

**CURRENT GUIDANCE**

## **The Public Access Scheme Guidance for Barristers**

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### Scope of this guidance

1. A barrister may accept instructions directly from or on behalf of a member of public, also known as a lay client (the “client”) (rS24 of the Scope of Practice section of the BSB Handbook). This is known as public access. In carrying out public access work a barrister must comply with the BSB Handbook and in particular the Public Access Rules which are at rC119-rC131 of the Code of Conduct section.
2. This document gives guidance on the interpretation of the Handbook and good practice. You should have regard to it in considering whether to accept and in carrying out public access instructions in accordance with the rules set out in the Handbook.

### Qualification requirements

3. Before you may accept public access instructions, you must:
  - (1) Hold a full practising certificate. If you have less than three years’ standing you must have a qualified person readily available to you to provide guidance, if necessary (see paragraph 5 below);
  - (2) Have undertaken and satisfactorily completed a Bar Standards Board approved training course. Details of such courses can be obtained from the BSB website;
  - (3) Notify the Bar Council of your intention to undertake such work; and
  - (4) Have insurance cover as required by the Handbook. BMIF cover satisfies this requirement.

### Additional requirements for barristers with less than three years’ standing

4. The prohibition on barristers with less than three years’ standing undertaking public access work has been removed. However there are two additional requirements with which a barrister under three years’ standing must comply.
5. You must have a qualified person available to provide guidance. A person shall be a “qualified person” for these purposes if they are public access accredited and have<sup>1</sup>:
  - (a) been entitled to practise and have practised as a barrister or have been authorised to practise by another approved regulator for a period (which need not have been as a person authorised by the same approved regulator) of at least six years in the previous eight years;

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<sup>1</sup> rS22, BSB Handbook

- (b) made such practice their primary occupation for the previous two years; and
- (c) been entitled to exercise a right of audience before every Court in relation to all proceedings.
6. You are also required to:
- (a) keep a log of the public access cases you have dealt with and record any issues or problems that have arisen; and
- (b) where possible and appropriate, seek feedback from public access clients.
7. A pro forma for logging cases is attached at Annex A. The purpose of this requirement is twofold:
- (a) Its primary purpose is as a tool to assist you to reflect upon and learn from your practice, (in this connection a barrister will need to consider whether seeking feedback from a client involved in an unsuccessful criminal case would be appropriate) and
- (b) to assist the Bar Standards Board in assessing whether the removal of the prohibition has introduced any unacceptable risk in to the process. Therefore the BSB will sample a selection of these logs to gauge the impact of the rule change.

### **Nature and scope of public access work**

8. A barrister may accept public access instructions in any area of practice. You are reminded that rC21.8 of the Handbook prohibits you from accepting instructions if you lack sufficient experience or competence to handle the matter. In a public access case you should remember that dealing directly with a client may be more difficult or demanding than acting for a professional client and you must be able to handle those demands.
9. Public access does not widen the types of work a barrister may do. You are performing the same functions as you would if you were instructed by a solicitor. Examples of the type of work you may do for a public access client are:
- advocacy;
  - drafting documents;
  - advising in writing or in conference;

- representation in alternative dispute resolution (ADR) such as mediation or arbitration;
- Negotiating on behalf of your client;
- Investigating and collecting evidence. You should however have regard to the BSB's 'Guidance on Self-Employed Practice', which is published on the BSB's website and provides guidance on investigating or collecting evidence and taking witness statements. In particular, you must not conduct a case in court if you have previously investigated or collected evidence in the case unless you reasonably believe that the investigation and collection of that evidence is unlikely to be challenged;
- Corresponding on behalf of your client. You may send letters on your Chambers' letterhead or faxes or emails. However, you must only conduct correspondence if you are satisfied it is in your client's best interests to do so and you have adequate systems, experience and resources for managing the correspondence (see rC130 and relevant guidance at gC24 and gC71). Bear in mind that solicitors' offices have systems for logging incoming and outgoing correspondence and dealing with urgent letters in the absence of the fee earner which your Chambers may not be able to offer.

### General restrictions

#### (A) Restriction on conducting litigation without authorisation

10. Public access does not put barristers on a par with solicitors. A key difference is that solicitors may conduct litigation on behalf of their client. A barrister in independent practice does not have the right to conduct litigation unless authorised by the BSB to do so. If you conduct litigation without authorisation you are not only breaching the Handbook but also committing a criminal offence under the Legal Services Act 2007.
11. The Legal Services Act 2007 defines the conduct of litigation as:
  - a. the issuing of proceedings before any court in England and Wales;
  - b. the commencement, prosecution and defence of such proceedings; and
  - c. the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).
12. The BSB takes the view that the following fall within this definition and therefore **you should refuse to do them if you are not authorised to conduct litigation:**

