



The Bar Council

Retainers, Fee Arrangements and Non-Standard Work Arrangements

Purpose:	To assist barristers to identify permissible and impermissible fee arrangements for work undertaken as a self-employed barrister, and to identify when non-standard work arrangements (such as secondments) may trigger specific requirements under the Code of Conduct within the BSB Handbook (including requirements applicable to practice as an employed barrister)
Scope of application:	Self-employed and employed barristers
Issued by:	Ethics and Remuneration Committees
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Status and effect:	Please see the notice at the end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

Introduction

1. This document is concerned with fee arrangements, particularly "retainers" of various types, relating to self-employed practice, and the circumstances in which some work arrangements (such as secondments) entered into by self-employed barristers may lead them to being treated as employed barristers under the BSB Handbook.

2. Non-standard work arrangements (including retainer type agreements, differing fee arrangements and consultancy agreements) have proliferated in recent years. They have the potential (a) to mean that you are working as something other than a self-employed barrister (with the attendant duties of those different modes of

work), or (b) to affect the duties that a barrister is under. Potential duties under the Code of conduct that may be affected include for instance: CD4- the duty to maintain your independence; CD1- your duty to the court in the administration of justice, and CD3- your duty not to do anything that could reasonably be seen by the public to undermine your honesty, integrity and independence.

3. For those reasons it is important when entering into any non-standard work arrangement that that arrangement is correctly categorised, and to be aware of any potential impact it has on your duties under the Code, and further whether, accordingly, it is permissible.

4. The prohibition on referral fees and other commission-type payments arises from a number of rules in the BSB Handbook. Namely, at rC8 (not undermining honesty, independence and integrity) and gC18-21 (compromising your independence by the giving commission, gifts or referral fees to clients, or accepting money for anything other than professional services), as well as rC10 (the prohibition on referral fees) and gC29-32 (guidance on referral fees). The prohibition is the subject of a separate document prepared by the Ethics Committee, as well as separate guidance from the BSB.

5. There is no generally-accepted definition of "retainer". It may, in context, refer to no more than a barrister's agreement with a solicitor to provide legal services. To avoid issues of terminology, this document sets out various types of arrangement that are sometimes called "retainers" and which may give rise to ethical considerations and problems of professional regulation, together with the Bar Council's views about such arrangements. It will then go on to consider particular types of work arrangement which might lead a self-employed barrister to be treated as an employed barrister, at least for time spent working under that arrangement.

6. At the end of this document, the checklist at Annex A is intended to assist you in analysing whether or not it is permissible for you to enter into a particular fee and/or work arrangement.

Retainer-type arrangements

7. Rule C9.7 in the BSB Handbook requires that barristers must only propose or accept fee arrangements which are legal. Thus, any particular fee arrangement may be prohibited because it is unlawful. This may not, however, be the only relevant rule to be considered in relation to a retainer-type arrangement.

Payments giving the client a "call option" on your services and barring you from appearing against that client

8. This is the traditional type of retainer which was abolished in the 1980s. In our view:

8.1. A "general retainer" (whose effect is that you are debarred from acting against that client in any matter, whether or not you have received instructions to act for him in a particular case) will not usually be permissible. This is because, in the absence of a true conflict, it is an affront to the 'Cab-rank rule', and to the free availability of legal services.

8.2. A "special retainer" (debarring you from accepting a brief from any other party in a particular case) is likely to be subject to the same objections, at least up to the time when instructions are received.

9. Both types of retainer are to be distinguished from booking fees: see the next section. A retainer lacks the specificity of a booking fee.

Fee Arrangements

Payments in the nature of "booking" fees

10. Whether it is permissible to charge a "booking" fee depends on what is meant by a booking fee in any particular case.

11. Where it is proposed to charge fees before work has been undertaken, the question whether the arrangement is permissible will depend on whether the fee can be said to be incurred for professional services supplied or to be supplied (see gC18.3).

12. For example, if you agree to keep yourself free in order to undertake a particular piece of work, it will be acceptable to charge a non-refundable fee so long as that fee is genuinely a payment in respect of the work that you anticipate carrying out. The fact that, in the event, you are not required to carry out the work does not alter the fact that the fee was paid for work to be undertaken. Such an arrangement is no different in principle from a brief fee which is incurred in whole or part before the papers are delivered and is treated as non-refundable if the case settles.

