

Standard Contractual Terms Guide

The Supply of Legal Services by Barristers to Authorised Persons



The Bar Council

Integrity. Excellence. Justice.

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

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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.¹ From 31 January 2013 this was changed. On that date the Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012² (the "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.³ In 25 May 2018 the General Data Protection Regulation (GDPR) became effective in the UK, and the Bar Council accordingly updated clauses 6 and 7. The Standard Terms are available on the Bar Council website.⁴ The Standard Terms do not operate as default terms. It is 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. The changes were 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. Barristers can choose between the following alternatives:

3.1 Accepting instructions on the Standard Contractual 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 their Chambers or a Specialist Bar Association (SBA). Here it will be the responsibility of the individual barrister to ensure that their bespoke terms do not leave the barrister 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 the barrister's liability at common law in tort. If a barrister is minded to draft or agree a bespoke term which potentially

¹ Gwinnutt v George [2018] EWHC 2169 (Ch).

² As referred to in Rule rC30.9c of the BSB Handbook. The Standard Terms were approved by the Bar Standards Board and the Legal Services Board ("the Regulators").

³ Annexes G1 and G2 of the pre-2013 Bar Code of Conduct.

⁴ <http://www.barcouncilethics.co.uk/documents/contractual-terms/>

could affect their professional indemnity over, enquiry should be made of BMIF.⁵

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 the barrister exposed to liabilities that are not covered by BMIF, with the risk of professional misconduct.⁶

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 the barrister exposed to liabilities that are not covered by BMIF, with the risk of professional misconduct.⁷

4. The Standard Terms apply only to instructions from Authorised Persons who have been authorised by the Law Society or the Solicitors Regulation Authority⁸ (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 BMIF have indicated that it does not consider the Standard Terms extend barristers' contractual liabilities beyond those they owe at common law.

⁶ 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.

⁷ 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".

⁸ 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.

5. Barristers who choose to contract on the basis of the 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 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 Standard Terms, or the barrister's own terms.

6. The 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 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.

7. As a consequence of the introduction of the Standard Terms, the focus of the Cab Rank Rule⁹ has shifted so that it now applies to instructions offered to the barrister on either the Standard Terms or on any terms which the barrister (or their 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.

⁹ rC29 and rC30 of the BSB Handbook.

CHAPTER 1: Using the Standard Terms

What changed?

8. The 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. The 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 Aid Agency and is then liable to pay counsel from those funds.
10. The Standard Terms do not apply where the barrister is paid directly by the Legal Aid Agency or by the Crown Prosecution Service.
11. The Standard Terms can apply to a Conditional Fee Agreement (CFA) where the CFA specifically incorporates these Terms.
12. The 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.
13. The Standard Terms expressly provide that barristers can sue for unpaid fees and may claim interest on unpaid fees.
14. The 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.
15. The old 'Terms of Work' on which barristers offered their services to solicitors and the 'Withdrawal of Credit Scheme'¹⁰ and the 'Withdrawal of Credit List' was abolished, together with the obligation on barristers to refuse work from solicitors on the List unless payment was received with the brief or special permission had been given by the Chairman of the Bar.

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

16. The 'Withdrawal of Credit List' was replaced by the advisory 'List of Defaulting Solicitors and Other Authorised Persons'¹¹. This assists barristers in relation to rC30.7 of the BSB Handbook, that the cab rank rule does not apply if "the professional client: [...]b represents, in your reasonable opinion, an unacceptable credit risk;" 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 Aid Agency. Under transitional arrangements, solicitors on the 'Withdrawal of Credit List' were automatically transferred to the advisory 'List of Defaulting Solicitors and other Authorised Persons'.

17. In relation to instructions accepted on the Standard Terms, complaints about non-payment of fees can only be made to the Bar Council if a judgment has been obtained.

Interaction with Cab Rank Rule and BSB Handbook

18. With effect from 31 January 2013, the Cab Rank Rule in the BSB Handbook was amended.

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

20. 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 the authorised person wishes to instruct the barrister on the Standard Terms or on the terms of work which the barrister (or their chambers) publicises as being their standard terms (unless the instructing "Authorised Person" represents an unacceptable credit risk).

