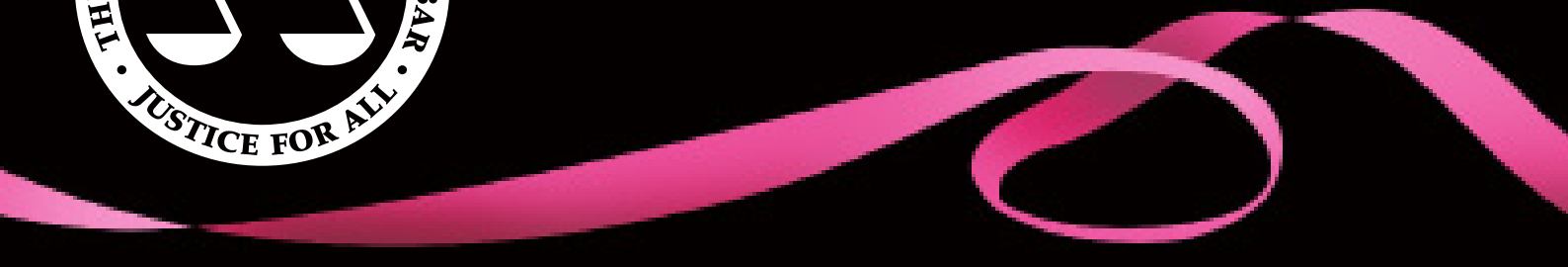


Standard Contractual Terms Guide

The Supply of Legal Services by Barristers to
Authorised Persons 2012



The Bar Council
Integrity. Excellence. Justice.



Guide to Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012

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Introduction

1. For centuries most barristers have accepted instructions from solicitors on a non-contractual basis, where the obligation to pay their fees was binding in honour only. From 31 January 2013 this was changed. On that date the new Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012¹ (the "new Standard Terms") came into force and replaced the previous Terms of Work on Which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme.² However, the new Standard Terms do not operate as default terms. It will therefore be essential that barristers expressly agree with solicitors the terms on which they perform any work because there are no longer any terms operating in default of such agreement.

2. These changes are part of bringing into effect the regulatory freedom now enjoyed by barristers to agree a contractual basis for the work they do for solicitors and certain other "Authorised Persons", with the advantages that follow from a contractual relationship.

3. Subject to transitional arrangements³, barristers can choose between the following alternatives:

3.1 Accepting instructions on the new Standard Terms. A detailed explanation of how they operate follows this Introduction.

3.2 Accepting instructions on 'bespoke' terms (contractual or non-contractual) that have been drafted by the barrister or his Chambers or an SBA. Here it will be the responsibility of the individual barrister to ensure that his bespoke terms do not leave him exposed to liabilities that are not covered by the Bar Mutual Indemnity Fund (BMIF). Barristers will be aware that practising without full insurance cover may amount to professional misconduct. Broadly, BMIF will not cover a barrister's contractual liability to the extent that it exceeds his liability at common law in tort. If a barrister is minded to draft or agree a bespoke term which potentially could affect his professional indemnity over, enquiry should be made of BMIF.⁴

¹ As referred to in Rule rC30.9c of the BSB Handbook. The new Standard Terms were approved by the Bar Standards Board and the Legal Services Board ("the Regulators"). See Bar Council's website http://www.barcouncil.org.uk/media/278543/12_7_27_approved_contractual_terms_updated_bsb_handbook.pdf

² At Annexes G1 and G2 of the old Bar Code of Conduct. See Bar Council website http://www.barcouncil.org.uk/media/278355/annexe_g1_non_contract_tow.pdf and http://www.barcouncil.org.uk/media/278358/annexe_g2_contractual_tow.pdf

³ These provide that where instructions were accepted by the barrister on a non-contractual basis before 31 January 2013 and the work is done after that date, the old Terms of Work, found in Annexes G1 and G2 of the old Bar Code of Conduct, will continue to apply.

⁴ The Bar Mutual Indemnity Fund has indicated that it does not consider the new Standard Terms extend barristers' contractual liabilities beyond those they owe at common law.

