

Combar/CLLS
Guidance note on the Agreement for the Supply of Services by a Barrister in a Commercial Case

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Introduction

As a result of regulatory changes, barristers enter into contracts with their instructing solicitors more frequently than was traditionally the case. In order to assist barristers and solicitors in commercial cases, the City of London Law Society and the Commercial Bar Association have negotiated specimen terms (the "Terms") that can, if the parties so wish, be used as a basis for discussions in relation to terms to be agreed for any particular case. Version 1 of the Terms was first published in January 2013, but was succeeded by version 2 with effect from 1 January 2014. Version 2 endeavoured to build on practical experience of using the Terms, aimed to make clearer the effect of certain terms and also to reflect certain regulatory changes. Certain further changes were made in June 2014 in version 2.1, which was succeeded in April 2018 by version 3.0 with amendments to take into account the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which comes into force on 25 May 2018.

It is envisaged by Combar and the CLLS that where barristers and solicitors contract on the basis of the Terms, it is the Terms in force at the time of making the Agreement to supply Services that will apply to those Services. Accordingly, we would expect barristers and solicitors contracting on the basis of the Terms from 25 May 2018 to be contracting on Version 3.0 (unless and until they are replaced).

It should be emphasised that these terms have not been agreed by the chambers or firms which are members of Combar or CLLS. No barrister, from any chambers, and no solicitor, from any firm, has agreed to be bound by these terms if proffered in any particular case.

Background

Until the coming into force of section 61(1) of the Courts and Legal Services Act 1990, a barrister was unable to enter into a contract with the barrister's instructing solicitors or with the barrister's lay client. One consequence was that a barrister was unable to sue for unpaid fees.

In 2001, the Bar's Code of Conduct (the "Code") was changed in order to allow barristers to agree contracts in writing with solicitors. Barristers were not, however, required to enter into contracts and, in particular, barristers were not obliged by the "cab rank" rule to accept work on a contractual basis. The *Terms of work on which Barristers Offer their Services to Solicitors* set out in Annex G1 to the Code expressly provided that they did not create legal relations. As a result, barristers continued, in the main, to be instructed on a non-contractual basis.

From 31 January 2013, the Code gave effect to a decision by the Legal Services Board of 27 July 2012, whereby the cab rank rule obliges a barrister to undertake work either on the basis of the Standard Contractual Terms in Annex T1 to the Code or on the basis of standard terms of work published by the barrister. The Standard Contractual Terms in Annex T1 (now the

Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012, published on the Bar Standards Board's web-site) necessarily cover a wide range of the possible work by a barrister and, as a result, may not be suitable for commercial work. Barristers in specialist fields, such as commercial work, may therefore wish to adopt their own terms.

It would be costly and time-consuming for all barristers to draft their own terms, and for barristers and solicitors to negotiate contracts for individual cases, starting in each case with a blank sheet of paper. For that reason, Combar and the City of London Law Society have negotiated the Terms, which are available to solicitors and barristers should they wish to use them. Version 1 of the Terms was first published in January 2013 but is now succeeded by version 2, which builds upon a year's practical experience of using the terms and suggestions made to Combar and the CLLS as to amendments and clarifications that would be useful. Version 2 also reflects the fact that the Code was replaced on 1 January 2014 by part 2 of the Bar Standards Board's Handbook.

The Schedule to this Guidance sets out the principal changes between versions 1 and 2 of the Terms. The only changes between versions 2.1 and 3.0 are to clause 19.5, regarding data protection (see below).

No one is, or should feel, obliged to use the Terms, which can only offer a starting point for negotiations, hopefully saving the parties time and effort in those negotiations. Some, perhaps all, of the provisions in the Terms will not be appropriate for particular cases; additional terms may be needed; uncertainties and ambiguities may be identified. Individual cases will continue to require individual treatment, and it is the responsibility of solicitors and barristers to ensure that what they agree is appropriate for any particular case, having proper regard for the interests of their shared lay client.

Solicitors instruct barristers on behalf of their clients. The Terms set out the agreement between a barrister and a solicitor. With one exception (payment Basis C discussed below) the lay client will not be a party to the agreement incorporating the Terms. Both solicitors and barristers accept that their primary obligations are (aside from the duties to the Court) to their lay clients, rather than to each other.

