as contracts, standard terms and conditions, correspondence, letters before actions, reports etc.);

(2) Drafting of claim forms, petitions and other applications;

(3) Drafting of statements of case;

(4) Advice on the factual and expert evidence which will be needed in order to establish the case at the hearing, whether oral or written;

(5) Advice on which witness statements, expert reports and documents must or should be disclosed to the other side;

(6) Assistance in the preparation of affidavits and witness statements for use at a hearing. There is an important distinction between (i) taking a statement from a witness, which

involves interviewing the witness in order to elicit his or her evidence, and (ii) assisting in the preparation of a witness statement. The latter task typically includes identifying the matters the statement should cover, reviewing a draft witness statement, advising on questions of admissibility and weight of particular passages of draft statements, and by settling from drafts a final form of witness statement¹;

(7) Preparation of any documents, such as skeleton arguments, chronologies, etc, used for the purposes of presenting a case in court;

(8) Representation at any court hearing;

(9) Representation at a hearing before a tribunal other than a court, for example a disciplinary tribunal;

(10) Advice on tactics in relation to the litigation generally and its settlement.

3.4 There are some things, on the other hand, which a barrister would not normally be expected or entitled to do. In general barristers do not have the facilities or the office back-up to undertake much of the general preparatory work necessary to get a more complex case to trial. In particular, barristers are not permitted to do the following:

(1) The management, administration and general conduct of litigation including written or oral communication between the parties or their advisors²;

(2) Investigating and collecting evidence for use in court;

(3) The receipt or handling of client money³.

3.5 In general, accordingly, unless the licensed access client is equipped and prepared to undertake the type of litigation support function normally undertaken by a solicitor, the typical case in which a barrister might be instructed directly to appear in court will be one:

(1) of lesser factual complexity; and

(2) where there is unlikely to be a need for extensive investigation into and gathering of evidence, whether oral or documentary.

Even in the more complex cases, or cases where extensive investigation is required, it may be appropriate to instruct a barrister direct to advise, or to appear in court on a particular application within the litigation.

Choosing a barrister

3.6 The following factors are relevant in determining the appropriate barrister.

(1) Whether the case merits more than one barrister. It may be appropriate to instruct two (or more) barristers to work as a team, possibly each from a different field of expertise.

(2) Whether the case merits the use of a Queen's Counsel, or a junior barrister, or both. There is no hard and fast rule as to when it is appropriate to use a Queen's Counsel. In general, it is appropriate where the issues involved in the case are particularly complex, where the result is likely to have significant consequences for the client, and where there is a sufficient amount at stake to warrant the higher cost. Similarly, there is no hard and fast rule as to when it is appropriate to instruct both a junior barrister and a Queen's Counsel. In general, it is appropriate to do so where the criteria for the use of a Queen's Counsel are satisfied and there is likely to be a significant amount of preparatory, drafting or research work which could be carried out by a junior barrister at a significantly lower cost than if the Queen's Counsel were to do so.

(3) The seniority of the barrister. A barrister's seniority is denoted in the various published directories and guides (see below) by reference to the year in which he was called to the bar. A barrister is normally called to the bar during the year between completing his final year of studying for the bar (i.e., taking the exams at the end of the bar vocational course) and completion of his pupillage. In practice this means that a barrister called in, say, 1990 will by October 1999 have been in practice since about October 1991, i.e., 8 years. This is not, however, a hard and fast rule. Some barristers might have followed another career path (for example an academic career) between being called to the bar and entering practice. The various directories of barristers denote the seniority of a Queen's Counsel by the year in which he took silk. Queen's Counsel are appointed in the April of each year. The factors which will dictate the appropriate level of seniority for a particular case are similar to those which dictate whether it is appropriate to employ the services of a Queen's Counsel or a junior barrister (see above).