3.3 Accepting instructions on 'bespoke' terms that have been drafted by the Authorised Person (e.g. the instructing solicitor – see below for a detailed explanation). Here again it will be the responsibility of the individual barrister to ensure that these bespoke terms do not leave him/her exposed to liabilities that are not covered by BMIF, with the risk of professional misconduct.⁵

3.4 Accepting instructions on terms that are a negotiated variant of any of the above. Here again it will be the responsibility of the individual barrister to ensure that the negotiated terms do not leave him/her exposed to liabilities that are not covered by BMIF, with the risk of professional misconduct.⁶

4. The new Standard Terms apply only to instructions from Authorised Persons who have been authorised by the Law Society or the Solicitors Regulation Authority⁷ (SRA), almost all of whom will be solicitors. "Authorised Persons" is defined more widely in the Legal Services Act 2007 so as to include persons authorised by other approved regulators as well as the Law Society. Barristers are free to adapt the Standard Terms to suit instructions from such persons if they do wish to do so, subject to overall compliance with the BSB Handbook.

5. Barristers who choose to contract on the basis of the new Standard Terms, or the barrister's own standard terms, will need to take effective steps to ensure that such terms form the basis of the contract. Barristers should accordingly consider:

5.1 Including a sufficiently prominent statement on their website that all instructions are accepted on the basis of the new Standard Terms, or the barrister's own standard terms (as the case may be), and

5.2 In any communication accepting instructions, stating unequivocally that acceptance is on the new Standard Terms, or the barrister's own terms.

6. The new Standard Terms and the barrister's own standard terms (if any) are subject to the Cab Rank Rule (see below) but if the Authorised Person does not insist on using those terms, counsel and the Authorised Person can agree to amend any of the terms to suit their needs – for

⁵ If bespoke terms of this kind are used, it may not be possible to obtain confirmation of cover from BMIF in advance. In that case, the barrister might indicate that the instructions will only be accepted on those terms subject to a caveat along the following lines: "Notwithstanding [the Authorised Persons'] standard terms of contract, [the barrister's] liability in contract, whether to [the Authorised Persons], the lay client or any third party, shall in no circumstances exceed, whether in the type or extent or quantum of damage, [the barrister's] liability at common law in tort were no such contract to exist". This should ensure that any liability falls within the scope of existing BMIF cover.

⁶ The comments in the previous footnote are equally valid here and the suggested wording as regards the preservation of BMIF cover could be along the following lines: "In no circumstances shall [the barrister's] liability under this [contract], whether to [the Authorised Persons], the lay client or any third party, whether in the type or extent or quantum of damage, exceed [the barrister's] liability at common law in tort were no such contract to exist".

⁷ The Law Society has devolved its authorising power under section 18(1)(a) of the Legal Services Act 2007 to the SRA, so in practice the SRA is responsible for giving authorisation

example the timing of payment; whether payment is dependent upon the solicitor being placed in funds; the timing and rate of interest and the time limits for challenging fees and referral to the Joint Tribunal.

7. As a consequence of the introduction of the new Standard Terms, the focus of the Cab Rank Rule⁸ has shifted so that it now applies to instructions offered to the barrister on either the new Standard Terms or on any terms which the barrister (or his Chambers) publicises as being his standard terms of work. Refusing to accept such instructions will be a breach of the Cab Rank Rule (subject to the usual exceptions e.g. not being available, being professionally embarrassed etc.). However, the Cab Rank Rule does not apply to instructions offered on any other basis; barristers are free to choose whether or not to accept such instructions. If instructions are offered on the basis of contractual terms prepared by the Authorised Person, the barrister would be well advised to scrutinise such terms carefully before accepting them and should make sure that the terms on which the instructions are accepted have been properly recorded.

8. In the following notes, clause numbers refer to the clauses of the new Standard Terms⁹ unless otherwise stated.

⁸ With the introduction of the new Standard Terms, the Cab Rank Rule in the BSB Handbook (formerly the Bar Code of Conduct) is amended.

⁹ As referred to in Rule rc30.9c of the BSB Handbook – see Bar Council website http://www.barcouncil.org.uk/media/278543/12_7_27_approved_contractual_terms_updated_bsb_handbook.pdf.

CHAPTER 1: What has changed and using the new Standard Terms

What has changed?

