



The Bar Council

Dual-Capacity Practice Protocol

Purpose:	To advise existing and prospective dual-capacity barristers regarding the rS18 requirement to agree a protocol with their employers or authorised bodies before undertaking dual-capacity practice, which sets out how potential conflicts of interest will be dealt with and avoided
Overview:	BSB requirement - purpose of the Protocol - examples of relevant circumstances - the general rules - possible conflicts - relevant considerations - ceasing to act - template draft Protocol (for guidance only; includes: purpose - duties of barrister - matters to be agreed between the parties - possible approach to general conflicts - termination - insurance - confidentiality - contract of employment)
Scope of application:	All existing and prospective dual-capacity practice barristers
Issued by:	The Employed Barristers and Ethics Committees
Issued:	September 2016
Last reviewed:	June 2020
Status and effect:	Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

Introduction

1. This document provides ethical advice to barristers who are in, or thinking about entering into dual-capacity practice, in preparing and agreeing the required protocol for avoiding and resolving conflicts which may arise. There is also a sample

template protocol provided as an annex at the end of this document, should you wish to amend this to your particular circumstances.

2. Working in a dual-capacity may enable you to make more flexible use of your available time or to provide legal services in new ways. At the same time, this can raise challenging ethical issues, requiring careful prior consideration.

3. In determining whether you require a dual-capacity practising certificate, you should bear in mind that you may only carry on 'reserved legal activities' or supply other legal services in the capacities set out in rule S16. You will need to have regard to the definitions relating to 'employed barristers' in Part 6 of the BSB Handbook, including the relevant scopes of practice in Part 3. It should be noted that there are a number of situations in which a barrister may be an 'employed' barrister for regulatory purposes, even if they are not "employed" for tax or other purposes, and will therefore need an employed or dual-capacity practising certificate. The Ethics Committee has produced a document entitled [Retainers, Fee Arrangements and Non-standard Work Arrangements](#) which may assist you in considering whether you are carrying on any activities as an 'employed barrister'.

4. If you do decide to engage in practice in more than one of the capacities listed in Rule S16, then the BSB Handbook makes the following provision in Rule S18:

"rS18 You may only practise or be involved with the supply of legal services (whether reserved legal activities or otherwise) in more than one of the capacities listed in Rule S16 after:

1. having obtained an amended practising certificate from the Bar Standards Board which recognises the capacities in respect of which you are intending to practise; and

2. having agreed with each employer or authorised body with which you are involved a protocol that enables you to avoid or resolve any conflict of interests or duties arising from your practice and/or involvement in those capacities,

and provided always that you do not work in more than one capacity in relation to the same case or issue for the same client, at the same time."

(Emphasis added.)

5. You must, therefore, agree a protocol with each employer or relevant body with whom you intend to work in order to practise in dual capacity. Such a protocol will provide a degree of protection for you as well as the employer, creating mutual assurance in your relationship and assisting you to avoid and/or resolve such

conflicts of interest as might arise, or might be perceived to arise, in the course of practising in more than one capacity.

6. It should be noted that **the draft protocol at the end of this document is a sample only**, created with only the most straightforward situations in mind and mainly for the purpose of identifying issues to be considered and possible ways in which you might consider addressing them. Some sections of the template may not apply to your situation; for example, references to the employment contract may not be applicable to secondment-type roles. This is also subject to the qualifications and warnings below about the efficacy of some arrangements, such as information barriers. At the very least, you should discuss the points in this guidance and template protocol with your employers or relevant bodies, and prepare your own protocol to suit the particular circumstances having regard to their professional and legal obligations, as well as your own.

7. These are just a few examples of when your protocol might be engaged:

7.1. Your employer is instructed to handle an appeal in a case in which you were previously involved in a self-employed capacity.

7.2. Similarly, your employer could be instructed on the other side in a case you were previously or are currently involved, or in which you are booked in to be involved.

7.3. You are approached by an independent client who, because of your (part-time) in-house role asks you to advise (as a self-employed barrister) on a legal matter concerning that client's business. In that situation you might need to consider whether, in so advising, there would be a 'real risk' (see rC.21.4) of breaching your duty of confidentiality to your employer, or of disadvantaging your employer's business (i.e. there is a potential conflict of interest between your employer and the prospective client - see r.C.21.3).