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

22. 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 were transferred to the advisory 'List of Defaulting Solicitors and other Authorised Persons'.

23. 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.¹²

¹¹ <https://www.barcouncil.org.uk/supporting-the-bar/fees-collection/list-of-defaulting-solicitors/>

¹² <http://www.barcouncilethics.co.uk/documents/provision-services-regulations-2009/>

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

24. The 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.

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

25.1 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....."

25.2 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:

25.2.1 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;

25.2.2 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);

25.2.3 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.

25.3 BMIF Guidance on the impact of the contractual terms and insurance cover can be found on their website.¹³

¹³<http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Guidance%20Note%20to%20Members%20-%20February%202013.pdf>

- 25.4 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.
- 25.5 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:
- 25.5.1 The Authorised Person cannot, without the barrister's informed prior consent vary, waive or reduce sums payable to the barrister;
 - 25.5.2 The Authorised Person's commercial interests – for example in relation to promises of future work – cannot prejudice the recovery of the barrister's fees;
 - 25.5.3 The Authorised Person keeps the barrister informed about the solvency of the client;
 - 25.5.4 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
 - 25.5.5 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.¹⁴
- 25.6 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.
- 25.7 Chambers will need to implement systems to ensure that:
- 25.7.1 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
 - 25.7.2 The terms upon which instructions have been accepted are properly recorded and retained.

¹⁴ In particular Rules rC73-75 of the BSB Handbook concerning handling of client money etc.

26. 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 Standard Terms and suggesting alternative clauses. The Bar Council was concerned that the Law Society's proposals could give rise to some serious potential difficulties, and on 29 January 2013 issued guidance on this matter, as follows:

“The Bar Council's guidance on the points raised by the Law Society on its Practice Note is as follows. This advice should be read with the Bar Council's Standard Contractual Terms Guide which was published recently.

Anti-Money Laundering

The Bar Council's guidance on the Money Laundering Regulations explains that because barristers in independent practice are not permitted to undertake the management or conduct of their clients' affairs, or to handle client money, they do not generally fall within the ambit of the Money Laundering Regulations 2007, save for those (particularly members of the Chancery and Tax Bar) who may fall within the category of "tax advisers". Solicitors, on the other hand, are almost always obliged to carry out such checks.

The Standard Contractual Terms mirror standard practice whereby barristers generally rely on solicitors to carry out proper checks. There is no benefit to anyone in duplicating the same process. Clause 4 provides that the solicitor (generally the instructing solicitor) will provide the barrister with all reasonable assistance to carry out any necessary customer due diligence including (if required to do so) consenting to the barrister relying upon the solicitor under Regulation 17 of the Money Laundering Regulations 2007.

The Law Society has however proposed three variations to clause 4.3. Variation 1 takes the extreme position of requiring the barrister to carry out money laundering checks unilaterally without seeking any assistance from the solicitor. It is unclear why the Law Society is, it appears, suggesting that Solicitors should not be prepared to offer reasonable assistance to barristers. Variations 2 and 3 merely give the solicitor discretion (but not an obligation) to assist. If agreed, such terms might require the barrister to repeat the checks already carried out by the solicitor, at inconvenience and probable cost to all – including, most importantly, the lay client - for no good reason at all.

Intellectual property

The BSB issued Knowledge Management Guidance, approved by the Law Society, in 2005. That guidance states that Counsel, as author of an opinion is undoubtedly the legal owner of the copyright in it. Clause 9 of the Standard Contractual Terms provides that copyright in the barrister's work product belongs to the barrister; and whilst the solicitor and the lay client have the right and licence to use the work

product for the particular purpose for which it is prepared, if it is to be used for other purposes, that requires the barrister's written permission.