9.1 The new Standard Terms may be used for instructions from all Authorised Persons, which here means all bodies and persons authorised by the Law Society or the SRA under section 18(1)(a) of the Legal Services Act 2007 to carry out reserved legal activities. This includes all practising solicitors but will also include any other bodies that are not solicitors' practices but which the SRA regulates. The SRA at present licences such bodies and persons on behalf of the Law Society, but does not publish a list of those bodies and persons who are authorised.

9.2 The new Standard Terms apply only to cases where the barrister is paid by or through the Authorised Person. Most such cases will be privately funded matters but this does include publicly funded matters where the Authorised Person (usually a solicitor) is paid by the Legal Services Commission and is then liable to pay counsel from those funds.

9.3 The new Standard Terms do not apply where the barrister is paid directly by the Legal Services Commission through the Community Legal Service or the Criminal Defence Service or by the Crown Prosecution Service.

9.4 The new Standard Terms can apply to a Conditional Fee Agreement (CFA) where the CFA specifically incorporates these Terms.

9.5 The new Standard Terms expressly provide that if fees for earlier work on the same case are unpaid for more than 30 days after delivery of the invoice or fee note the barrister is entitled to refrain from doing any further work on the case unless payment for that further work is made in advance, subject to the barrister's obligations to the Court and subject to the other provisions of the BSB Handbook.

9.6 The new Standard Terms expressly provide that barristers can sue for unpaid fees and may claim interest on unpaid fees.

9.7 The new Standard Terms are intended to apply for the whole life of the case. However, they can be adopted (or not adopted) on a per instruction basis; and where they have applied to a case, it can be agreed that they should no longer apply.

10. The old 'Terms of Work' on which barristers offered their services to solicitors and the 'Withdrawal of Credit Scheme'¹⁰ have been abolished. This means that the 'Withdrawal of Credit List' has also been abolished, together with the obligation on barristers to refuse work from solicitors on the List unless payment is received with the brief or special permission has been given by the Chairman of the Bar.

11. The 'Withdrawal of Credit List' is replaced by the new advisory 'List of Defaulting Solicitors and Other Authorised Persons'. Amendments to the Bar's Code of Conduct (now BSB Handbook) provide that a barrister has the option to refuse work offered on credit from solicitors named on the

¹⁰ At Annexes G1 and G2 of the old Bar Code of Conduct.

'List of Defaulting Solicitors and other Authorised Persons 2012'. This option to refuse work applies regardless of whether the fees are to be paid by the instructing solicitors/authorised persons or by the Legal Services Commission or the Criminal Defence Service. Under transitional arrangements, solicitors currently on the 'Withdrawal of Credit List' are automatically transferred to the advisory 'List of Defaulting Solicitors and other Authorised Persons 2012'.

12. Where instructions were received before 31 January 2013 on the basis of the former 'Terms of Work', the transitional arrangements allow complaints about non-payment of fees for that work to be made to the Bar Council, as before, but with the solicitor being placed on the 'List of Defaulting Solicitors and other Authorised Persons 2012' instead of the 'Withdrawal of Credit List'. In relation to instructions accepted on the new Standard Terms, complaints about non-payment of fees can only be made to the Bar Council if a judgment has been obtained or if a joint tribunal award is unpaid.

Interaction with Cab Rank Rule and BSB Handbook

13. With effect from 31 January 2013, the Cab Rank Rule in the BSB Handbook (formerly the Bar Code of Conduct) is amended.

14. Barristers are no longer required to accept instructions if the Authorised Person wishes to instruct them on terms other than the new Standard Terms OR the terms of work which the barrister (or his chambers) publicises as being his standard terms of work.

15. On the other hand, it is a breach of the Cab Rank Rule for a barrister to refuse instructions from an SRA "Authorised Person" where he wishes to instruct the barrister on the new Standard Terms or on the terms of work which the barrister (or his chambers) publicises as being his standard terms (unless the instructing "Authorised Person" is on the 'List of Defaulting Solicitors and other Authorised Persons 2012').

16. The usual exceptions to the Cab Rank Rule continue to apply e.g. not being available, being otherwise professionally embarrassed etc.

17. Furthermore, it is no longer misconduct for a barrister to accept instructions from a solicitor who has been the subject of a direction to withdraw credit. All such solicitors having a direction to withdraw credit against them on the 31 January 2013 will be transferred to the advisory 'List of Defaulting Solicitors and other Authorised Persons 2012' (see page 17).