General Approach

8. All practising barristers, whether employed or self-employed, are bound by the Core Duties and the Conduct Rules contained in the BSB Handbook when practising or otherwise providing or offering to provide legal services. These place your duty to the Court in CD1 above any other Core Duty, if and to the extent that the two are inconsistent; see gC1.1.

9. Your approach to acting in a dual capacity should take into account the provisions of rC15 and rC16 so that it is clear to your employer that your duty to act in the best interests of each client (CD2) is subject to your duty to the court (CD1), to your obligations to act with honesty and integrity (CD3) and your duties to maintain your independence (CD4) and not to discriminate (CD8).

10. You will need also to bear in mind that the Conduct Rules provide that your duty to the court includes the duty to act independently in the interests of justice¹ and that your duty to act in the best interests of each client, while subject to your duty to the court, does not require you to act in breach of your duty to keep the affairs of each client confidential².

11. It will be an important starting point when drafting the required protocols and subsequently acting in a dual capacity, to be clear with your employer about your ethical duties and to identify as clearly as possible who your client is or may be in respect of each capacity in which you intend and are permitted to practise. In employed practice this is particularly useful as often the terms of employment and/or management structures can obscure the true identity of the client. Such an analysis is necessary as your duty is to the end (lay) client, not the professional client or other intermediary³. The Handbook places the interests of the end client above both your own interests and those of professional clients and employers⁴.

12. You should also consider the effect that your duty to act independently in the interests of justice has on your relationship with your client, which is constrained by rC20 (inasmuch as you are personally responsible for your own conduct and professional work notwithstanding the views of your client, professional client, employer or any other person). This may not cause concern where the employed side of your practice is within a non-authorized body such as a government department whose terms of employment will include an obligation to comply with the Civil Service Code⁵; this may, however, require further consideration depending on the context of your employed practice. Your honesty, integrity and independence are fundamental. The interests of justice and your client's best interests can only be properly served and any conflicts (real and perceived) between the two properly resolved, if you conduct yourself honestly and maintain your independence from external pressures when acting in either capacity.

13. Your duty to the client is expressed in the BSB Handbook as a duty to act in the best interests of 'each client', so that you may only act for more than one client if you are able to act in the best interests of each client as if that client were your only client⁶. These reflects your legal obligation of undivided loyalty to each client. In all cases, therefore, you should only accept instructions to act for more than one client if

¹ rC3

² rC4 and rC5

³ gC36

⁴ rC15

⁵ This expressly reaffirms the duty of government lawyers to act in accordance with their profession obligations so that there is no conflict between the two - see, for example, Guidance Note for Government lawyers, section 1.

⁶ gC37.

you are able to act in the best interests of each client, as if that client were your only client.

Conflicts

14. Dual capacity practice will require you to give particularly careful consideration to the potential conflicts that might arise.

15. The term 'conflicts' is often used to cover different sorts of ethical difficulties. Some examples, in a situation involving some form of entity (i.e. employer or other relevant body) may assist to illustrate this:

15.1. There may be conflicts between interests of different clients of an entity.

15.2. There may be conflicts between the personal interests of an entity, or of an individual lawyer practising in or through that entity, and the interests of a client of the entity.

15.3. There may be conflicts between an entity itself and the separate clients of a particular barrister in that entity who works in a dual-capacity.

15.4. There may be conflicts between clients of an entity and the separate clients of a particular barrister in that entity who works in a dual-capacity.

15.5. The entity or the dual-capacity practising barrister may be acting (or have acted previously) for clients to whom it or they owe duties of confidence. It or they may also have entered into confidentiality obligations with people or organisations other than clients. These confidentiality obligations may prevent them from being able to act for a new client who could benefit from being told the confidential information which is known to the entity. For this purpose, it does not matter whether the interests of the various clients/parties are in conflict with each other.

16. It is the last three of these examples which may give rise to the most practically difficult aspects of dual-capacity practice.

17. The potential types of conflict that could arise will depend on the nature and business of your employer/entity: for example, the difficulties may be reduced if the entity does not have clients of its own, and you are employed simply to provide legal services to the entity. An important first step, therefore, before embarking on any dual-practice, will be to identify which types of conflict might arise, and how.