The Law Society's Practice Note suggests that this may hinder solicitors from placing barristers' work on their knowledge management systems and proposes two variations. The first provides that all intellectual property rights shall be assigned to the solicitor. The second provides that the solicitor may include the barrister's work in its knowledge management system. The first seems entirely unnecessary given the express licence for use which is granted. Both give rise to a number of potential problems. They are discussed fully in the BSB's Knowledge Management Guidance on the subject (approved by the Law Society), which should be read in detail if the incorporation of such provisions is being contemplated.

Barristers' liability

The Practice Note seems to suggest that barristers are seeking to restrict their liability to solicitors and/or lay clients. The Bar Council respectfully disagrees. The Standard Contractual Terms seek to replicate the scope of barristers' liability that existed before 31 January 2013 - neither wider, nor narrower.

Clause 3.1(x) of the terms of cover of the Bar Mutual Indemnity Fund excludes: "Claims or Disciplinary Proceedings in respect of any liability incurred under any contract, save to the extent that 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..."

Clause 10 of the Standard Contractual Terms is accordingly designed to dovetail with barristers' professional indemnity insurance. In cases where a barrister is alleged to have been negligent, solicitors will be entitled to seek a contribution under the Civil Liability (Contribution) Act 1978, as before.

Significantly, both of the Law Society's two proposed variations could leave the barrister liable for losses which are not covered by BMIF's cover – or any top up cover. This could mean that the barrister would be in breach of clause 204(c) of the Code of Conduct, which states that a barrister may supply legal services to the public only if he is covered by insurance against claims for professional negligence arising out of the supply of his services in such amount and upon such terms as are currently required by the Bar Council. Barristers should therefore not agree to either of these proposed variations.

Fees

The Standard Contractual Terms allow barristers to propose reasonable increases in hourly rates, which is in accordance with current practice, and probably mirrors similar provisions in most solicitors' terms of retainer.

The Practice Note seems to object to this, and the Law Society proposes three variations, one of which would prevent the barrister from seeking to negotiate an increase in the agreed hourly rate at all. The barrister should think carefully about how long the case could continue before agreeing to any such provision.

Invoices

The Practice Note proposes variations to clause 12 which would prevent the barrister from being able to raise an invoice until the solicitor has given authority to do so. No express duty is imposed on the Solicitor to give such authority at any specific time or in any specific circumstance. This is not in accordance with present practice, and could lead to financial hardship for the barrister as it appears to place the question of payment entirely at the solicitor's discretion. A barrister should seek safeguards about circumstances in which the solicitor could reasonably delay the barrister from raising an invoice before agreeing to any such term.

Pay when paid

Section 3.2.5 of the Practice Note proposes a further clause which would delay the solicitor's obligation to pay the barrister's fees until the solicitor has been put in funds by the lay client. As explained in paragraph 20.5 of the Bar Council's Guidance on the Standard Contractual Terms, barristers should be very careful to agree proper safeguards before agreeing to any such term."

When can you NOT use the Standard Terms?

27. The Standard Terms are for use where instructions are 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.
28. The Standard Terms cannot be used:
 - 28.1 Where the lay client is to be party to the contract unless the lay client is the Authorised Person, or
 - 28.2 For CFAs, unless the CFA specifically provides for the Standard Contractual Terms to apply (clause 2.4.2 of the Standard Terms), or
 - 28.3 For publicly funded matters where the barrister is paid direct by the Legal Aid Agency or by the Crown Prosecution Service.
29. However, the barrister and the instructing party are free to adapt the 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.

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

Notification of use of the Standard Terms

30. 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 Standard Terms to particular instructions at the first available opportunity, otherwise the 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.

31. Barristers are again reminded that the Provision of Services Regulations 2009 require publication of their normal terms of engagement.

32. 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

33. Clause 12 of the 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.

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

35. 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 Standard Terms as it is considered unnecessary.

Is counsel accepting the instructions?

36. The 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 Standard Terms are also intended to apply to all instructions received thereafter in the same matter.

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

38. Despite having accepted the instructions, if the barrister comes to the conclusion that the requirements of the Money Laundering Regulations have not been satisfied, the barrister 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).