13. Similarly, it is permissible to charge and receive a fee if the fee is in respect of making yourself available for a defined period of time, if that time may genuinely be needed for professional work: e.g. for blocking out a defined period of time in your diary for a case.

14. However, there are cases where barristers have sought to charge merely for "agreeing to act" in respect of a particular matter (but not for undertaking any further obligation). Such a fee is not a fee for professional services supplied or to be supplied, and is likely to be objectionable for the reason given in paragraph 8 above.

Other non-standard work arrangements

15. Non-standard work arrangements have (in addition to retainers and fee arrangements) the potential to give rise to different duties than those arising from work as a self-employed barrister in the standard way. As such it is important to identify when such a situation arises and the consequent duties. The following list is not exhaustive, as the types of arrangements are potentially infinite, and each one has to be examined on its own characteristics.

A condition, attached to a standard brief or instructions, purporting to debar you from acting against that client in the future

16. Some major clients are said to seek to impose this as a pre-condition of receiving instructions from them. We believe that the problem occurs most commonly in relation to banks, insurance companies, national newspapers, large accountancy firms, and some US clients. We have also been made aware that those who are members of certain government panels at times feel under (or are placed under) pressure not to accept instructions to act against the governmental body on whose panel they serve.

17. In our view, it would be professionally improper for you to agree, expressly or implicitly, to such a condition. In effect, it would be an attempt to "contract out" of the 'Cab-rank rule', which positively obliges you to accept instructions against an existing or former client unless a specific conflict would result. Such a conflict would usually relate to confidential information (see rC21.4), although it might also arise in other circumstances (see, e.g., rC21.1 and rC21.3). You must remain free to test any proposed new instructions against existing and previous ones on a case-by-case basis. Were it otherwise, then major clients could quickly 'scoop the pool' and monopolise competent representation in their field.

18. You should also be wary of attempts artificially to 'create' such conflicts. Any conflict must be a real one.

A condition attached to a particular brief or instructions, precluding you from carrying out other work during that case

19. There appears to be no objection in principle to this, provided (1) the object is genuinely to ensure that you have sufficient time to deal with the work, (2) the condition, and its extent, are objectively justifiable, and (3) it does not prejudice other, pre-existing clients.

An arrangement whereby you are not paid on the traditional "piecework" basis (per case, day or hour) but are "retained", in return for periodic payments, to deal generally with whatever legal matters may arise

20. In principle, the BSB Handbook permits any lawful fee arrangements (rC9.7), so long as you have the right type of practising certificate.

21. It is not unusual, particularly at the junior end of the common law Bar, for flat-fee arrangements of some sort to be proposed to chambers by solicitors, clients or claims handlers who wish to cap their legal costs.

22. In principle, such arrangements may be legitimate. In practice, there is a real risk that such fee arrangements may be linked with doubtful work practices that prejudice junior barristers' professional independence and lead them into danger of breaching other rules or Core Duties in the BSB Handbook.

23. One such danger (with a related impact on professional independence and other Core Duties) is that such an arrangement may in fact amount to or involve a disguised referral fee or commission, which is prohibited by the Handbook (see the Introduction above). A payment of this nature may also be illegal.

24. Other dangers might include, for example, pressure to 'cut corners' due to having agreed unreasonably low fees, and a consequential pressure to accept too great a workload to compensate for this.

25. You also need to be alert to identify arrangements that may require you to be authorised in a different capacity. In particular, some arrangements will involve you in practising as an employed barrister when working under that arrangement, as explained below.

Identifying arrangements which might lead to you being treated as an employed barrister

26. This section is concerned with work arrangements that you might make with solicitors in England and Wales¹.

27. Some work arrangements that have become fairly common may need to be analysed carefully in order to identify whether, when working under such an arrangement, you are practising as an employed barrister rather than a self-employed barrister. This is an important question. **You will be in breach of the BSB Handbook if you provide legal services in a capacity which your practising certificate does not permit, and this might result in you committing a criminal offence.**

28. The starting point is the definitions of “employed barrister” and “self-employed barrister” in Part 6 of the BSB Handbook.