18. Barristers are reminded that the Provision of Services Regulations 2009 require publication of their normal terms of engagement. Guidance on the Regulations can be found on the Bar Council's website by searching "Provision of Services Regulations 2009" or at the following address: <http://www.barcouncil.org.uk/provision-of-service-regulations-2009>.

Are the new Terms fixed? Can we deviate from these new Terms?

19. The new Standard Terms have been written to delineate the responsibilities of the parties and to provide a comprehensive but not over-elaborate set of contractual terms. They are standard terms but barristers and SRA Authorised Persons are free to agree variations to them (or to agree entirely different terms) to suit their particular needs.

20. However, particular care must be exercised where barristers undertake work on terms that are different from the new Standard Terms. It is impossible in this guide to summarise all of the areas of difficulty which might arise where alternative terms are canvassed, but we draw attention to the following important points:

20.1 Barristers will wish to take care to ensure that they do not assume duties or liabilities which are not covered by their professional indemnity insurance cover. In particular, it is essential that the barrister takes into account Clause 3.1(x) of BMIF's Terms of Cover, which excludes cover for "Claims or Disciplinary Proceedings in respect of any liability incurred under any contract, save to the extent that (a) 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....."

20.2 Examples of clauses which would potentially expose barristers to a greater liability than their BMIF cover, and which would therefore amount to misconduct unless additional insurance cover was obtained, include:

20.2.1 Clauses seeking to impose liability for the solicitor's loss of profits, for example if the solicitor loses the client because of negligent advice given in a particular case by a barrister:

20.2.2 Clauses seeking to make the barrister strictly liable for advice given (i.e. liable even in the absence of negligence/failure to take reasonable care):

20.2.3 Clauses seeking to make the barrister liable for loss suffered by clients of the solicitor other than those on whose behalf he is instructed, for example where the advice is of more general application than the specific case and is used by the solicitor in other contexts as a result.

20.3 BMIF Guidance on the impact of the contractual terms and insurance cover can be found at

<http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Guidance%20Note%20to%20Members%20-%20February%202013.pdf>

20.4 Consideration will have to be given to the suitability and effect of alternative terms in respect of matters such as the payment of fees; the authority of clerks; confidentiality/publicity; conflicts of interest; copyright; data protection; the retention and storage of documents; devilling/the use of pupils and dispute resolution.

20.5 Barristers should take particular care before agreeing that the “Authorised Person's” liability to pay fees is conditional upon their having received funds from the client. The barrister will wish to ensure that:

- 20.5.1 The Authorised Person cannot, without the barrister's informed prior consent vary, waive or reduce sums payable to the barrister
- 20.5.2 The Authorised Person's commercial interests – for example in relation to promises of future work – cannot prejudice the recovery of the barrister's fees
- 20.5.3 The Authorised Person keeps the barrister informed about the solvency of the client
- 20.5.4 The Authorised Person provides full and timely information to the barrister about whether fees have been paid on account in full and on time, and
- 20.5.5 If the Authorised Person refuses to take primary liability for the barrister's fees, the barrister may prefer to be paid by the client directly, so long as arrangements are agreed which are in accordance with the BSB Handbook.¹¹

20.6 Heads of Chambers must ensure that no member of chambers or pupil is under any improper commercial pressure to accept onerous or unfairly disadvantageous terms, for example because an Approved Person is a regular client of chambers.

20.7 Chambers will need to implement systems to ensure that:

- 20.7.1 Administrative teams are aware of the risks associated with contracting on alternative terms and so be able to identify the boundaries as to what may be agreed, and
- 20.7.2 The terms upon which instructions have been accepted are properly recorded and retained.

21. The Law Society issued a Practice Note on the 24 January 2013 to their members, making a number of detailed comments on the terms of the new Contract and suggesting alternative clauses. The Law Society's proposals could give rise to some serious potential difficulties and barristers and clerks are strongly advised to read the Bar Council's guidance on this matter. This guidance can be found on the Bar Council's website, <http://www.barcouncil.org.uk/for-the-bar/fees-collection/guidance-on-law-society's-practice-note/>

¹¹ In particular Rules rc73-75 of the BSB Handbook concerning handling of client money etc.

When can you NOT use the new Standard Terms?