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

39.1 Chambers should ensure that an acknowledgement of receipt of papers cannot be taken as acceptance of instructions;

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

40. Clause 4 of the 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 of Conduct.

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

What are the Authorised Person's obligations?

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

42.1 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.

42.2 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 the barrister is unable to comply with the urgency required.

What are the barrister's obligations?

43. Clause 4 refers to the Receipt and Acceptance of Instructions (see 'Is counsel accepting the instructions?' above). The barrister must review the instructions within a reasonable time of receipt and must advise the Authorised Person whether the barrister accepts the instructions.

44. Clause 5 details the need for the barrister to keep confidential all information provided unless obligated or permitted to disclose it. To the extent that such information is already in the public domain, the barrister may disclose in their 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.

45. 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.

46. 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. In 2018 the Bar Council updated clause 7 in the light of the General Data Protection Regulation.

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

47.1 To have an assessment of the costs incurred, and

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

48. 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.

49. 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

50. 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?

51. The 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.

52. Subject to the provisions in Clause 5 concerning confidential information and publicity, the barrister can retain for the purposes of their 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 the barrister's fees should the barrister have to sue for them and/or substantiate the level of fees claimed.

CHAPTER 4: Fees

53. 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 the barrister and the instructing Authorised Person. The 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.

54. 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 the obligations to the client under the BSB Handbook.

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

56. 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

57. 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 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 practice¹⁵, or they may choose 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.¹⁶

58. 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:

58.1 A request by the Authorised Person, or

¹⁵ 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.

¹⁶ This potential disadvantage can be avoided by most barristers by electing for cash accounting for VAT purposes. See the Bar Council's Taxation and Retirement Benefits Guidance <http://www.barcouncilethics.co.uk/documents/taxation-handbook/>

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

58.3 Termination of the Agreement.

59. 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.

60. 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 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.¹⁷

61. 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, 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

62. 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 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 their obligations under the BSB Handbook. It is obviously sensible for the barrister to explain in writing, at the earliest opportunity, the grounds upon which the barrister has terminated the contract.

CHAPTER 7: Notices and Delivery

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

¹⁷ Where the invoice is also a VAT invoice, it must also comply with the relevant VAT Regulations concerning the contents of a VAT invoice.

CHAPTER 8: Challenges to the Fees

64. 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).

65. 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.

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

66. The scheme for placing solicitors/Authorised Persons on the advisory 'List of Defaulting Solicitors and other Authorised Persons' 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', and instead they may choose whether or not to accept such instructions.

67. For fee chasing and legal action, the Bar Council provides a panel of solicitors' firms who provide debt-recovery services and come recommended by clients.¹⁸

68. If a barrister has sued a solicitor or Authorised Person for unpaid fees and has obtained a legal judgment for the fees, the barrister may provide a copy of the judgment to the Bar Council in order for the Firm to be placed on the advisory 'List of Defaulting Solicitors and other Authorised Persons'.

For queries or further information contact:

Member Services
General Council of the Bar
289-293 High Holborn
London
WC1V 7HZ
Tel. 020 7242 0082.

¹⁸ <https://www.barcouncil.org.uk/supporting-the-bar/fees-collection/debt-recovery-panel/>

FREQUENTLY ASKED QUESTIONS

Q.1 Who and what is an 'Authorised person'? how do I find out if someone is an 'Authorised Person'?

A. Unlike the old Terms of Work/Withdrawal of Credit Scheme, the Standard Contractual Terms are for use by all Persons authorised by the SRA to carry out legal activities as defined under Section 18(1)(a) of the Legal Services Act 2007. The legal activities are listed in Section 12 of that Act as follows:

- (a) the exercise of a right of audience
- (b) the conduct of litigation
- (c) reserved instrument activities
- (d) probate activities
- (e) notarial activities
- (f) the administration of oaths

Schedule 2 of the Legal Services Act 2007 gives the definitions of those legal activities.