29. A solicitors’ firm is required to be authorised to carry out reserved legal activities under the Legal Services Act 2007, so will almost invariably be within the BSB Handbook definition of an ‘authorised (non-BSB) body’. Accordingly, if you were to be an ‘employed barrister’ in the context of a solicitors’ firm, your employed status would be as an ‘employed barrister (authorised non-BSB body)’. This term is defined as follows:

“a practising barrister who is employed by an authorised (non-BSB) body either:

- a) under a contract of employment; or*
- b) under a written contract for services which is for a determinate period (subject to any provision for earlier termination on notice),*

¹ Similar issues are likely also to arise in relation to arrangements entered into outside England and Wales, but you would need to consider the nature of your practice under those arrangements. Your attention is drawn here only to three points. Firstly, in some circumstances, you will not be treated as a practising barrister (see rS12 to rS15), but these will only apply if your status is that of an ‘unregistered barrister’ (an individual who does not hold a practising certificate but who has been called to the Bar by one of the Inns and has not ceased to be a member of the Bar). Secondly, a firm of lawyers based outside England and Wales is unlikely to be a body authorised to provide reserved legal activities in England and Wales, so the relevant type of any ‘employment’ is likely to be as an ‘employed barrister (non-authorised body)’. Thirdly, just because you will be based outside England and Wales does not in itself mean that your work in or for that firm will necessarily be ‘foreign work’ within the meaning of the BSB Handbook (see definition 96).

who supplies legal services as a barrister in the course of his employment."

30. The term 'practising barrister' is defined by reference to rule S9, and the terms 'barrister' and 'legal services' are also defined (but will not usually give rise to any issue in the context with which this section is concerned).²

31. **The first question to ask yourself, therefore, is whether the nature of your arrangement falls within paragraph (a) or (b) of the definition of 'employed barrister (authorised non-BSB body)'**³. If it does, and if you will be supplying legal services as a barrister pursuant to that arrangement, then you will be practising as an employed barrister when supplying those legal services.

32. Several factors are likely be relevant in determining the nature of any particular arrangement, so each arrangement will need to be considered on its own facts.

33. Whether a contract is a 'contract of employment' within part a) of the definition is primarily a question of law, based on the circumstances relating to that contract.

34. Beyond that, part b) of the definition makes clear that, to be an 'employed barrister' under the BSB Handbook, your *legal* status does *not* need to be that of an employee: it is possible to be a self-employed, independent contractor in law whilst also an 'employed barrister' for the purposes of the BSB Handbook, if your contract falls within part b) of the definition. As a result, **many types of short-term *fixed-period* work (including short term 'secondments' to solicitors' firms) undertaken by self-employed barristers under a written contract may well involve those barristers working as 'employed barristers' during that period.**

² Some of the other terms used are also defined, but these additional definitions are unlikely to be triggered by an arrangement with a firm of solicitors. The term 'employment' is defined as meaning 'direct or indirect employment'; and 'indirect employment' is defined as meaning 'employment by a non-authorised person that in turn is owned or controlled by one or more BSB authorised persons'. The terms 'non-authorised person' and 'BSB authorised person' are themselves defined, and concern authorisation to undertake reserved legal activities under the Legal Services Act 2007.

³ This assumes that the firm or organisation is authorised by a legal services regulator (i.e. an 'Approved Regulator' under the Legal Services Act 2007) other than the BSB. If this is not the case, then you will need to consider and apply the other 'employed barrister' definitions, and there may be additional restrictions on the type of work you can carry out under your arrangement with the firm or organisation: see Part 3 of the BSB Handbook.

35. If the answer to that first question is 'yes', then you will need to apply **beforehand** for an amended practising certificate to cover all capacities in which you will be practising (see, especially, rS70). If you will be spending all of your time working as an employed barrister, then you will need a practising certificate which entitles you to practise as an employed barrister. If you will be switching regularly between practice as an employed and as a self-employed barrister, then you will need a dual-capacity practising certificate (rS18.1).

Issues arising/ necessary action if your work under a non-standard arrangement renders you an employed barrister

36. If you will be spending at least part of your time working as an employed barrister, then there are several areas and issues that you will need to consider and address in order for you to be able to comply with your obligations as an employed barrister under the BSB Handbook. These are set out in the below paragraphs.

37. Considering these areas and issues may also help you to identify whether a proposed arrangement might lead to you practising as an employed barrister.

37.1. The first issue is one of clarity as to **the nature of the arrangement**. This is necessary in order for you to be confident that you have reached the right conclusion about your professional status under the BSB Handbook.