18. Some, but not all, conflicts can be avoided by obtaining the informed consent of all relevant persons beforehand. However, the obtaining of consent may itself be

fraught with difficulties (not least as regards the degree of explanation and disclosure required for consent to be “informed”, and whether and how consent can be sought without breaching existing duties of confidence). In this respect, there is a particular problem that dual-practising lawyers may face in simply performing ‘conflict checks’. It may be that even the attempt by a (potential) client to instruct an entity or barrister is itself confidential. Obviously a barrister or (for example) solicitor’s firm can check using information that they themselves hold to see whether they are conflicted, and there must be an implied permission to use that confidential information for that purpose (so long as the information is not disclosed to anyone else). However, if the barrister or firm has then to check with a third party (i.e. the barrister needs to check with the part-time employer, or the employer needs to check with its dual-capacity barrister in his/her self-employed capacity) then this may expose confidential information to a third party, outside the scope of any sort of implied permission. One possible approach to dealing with these issues is set out in the Template Protocol at paragraphs 6 and 7. It should be noted, however, that this is not a perfect solution and care should be taken in each case.

19. Information barriers (sometimes referred to as, ‘Chinese walls’) within an entity may also, in some circumstances, enable a conflict relating to confidential information to be avoided (e.g. where an individual lawyer who works on a self-employed basis for a client (client A) is excluded altogether from any risk of coming into contact with an entity’s work for (and any confidential information relating to) another client (client B) whose interests conflict with those of client A); but this, too, is fraught with difficulties, and may not be permissible or effective, both in law and in practice, where a conflict or risk of conflict has already been identified, especially in a smaller entity. This does not mean, however, that such barriers should not be put in place to avoid previously *unidentified* conflicts from arising or creating difficulties without first being identified and managed: see paragraph 6(c)(iv) of the sample protocol.

20. In addition to actual or potential conflicts of the sort described above, you will also need to consider whether acting for particular clients or in a particular situation might give rise to an appearance of potential impropriety, and thus be contrary to your duty to the court⁷ or your general duty not to diminish public trust and confidence in the profession⁸, even if it might otherwise be permissible.

21. With those issues of conflict and confidentiality in mind, when acting in your self-employed capacity you will need to give careful consideration to rC21 and rC29 (‘the cab rank rule’) when you are deciding whether you can accept new instructions. In doing this, you will need to consider the interests of your own

⁷ CD1. See, for example, *Skjevesland v Gevevan Trading Co td (No.2)* [2003] 1 WLR 912.

⁸ CD5. Again, see for example, *Skjevesland* (note 7 above).

current and former clients as well as those of your employer and its clients, depending on the nature of your employed relationship.

22. In accordance with rC21, when accepting instructions to act in a self-employed capacity, you will need to consider the circumstances in which you are not permitted to act, which will require you to consider whether:

22.1. due to any existing or previous instructions, or obligations under your contract of employment, you may not be able to fulfil your obligation to act in the best interests of the prospective client;

22.2. there is or may arise a conflict of interest between your own personal interests, those of your employer, or the interests of a previous, existing or prospective client in respect of the particular matter;

22.3. there is a real risk that information confidential to your employer and/or another former or existing client, or any other person to whom you owe a duty of confidence, may be relevant to the matter, such that if, obliged to maintain confidentiality, you could not act in the best interests of the prospective client if the person to whom that duty is owed does not give informed consent to disclosure of the confidential information;

22.4. your instructions seek to limit your ordinary authority, duty or discretion in the conduct of proceedings in court;

22.5. your instructions require you to act other than in accordance with law or with the provisions of the Bar Standards Board Handbook;

22.6. you are not authorised or otherwise accredited to perform the work required by the relevant instruction;

22.7. you are not competent to handle the particular matter, or otherwise do not have enough experience to handle the matter;

22.8. you do not have enough time to deal with the particular matter, unless the circumstances are such that it would nevertheless be in the client's best interests for you to accept; or

22.9. there is a real prospect that you are not going to be able to maintain your independence.

23. Where any of the circumstances set out above arise later, by reason of either your employment or a previous or current self-employed instruction, you should cease to act in accordance with rC25, which also sets out additional circumstances in which you must cease to act.