- issuing proceedings or applications;
  - acknowledging service of proceedings;
  - giving your address as the address for service;
  - filing documents at court or serving documents on another party; and
  - issuing notices of appeal.
13. You may advise your client on how to take any of these steps. For example you may advise on the procedure for lodging an appeal and you may of course draft the grounds of appeal. However the steps in question must be taken by the client as a litigant in person if you are not authorised to do them. Normally public access clients who are litigants in person will be expected to be able to perform the activities usually undertaken by an authorised litigator with little or no prompting. If this is not the case you must consider whether it is proper to act on a public access basis (see paragraphs 21 to 25 below). This consideration is particularly relevant when dealing with vulnerable clients. 'Vulnerable clients' is interpreted widely and may include clients who have English as a second language, who have mental or physical impairments or who are otherwise vulnerable eg because of their age, caring responsibilities or immigration status.
14. Certain activities at first blush look like they might fall within the definition of conducting litigation but in fact do not. This is generally because it is work that barristers have traditionally done when instructed by solicitors. The following are therefore **permissible if you are not authorised to conduct litigation**:
- Lodging documents for hearings. It is proper for you or your clerk to lodge certain types of documents for hearings, provided that they are ancillary to your role as an advocate. Barristers often draft the case summary, chronology, list of issues or position statement. There is nothing wrong with clerks or barristers lodging these sort of documents.
  - Skeleton arguments. Exchanging skeletons with an opponent or sending skeletons and bundles of authorities to the court is allowed. In a criminal case defence barristers often hand a defence case statement to the Crown or the court and this would also be permitted if instructed directly.
  - Covering applications to fix trial dates. Clerks regularly fix trial dates to ensure that the date is convenient for counsel instructed. This is permissible whether instructed by a solicitor and therefore also when instructed directly. Clerks making representations to the Masters in relation to hearing dates is

permissible for the same reasons.

- Court orders. Liaising with the other side or the court over the preparation of an order is something barristers often do and is allowed. Clerks regularly deal with the sealing of court orders and so this, too, is permitted.
- Discharging a duty or a courtesy to the court. For example a letter or e-mail to a judge explaining an absence from court or providing dates to avoid or corrections to a draft judgment.
- Signing a statement of truth. A statement of truth may be signed by a legal representative, which is defined as including a barrister (Civil Procedure Rules Part 2.3). Therefore you may sign a statement of truth on behalf of your client (*O'Connor v BSB* (2012) Visitors to the Inns of Court, August 17, unrep.). However you should ensure that the provisions of the Civil Procedure Rules are complied with before you do so, in particular Part 22 PD paragraph 3.8.

#### (B) Code of Conduct restrictions

15. The following are expressly prohibited by the Code of Conduct:

- Receiving or handling clients' money, except as payment for fees. The prohibition against holding clients' money means that a barrister cannot make disbursements on behalf of a client, for example by paying court fees or witnesses' expenses. (rC73-rC75, BSB Handbook).
- Undertaking the general management, administration or conduct of a client's affairs (rS25, BSB Handbook).

#### Public funding (legal aid)

16. In each case, before a barrister accepts a public access instruction, it is a Code of Conduct requirement to:

'Take such steps as are reasonably necessary to ensure that the client is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access.' (rC120.4, BSB Handbook)

17. If a client qualifies for legal aid it may be, and often will be, in their best interests to instruct a solicitor on a public funding basis. There may however be some situations where the client will prefer to instruct a barrister on public access – for example if their legal aid contributions would be higher than instructing a barrister

without a solicitor, or they want to instruct a more senior barrister, such as a QC, than they would be entitled to on legal aid.

18. It is important that the client makes an informed choice about public funding. In many cases it will be obvious from the nature of the case, or the nature of the client, that public funding is unlikely to be available. However in other cases you may take the view that it would be in the best interests of the client to explore their eligibility for legal aid. In those cases, you are likely to want to discuss this with them when you first meet and draw their attention to where they can find out more about legal aid and get help to assess their eligibility. Before accepting an instruction you will want to discuss this matter with the client to ensure that they understand the position regarding legal aid, have made an informed decision and that proceeding on a public access basis will be in their best interests.
19. Information about public funding is available to clients in the guidance for clients, which is available on the BSB's website at:  
  
<https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>
20. The model client care letter (see paragraph 33 below) explains that a barrister cannot be instructed directly on a legal aid basis, gives details of how the client can find out if they are eligible for public funding and the basis on which you can advise and represent them. Writing to your client in the terms set out in the model client care letter can therefore help to demonstrate that you have covered this matter with them.