37.2. The second issue is also one of clarity, and is related to the first: **who is your client?** Your contract or instructions should contain an explicit statement as to the identity of your primary client: in particular, whether you are instructed on behalf of an end-client or on behalf of your solicitors personally. If they do not, then you need to clarify who is your primary client. You may also, of course, have obligations in any event to undertake due diligence in relation to that client under the applicable Money Laundering Regulations; and in whatever capacity you are practising, you may need to know this in order to satisfy yourself that the situation is one in which you are permitted to act under the applicable section of Part 3B of the BSB Handbook, headed 'Scope of Practice'.

37.3. In order to reach a conclusion, it might help to think about the three main types of situation that you might encounter as a self-employed barrister:

37.3.1. In the usual referral-work situation, your primary client will be the lay/ end-client, and your solicitors will be your 'professional client' for the purposes of the BSB Handbook.

37.3.2. In some situations, however, your solicitors' firm will clearly be your only client: for example, where your advice is sought on the solicitors' own position in relation to a potential claim by or against them.

37.3.3. On occasion, you might be asked to act for a firm of solicitors as your client, but with a view to those solicitors using your advice to advise *their* own client. This is not necessarily inappropriate, but it will often be artificial, and you would be wise to satisfy yourself that this is an accurate reflection of the situation, and to take account of the possibility that the end client might still be seen as your primary client if the issue were to be tested. Any uncertainty could also have related consequences: see paragraph 37.5 below.

37.4. Whoever your client may be, you will still be subject to all of your Core Duties and other relevant obligations under the Code of Conduct. This will include your duties to act with honesty and integrity (CD3), to maintain your independence (CD4), and not to behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession (CD5).

37.5. If you were to become aware that the end-client was in any way being misled as to their relationship with you then you are likely to owe a professional duty to correct this⁴.

37.6. The third issue is also one of clarity, and is related to both the first and second issues: **what are your legal duties?** If clarity can be achieved in this regard, then that is likely to be to your advantage, but in practice, you may decide that the only safe basis on which to proceed is on the basis that you could be subject to a claim for professional negligence by the end-client in any situation where you have undertaken work as an employed barrister. For example, even though a claimant would usually proceed only against a solicitors' firm and not individual employees personally, there is authority to the effect that employees can

⁴ Either under, or by analogy with, rC19.

be sued personally, at least in some circumstances: Merrett v Babb [2001] EWCA Civ 214, [2001] QB 1174.

37.7. The fourth issue is related to all of the first three issues: **insurance**. As a self-employed barrister, you will be covered by your compulsory Bar Mutual Indemnity Fund Limited cover, plus any top up cover that you take out; but this provides cover **only** for your practice as a self-employed barrister or as a barrister employed by a BSB-authorized entity. It does not cover practice as an employed barrister in any other circumstances. As a result, if you are practising as an employed barrister in relation to a solicitors' firm and it is possible that a claim might be made against you for work done in that capacity⁵, you will need to ensure (both for your own peace of mind and in order to comply with your obligations under rC76) that you are covered by *some other* insurance which is adequate and which covers all of the legal services you may supply to the public. You may also wish to ensure that this insurance covers you for disciplinary proceedings. Depending on the nature of the arrangement, you may be covered automatically by your solicitors' insurance policy, but you would be wise to seek specific confirmation of this, of the scope of the cover (e.g. as to whether it covers disciplinary proceedings), and of the extent to which you are likely to be covered for a claim made several years after you have done the work. In most situations, if you are an 'employed barrister' in relation to a solicitors' firm, you can expect to be covered by that firm's professional indemnity insurance policy from time to time, on the basis that you fall within the SRA Glossary definition of an 'employee' for this purpose; but again you would be wise not simply to assume that this is the case, and you might wish to ensure that you obtain an express indemnity from your solicitors if the arrangement might result in you being an employed barrister. In other situations, you may need (or want) to obtain separate professional indemnity cover.

37.8. Fifth, you may need to be wary of **additional questions that may arise if your instructions are only to advise or assist your solicitors as your primary client**. For example, if you are not an employee and

⁵ When considering your insurance position, do not forget to consider both your position in relation to claims made by lay clients of the firm and the possibility of claims against you by the firm of solicitors itself (if the solicitors are your 'client'). You should also ensure that your contract does not involve you accepting duties or potential liabilities which go beyond those which would be covered by the insurance policy.

your instructing solicitors' client has not agreed to you being instructed, then an issue might arise over whether you can consider and use information which is confidential to that client. In very many situations, you are likely to be comfortable relying on your instructing solicitors' confirmation that this is authorised under their contract with their client, or that they have their client's separate agreement to this, but there may be some situations in which you need to go further to confirm the position.