This guidance note explains briefly how the Terms are intended to work in practice. The explanation in this note is not comprehensive. References to clauses below are references to clauses of the Terms.

The Terms are not appropriate for conditional fee or damages-based agreements.

Entering into an agreement incorporating the Terms

The engagement of a barrister should in practice be preceded by a discussion between the solicitor and the barrister (including, for these purposes, the barrister's clerk) in order to explain

the nature of the work, to ascertain the barrister's availability, to allow possible conflicts of interest to be checked and, perhaps, to negotiate fees.

If the barrister and solicitor wish to contract on the Terms, this may be achieved by the solicitor and the barrister completing the front sheet of the Terms and signing it. Alternatively, it may be achieved by an email exchange confirming that the barrister and the solicitor intend to be bound by a contract incorporating the Terms, and setting out the information required by the front sheet of the Terms, together with any amendments agreed. A barrister's clerk has authority for these purposes to enter into an agreement incorporating the Terms on behalf of a barrister.

The information referred to on the front sheet of the Terms that is needed in order to form a contract between the barrister and the client below is as follows:

- the name of the barrister
- the name of the instructing solicitor
- sufficient details of the case
- the payment basis (see below)

Other terms may also be required depending upon the basis upon which the barrister is instructed (eg the barrister's hourly rate, minimum insurance cover and liability cap).

In addition, the name of the lay client should also normally be provided, and must be provided if payment is to be made on Basis C or Basis D (clause 2.4; see below). The barrister and the solicitor may also agree additions, deletions or other amendments to the Terms.

If payment is agreed on Basis C, the lay client must also sign the agreement or otherwise confirm in writing its agreement to be bound by the Terms (clause 2.2). If payment is to be made on another Basis, the lay client is not a party to the agreement but may still enforce the Terms under the Contracts (Rights of Third Parties) Act 1999 (clause 4.4). The Terms do not limit any rights the lay client would otherwise have as a matter of the general law (clause 12.3).

The Services

The precise services that the barrister is engaged to perform should in general be set out, or confirmed, in written instructions sent to the barrister (clause 2.3). Solicitors must ensure that instructions are adequate to enable the barrister to carry out the work requested (clause 5.1). The barrister will carry out the work requested within a reasonable time, having regard to the urgency and nature of the instructions. Instructions that are urgent should be marked as such or otherwise expressly stated to be urgent (clause 3.5). In practice, the timescale required for any work should be discussed at the outset.

Instructions may also state whether the barrister is being instructed for a single piece of work (eg to advise on a point of law or to appear at a single hearing) or whether it is anticipated that the barrister will be instructed for the duration of the case in question.

Particular hearings

If a barrister is instructed for a particular hearing, then it is the barrister's obligation to appear at that hearing. It is never acceptable for a barrister voluntarily to accept more than one booking for the same time without the informed consent of the solicitor making the second booking. However, it is important for solicitors and clients to be aware that circumstances can occasionally arise where even though the barrister has been booked for a particular hearing, other professional obligations may prevent the barrister from being able to carry out the booked hearing without fault on the barrister's part - for example, where a trial goes on longer than expected. In such circumstances, the barrister may terminate the agreement under clause 16.3.

The barrister's personal responsibility

A solicitor who instructs a barrister expects the barrister to carry out the work concerned personally and not to subcontract the work to others (clause 6.1). If a barrister needs assistance or if the barrister considers that it would be sensible for someone else to be engaged in relation to the work, the barrister should discuss this with the solicitor.

This is not, however, intended to prevent a barrister making proper use of a pupil who is in training with the barrister's chambers. Nor is it intended to prevent a barrister from seeking the assistance of another barrister in order, for example, to check certain points of law or to locate comment on a particular authority. In doing this, however, the barrister must comply with the barrister's obligations of confidentiality (clause 10), and will remain responsible in full for the performance of the work the barrister is instructed to undertake.

Clause 10.3 of the Terms has been amended to clarify that barristers may disclose information to pupils and mini-pupils. However, the Barrister will be strictly liable for any breach of confidence by the pupil or mini-pupil.

The barrister must exercise reasonable skill and care in supplying the services, subject to and in accordance with the Code (clauses 3.2 and 3.3). This reflects the obligation the barrister owes at common law with regard to performance of the barrister's work.