### **Interests of the client and interests of justice**

21. You cannot accept public access instructions if you form the view that it is either in the best interests of your client or in the interests of justice for the client to instruct a solicitor or other professional client (rC120.3, BSB Handbook). This is a continuing duty which you must keep under review during the course of a case.
22. This decision is likely to depend both on the complexity of the case, the capability of the client and whether you are authorised to conduct litigation eg a well-resourced client, such as a large corporation, may be able to handle very complex litigation.
23. In making this assessment you are likely to reach one of three views:
  - The level of the case and the likely work involved is within the client's capabilities and there is no obvious reason why a solicitor or other professional client should be instructed.

- The case is of such complexity or has reached a stage that it is not in the client's interests or the interests of justice to instruct a barrister without a solicitor or other professional client. Having reached such a view you can no longer act on a public access basis. You would be able to act if instructed by a solicitor (or other professional client) and you can make recommendations as to who could act.
  - The case may well become complex and may involve work which the client cannot do, but you do not consider that a solicitor or other professional client needs to be instructed yet.
24. In every case you must make your client aware at the outset that there may be circumstances in which you will have to recommend that a solicitor (or other professional client) is instructed, and that you will have to withdraw if that advice is not heeded. There is a paragraph in the model client care letter (see paragraph 33 below) setting this out.
25. It is essential that barristers should consider at every point at which they are instructed whether a client needs to instruct a solicitor and to advise as soon as it becomes clear that this is the case. This is of particular importance where limitation periods are involved or where hearings are imminent. Barristers failing to do this may find themselves at risk of actions in negligence, findings of inadequate professional service by the Office of the Legal Ombudsman, or professional misconduct charges by the BSB.

### **Relationship with client**

#### **(A) Initial contact**

26. It is likely that initial contact will be by a telephone call or email between the client and yourself or your clerk, or the receipt of written instructions in Chambers. You are required to keep a record of the date that instructions were received, the name of the client, the name of the case and any requirement of the client as to time limits (rC128). As you will also need to send a client care letter you will need the client's address.
27. You may take the view that a preliminary meeting is required. This may be necessary to comply with the requirements of the Money Laundering Regulations (see paragraphs 72 to 75 below). If so, you should write to the client summarising those regulations and setting out what is required in order to satisfy the identification requirements. A preliminary meeting may be helpful to decide whether you will accept the instructions. It is open to you to accept instructions for the limited purpose of reading papers and advising whether you are able to perform substantive professional work; in such a situation it is open to you to make an

arrangement that you are paid a fee for doing so. If you decide to charge for the preliminary meeting, a client care letter should be sent to the client in the usual way, setting out the charge for the advice and any other work done and making it clear that you do not agree to do more in the first instance than assess whether or not you can assist the client. In many cases, you may consider that it is good client care not to charge for a preliminary meeting.

(B) Identifying and representing vulnerable clients

28. There are a number of factors which may make a client vulnerable and which may have implications for how you manage their case. Some of these factors may be obvious, for example a client may be very young or may not be able to speak English. Issues related to the protected characteristics listed in the Equality Act 2010 which may make a client vulnerable include:

Race

- Clients with English as a second, third or non-existent language.
- Asylum seeking or refugee clients who may have mental health issues such as post-traumatic stress conditions related to treatment (e.g. torture or persecution) in their home country.
- Immigration clients who may have been separated from their families or who are new to the UK, may be unfamiliar with the UK legal system and who may have difficulties carrying out litigation work.

Gender

- Clients with caring responsibilities for young or disabled children, particularly lone parents who may have difficulties in undertaking tasks such as serving documentation at court.
- Clients with caring responsibilities for older dependents, in particular lone carers.
- Lone parents who may have access to less financial resources than other clients.
- Sensitivity of men or women in relation to one to one meetings with the opposite sex - if this is necessary or in relation to questioning/discussion of intimate subjects.

Disability

- Clients with physical impairments which may impact upon their ability to undertake physical aspects of litigation.
- Clients with physical or mental health issues which may impact upon their ability to undertake litigation activities.
- Clients with learning disabilities.
- Clients who are heavily reliant on carers to manage their day to day activities.

#### Age

- Very young clients.
- Clients who for reasons relating to their age (particularly older clients) may find the physical aspects of litigation difficult.
- Clients who for reasons relating to their age have difficulties associated with memory loss and/or confusion.

#### Pregnancy/Maternity

- Heavily pregnant or new mothers who may find the physical aspects of conducting litigation difficult.
- New mothers with post natal health issues affecting physical mobility or mental health (e.g. post natal depression).

#### Gender re-assignment

- Clients undergoing transition (which may involve frequent visits to hospital or other medical appointments).

#### Religion or belief

- Clients whose religious beliefs make it difficult for them to undertake litigation activities on particular days or at particular times.