24. If you are acting in more than one capacity, you should consider each new set of instructions in the context of your current and former clients and the duties you owe them, irrespective of the capacity in which you have acquired them. This may be more difficult in your employed capacity because, unless you negotiate this as part of your terms of employment, you will have difficulty returning instructions or refusing to act, as you would in your self-employed capacity, if a conflict arises. For these reasons, where you have professional duties to clients which have been gained during your employed practice, where they are first in time, they are likely to take priority. As a result, you may find that you are unable to accept new instructions from existing clients on existing matters in the event that a conflict arises (i.e. you may be obliged to give preference to clients of your employer); and that, accordingly, you are unable with confidence to accept instructions from clients in your self-employed capacity other than on a piecemeal basis (i.e. instruction by instruction, rather than (e.g.) under a longer-term arrangement which applies to all instructions which might be delivered in a case). You will need to decide what degree of risk there may be of this happening, and whether that degree of risk is acceptable for you and your clients. In some circumstances, it may be in the best interests of some prospective clients (particularly in your self-employed practice) that the risks are explained to them at the outset, or that they are advised to seek alternative counsel. In making these assessments prior to entering into a dual-capacity arrangement, you may find that your obligations to existing clients have the result that – unless the conflict or risk of conflict can be addressed satisfactorily – you should decline to enter into the arrangement with a particular employer until those obligations have ceased.

Additional matters

25. If you will also be entering into an employment contract, then your conflicts protocol should be considered in that context too. There will be additional matters that your contract will need to cover, but the two will need to be consistent, and you will want to be confident what obligations will be contractually binding on you, and what obligations will merely reflect your professional duties (to which your contract ought in any event be subject). Issues such as this are not covered in the sample protocol.

Insurance

26. The professional rules on insurance are in rC76-78 and gC113-117 in the BSB Handbook. As well as ensuring that you are covered by the Bar Mutual Indemnity Fund (BMIF) for your self-employed practice, you will need to ensure you are adequately covered for your employed practice. The latter will commonly be by way of insurance which is provided by the employer, but you need to have a clear understanding of this. The Ethics Committee's document entitled, '[Retainers, Fee Arrangements and Non-standard Work Arrangements](#)' discusses this issue.

Feedback

27. The possibility of practising in more than one capacity is still relatively new. The Bar Council would be interested in, and grateful to know of, any experience gained by practitioners of ethical issues arising in dual-capacity practice, particularly as regards the issues dealt with in this document and the sample protocol. Feedback may be provided through the Ethical Enquiries Service (email: Ethics@BarCouncil.org.uk).

Important Notice

This document, and the annexed sample protocol, have been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **They are not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in them.** They do not comprise – and cannot be relied on as giving – legal advice. They have been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in their preparation accept any responsibility or liability for anything done in reliance on them. For fuller information as to the status and effect of these documents, please see [here](#).

Annex: Template Protocol

Introduction

This Protocol is intended to assist [*insert name of barrister*] ('the barrister') and [*insert name of employer*] ('the employer') in managing their relationship as a consequence of the barrister exercising his or her right to practise as a dual qualified self-employed barrister while at the same time as a barrister [*insert type of arrangement e.g. contracted / employed by/on secondment with*] the employer. Please note that this Protocol addresses the issues of the barrister's professional obligations only, and does not address any professional obligations to which the employer is or may be subject.

1. The purpose of this protocol is to make provision so that any conflict of interest or duty that arises from the barrister practising in two separate capacities is avoided or resolved. It recognises the professional obligations owed by the barrister and provides assurance to the employer and the barrister that any such conflicts will be identified and will be managed fairly, effectively and transparently. This protocol is intended solely to ensure compliance with the professional obligations of the barrister and does not form part of or vary any contract of employment that might exist with the employer. It is understood that it will at all times be the responsibility of the barrister to ensure that any role adopted or actions taken by the barrister in either capacity are fully in accordance with his/her professional obligations.
2. The barrister's professional obligations make his/her duty to the court paramount so that his/her duty to act in the best interests of each client is subject to his/her duty to the court, to act with honesty and integrity, to maintain independence and not to discriminate. At all times, a barrister's honesty, integrity and independence, are fundamental. The interests of justice and, when applicable, an employer's best interests can only be properly served and any conflicts between the two properly resolved, if the barrister conducts him/herself honestly and maintains his/her independence from external pressures when acting in either capacity.
3. It is understood that the barrister may only accept instructions to act for more than one client if they are able to act in the best interests of each client as if that client were their only client. Further, the barrister will not act (whether pursuant to his/her employed or self-employed status) where his/her independence is compromised by reason of employment with the employer or a previous or current self-employed instruction.
4. The barrister may not pay or accept referral fees, act in circumstances of a conflict of interest, or where s/he risks breaching one client's confidentiality in favour of another's.