Payment

Historically, a solicitor has been personally responsible for a barrister's fees regardless of whether the solicitor received payment from the lay client. The Terms retain this as an option (Basis A) but also offer three other options (Basis B, Basis C and Basis D: clause 9). In order to enter into a contract, the barrister and solicitor must select one of these Bases. The Terms do not set out a default Basis that will apply in the absence of the choice by the parties.

Basis A is the traditional basis (clauses 9.4 and 9.5). The solicitor will be liable to the barrister to pay the barrister's fees within 30 days of receipt of a fee note sent by the barrister in accordance with the Terms. The solicitor must pay the barrister regardless of whether or when the solicitor is paid by the lay client.

Basis B also makes the solicitor personally liable to pay the barrister's fees, but only if the solicitor is first paid by the lay client or the barrister is unable to collect the fees from the lay client for reasons connected with the solicitor's fault (clauses 9.6 to 9.12). The solicitor must endeavour to collect the barrister's fees in the same manner that the solicitor collects the solicitor's own fees and must alert the barrister if the solicitor has reason to believe that the lay client may be unable or unwilling to pay the barrister's fees (clause 9.10). If the lay client pays the solicitor in respect of the barrister's fees, the solicitor must pay the barrister within five business days of receipt of that payment. If the lay client does not pay the barrister's fees to the solicitor, the barrister may request an assignment of the claim against the lay client in respect of the barrister's fees so that the barrister can pursue the lay client personally. The solicitor must assist the barrister in this, including by taking any steps regarding the delivery of bills required by the Solicitors Act 1974. Any assignment is likely to be an equitable assignment. Solicitors should ensure that their agreements with their lay clients permit assignment.

Basis C provides for the lay client to have direct responsibility to the barrister for payment of the barrister's fees (clause 9.13 to 9.16). The solicitor will negotiate the barrister's fees on behalf of the lay client (in respect of which the solicitor provides a warranty of authority: clause 18.2), but has no responsibility for payment of the barrister's fees. The barrister will send fee notes directly to the lay client and will be paid directly by the lay client. In order to create a contractual obligation on the lay client to pay the barrister's fees, the lay client must therefore be a party to the agreement between the solicitor and barrister. The solicitor must ensure that the lay client understands that the lay client is entering into a contract with the barrister, the terms of that contract, and that the lay client will receive fee notes from the barrister and must pay any sums due directly to the barrister.

Basis D provides for fees to be agreed exclusively between the barrister and the lay client, with no involvement or liability on the part of the solicitor (clause 9.17). The agreement between the barrister and the lay client in relation to fees will be separate from the agreement between the solicitor and the barrister incorporating the Terms.

Whatever the Basis chosen, the level of the barrister's fees and how they should be determined is a matter for agreement (clause 7.1). The default position is that fees will be calculated on the basis of a reasonable hourly rate for the work in question (clause 7.2) and, for this purpose, the barrister should notify the solicitor of the barrister's hourly rates at the outset, which must also be included on the front sheet of the Terms (clause 7.3).

Clause 8.3 provides that if work ceases before the case has been completed, the Barrister will only be entitled to fees for work actually done, unless otherwise agreed. Obvious examples of circumstances in which the parties may agree fees are payable other than by reference to the actual work done are where the parties have agreed a brief fee or staged payments for a brief fee.

Conflicts of interest

A barrister must ensure before accepting instructions on a case that doing so will not lead to the barrister having any conflict of interest (clause 11.1).

Where a barrister accepts instructions notwithstanding a conflict of interest, the barrister will be liable in damages only where a relevant disciplinary panel has decided there was a conflict of interest (clause 11.3). The rationale behind this provision is that a barrister may be unfairly hindered by reasons of privilege from disputing such allegations in Court. Clause 11.3 is without prejudice to the general jurisdiction of the Court to restrain any barrister (or solicitor) from acting where there is a conflict of interest (clause 11.4).

Liability

Nothing in the Terms is intended to affect the barrister's liability to the lay client or to the solicitor as a matter of general law, or vice versa (clause 12.3). The barrister must maintain insurance cover for that liability as required by the Code or, if higher, as agreed with the solicitor (clause 12.2).

Entering into a contract potentially gives rise to new liabilities against which barristers have traditionally been uninsured. Bar Mutual has confirmed that it will extend its cover to indemnify barristers against liabilities arising solely as a result of entering into a contract up to a limit of £100,000. This limit will be the subject of review in the light of Bar Mutual's claims experience over time. In accordance with this extension, clause 12.4 limits a barrister's liability to the lay client or the solicitor which is exclusively contractual to £100,000.