29. Other relevant factors to consider in relation to the vulnerability of a client include:
- Limited access to financial resources to pay for the cost of litigation activities or additional unforeseen costs.
  - Illiteracy or low levels of literacy.
  - Vulnerability or trauma arising from the matter at issue (e.g. the matter involves a serious crime such as serious assaults or sexual offences perpetrated against the client).
  - Homelessness.
  - Drug or alcohol dependency or other addiction issues.
30. The term 'vulnerable client' should be interpreted widely. You will need to identify any factors that may make a client vulnerable when considering whether or not to take on their case. Having identified any such factors, you will need to consider what additional measures, if any, are necessary to ensure that the client is supported properly and understands fully any information which you communicate to them, so that you may act in their best interests. This may involve ensuring that documentation provided to your client is translated into another language or into plain English. You should also consider whether you can direct the client to any external resources or agencies for further advice and support.

(C) The basis of the agreement and the client care letter

31. The agreement between barrister and client is contractual. This means that:
- the barrister is bound by the agreement and may be liable in contract for failure to perform;
  - it should be clear what is to be done under the contract, the charging rate and any other special terms that may be agreed (note your general duties under rC22 in addition to the public access rules);
  - the barrister will be able to sue for fees.
32. There are a number of things a barrister must inform his client about at the outset of the agreement. These are set out in rC125. They include warning a client that you are an independent practitioner and there may be occasions where a clash of professional commitments prevents you from carrying out an instruction.
33. A model client care letter is on the BSB's website. Provided you have promptly written to your client in the terms of the model letter you will have complied with the notification requirements in rC125. Where the client has previously instructed you in respect of the same matter it may well be unnecessary for you to provide a full client care letter in respect of every new instruction received. Barristers must still ensure that the fundamentals of the client care letter are set out in respect of each new instruction i.e. the work that is to be undertaken, the cost and the payment mechanism. Other matters which you are required to inform your client about, such as the barrister's limitations (if any) with respect to litigation, how to complain and the fact the barrister may have to withdraw can be covered by referring the client to the original client care letter.
34. It may also be possible in limited circumstances for you to enter into a retainer or novel fee arrangement with a public access client. However, care should be taken to ensure you continue to observe your general Handbook duties around independence and conflict of interest.

(D) Non-discrimination rules

35. In deciding not to accept an instruction, you should be mindful of rC28 of the Handbook. This states that you must not withhold your services or permit your services to be withheld:
- a. on the ground that that the nature of the case is objectionable to you or to any section of the public;
  - b. on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to you or to any section of the public; or

- c. on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question.
- 36. rC12 states that a barrister must not discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender re-assignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief or pregnancy and maternity.
- 37. The effect of these rules is that, whilst the 'cab rank' rule does not apply to public access cases, you must not discriminate in the way you accept, refuse or carry out public access instructions. Potential clients may feel aggrieved if a barrister refuses to take on a case and may allege that they did so for improper reasons. It would be prudent for a barrister refusing a case to make a brief note of the reasons for so doing in case this is questioned in future.

(E) Withdrawal from a case

- 38. rC25 to rC27 of the Handbook highlight the scenarios where a barrister must or may cease to act and return instructions.
- 39. In addition to the usual reasons for withdrawal from a case, barristers are required to cease to act in a public access case where they have formed the view (for instance, as a result of receiving further information about the case) that it is in the interests of the client or in the interests of justice for the client to instruct a solicitor or other professional client.
- 40. If, as a result of being told that you cannot continue to act without a solicitor or professional client being instructed, the client instructs a solicitor or other professional client, then you will be able to continue to act. It is open to you, therefore, to give the client the opportunity to instruct a solicitor or other professional client before you finally withdraw from the case.
- 41. In a public access case, the issue of withdrawing from a case will only arise once you have accepted the instruction. That will usually be when the client care letter is sent. You will need to take care in deciding whether to withdraw not only because you owe a duty under the Handbook to act in the best interests of your client, but also because you may owe them contractual duties. Unless your decision to withdraw is justified by your obligations under the Handbook you are likely to place yourself in breach of your contract with the client.
- 42. It will therefore very rarely be appropriate for you to withdraw where there is simply a difference of opinion between yourself and the client. In particular, the fact that a client legitimately rejects your advice on tactics or a settlement will not of itself justify you in withdrawing from the case; nor does the fact that a client may raise a minor complaint or question about the service provided by you. Where such

disagreements arise, however, you would be prudent to make full attendance notes of the discussion and have them agreed by the client.