The SRA does not publish the names of Authorised Persons but does publish some names of Alternative Business Structures supervised by the SRA. Also, not all solicitors are listed on the Law Society's website. If in doubt about whether your prospective client is able to instruct, contact the SRA on 0870 606 2555 or email contactcentre@SRA.org.uk to check the status of an individual or organisation.

Q.2 Do I need to have Terms? Do I need to do anything?

A. The Terms of Work/Withdrawal of Credit Scheme were, in the Code of Conduct, the default terms in the absence of alternative Terms having been agreed. With the abolition of those Terms on the 31 January 2013, there are no default terms. If a barrister is unpaid, there is no protection available from the Bar Council as the Withdrawal of Credit Scheme is abolished and the List of Defaulting Solicitors would not apply. The Standard Contractual Terms are not default terms.

The presumption against barristers and solicitors intending to contract may no longer apply. Therefore you may find that a contract has been agreed in oral negotiations between solicitors and your clerk, or by exchange of emails or a Court may infer terms. A simple contract like that may extend the barrister's liability beyond the cover provided by BMIF. Therefore it is unsafe to do nothing.

Q.3 BMIF – Insurance – Am I covered ?

A. The Standard Terms do not create any liabilities for barristers that do not arise in any event at common law. Neither do they impose any further limitation of liability. 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>

Q.4 Accepting new instructions – can I rely on what is published on my website?

A. There are no default terms in the Bar Code of Conduct on or after the 31 January 2013. Consequently you cannot assume that these Standard Terms or the terms on your website (if different) can be considered automatically as the basis upon which your instructing solicitors or authorised person is instructing you. Although not a professional requirement, it would be wise to refer to and to confirm in writing the basis upon which you are accepting instructions. Simply having the terms on your website may not be sufficient notice.

Q.5 Due to the pressure of other commitments I did not respond promptly on receipt of instructions. The solicitor is saying that they took the view that in default of a prompt response, it was OK to assume that the instructions could be considered to have been accepted. I do not like the terms that they are offered on and I wish to refuse them. Can I do this?

A. Whether the delay was such that the solicitor or lay client has good ground to lodge a complaint to the Bar Standards Board is a matter of professional conduct and the decision would be based on the particular facts of the situation – for example, the type and complexity of the instructions, whether the instructions were marked urgent and how long was the period of delay. Did the acknowledgement of the instructions clearly explain that the acknowledgement of receipt is not an acceptance of the instructions? Clause 4.1 of the Terms provide that a barrister has a reasonable time to review the instructions before informing the Authorised Person whether or not he accepts the instructions.

You are under no obligation to accept the instructions if the solicitor insists on terms other than the Standard Terms or the barrister's published terms of engagement. However, whether you accepted the solicitor's instructions because of the delay in responding is a legal question and the answer is dependent on the particular circumstances of the situation.

Q.6 The lay client has asked me to enter into a contract in addition to the one that I have with the solicitor. Can I do this?

A. So long as you continue to receive instructions from the solicitor, you can enter into a contract with the lay client – for example for the payment of fees. Barristers should make sure that the terms with the lay client do not conflict, but dovetail, with the contractual terms agreed with the solicitor. You should ensure that the contract does not give rise to liability that is wider than the cover provided by the BMIF.

Q.7 I accepted a return from a fellow member of Chambers and I was not aware that a different set of Terms had been agreed with that firm. Am I stuck with those Terms or can I insist on the Standard Terms?

A. If you have accepted the return, then you have accepted the terms upon which the instructions were given, including the different set of terms. Once you have accepted the instructions, you are bound by them.

Q.8 What is date of delivery?

A. The date of delivery is important for the purposes of being sure when you can start to charge interest or take enforcement action for unpaid barristers' fees. It is the date that the Invoice (which includes a fee note not amounting to a VAT invoice) was received by the solicitor under Clause 12.2 of the Standard Terms. Dates of deemed receipt are set out in Clause 18.2.

Q.9 The solicitor wants to agree a modest variation to the Standard Terms. Will an exchange of letters suffice?