37.9. Sixth, you will need to be able to identify, avoid, and where necessary resolve additional possible **conflicts of interest** between your self-employed practice and your employed practice. For this purpose you **must** have in place a **protocol that enables you to avoid or resolve any conflict of interests or duties arising from your practice and/or involvement in each capacity in which you practice**: rS18.2. You will need to agree such a protocol with each employer or authorised body with which you are involved.

37.10. Seventh, if you will be practising in dual capacities, then you will need to ensure 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**: rS18.

37.11. Eighth, when you are practising as an 'employed barrister (authorised non-BSB body)', **you may only supply legal services to those categories of persons listed in rS36**. In the case of a solicitors' firm, those persons include the firm itself and any client of the firm. If you are **employed by a non-authorised body, for example an employment agency, but are then are subcontracted to provide services to an end client**, perhaps a company (non-authorised body) or a law firm (non-BSB authorised body) and its clients, you are permitted to do so because of the provisions at gS8A and gS8B respectively.

37.12. A further issue concerns only those **barristers who are of less than three 'years' standing'** (as defined in the BSB Handbook).

37.12.1. If this applies to you, then you may be subject to additional requirements under rS20. For your self-employed practice, these will usually be satisfied through your chambers. If and to the extent that you will be practising as an employed

barrister, you will need to take *separate* steps to comply with them in the employed part of your practice.

37.12.2. In order to identify those requirements, you will first need to identify (1) whether you will be providing legal services to members of the public (for which purpose it does not matter whether 'the public' will be *your* clients or *your employer's* clients), and (2) whether you will be exercising a right of audience and/or exercising the right to conduct litigation.

37.12.3. Under rS20, you may supply legal services to the public, exercise a right of audience, or conduct litigation, by virtue of authorisation by the Bar Standards Board *only if* in your principal place of practice (or, if you are practising in a dual capacity, in *each* of your principal places of practice) a relevant 'qualified person' (as defined in rS22) is readily available to provide guidance to you: rS20.

37.12.4. The requirements with which someone must comply in order to be a 'qualifying person' are set out in rS22. They have common elements, but they also vary depending on whether you need such a person (1) in order to be allowed to supply legal services to the public, (2) in order to be allowed to exercise a right of audience, or (3) in order to be allowed to conduct litigation. If you will fall into more than one of those categories, then you will need to consider each category separately.

37.12.5. A 'qualified person' is a barrister or a person authorised by another Approved Regulator to provide legal services (such as a solicitor⁶), so long as they satisfy the other requirements for a 'qualified person' in each category.

37.12.6. The only exception to rS20 is in rS21, which applies to those who are within the definition of 'employed barrister (non-authorised body)', and who are providing legal

⁶ Individual solicitors will usually be authorised by the Solicitors' Regulation Authority, which is one of the Approved Regulators.

⁷ <https://www.barcouncilethics.co.uk/documents/becoming-a-sole-practitioner/>

services only to those persons listed in rS39.1 to rS39.6 (which does *not* include the public or clients of the ‘employer’). Those barristers are required only to have such an arrangement in place if they are of less than *one* year’s standing. This would not apply if you are working for a firm of solicitors which is authorised by the SRA, because that firm would be an *authorised* body (and you would be likely in any event to be providing at least some legal services to clients of the firm (and also, thus, to the public)).

37.13. Finally, you may need to consider whether the work arrangement is such that any fees earned can still properly be treated for **income tax and VAT** purposes as having been earned in the course of your self-employed practice, or whether they need to be treated differently for such purposes (including whether income tax ought to be deducted at source, i.e. under the PAYE system, and whether VAT is properly chargeable). There might also be implications for **National Insurance contributions**. Any issues of this nature are likely to affect your instructing solicitors as well.

Examples of particular non-standard work arrangements

Work arrangements which involve you practising in ‘an association’ other than a set of chambers

38. Some work arrangements may involve you practising in ‘an association’ with someone else. This is defined in the BSB Handbook, and is the subject of specific rules: rC79 to rC85. You should also consider Outcome 25. A set of chambers is an association, but your concern will be to identify whether the work arrangement gives rise to an association under the second limb of the definition:

“where ... [you] are sharing premises and/or costs and/or using a common vehicle for obtaining or distributing work with any person other than a BSB regulated person, in a manner which does not require the association to be authorised as an entity under the Legal Services Act 2007.”