21. The new Standard Terms are for use where instructions given by a person authorised by the Law Society or SRA under Section 18(1)(a) of the Legal Services Act 2007 to carry out reserved legal activities, almost all of whom will be solicitors.

22. The new Standard Terms cannot be used:

22.1 Where the lay client is to be party to the contract unless the lay client is the Authorised Person, or

22.2 For CFAs, unless the CFA specifically provides for the new Standard Terms to apply (clause 2.4.2 of the new Standard Terms), or

22.3 For publicly funded matters where the barrister is paid direct by the Legal Services Commission as part of the Community Legal Service or as part of the Criminal Defence Service or by the Crown Prosecution Service.¹²

23. However, the barrister and the instructing party are free to adapt the new Standard Terms to meet the above situations if they so agree (or may use different terms), provided that the barrister does not thereby infringe any other provision of the BSB Handbook and subject to the observations made above.

¹² However, a barrister may still make complaints to the Bar Council about the solicitors' failure to deal with publicly funded matters covered by full publicly funded certificates under a new complaints scheme in (see page 18 of this Guide).

CHAPTER 2: Informing solicitors and the Authorised Person of the new Terms

Notification of use of the new Standard Terms

24. It has always been commonsense and good practice for chambers to advise their professional clients of the terms on which their members provide services. Barristers are advised to draw attention to the application of the new Standard Terms to particular instructions at the first available opportunity, otherwise the new Standard Terms might not apply. If no alternative terms have been agreed in the meantime, it should be made clear on what terms the instructions are accepted no later than when notification is provided to the solicitor of the acceptance of the instructions.

25. Barristers are again reminded that the Provision of Services Regulations 2009 require publication of their normal terms of engagement. Guidance on the Regulations can be found on the Bar Council's website by searching "Provision of Services Regulations 2009" or at the following address: <http://www.barcouncil.org.uk/provision-of-service-regulations-2009>

26. Accordingly, if chambers are expecting that the Standard Terms will be their usual terms of engagement, they should consider their obligation to publish them on, for example, their website, as well as referring to them when confirming the acceptance of instructions.

CHAPTER 3: Responsibilities

Liability to pay

27. Clause 12 of the new Standard Terms provides that payment should be made within 30 days of the delivery of the barrister's fee note or invoice and that interest can be charged, in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.

28. There is no obligation on the barrister to charge interest if fees are paid late or (where interest might be claimed) to claim it.

29. The former 'Terms of Work' provided that the solicitor was liable to pay irrespective of whether the solicitors' practice has been put in funds by the lay client. That provision has not been replicated in the new Terms as it is considered unnecessary.

Is counsel accepting the instructions?

30. The new Standard Terms are intended to apply when the first instructions in a matter are received (and accordingly include obligations relating to the consideration and acceptance of the instructions). The new Standard Terms are also intended to apply to all instructions received thereafter in the same matter.

31. Clause 4 of the new Standard Terms provides that the barrister, having had a reasonable time to review the instructions, must inform the instructing Authorised Person whether or not he accepts the Instructions.

32. Despite having accepted the instructions, if the barrister comes to the conclusion that the requirements of the Money Laundering Regulations have not been satisfied, he may withdraw any acceptance of those instructions without incurring liability (clause 4.4) and it is strongly advised that the client is informed at the earliest opportunity of why the barrister is withdrawing (provided that doing so does not contravene the Regulations).

33. It is obviously important that the communication with the Authorised Person regarding the instructions is clear:

33.1 Chambers should ensure that an acknowledgement of receipt of papers cannot be taken as acceptance of instructions.

33.2 Communication of the acceptance or refusal of the instructions must be clear and capable of justification in the event of a subsequent dispute.

34. Clause 4 of the new Standard Terms should be read in conjunction with the BSB Handbook to ensure that any refusal of the instructions is not a breach of the Code.

35. If the solicitors/Authorised Persons are named on the Advisory List of Defaulting Solicitors and other Authorised Persons 2012, the barrister is free to accept or refuse the instructions, as he/she sees fit, without contravening the Cab Rank Rule.

What are the Authorised Person's obligations?

36. Clause 3 spells out the obligations of the Authorised Person regarding the issue and acceptance of instructions. It is the Authorised Person's responsibility:

36.1 To provide adequate instructions, in sufficient time and ensuring that the relevant documentation and information is included. Requests from the barrister for further information or instructions must be responded to promptly and the Authorised Person must inform the barrister immediately if there is reason to believe that any of the information or documentation is untrue or inaccurate.