43. A barrister acting for a client who is a party to proceedings must bear in mind the particular difficulties which the client might encounter if the barrister withdraws. A hearing may be imminent; or the client may experience real difficulty in finding a solicitor willing to take on the case. Where there is doubt, or a difference of opinion as to whether you should withdraw, and withdrawal would or might cause difficulties for the client, it would be prudent for a barrister to contact the Bar Council Public Access enquiries line (0207 611 1472) for guidance.
44. Where you consider that you are required to withdraw and it appears that, by reason of the proximity of a hearing, a client may have difficulty finding another lawyer to take on the case in the time available, you should provide such assistance as is proper to protect the client's position. This can include:
  - a. applying to the court for an adjournment if it is necessary to withdraw during the course of the hearing;
  - b. drafting letters for the client to send to the court and the other side seeking an adjournment;
  - c. providing supporting letters for the client explaining that, for professional reasons, you have had to withdraw and, so far as this is possible without breaching confidentiality or prejudicing the client's position, explaining the reasons;
  - d. where the matter is urgent or it is otherwise appropriate, contacting solicitors or other suitable intermediaries who may be willing to take on the client's case.

#### (F) Complaints

45. The Handbook requires barristers to have in-house procedures for dealing with complaints (rC99-rC109). Such procedures can be a useful source of feedback to Chambers and also a way of retaining client goodwill when mistakes occur. Public access work may result in Chambers receiving a substantially greater number of complaints from clients, which may or may not be legitimate. However, all such complaints should be addressed and acted upon within an appropriate timescale.
46. You should have regard to the BSB's guidance on complaints handling. In particular, you must:
  - a. ensure that the client is told about the procedure in the client care letter;
  - b. deal with complaints promptly and according to that procedure as they arise;

- c. inform the client that, if they are dissatisfied with the way in which the complaint has been handled, they may refer it to the Legal Ombudsman.

## **Fees**

### (A) Notifying the client

47. If you accept public access instructions you must forthwith notify your client in clear and readily understandable terms of the work you have agreed to perform and the fees which you propose to charge or the basis on which your fee will be calculated. You should therefore complete those parts of the model client care letter which deals with these matters.
48. rC22 and rC88 require barristers to keep adequate records to support fees charged, and to provide such records or details to clients on request. Such records should contain separate items for each piece of paperwork and, where substantial telephone advice is provided, separate items for each piece of such advice. If the client requires further detail and, notably, the exact work done and the cost of it in respect of each item involved this should be provided.

### (B) Payment in advance

49. rC73 prohibits a barrister from handling client money. The associated guidance (gC106-gC107) clarifies that a fixed fee paid in advance is not client money for the purposes of rC73. If you agree with a client, who can reasonably be expected to understand the implications of such an agreement, that (1) your fee for any work will be charged according to the time spent on it, but (2) you will be paid a fixed fee in advance for it, and (3), when the work has been done, you will pay the client any difference between that fixed fee and the fee which has actually been earned, and (4) you will not hold the difference between the fixed fee and the fee which has been earned on trust for the client, that difference will not be client money. Such fees may be considered as client money if you cannot demonstrate that the agreement was made in advance and on clear terms. You should also consider carefully whether such an arrangement is in the client's interest and that the client fully understands the implications.

### (C) Withholding paperwork until paid

50. Barristers may withhold paperwork until fees have been received. We recommend, however, that it should be made clear to the client at the time of instruction that this will be the arrangement. It should be expressly stated in the client care letter. Barristers should note that while they are permitted to withhold the work they have done, they may not be permitted to withhold the client's papers.

(D) Lien

51. We are not aware of any authority by which barristers gain a general lien on documents belonging to the client until the fees are paid, although there seems to be nothing in the law to invalidate an express agreement made between a barrister and a client permitting the barrister to exercise such a lien. In the absence of a contractually enforceable lien you should return the papers to your client on request, but first ensure that you have complied with your record keeping obligations (see paragraphs 67 to 71 below).

(E) Disbursements

52. You may agree with your client that you are entitled to charge disbursements, such as travel and accommodation expenses and photocopying. This can include charging for the work of a clerk, administrative assistant or paralegal. This must be agreed in advance and therefore should be included in the client care letter.

(F) Over-charging and disputes

53. It is likely that clients will, on occasion, seek to dispute the amount that is charged by a barrister or to claim that they have been overcharged. The scope for such disputes is obviously greatly reduced if there is clarity about the charging arrangements beforehand.
54. It is obviously appropriate for you to seek to resolve the dispute informally if this is possible. Otherwise two options exist:
- a. the client can refuse to pay and the dispute may have to be resolved by litigation;
  - b. the client can complain to the Office of the Legal Ombudsman (“LeO”), if they consider that you have provided inadequate professional services. In appropriate cases LeO has the power to fine you and/or order that fees be repaid. Complaints may also be made to the Bar Standards Board where the alleged conduct may amount to a breach of the Handbook.

(G) Conditional Fee Agreements (CFA) and Damages-based Agreements

55. While in principle there is nothing to prevent barristers undertaking public access work on a Conditional Fee Agreement or a Damages-based Agreement, particular care should be taken with such arrangements. You should consider the level of risk and the likelihood of recovering base costs and the success fee in the case of a Conditional Fee Agreement and the likelihood of recovering the percentage of the claimant’s damages in the case of a Damages-based Agreement.