Termination

The solicitor or the lay client may terminate the agreement with the barrister at any time without any liability beyond liabilities already accrued (clauses 16.1 and 16.5). The agreement may also terminate if required under the BSB Handbook (clauses 16.2 and 16.3).

The barrister may terminate the agreement if the barrister is not paid fees due to the barrister, provided that the barrister first gives notice of the barrister's intention to terminate the agreement (clause 16.4).

Data Protection

Clause 19.5 addresses Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the "GDPR", the definition of which is intended to encompass any re-enacted and amended version of this Regulation that is applicable in England and Wales following the UK's withdrawal from the European Union), which came into force on 25 May 2018, and the Data Protection Act 2018 (the "Act"). At the date of publication of this Guidance, the Act has not been enacted; this Guidance assumes that no material amendments are made to the current bill.

The GDPR and the Act impose extensive obligations on "controllers" of "personal data" and in relation to the "processing" of that data. By sending personal data with Instructions, the Solicitor is likely to be processing that data, and on receipt of the data the Barrister is likely to become a controller and therefore subject to the provisions of the GDPR and the Act.

The Terms confirm that, if the Lay Client is an individual, the Solicitor consents on the Lay Client's behalf to the Barrister processing personal data of the Lay Client. With regard to personal data about others, the Solicitor and the Barrister must act in accordance with the GDPR and the Act, including by implementing appropriate technical and organisational measures to ensure that processing is performed lawfully. They may be able rely on, for example, one or more of the following provisions in order to process personal data: article 6(1)(b) of the GDPR (processing necessary for the performance of a contract to which the data subject is party – though this may only apply where clause 9.16 of the Terms applies; article 6(1)(f) of the GDPR (processing necessary for the legitimate interests pursued by the controller or by a third party); or article 9(2)(f) of the GDPR (processing necessary for the establishment, exercise or defence of legal claims).

In some circumstances, the Solicitor and the Barrister may be joint controllers of personal data (perhaps with the Lay Client) within the meaning of article 26 of the GDPR. These circumstances may include the drafting of letters or witness statements, into which considerable input is received from both Solicitor and Barrister and which contains personal data of various data subjects. If the Solicitor and the Barrister are joint controllers, they are obliged to determine in a transparent manner their respective responsibilities for compliance with their obligations under the GDPR, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in articles 13 and 14, by means of an arrangement between them. Clause 19.5 sets out an arrangement, placing individual responsibility on the Solicitor and the Barrister for the processing each undertakes, for the implementation of appropriate technical and organisational standards and as regards the exercising of the rights of the data subject. However, it places responsibility on the Solicitor to comply with articles 13 and 14 of the GDPR. These articles oblige the data controller to provide a "data subject" with certain information. This obligation does not apply to personal

data that consists of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings (paragraph 19 of Schedule 2 to the Act).

The Terms are not appropriate if the Barrister is merely a "processor" of personal data on behalf of the Solicitor or Lay Client within the meaning of article 28 of the GDPR. If that is the case, more detailed contractual provisions are required in order to comply with the GDPR and the Act.

The Terms may also not be appropriate for use in circumstances where the data concerning the data subject falls within the special categories of personal data set out in article 9 of the GDPR (ie personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, or the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation). Such circumstances should be considered on a case by case basis.

Optional clauses

The solicitor and the barrister may agree such additions to the Terms as they wish. Clause 20 sets out certain optional clauses the parties may wish to consider and which are referred to in paragraph 7 of the front sheet.

First, the parties may agree that the barrister will maintain minimum insurance cover in a particular sum (clause 20.2). This will be a matter for specific negotiation between the solicitor and the barrister.

Secondly, they may agree to limit the barrister's liability to a particular sum, chosen by reference to the circumstances of the case and the level of insurance cover reasonably available to the barrister (clause 20.3).¹ This general limitation on the barrister's liability is intended to apply to claims by the lay client as well as to claims by the solicitor. The solicitor should therefore ensure that the lay client is aware of the limitation and agrees to it.

Thirdly, they may agree that monies on account should be obtained from the lay client and held either by the solicitor or by Bar Services Company Limited, which trades under the name BARCO (barristers are not permitted to hold client monies themselves) (clauses 20.4 and 20.5). BARCO has issued guidance and has standard terms upon which it holds money, which solicitors will need to consider carefully if considering the use of BARCO.