This is dealt with in more detail in the checklist at Annex A.

Fees agreed in work arrangements other than conventional referral-basis instructions from a solicitor

39. An additional consideration in work arrangements which are different from standard referral work from solicitors is the basis on which the client is charged for your work.

40. In an ordinary referral work situation, your fees will be a disbursement for your instructing solicitors: i.e. they will be a "*sum spent on behalf of the client...*". In this situation, the client should be charged for your services only what you yourself charge to your solicitors. For example, Indicative Behaviour ("IB") 1.21 in the SRA Code of Conduct requires that any disbursement included in your solicitor's bill must "*reflect the actual amount spent or to be spent on behalf of the client*".

41. In other situations, it may be less clear whether your fees are to be treated as a disbursement or as a cost incurred by your solicitors for their own purposes, and so less clear what duties your solicitor may owe to your client in respect of your fees. If the nature of your contract with your instructing solicitors is such that you are, in law, an employee, then your fees will be part of the solicitors' own costs, in the same way as a salary paid to any other employee. If the nature of your contract is such that you are an independent contractor, then whether your fees are a disbursement or not may be a more complex issue, which is likely to overlap with at least some of the considerations referred to under issue 6 above.

42. The Bar Council is aware that in some situations, solicitors are charging clients more for the services of barristers who practise ordinarily as self-employed barristers than the barristers themselves are charging. If the arrangement is one in which your fees are genuinely a cost to the solicitors themselves, and not a disbursement, then this may be permissible on the part of your solicitors, at least if it is in the client's best interests in all the circumstances. It may also be permissible if it is done with the informed agreement of the client, at least if the client is a sophisticated commercial client. Where your fees ought to be charged as a disbursement, however, this would be quite wrong, and could raise serious questions about your solicitors' own professional conduct.

43. In most circumstances, this will not be an issue for you. You will not usually be aware of communications between your solicitors and their client about fees, or the terms of your solicitors' retainer. Your solicitors' charges to their client are also primarily a matter between your solicitors and that client, and whether your solicitors' actions are permissible is a matter of law and conduct for your solicitors as independent professionals. You should ensure, however, that you are not actively

and knowingly involved in creating or entering into an arrangement which involves charging the client more for your services than you are charging in circumstances in which this is unlawful or in clear breach of your solicitor's duties to the client. If you are in any doubt about this, you would be well advised to consult senior colleagues and/or to contact the Bar Council's Ethical Enquiries Service.

Working as a permanent or regular consultant for a law firm

44. Increasingly professional clients are seeking to engage barristers to work for them under different models including as a "consultant", either regularly or permanent. Often the intention of the law firm is to have the benefit of an ongoing commitment from the barrister on predetermined terms, but without the burdens (both in relation to tax and administration) that come with employing that barrister.

45. Such arrangements, pose the risk of the barrister no longer being self-employed, or, even if self-employed, working as a sole practitioner, or involving the conduct of litigation or other work which would require specific authorisation from the BSB.

Does the consultancy arrangement render you an employed barrister?

46. As indicated earlier, regardless of your legal status, if the nature of your work is such that you are providing legal services under a written contract for services for a determinate period, you are likely to be deemed to be an employed barrister pursuant to the definition of an employed barrister in part 6 of the code. If the effect of your consultancy agreement is that you are providing services in that way, you will need to have regard to the consequences and duties of working as an employed barrister.

47. The issues that arise from being an employed barrister are set out above at paragraphs 37.1 to 37.13. As set out there, if the effect of the arrangement is such that you are an employed barrister for the purposes of the Code, it will be important that you:

- (a) Ensure that you have an appropriate practising certificate, i.e. permitting employed-capacity or dual-capacity practice, as the case may be.
- (b) Have the nature of the agreement set out in writing so that, firstly, you can clearly determine what duties arise from it, and secondly, be sure that it does not entail obligations that breach those duties.