36.2 If all or any of the instructions require to be dealt with urgently, then the barrister must be informed of the urgency, and the reason for the urgency, at the time of the delivery of the instructions. In addition, the instructions themselves must be marked "urgent". A barrister is entitled to decline the instructions if he is unable to comply with the urgency required.

What are the barrister's obligations?

37. Clause 4 refers to the Receipt and Acceptance of Instructions (see 'Is Counsel Accepting Instructions?' above). The barrister must review the instructions within a reasonable time of receipt and must advise the Authorised Person whether or not he/she accepts the instructions.

38. Clause 5 details the need for the barrister to keep confidential all information provided to him/her unless he/she is obligated or permitted to disclose it. To the extent that such information is already in the public domain, the barrister may disclose in his/her marketing and similar materials information relating to the case. Where the information is not already in the public domain, the barrister may only refer to it for marketing purposes in a form which preserves the lay client's privilege and confidentiality and (where required) with the lay client's consent.

39. Clause 6 provides that the parties can correspond by means of electronic mail unless otherwise directed. The parties must use reasonable procedures to ensure security.

40. The barrister is the data controller for the purposes of the Data Protection Act and clause 7 makes clear his/her responsibilities as regards data protection.

41. The barrister has a contractual obligation to provide all information reasonably required to enable the lay client and/or the Authorised Person:

41.1 To have an assessment of the costs incurred, and

41.2 To obtain and enforce any order or agreement to pay costs against any third party (Clause 8.4).

42. Clause 8 imposes a contractual obligation upon the barrister to provide the services required by the instructions in a timely manner and using reasonable skill and care. The clause permits the barrister to delegate the provision of any part of those services but specifies that the barrister remains responsible for the work. This provision is to allow devilling or preparation of drafts by pupils; it is not intended to allow other types of delegation of the work required.

43. Clause 10 provides that, so far as such exclusion is not prohibited by law, the barrister is not liable for any loss or damage suffered by any person other than the lay client, nor for any loss or damage caused by inaccurate, incomplete or late instructions

Intellectual Property Rights

44. Clause 9 makes clear that all copyright and other intellectual property rights attaching to the barrister's work product belongs to and remains with the barrister. Although the Authorised Person and the Lay Client have the right and licence to use the barrister's work product for the particular case and purpose for which it was prepared, neither are entitled to use copies of the barrister's work product for other purposes without the express written permission of the barrister.

Should the barrister retain instructions and records?

45. The new Standard Terms do not affect the fact that the papers sent by the Authorised Person to the barrister belong to the authorised person, who can therefore ask for the return of those papers at any time.

46. Subject to the provisions in Clause 5 concerning confidential information and publicity, the barrister can retain for the purposes of his records copies of the instructions and written advices. The Bar Council strongly urges barristers to do this, as such information would be required, at the least, to substantiate any claim for his fees should the barrister find himself/herself in the position of having to sue for them and/or substantiate the level of fees claimed.

CHAPTER 4: Fees

47. Clause 11 provides that, subject to the BSB Handbook, a barrister may agree to provide services for a fixed fee or an hourly rate or any such other basis as agreed between himself and the instructing Authorised Person. The new Standard Terms also provide that if fees are agreed at an hourly rate, that rate can be subject to a reasonable periodic review by the barrister.

48. If, when the barrister wishes to carry out such periodic review, the increase in hourly rate and effective date cannot be agreed with the Authorised Person, the barrister is entitled to treat the contract as terminated, subject of course to his obligations to the client under the BSB Handbook.

49. If no fee or hourly rate is agreed, then the barrister is entitled to charge a reasonable fee.

50. Clearly it is very important that any terms agreed as regards fees are clearly documented in case the barrister needs to take enforcement action to recover unpaid fees.