56. You should also consider the question of payment. Payment in advance or on completion of a particular piece of work would not be possible since, by definition, no fee is payable until success had been achieved. Generally, any money paid in advance would be considered client money and barristers are not permitted to hold this (see paragraph 49 above for circumstances when payment in advance may be possible). If you require further advice please contact the Bar Council.

### **Intermediaries**

57. You may find yourself asked to perform legal services by a person or organisation that is an intermediary, for the benefit of a named client. For example, an independent financial adviser may wish to take advice for a client, or arrange to have a document drafted. A son or daughter may want to instruct you on behalf of an elderly parent. A sponsor in this country may wish you to act in an immigration matter for a person who is out of the country. There is no objection in principle to a barrister accepting instructions from such an intermediary, but care must be taken in respect of a number of matters.
58. You must ensure that the intermediary is not acting, or proposing to act, as a 'litigator'. It is a criminal offence under the Legal Services Act 2007 for an unauthorised person to act as a litigator, and a barrister who facilitated such activity might also be criminally liable.
59. When specifically providing services to an immigration adviser who is acting as an intermediary, barristers should satisfy themselves that they are not engaging with anyone who is acting outside of the Immigration and Asylum Act 1999 (IAA 1999), as anyone acting in this way would be committing a criminal offence and be liable to face prosecution. Barristers who accept work which is within the scope of the IAA 1999 and do so from an OISC regulated advisor should take steps to ensure they are aware of what that advisor is entitled to do.
60. You must ensure that both intermediary and client understand the true nature of the arrangement. To this end, you should send a client care letter to both the intermediary and the client. It is assumed that the intermediary will undertake contractual responsibility for your fees. If the intermediary does not wish to do so, you would be entitled to enquire why you should deal with the intermediary at all, rather than directly with the client. Model letters to both intermediary and client are on the BSB's website at:

<https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>

61. You should bear in mind the possibility that the intermediary may have negotiated a contingent fee arrangement with the client and the potential conflict of interest which could thus arise between the intermediary and the client. Barristers are already familiar with the risks of potential conflicts of interest between solicitors and

clients where conditional fee agreements have been made. However, in the case of unregulated intermediaries you may feel that there is an even greater need to be alert to the risk that the manner in which information is transmitted to you may have been coloured by the intermediary's own commercial interests.

62. If you form the view that there is a conflict of interest between client and intermediary, for example, because the intermediary has been negligent, Core Duty 2, rules such as rC15 and rC17 and related guidance require you to consider whether it would be in the client's interest to instruct another professional, and, if you consider it would be, you must both so advise and take steps to ensure that such advice reaches the client. However, it is not your duty to police the relationship between intermediary and client, which is a private matter to them.
63. Where the intermediary instructs you to perform advocacy services, for example, before a domestic tribunal or in an arbitration, you must take such steps as appear appropriate to ensure that the client does, in fact, wish you to appear for them. In many cases this will involve having a conference with the client. A barrister performing advocacy services should inform the tribunal that they are acting for their client. You have the same obligation to a tribunal to which you send a skeleton argument.
64. You must have regard to the relevant provisions of the Money Laundering Regulations (see paragraphs 72 to 75 below). Where instructed by an intermediary, you must normally follow the identification procedures in respect of the client. The only exception will be where the intermediary is a regulated professional and informs you by letter or certificate that they are a professional within the regulated sector as defined in Proceeds of Crime Act (POCA) and the Money Laundering Regulations and has carried out identification procedures
65. If you are approached by an intermediary you remain under the same obligation to satisfy yourself before accepting the case that it is appropriate to do so without a solicitor or other professional client as you would be under if you were approached by the client direct. If you are familiar with the intermediary and the way in which the intermediary operates then this will be a relevant factor, but will not obviate the need for you, in respect of each prospective case, to satisfy yourself that no solicitor is required.
66. The client care letter to the client should be sent to the client's home or, as appropriate, business address and not to the intermediary's address. The client's address will therefore be one of the pieces of information which you will need before accepting instructions through an intermediary.
67. It is prohibited for you to pay or receive a referral fee to or from an intermediary, or to any other person for introducing a client or providing you with work. Full guidance on referral fees can be found at:

<https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>

### Advertising and referrals

68. It is common, particularly in Public Access, for barristers to use advertising and marketing services, barrister owned referral companies and third party introducers to obtain work. For example:
- 1) Barristers may appoint a marketing or advertising business to promote their services;
  - 2) Barristers may establish, own and manage a limited company in order to advertise and market their services more effectively; and
  - 3) Third parties may set up services (which are often web-based platforms) to introduce Public Access clients to barristers. If you are obtaining work from a third party, you are practising in an association and must comply with the Associations with Others Rules in the BSB Handbook (Rules C79 – C85). In particular, you must complete the Associations Notification Form and return it to the BSB's Supervision Department ([Supervision@BarStandardsBoard.org.uk](mailto:Supervision@BarStandardsBoard.org.uk)). The Associations Notification Form is available on our website: <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/supervision/>
69. In using these three models to obtain work, barristers must ensure that they do not breach the prohibition on paying or receiving referral fees (Rule C10 in the BSB Handbook and associated guidance). Further guidance on using these models and not breaching the referral fees prohibition is available here: [https://www.barstandardsboard.org.uk/media/1666553/9\\_guidance\\_on\\_referral\\_and\\_marketing\\_arrangements\\_for\\_barristers\\_permitted\\_by\\_the\\_bsb.pdf](https://www.barstandardsboard.org.uk/media/1666553/9_guidance_on_referral_and_marketing_arrangements_for_barristers_permitted_by_the_bsb.pdf)
70. In using these models to obtain work, barristers must also take steps to ensure that:
- They do not enter into terms which interfere with their duties to act independently and in their clients' best interests (Core Duties 2 and 4 in the BSB Handbook);
  - In accordance with Rule C73 in the BSB Handbook, they do not handle client money (this also applies to anyone acting on a barrister's behalf). If a barrister decides in principle to take a case, they may request an 'upfront' fixed fee from a potential client before finally agreeing to the work. This should only be done having regard to Guidance C107 of the BSB Handbook, or there may be a breach of Rule

C73. In particular, a barrister should never accept an upfront fee before considering whether it is appropriate for them to take the case, and considering whether they will be able to undertake the work in a reasonable time;

- If they make use of third party payment services, they must comply with Rule C74 in the BSB Handbook and note the associated guidance;
  - Companies which are not authorised by a legal regulator are not providing reserved legal activities (in breach of the Legal Services Act 2007);
  - In accordance with Rule C19 in the BSB Handbook (not misleading clients and potential clients), any advertising and marketing material is accurate, clear and not likely to mislead;
  - Clients are not confused about who is responsible for the service provided, and the service operates as described;
  - Clients are not confused about the extent to which activity is regulated by the BSB, or by another regulator; and
  - Clients are not confused about what redress they have (and against whom) if things go wrong. In accordance with Rule C99 in the BSB Handbook, clients must be notified in writing about their right to complain to the barrister/chambers, right to complain to the Legal Ombudsman (if any) and right to complain to any third party. Clients must also be notified in writing about how to complain and, in accordance with Rule C103 in the BSB Handbook, chambers' websites must display information about the complaints procedure. Clients should be clear about when they are complaining to a barrister/chambers and when they are complaining to a third party.
71. Finally, barristers are reminded that their obligations under Core Duty 5 in the BSB Handbook require them not to act in an association with a person where, merely by being associated with such a person, they may reasonably be considered as bringing the profession into disrepute. Barristers are encouraged to undertake appropriate due diligence on third parties and how their services operate before agreeing to use them.

### **Administration and record keeping**

72. When taking on public access work, Chambers need to be aware that the expectations of clients are likely to be very different from those of solicitors. They will not necessarily understand that barristers work on a different basis from solicitors and that it will not always be possible to speak directly to the barrister and that there are limits to what can and cannot be done by barristers. This should be made clear at an early stage and may be something that you would want to discuss

with a client at a preliminary meeting. Barristers and clerks may need to adopt a flexible approach to dealing directly with the public and keep under review whether Chambers' administration should be adjusted accordingly.

73. In the absence of a solicitor it will be crucial for you to maintain records about your role in providing advice to the client in case questions or complaints arise afterwards. In particular, if it is not clear from other documentation, you should maintain a record of:
- a. the initial contact with the client;
  - b. the work you have been asked to do;
  - c. the dates of conferences and notes of advice given;
  - d. records of telephone conversations and advice given;
  - e. significant changes to instructions; and
  - f. hearings attended and advice given.

These records should be retained for at least seven years.

74. It is likely that clients will provide you with original documents. It is for each barrister to decide, in consultation with the client, whether they wish to retain those documents or work from copies. It is perfectly appropriate to charge for photocopying the documents but you should make it clear in your client care letter what the charge will be. You may also be asked to store the original documents on behalf of the client, but barristers are strongly discouraged from agreeing to do so unless retention by you is required in order to undertake litigation on behalf of the client (if you have been authorised to do so). The following matters should be kept in mind:
- a. the original documents belong to the client and, unless otherwise agreed (for example because a lien has been agreed), must be returned to the client on demand at any stage;
  - b. if you agree to store original documents for the client you must keep the documents in a secure place and may be liable in negligence for failing to do so;
  - c. it will almost always be impractical for you to store original documents for long periods of time unless your Chambers is prepared to guarantee such a service even after you have left Chambers or ceased to practise. If originals are retained you should specify to the client a date by which they must be collected or will be returned.