5. At no time will the barrister act in more than one capacity in relation to the same case or issue for the same client. With this in mind the barrister will:
 - a. Maintain a contemporaneous record of any matter in which s/he is acting or proposing to act in a self-employed capacity, identifying (as a minimum) the following matters:
 - i. Name of client;
 - ii. Name of matter;
 - iii. General nature of the issues; and
 - iv. Dates and times of working.
 - b. During any period of self-employment, ensure that there can be no confusion on the part of the employer or any other person as to the capacity⁹ in which the self-employed work is being carried out.
6. At or before the commencement of the [barrister's employment / this protocol]:
 - a. The barrister will provide to the employer a list of all of the clients to whom the barrister has provided legal services in the past [three] years and whose names the barrister is permitted lawfully and professionally to disclose. Both parties recognise that there may be other clients whose identities the barrister cannot disclose (including, for the avoidance of doubt, clients who cannot be identified due to data protection obligations).
 - b. The employer will run its normal conflict checks procedure against that initial list of the barrister's clients and identify any in relation to whom a potential or actual conflict arises.
 - c. Thereafter:-
 - i. The barrister will, when able to do so, notify the employer of the identity of all potential new clients, and the employer will again run its normal conflict checks procedure against those potential new clients and identify any for whom a potential or actual conflict arises.

⁹ This is very important as the situation could arise where it has been agreed that an employed barrister might nonetheless act as a self-employed barrister retained by the employer in relation to a particular item of work. In such circumstances professional, contractual, tortious and insurance issues could arise unless it has been made clear at all times the precise basis upon which a particular action was undertaken.

- ii. The barrister will not accept any new instructions where there would be a real risk of a conflict of interest arising, but the barrister would be unable to disclose the name of the client to the employer for the purposes of a conflicts check.
 - iii. The barrister will run his/her normal conflict checks against any new matter on which s/he is engaged whilst acting for the employer, and identify any in relation to whom a potential or actual conflict arises.
 - iv. The employer will [... *identify any information barriers or other steps that the employer will take to try to avoid previously unidentified conflicts from arising or creating difficulties for the barrister (or the employer), without having first being identified and managed ...*]
- 7. Where a potential or actual conflict of interest between the employer and/or their former or existing clients on the one hand, and the barrister's former, existing or prospective clients from their self-employed practice on the other hand, arises:
 - a. The barrister will consider his/her professional obligations.
 - b. If appropriate, the barrister will notify [*insert name/job title of individual(s) at employer allocated to deal with conflicts*] and discuss a strategy to deal with the potential or actual conflict.
 - c. The barrister and employer shall in the first instance endeavour to resolve the issue by way of an informal discussion, with the outcome or solution to be recorded in writing, subject to (d) below.
 - d. Where there is a real risk of a conflict of interest in respect of the particular matter:
 - i. between a prospective client of the barrister in their self-employed status on the one hand, and the employer or one or more of the employer's former or existing clients on the other, the barrister should refuse to accept the prospective instructions unless the employer and their former or existing clients give permission to inform the prospective client of the conflict, and all persons affected give their informed consent to him/her acting in such circumstances.
 - ii. between an existing client of the barrister in his/her self-employed status, on the one hand, and the employer on the other, the barrister will not act in his employed capacity, or will

cease to act in that capacity, unless the persons affected give their informed consent to him/her continuing to act in such circumstances.

- iii. between an existing client of the barrister in his/her self-employed status, on the one hand, and one or more of the employer's former or existing clients on the other, notify all affected parties that the barrister will not act in his employed capacity, or will cease to act in that capacity, on any matter for that former or existing client, unless the persons affected give their informed consent to him/her continuing to act in such circumstances.
- iv. the barrister and employer will take practical steps to avoid disclosures of confidential information by or to the barrister if and when the barrister is not acting on a particular matter for the employer due to an identified potential or actual conflict. Factors to bear in mind include printing of documents, discussing cases in open plan offices or team meetings, access to documents on shared computer drives, taking telephone calls, administrative support, and the operation of any information barriers [*insert matters specific to the individual workplace*].

- 8. During such times and in relation to such matters as the barrister is not working in a self-employed capacity, the contract of employment shall remain unchanged unless there is express agreement to the contrary. Specifically, the barrister shall ensure that any information held or made known to him as a consequence of the employment shall remain strictly confidential.