CHAPTER 5: Billing, Payment and Interest

51. Clause 12 refers to billing, payment and interest and uses the word "invoice". It is important to note that the definition of "invoice" in the new Standard Terms includes a fee note not amounting to a VAT invoice (clause 1.2). Barristers may therefore continue to issue fee notes (followed by the issue of a combined receipt and VAT invoice on receipt of payment), as is the current practice¹³, or they may chose instead to issue VAT Invoices from the outset, but should be aware of the tax consequences of doing so, for example that the barrister's obligation to account for VAT shown on a VAT invoice will arise at the date of invoice, rather than the date of receipt of payment, as is the case with traditional fee notes.¹⁴

52. Clause 12.2 requires the barrister to deliver the invoice as soon as reasonably practical and in any event not more than 3 months from the earliest of:

52.1 A request by the Authorised Person, or

52.2 Notification by the Authorised Person that the case has been settled or otherwise concluded, or

52.3 Termination of the Agreement.

53. Barristers and clerks should be aware that proceedings for detailed assessment of costs must be commenced not more than three months after the date of the relevant judgment, direction, order or award, so that the barrister should endeavour to provide the invoice more quickly than three months to allow sufficient time to prepare the documentation for detailed assessment.

54. Clause 12.3 provides that the invoice must set out an itemised description of the services provided by the barrister and the fees charged, together with details and cost of any disbursements incurred, and VAT (if charged). Although not spelt out in the new Standard Terms, it is obviously important that the invoice contains the Authorised Person's name and address together with the name and reference, if any, of the individual who provided the instructions, the barrister's address, the barrister's VAT registration number (if any), the date of the invoice, the name of the case and the barrister's reference number for it.¹⁵

55. Clauses 12.4 - 12.6 provide that the invoice must be paid within 30 days of delivery, without any set off. Failure to pay within that time will entitle the barrister to charge interest in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 and/or sue for payment. In addition, subject to the barrister's obligations to the Court and the other BSB Handbook provisions,

¹³ Clause 12.5 provides that where a barrister has been paid on a fee note, the barrister must provide a VAT invoice following receipt of payment at the request of the Authorised Person, as is the current customary practice of the Bar.

¹⁴ This potential disadvantage can be avoided by most barristers by electing for cash accounting for VAT purposes. See paragraphs 321-331 of the Bar Council's Taxation and Retirement Benefits Guidance, seventh edition 2013, at http://www.barcouncil.org.uk/media/171635/taxation_guidance_7th_edition.pdf

¹⁵ Where the invoice is also a VAT invoice, it must also comply with the relevant VAT Regulations concerning the contents of a VAT invoice.

the barrister is entitled to refrain from doing any further work on the case unless payment for that further work is made in advance.

CHAPTER 6: Termination of Contract

56. Under Clause 13, the Authorised Person can terminate the contract at any time, after giving written notice. The barrister can terminate the contract by written notice if he is entitled to do so under Rules rc25-27 of the BSB Handbook or is otherwise able to withdraw from the case, provided that doing so does not conflict with his obligations under the BSB Handbook. It is obviously sensible for the barrister to explain in writing, at the earliest opportunity, the grounds upon which he has terminated the contract.

CHAPTER 7: Notices and Delivery

57. Clause 18 provides that notices or other written communication may be sent electronically (including fax and email).

CHAPTER 8: Challenges to the Fees

58. As mentioned above, Clause 12.4 provides that invoices should be paid without any set-off (whether by reason of a complaint made or a dispute between the barrister and the Authorised Person).

59. If there is a dispute, then Clause 19 provides that it can be resolved by any dispute resolution procedure agreed between that the barrister and the Authorised Person. In addition, the Joint Tribunal procedure, which is operated jointly by the Bar Council and the Law Society, without charge, still currently continues for fee disputes between barristers and solicitors. Information on the Joint Tribunal service can be found on the Bar Council's website at <http://www.barcouncil.org.uk/jointtribunalservice>

CHAPTER 9: Making a complaint to the Bar Council regarding unpaid Fees

60. The scheme for placing solicitors/Authorised Persons on the advisory 'List of Defaulting Solicitors and other Authorised Persons 2012' is similar to the old 'Withdrawal of Credit Scheme' except that barristers are not required to refuse instructions from solicitors or Authorised Persons on the advisory 'List of Defaulting Solicitors and other Authorised Persons 2012', and instead they may choose whether or not to accept such instructions.