A. Yes. Clause 2.2 of the Standard Terms states that the Terms can be varied by the parties, in writing, including by exchange of emails. Be sure to retain the evidence of the change of Terms.

Q.10 The solicitor wants many of the Standard Terms changed. Where can I get advice on this?

A. The Bar Council strongly advises that great caution is exercised before entering into a contract which varies from the Standard Terms. You need to be very sure that the proposed Terms do not conflict with the Bar Code of Conduct. What is more likely to be a danger is that a barrister might be extending his potential liability beyond the limits of his BMIF cover. See "Are the Terms fixed? Can we deviate from these Terms?" in Chapter 1 of this Guide.

Q.11 A solicitor has asked me to enter into a contract that would appear to offend the Code of Conduct. What should I do?

A. Refuse. You are under no obligation to accept the instructions if the solicitor refuses to use the Standard Terms or the barrister's published terms of engagement and any breach of the Code of Conduct may lead to disciplinary proceedings.

Q.12 The solicitor is insisting on a 'pay when paid' clause in the contract. In effect, does this remove any liability to pay barristers at all? What incentive is there for a solicitor to chase a client to pay barristers' fees before their own or indeed at all?

A. You are correct that such a clause would leave barristers vulnerable to non-payment in the manner you describe. Whether or not you agree to such a clause is a matter of negotiation. Possibly an option to consider is to have a time limit, so that the solicitor is obligated to pay after a period of time irrespective of being placed in funds. Also think about ensuring that the solicitor will agree to chase your fees properly and will assign to you the right to pursue the client in the event of non-payment.

Q.13 One of Chambers biggest clients wants to agree a different set of standard terms with Chambers and not all members are agreeable to the penalty clauses. Their Terms have penalty clauses attached relating to poor service. Can Chambers as an entity sign up to this?

A. Part of the answer lies in the constitution of your chambers. As noted above, agreeing contracts as a chambers may have consequences in terms of being unable to act against each other and/or being liable for each other's defaults. However, the Standard Terms are between the barrister (not the chambers) and the Authorised Person who is instructing. We strongly advise that barristers do not agree to extending their potential liability beyond the limits of their BMIF cover. This could breach Rule rC76 of the BSB Handbook. The Standard Terms do not extend nor restrict the liability of barristers that existed prior to the 31 January 2013. Clause 3.1(x) of the Bar Mutual Indemnity Fund's terms of cover excludes "*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*" Rule rC30.3 of the BSB Handbook enables a barrister to refuse instructions where the potential liability for professional negligence in respect of the case could exceed the level of professional indemnity insurance which is reasonably available. Further guidance from the Bar Council and BMIF on this matter can be found in the section entitled "Are the Terms fixed? Can we deviate from these Terms?" in Chapter 1 of this Guide.

Q.14 A firm of solicitors wants to enter into a general contract with Chambers. The Terms are different to our Standard Terms but they are generally acceptable. Is this OK?

A. As described above, the Standard Terms are between the barrister (not their chambers) and the Authorised Person who is instructing. Barristers are self-employed individuals. Barristers are not employed by the chambers. Besides the question of whether a chambers could agree a general contract which binds the barristers, agreeing contracts as a chambers may have consequences in terms of barristers being unable to act against each other, and/or in being liable for each other's defaults. However, chambers can of course come to an arrangement or an understanding as regards terms for particular professional clients, which the chambers' barristers would usually use for accepting instructions.

Q.15 A solicitor has inserted a term into a proposed contract that says that I am liable for consequential loss. Can I agree to this?