(4) Expense. Particular regard should be paid to the cost of employing the services of different barristers. In so doing, the following should be taken into consideration:

(a) There are three basic methods by which barristers charge for their services:

(i) an hourly rate so that the fee varies upon the amount of time taken to complete the work;

(ii) a fixed fee agreed in advance for a particular piece of work;

(iii) a "brief" fee, which is a fixed fee to cover preparation for a hearing and the first day in court, and a "refresher" or a daily charge for each subsequent day.

Additionally, some barristers may in certain types of case be allowed and prepared to accept instructions pursuant to a conditional fee agreement, in which the payment or the amount of the fee will depend upon the outcome in the case.

Generally, licensed access clients should be prepared to negotiate with the barrister or his clerk in relation to the method of charging for the barrister's services as well as the overall amount to be charged.

(b) In comparing hourly rates offered in respect of different barristers, it should be borne in mind that a barrister well versed in the relevant field of expertise is likely to spend fewer hours on the matter than one who has a more general experience.

3.7 Each barrister has a professional duty to advise his client whenever he considers either that the client ought to be represented by someone with a different expertise, or by someone at a lower or higher level of seniority. In addition, each barrister owes a duty to consider, and advise, as to whether the case warrants the assistance of (as the case may be) a Queen's Counsel or junior barrister, or alternatively no longer merits the continued use of either the Queen's Counsel or junior barrister. The barrister also has a duty to advise whether the case merits the involvement of a solicitor.

3.8 There are a number of ways in which to identify a suitable barrister for the relevant case.

(1) Recommendation from others;

(2) The Bar Council publishes a Bar Directory that lists all barristers currently practising and gives details of the expertise of barristers in particular chambers.

(3) Directories are published by a number of specialist Bar Associations, for example by the Chancery Bar Association and the Commercial Bar Association, which contains lists of barristers (though not all barristers) practising within those fields and details of the expertise of barristers in particular chambers;

(4) There are a number of directories published by private organisations, many of which indicate the views of the editors of the directory of particular barristers operating in particular fields of expertise. These views, being subjective, need to be treated with caution.

(5) Having identified a set or sets of chambers whose members are held out as having expertise in the relevant field, it is worth contacting the chambers to discuss with the clerk the member or members who would be most suitable for your purposes, and to discuss the possible charging structure and charge-out rates of the relevant members.

Instructing a barrister

3.9 Once the licensed access client has decided upon a barrister to instruct, it is always preferable to contact that barrister's clerk in the first instance in order to ensure that the barrister is available.

3.10 In making enquiries of the barrister's clerk, there are four particular points to check:

(1) Is the barrister available to carry out the specific piece of work in relation to which he or she is to be instructed? Barristers are sole practitioners. This has the advantage that when a barrister is instructed it is the barrister himself or herself who carries out the work. In this respect a barrister differs from a solicitor who will regularly delegate work to an assistant or assistants. It has, however, the disadvantage that any particular barrister will already have commitments to other clients, including commitments to complete paper work by a certain

date, or to appear in court on a certain date or dates, so that his or her availability may be limited.

(2) If the barrister is to be instructed in a matter that will be ongoing, is he or she likely to be available for any court dates that are to be arranged in the future? Sometimes court hearings are arranged for the convenience of the parties, so that they can ensure that the barrister of their choice represents them. On other occasions, however, court hearings are arranged without regard to the availability of the parties' barristers. Whilst it will not be possible for the barrister to commit to be free for any lengthy period of time within which hearings might occur, it is sensible when initially instructing a barrister to enquire whether he or she has existing commitments such that it is known, or likely, that they will not be free during the period of time when prospective court hearings are likely to occur. It is sometimes sensible to enquire, at the outset, whether there are other members of chambers of a similar level of experience and with similar expertise who would be able to take over in respect of future court hearings in case the barrister of first choice subsequently became unavailable.

(3) If the barrister is being asked to advise in conference, or to attend a specific court hearing, his or her clerk should be asked at the outset to reserve the date and time in the barrister's diary for that purpose.