61. Complaints can be made against solicitors and Authorised Persons in the following situations:

61.1 The barrister has obtained a judgment for fees against the solicitor or Authorised Person

61.2 The solicitor has not paid a joint tribunal award

61.3 Where fees are covered by a full publicly funded certificate but remain unpaid due to the failures of the instructing solicitor. The solicitor may have failed to submit the final claim to the Legal Services Commission or, where there is eventually no claim on the legal aid fund because costs are to be recovered from the other side, the instructing solicitor fails to recover those costs or pass on the monies received to the barrister so that the barrister remains unpaid.

and

61.4 Where instructions were received before 31 January 2013 on the basis of the former 'Terms of Work', a complaint about non-payment of fees for that work may be made without having first to obtain a judgment or a joint tribunal award.

62. On receipt of a complaint regarding unpaid fees, the Chairman of the Bar Council will write to the solicitor/Authorised Person in question requiring payment to be made. Normally, the Chairman of the Bar Council will place the solicitor/Authorised Person on the advisory 'List of Defaulting Solicitors and other Authorised Persons 2012' if two or more such complaints have been made, unless the Chairman is persuaded that it would be inappropriate to do so.

63. The names of solicitors/Authorised Persons on the Withdrawal of Credit List as at 31 January 2013 will automatically be transferred to the advisory 'List of Defaulting Solicitors and other Authorised Persons 2012'.

64. The Rules relating to the advisory 'List of Defaulting Solicitors and other Authorised Persons 2012' and the Scheme for Complaining to the Bar Council for Publicly Funded matters on the Bar Council's website can be found on the Bar Council's website <http://www.barcouncil.org.uk/listofdefaultingsolicitors>

Procedure for making a complaint to the Bar Council

Non-payment of a judgment or a joint tribunal award

65. A complaint form must be completed and sent to the Bar Council's Fees Collection Department, together with a copy of the judgment or joint tribunal award, a copy of the fee note and copies of any relevant correspondence since the judgment or award.

Non-payment of fees (instructions received before 31 January 2013)

66. The appropriate version¹⁶ of Letter A and then Letter B, as prescribed in Schedule C to the 'Rules Relating to the List of Defaulting Solicitors and other Authorised Persons 2012', must be sent to the solicitor.

67. Letter A¹⁷ must be sent not earlier than one month after the first fee note to which the outstanding fees relate and letter B must be sent not earlier than three months after the first fee note to which the outstanding fees relate.

68. A complaint form must then be completed and sent to the Bar Council's Fees Collection Department, together with a copy of the fee note and copies of all relevant correspondence.

Non payment of fees – cases having full publicly funded certificates

69. 'The Scheme for Complaining to the Bar Council for Publicly Funded Matters', which is on the Bar Council's website <http://www.barcouncil.org.uk/listofdefaultingsolicitors>, applies and relates to matters covered by full publicly funded certificates where the barrister should be paid direct by the Legal Services Commission but remains unpaid due to the failures of the instructing solicitor. The solicitor may have failed to submit the final claim to the Legal Services Commission or, where there is eventually no claim on the legal aid fund because costs are to be recovered from the other side, the instructing solicitor fails to recover those costs or pass on the monies received to the barrister so that the barrister remains unpaid. This provision continues the present scheme operated under the Withdrawal of Credit Scheme though with the added advantage that the change to the Cab Rank Rule enables a barrister to refuse such publicly funded work if the instructions are from solicitors named on the List of Defaulting Solicitors.

70. Letter A and then Letter B, as prescribed in Schedule to 'The Scheme for Complaining to the Bar Council for Publicly Funded Matters' must be sent to the solicitor.

¹⁶ One version is for privately funded cases (including those cases which are funded by the Legal Services Commission but where the solicitors pay counsel e.g. for Controlled Legal Representation Cases) and one is for cases which have full publicly funded certificates where counsel should be paid direct by the Legal Services Commission.

¹⁷ In privately funded cases only, letter A may include the optional paragraph charging interest on the unpaid fees.

71. Letter A must be sent not earlier than one month after the first fee note to which the outstanding fees relate and Letter B must be sent not earlier than three months after the first fee note to which the outstanding fees relate and not earlier than two months after Letter A was sent.

72. A complaint form must then be completed and sent to the Bar Council's Fees Collection Department, together with a copy of the fee note and copies of all relevant correspondence.

For queries or further information: 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)

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amended February 2014 on introduction of BSB Handbook



The General Council of the Bar is the Approved Regulator of the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

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