Fourthly, they may agree that the barrister's work product may be stored for future reference in the solicitor's knowhow system (clause 20.5). This must be done in accordance with The Law

¹ The Bar Council has given guidance to barristers on limiting liability at <https://www.barstandardsboard.org.uk/code-guidance/the-extent-to-which-a-barrister-can-limit-their-indemnity-insurance-liability/>

Society's guidance entitled "Use of Counsel's Opinions - copyright and confidentiality". The barrister has no liability arising from use of the barrister's work produce as a result of its storage in the solicitor's knowhow system.

The parties may, of course, agree any further terms appropriate for the particular case.

Combar/CLLS

Combar, CLLS and anyone who has drafted, negotiated and/or reviewed the Terms and this note accept no liability whatsoever to anyone for any loss howsoever arising whether caused by negligence or otherwise.

First Edition: 24 January 2013

Second Edition: 1 January 2014 (revised 23 June 2014²)

Third Edition: 27 April 2018

² Changes at the beginning of clause 20.3 and to clause 12.3, as set out in the Schedule.

Schedule
Principal changes between versions 1.4 and 2.1 of the Terms

| Clause in version 1.4 | Clause in version 2.0 | Change |
|-----------------------|-----------------------|---|
| Cover sheet | Cover sheet | Addition of paragraphs 7(d), (e) and (f) reflecting new optional clauses in clause 20. |
| Clause 1.2 | Clause 1.2 | Change of definition from the Code to the BSB Handbook (and corresponding changes in the rest of the Terms) following the introduction of the BSB Handbook on 1 January 2014. |
| Clause 3.4 | Clause 3.4 | Addition of "if the Instructions are in writing or otherwise expressly stated to be urgent" to cover the possibility that Instructions might not be in writing. |
| Clause 9.4 | - | Deleted because it duplicated provisions already expressly covered under each of the payment bases. |
| Clause 9.11 | Clause 9.10 | Additional words at the end of the clause clarifying the circumstances in which the solicitor must inform the barrister if the solicitor has reason to believe that the lay client will be unable or unwilling to pay the barrister's fees. |
| Clause 9.12 | Clause 9.11 | Additional requirements on the solicitor to assist the barrister if the barrister takes an assignment of the claim against the lay client for the barrister's fees, including a requirement to deliver a bill of costs in accordance with section 69 of the Solicitor's Act 1974. |
| - | Clause 9.12 | New clause providing that if the barrister's claim against the lay client fails, the solicitor will pay the barrister's fees to the extent that the failure arose from the solicitor's negligence and was not caused by any breach of duty by the barrister. |
| - | Clause 10.2(e) | New sub-clause allowing the barrister to disclose confidential information to a pupil or mini-pupil. |
| - | Clause 10.3 | New clause making the barrister strictly liable for any breach of confidence by a pupil or mini-pupil to whom the barrister has disclosed confidential information. |
| - | Clause 10.4 | New clause requiring the barrister to notify the solicitor if the barrister receives a request for disclosure of confidential information. |
| - | Clause 11.4 | New clause clarifying that clause 11.3 limits the ability of the lay client or solicitor to claim damages but not to seek an injunction to prevent the barrister continuing to act if a conflict of interest arises. |
| Clause 18.1 | Clause 18.1 | Addition at the end of the clause: "in accordance with the terms (including the payment schedule) agreed between the Barrister and the Solicitor." |
| Clause 20.3 | Clause 20.3 | Additions at the beginning of the clause to clarify that any cap applies to all liability (including under clause 12.3, to which a corresponding amendment has been made) and at the end of the clause clarifying that, for claims against the barrister that sound only in contract, the limitation of liability in clause 12.4 continues to apply to those claims even if there is a higher overall cap on the barrister's liability. |
| - | Clause 20.4 | New optional clause if the solicitor is to hold monies on account of the barrister's fees. |
| - | Clause 20.5 | New optional clause if BARCO is to hold monies on account of the barrister's fees. |
| - | Clause 20.6 | New optional clause addressing storage of the barrister's work product in the solicitor's knowhow system. |

The only changes between versions 2.1 and 3.0 are to clause 19.5 in respect of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (see the text above on Data Protection).