(4) Fees. A barrister's fees are normally negotiated with his or her clerk. The way in which barristers charge for their services is referred to in paragraph 3.6(4) above. Negotiations at the outset should include whether a fixed fee should be paid, and if so for how much, whether payment should be on the basis of an hourly rate, in which case an indication of the number of hours which the matter is likely to take should be asked for and given, or whether a brief fee/refresher approach is appropriate, in which case the amounts should be agreed in advance. In addition, in any case where a fixed fee is agreed, you should ensure that there is clear agreement with the barrister's clerk as to the extent of the work to be included in the fee (e.g., whether it is to include advising both in conference and in writing, or only one of these).

Identifying the information and materials to send to the Barrister

3.11 There is no required form or procedure for informing a barrister of the matters in relation to which he is to advise or represent you. The appropriate quantity of material to provide, and the appropriate form in which to provide it, will depend upon the circumstances of each case and, to an extent, the requirements of the particular barrister. Solicitors have developed a particular format and style of expression in instructions to barristers. Whilst there is no reason why licensed access clients should not adopt a similar format and style, there is also no reason why they should. It is the content of the instructions that is important, not the form. In most cases, it is sufficient that the information is provided to the barrister in the form of a letter or a note.

3.12 In an urgent case it is possible to attend a conference with a barrister without any prior written instructions. Similarly, where urgent applications to court are concerned, it is more important that the barrister is provided with the necessary materials to make the application as soon as possible, than that time is spent on drafting written instructions.

3.13 Whenever you are in doubt as to any aspect of the instructions, telephone the barrister direct. A great deal of unnecessary time and expense can be saved by an initial discussion with the barrister as to the materials he will need at the outset to see.

3.14 The following guidelines are to be read in the light of the preceding paragraphs and are intended to be of general assistance only.

3.15 As a general rule, the following is the information and material which a barrister would normally expect to be sent to him upon his initial instruction:

- (1) A brief description of the circumstances giving rise to the issue in relation to which he is instructed, including a brief history of the matter and a description of the parties involved.
- (2) An outline of the issue or issues in relation to which he is either instructed to appear in court or to advise.
- (3) In the case of existing proceedings, copies of any documents already filed with the court, or exchanged between the parties which are relevant to the issue upon which the barrister is instructed;
- (4) A clear statement of what it is the barrister is being asked to do. For example:
 - (a) where advice is sought, state whether the barrister is asked to advise on a specific issue, or to advise more generally on the issues which he thinks arise out of the circumstances identified to him;
 - (b) where the barrister is requested to draft or settle a document, then state the document or documents which he is required to draft (e.g., a statement of case or application), or settle (e.g., an affidavit or a witness statement);
 - (c) where the barrister is requested to attend a hearing, identify the hearing and state clearly what result from the hearing the barrister is instructed to try to obtain.
- (5) Photocopies of those documents that you think are relevant to the matters upon which his advice is sought. The following should be noted:
 - (a) It is in relation to this aspect that communication with the barrister is particularly recommended, whether prior to sending any instructions, or having sent instructions with a few "core" documents so as to identify what other documents ought to be sent.
 - (b) It is important not to send original documents, since these should not be marked and should remain in their original form and should be available for inspection by third parties, whether by reason of disclosure orders which might be made in litigation or otherwise.
 - (c) Where correspondence or similar documentation is to be sent, it will save time and expense if it is arranged in chronological order.

(d) It is also helpful to include an index of the documents, or of the classes of documents, sent.

(6) A clear statement of the time within which a response is sought from the barrister.

(7) Where there is a time limit on commencing proceedings, or taking a step in existing proceedings, or for any other matter, a clear statement of this in the instructions.

Steps following the initial instructions

3.16 Having received the instructions, the barrister should take an initial look through the papers. There are four potential reasons why at this stage the barrister could decline to continue to act:

(1) It is possible that the barrister will identify a conflict of interest (for example because he is acting or has previously acted for another party in the same case) which was not picked up during your discussions with his or her clerk.