A. Barristers are free to agree whatever terms they wish, provided they are legal and do not conflict with the Bar Code of Conduct. With regard to consequential loss, we would urge great caution before agreeing to this. The Standard Terms do not create, extend or reduce any liabilities for barristers that do not arise in any event at common law and consequently do not extend the barrister's potential liability beyond the limits of BMIF cover. Extending the barrister's liability to cover consequential loss may extend the barrister's liability beyond that which is covered by his BMIF insurance. Rule rC76 of the BSB Handbook requires: *"You must: .1 ensure that you have adequate insurance (taking into account the nature of your practice) which covers all the legal services you supply to the public;"*. Rule rC30.3 enables a barrister to refuse instructions where the potential liability for professional negligence in respect of the case could exceed the level of professional indemnity insurance which is reasonably available. If the proposal is regarding the solicitor's consequential loss, then agreement is very likely to be outside the scope of BMIF's cover. If the proposal is about the lay client's consequential loss, then it is likely to be within the scope of BMIF's cover. Further guidance from the Bar Council and BMIF on this matter can be found in the section entitled *"Are the Terms fixed? Can we deviate from these Terms?"* in Chapter 1 of this Guide.

Q.16 I started a case under the Chambers Standard Terms and the solicitor now wants to agree modestly different terms prior to delivering the brief for the final hearing. I have objected to the new terms but the solicitor says that I am instructed on the case and cannot now decline to do the case. Can I refuse to accept the brief?

A. Having agreed terms, neither party (barrister and the instructing Authorised Person) is entitled to demand, unilaterally, that different terms be substituted. However, if you are considering withdrawing from the case, gC83 of the BSB Handbook states *"In deciding whether to cease to act and to return existing instructions in accordance with Rule rC26, you should, where possible and subject to your overriding duty to the court, ensure that the client is not adversely affected because there is not enough time to engage other adequate legal assistance."*

Q.17 The solicitor has not paid me in a timely way, the final hearing, which will involve a substantial amount of work, is imminent and I doubt the solicitor will pay for that either. The solicitor says that I cannot withdraw at this stage as it would prejudice the client. Can I withdraw?

A. Clause 12.6.3 in the Standard Terms provides that, if fees in a case remain unpaid for 30 days or more, the barrister is able 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 rules rC25-27 of the Code. See in particular:

“rC26 You may cease to act on a matter on which you are instructed and return your instructions if: [...] .5 you do not receive payment when due in accordance with terms agreed, subject to Rule rC26.7 (if you are conducting litigation) and in any other case subject to your giving reasonable notice requiring the non-payment to be remedied and making it clear to the client in that notice that failure to remedy the non-payment may result in you ceasing to act and returning your instructions in respect of the particular matter;”

“gC83 In deciding whether to cease to act and to return existing instructions in accordance with Rule rC26, you should, where possible and subject to your overriding duty to the court, ensure that the client is not adversely affected because there is not enough time to engage other adequate legal assistance.”

Q.18 Using the Standard Terms, the solicitor and I agreed the fees and I undertook the work. The solicitor is now disputing the amount of fees that was agreed. What options are available to me?

A. You can seek to resolve the matter by use of any dispute resolution procedure.

Q.19 The solicitor has not paid my fee – can I report the solicitor to the Bar Council for non-payment?

A. For fee chasing and legal action, the Bar Council provides a panel of solicitors' firms who provide debt-recovery services and come recommended by clients. <https://www.barcouncil.org.uk/supporting-the-bar/fees-collection/debt-recovery-panel/> Once a barrister who has obtained a judgment for fees against the solicitor or Authorised Person they may report the firm to the Bar Council for placing on the advisory 'List of Defaulting Solicitors and other Authorised Persons'.

Q.20 Who is the contract actually agreed with? And do I sue the firm or the solicitor? Is it a personal liability?

A. The Standard Terms are stated to be an agreement between the barrister and the Authorised Person. The Authorised Person is defined as the person approved by the SRA (see Q1 above) and includes all successors and assignees. Although the Authorised Person can be an individual, it is likely to be the "firm" and therefore you would sue the firm. If the firm is a true partnership, then the partners are likely to be joint and severally liable. Save for that, there is no provision in the Standard Terms that an individual solicitor is personally liable for the instructions given in the name of the firm.