75. In any case it is prudent to keep papers following the conclusion of the case because there might be an appeal, a complaint or an action for professional negligence. If a solicitor is instructed that obligation generally falls on the solicitor. In a public access case the obligation falls on the barrister. You must keep for a period of seven years the originals, copies or a list of all documents you have received or take reasonable steps to ensure that the client will do so.
76. Electronic storage is permissible if appropriate – you may wish to consult the Bar Council for further information on Information Security.

### **Money laundering and proceeds of crime**

77. The Bar Council has produced detailed briefings on the Money Laundering Regulations 2007 and the Proceeds of Crime Act 2002.
78. The Money Laundering Regulations apply to barristers who are asked to advise at the planning or execution stage in transactions which involve either:
- a. the buying or selling of real property or business entities;
  - b. the creation, operation, or management of trusts, companies or similar structures.
79. The requirements upon barristers who conduct relevant business can be summarised as:
- Customer due diligence e.g. (i) identifying the client or beneficial owner prior to the establishment of the business relationship, or the execution of the transaction, (ii) obtaining information about the business relationship or transaction, (iii) monitoring the business relationship on an ongoing basis.
  - Record keeping procedures – records of all relevant transactions and evidence of client identity must be maintained for five years from the date on which the last transaction was completed.
  - Procedures to forestall money laundering, and training staff – all barristers and sets of Chambers who undertake work within the ambit of the Regulations should have in place and operate general systems and procedures for ensuring compliance with the Regulations. This includes training staff on the law relating to money laundering/terrorist financing and on how to recognise and deal with transactions and other activities which may be related to money laundering/terrorist financing.
80. The POCA makes it an offence to enter into or become concerned in an arrangement which you know or suspect facilitates (by whatever means) the

acquisition, retention, use or control of criminal property by or on behalf of another person.

### **Solicitors and professional clients**

81. Two main issues arise in respect of solicitors and other professional clients in relation to public access work:
- a. acceptance of work where there is already a solicitor or professional client advising the client; and
  - b. the recommendation of solicitors to public access clients.
82. There is no objection to you accepting instructions from a client where a solicitor is currently instructed in the matter, if the solicitor is aware that the client is doing so. There is no obligation on the solicitor to instruct you directly and, in some cases, solicitors having done the necessary preparatory work will be content for the client then to brief you directly. In such circumstances, however, it is important that you should:
- a. consider whether there is any reason why the solicitor needs to instruct you directly (for example, because the matter is complex or the client cannot properly undertake the litigation component of the case, if you are not authorised to do so);
  - b. be satisfied that the solicitor is aware that the client is instructing you.

If you are satisfied that the client does not require a solicitor's involvement, then you may accept the case.

83. A more difficult question arises where the solicitor does not know that the client is coming to you for advice. In some cases, the client will be seeking advice on the conduct of the solicitor or for a second opinion. Here there is no reason why you should not provide advice. You should not inform the solicitor of this without the client's consent. Where a case is litigious it is advisable for you, if client gives their consent, to liaise with the solicitor as necessary
84. It is possible that clients will wish to seek counsel's advice directly in respect of matters for which a public funding certificate is already in existence and where the certificate does not extend to counsel's advice. Counsel should be alert to guard against any breach of the rules against "topping up". Where the client has indicated that they already have a solicitor, counsel should seek to establish whether or not a certificate is in existence in respect of such work.

85. If you decide that a client should instruct a solicitor or professional client, the client may well ask you to recommend a particular individual. You may properly do this (and, if prudent, may well suggest suitable names) provided that:
- a. you have reasonable grounds to believe that the solicitor or professional client is competent to do the work; and
  - b. you receive no payment for the referral; and
  - c. the solicitor is free to instruct another barrister.

**September 2017**  
**Bar Standards Board**

**ANNEX A**

**PRO FORMA FOR USE BY BARRISTERS WITH LESS THAN THREE YEARS' STANDING**

**Name of Barrister:**.....

**Date of call (month/year):**.....

**Chambers/entity:**.....

<p><b>Basic case details e.g. month and year accepted, when concluded and area of law</b></p>	
<p><b>Case issues e.g. any difficulties in the client undertaking the litigation component, problems/matters that required advice to be sought from a 'qualified</b></p>	

<b>person', matters that required additional research or learning, was it necessary to involve a solicitor or withdraw.</b>	
<b>Summary of any complaint raised by the client and, if so, nature of complaint and how resolved</b>	
<b>Summary of any other comments or feedback received from the client about the service provided and any steps taken to address feedback</b>	