(2) The barrister (in cases other than where the licensed access client is able to undertake litigation support such as that normally undertaken by a solicitor) may decide that, because the case requires taking detailed statements from witnesses, or extensive office back-up that he or she does not have, it is not an appropriate case for direct access and needs the expertise of a solicitor. In those circumstances the barrister is required to take no action until an appropriate intermediary is instructed.

(3) The barrister may decide that on closer inspection of the papers the subject matter falls outside his or her area of expertise, or that the case is more complex than he or she is equipped to deal with. He or she is then entitled to decline the instructions.

(4) The barrister may decide, having accepted the instructions on the basis that they were likely to occupy a certain amount of time, which he or she had available, that the instructions will in fact require considerably more of his or her time, which is not available.

3.17 Alternatively, the barrister may decide that whilst the case is within his or her expertise, it is more suitable for a barrister of different seniority. In that case, the barrister is obliged to advise you of his view, but you may choose whether or not to accept that advice.

3.18 Assuming that the barrister is able to continue to work on the case, the course of conduct thereafter will depend upon the circumstances of the individual case.

3.19 It will often be useful to arrange a face to face meeting with the barrister in order either to discuss the advice that the barrister is to give, or to discuss what work needs to be done in preparing the case for court. Such a meeting may take place either at the barrister's chambers, or at the premises of the licensed access client. It is often easier for the barrister to hold the meeting at his or her chambers, where he or she has ready access to the background material needed in order to advise, unless the volume of material, the need to view equipment or a site or the convenience of the client or witnesses suggests otherwise.

3.20 A face to face meeting is particularly useful in order to discuss and agree upon the division of work as between the barrister and the licensed access client in progressing a case towards a court hearing (bearing in mind those matters which the licensed access client can expect, or should not expect, the barrister to do, as set out earlier in these guidelines).

Billing

3.21 The barrister will send a fee note, either at the end of the case, or after each separate item of work done or, in an ongoing matter, at periodic intervals.

3.22 The licensed access client is contractually liable for the fees of the barrister. Any disputes with the barrister over the fee should be taken up with the barrister's chambers as soon as possible. It will often be the case that any dispute over the fee, or other complaint, can be resolved informally with the barrister's chambers.

3.23 The Bar Council is not usually able to involve itself in disputes over fees, except where there is an allegation of professional misconduct⁴. If the fee dispute cannot be resolved informally, accordingly, there is little alternative but for the matter to go to court.

3.24 If you have any concerns about the services provided by your barrister, you should, in the first instance, refer these to the barrister himself to be resolved through the chambers complaints procedure if possible. If you remain dissatisfied, it is open to you to approach the Bar Council and you should write to the Secretary of the Professional Conduct and Complaints Committee at the Bar Council for further information about this.

Practical matters

3.25 Appended to these guidance notes is guidance on the preparation of witness statements⁵.

Appendices

[1. An application form for those seeking recognition as licensed access clients](#)

[2. The Licensed Access Terms of Work](#)

[3. The Licensed Access Rules](#)

[4. The Licensed Access Recognition Regulations](#)

¹ Save in exceptional circumstances, it is not appropriate for a barrister who has actually taken (as opposed to having assisted in the preparation of) a witness statement to act as an advocate at the trial. Usually, accordingly, it is not appropriate for the barrister, in the event that he or she is intended to appear as the advocate at trial, to take a witness statement. It is open to the Licensed access client, however, to instruct a barrister, either a junior in the case where there is to be a more senior barrister presenting the case in court, or a barrister who is

not to be instructed at the trial, specifically to take witness statements. The primary requirement is that the witness statement is in the intended witness' own words.

²Barristers do, however, frequently assist their clients in the drafting of correspondence which is sent to other parties under the client's own name.

³This may have important consequences, particularly in relation to settlement negotiations.

⁴See the Bar Code of Conduct published by the General Council of the Bar.

⁵Taken from section 3 of the Bar Code of Conduct.