Q.21 A senior member of Chambers did a small piece of work for one of Chambers biggest clients. The solicitor is declining to pay at this stage saying that the client has cited some minor dissatisfaction with the work of that barrister. The barrister has said that they will sue for their fees if they are not paid, and the firm has said that they will pull all of their work from Chambers if the barrister does. Can Chambers stop the barrister suing the solicitor or could Chambers just cover the fee? Is Chambers obliged to support the member of Chambers?

A. The introduction of the Standard Terms does not affect the provisions of the Code of Conduct in respect of the position of chambers and the responsibility to ensure that fee notes of all former members, pupils and members irrespective of their standing, are sent expeditiously and pursued efficiently (rC89.1 and rC110.3.i of the BSB Handbook). The Bar Council is not in a position to comment on the procedures or decisions of a chambers unless such procedures or decisions conflict with the Bar Code of Conduct.

Q.22 Invoices – I am using fee notes and wish to continue to do so but one client is insisting that I invoice him. Can I operate both systems concurrently?

A. Yes, but you would have to be very careful with your records as it affects the barrister's tax situation. Essentially, a fee note is not deemed to be an invoice and is not treated as an invoice until the fee note is reissued as a combined receipt and VAT invoice. This practice arises from the Regulation 92 of the VAT (General) Regulations 1995, whereby the barrister's liability for payment of VAT does not arise until the fees are paid. With invoices, the barrister's liability for payment of VAT arises when the invoice is issued, not when the fees are paid. Further information is available in the Bar Council's 'Taxation and Retirement Benefits Guidance' <http://www.barcouncilethics.co.uk/documents/taxation-handbook/>

Q.23 I have an outstanding fee of £500 for which I wish to sue the solicitor in the small claims court. Where can I find out information about this? What is the maximum amount that I can sue for in the small claims court and does the amount that I sue for include interest?

A. The maximum amount that you can sue for in the small claims court is £5,000. However, creditors can make a claim on line for any amount through the County Court Money Claims Centre (the CCMCC). The CCMCC centralises the administrative functions and manages the early stages of claims, up to allocation of the case in the relevant court. Information can be found in <https://www.gov.uk/make-court-claim-for-money/overview> For fee chasing and legal action, the Bar Council provides a panel of solicitors' firms who provide debt-recovery services and come recommended by clients. <https://www.barcouncil.org.uk/supporting-the-bar/fees-collection/debt-recovery-panel/> Regarding interest, see the next FAQ.

Q.24 How much interest can I charge? Do I have to charge interest?

A. The Standard Terms provide at clause 12.6.1 that interest can be charged in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 and the Terms also provide that the interest can be charged from 30 days after the date of the delivery of the fee note. At present, the rate of interest is governed by the Late Payment of Commercial Debts (Rate of Interest) (No 3) Order 2002 (SI 2002 no 1675) and provides for interest to be charged at 8% above the Bank of England bank (base) rate. The Bank of England's link to the bank rates is <http://www.bankofengland.co.uk/boeapps/iadb/Repo.asp?Travel=NIxIRx>

Remember, it is entirely optional as to whether interest is charged. The Standard Terms say the barrister is "entitled" to charge interest. This does not mean the barrister "has" to charge interest. In addition, of course, the barrister and instructing person can agree a different rate of interest or agree not to charge interest at all.

The Late Payment of Commercial Debts Regulations 2002 (SI 2002 no 1674) allows the barrister to charge a fixed sum, in addition to the interest charged under the Commercial Debts (Interest) Act 1998, to compensate for the costs of collecting the debt. The sum is £40 for a debt of less than £1,000, £70 for a debt of £1,000 or more but less than £10,000 and £100 for a debt of £10,000 or more.

Q.25 I have prepared an extensive advice and I understand that the solicitor is now using that advice for other clients of his. Can the solicitor do this?

A. Clause 9.1 of the Standard Terms clearly require that the barrister's written permission is obtained by the solicitor before the solicitor can use that advice for purposes other than those for which it was prepared. The work was carried out by the barrister for a particular case and for a particular purpose and it must not be used for other purposes without the barrister's written consent.