- (c) Ensure that the identity of your client is clearly set out, and the fact that you are working for that primary client.
- (d) Have the scope and nature of your duties clearly set out in the agreement, again to ensure you are not being required to undertake work that you are not permitted to do.
- (e) Ensure that you are insured to do the work that you are engaged to do.
- (f) Have a defined process to resolve conflicts of interest.
- (g) Ensure that you do not work in different capacities on the same issue.
- (h) Ensure you are only providing legal services to the categories of recipient permitted by rS.36.
- (h) If you are under 3 years standing, refer to the duties set out at 37.12 above.
- (i) Ensure your work under the arrangement is categorised correctly for tax purposes (which the solicitors you are working for will also have an obligation to do).

Does the consultancy agreement render you a sole practitioner?

48. If you are not an employed barrister by reason of the arrangement, but are working on a self-employed basis (for the purposes of the Code of Conduct) then you may be a 'sole practitioner' for the purposes of the Code. Please note that This is not a defined term, but is used in Part 3 of the BSB Handbook 'Scope of Practice, Authorisation and Licensing Rules' at rC164-169 to refer to a self-employed barrister not practising in a chambers or a BSB entity. In those circumstances you would need to:

- (a) Be aware that you could only work in that way once you have practiced for three years with a qualified person; see rS20.
- (b) Ensure your MyBar records and BMIF records have been amended to reflect your sole practitioner status.
- (c) You have made adequate provision for the administrative burdens of sole practice and data protection.

- (d) You have made sufficient provision for support, and returning work to others.
- (e) That you have a complaints policy and procedure in place (the BSB provides a model complaints policy).
- (f) That your status is accurately reflected in any marketing of yourself either by yourself or by the firm you are working as a consultant for.

See the Bar Council Guidance Paper “**Guide to Barristers Setting up as a Sole Practitioner**”⁷ for further guidance.

Provision of work through other entities⁸

48. If the work you are doing under the consultancy agreement is from a business owned and managed by you or others, providing legal services to the public, that business is likely to be an entity requiring authorisation or a license by or from the BSB or another legal regulator (e.g. the SRA), and be subject to regulation. Without authorisation you will be working for a non-authorised body, be subject to the scope of practice rules at rS39 and be unable to supply legal services to clients of the entity.

49. If working for an entity, your practicing certificate will need to reflect the fact that from the Handbook perspective, you are employed.

50. The Rules concerning (a) whether the nature of the work you are doing amounts to working from an entity requiring authorisation and (b) the issues that arise from that status are set out in detail in the Bar Council Guidance Paper ‘**Entities: Information on ‘how to’ and Frequently Asked Questions**’⁹. The BSB entities webpage¹⁰ sets out the steps you are required to undertake if you wish to apply for entity authorisation and gives other useful information. You should refer

⁷ <https://www.barcouncilethics.co.uk/documents/becoming-a-sole-practitioner/>

⁸ Entity is the term used to describe both authorised bodies and licensed bodies. See section 6 of the BSB Handbook for their full definitions.

⁹ <https://www.barcouncilethics.co.uk/documents/entities/>

¹⁰ <https://www.barstandardsboard.org.uk/for-barristers/bsb-entities.html>

to both if the work done by you under the consultancy arrangement is provided through a business owned and managed by you or others.

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Annex A: Checklist

This checklist is addressed to and aimed at self-employed barristers (including those who are seeking to identify whether they need to apply for a dual-capacity practising certificate), but may also be of use to employed or non-practising barristers confronted with similar issues.

This checklist is intended to assist you to analyse whether or not it is permissible to enter into either (1) a retainer in the traditional sense, that is, an agreement in relation to the provision of legal services by you which seeks, expressly or by implication, to limit your freedom to accept other work; (2) other types of fee arrangement between you and your solicitor or lay client which are different from the traditional system of “piecework” payment for each separate matter dealt with. It is also intended to assist you to identify when work arrangements might result in you practising as an ‘employed barrister’ under the BSB Handbook, or trigger any other Handbook requirements.

Rule C9.7 in the BSB Handbook makes clear that there is no objection in principle to alternative fee arrangements; but you need to take care to ensure that you do not enter into a fee arrangement that may lead, directly or indirectly, to breaches of other provisions in the BSB Handbook.

Since the range of permitted fee/work arrangements is infinitely variable, it is not possible to cover all such arrangements. The Ethical Enquiries Service may be able to assist you to analyse specific situations.

If necessary and appropriate, you may wish to make a formal application to the BSB for a waiver from particular provisions of the BSB Handbook; but the decisions whether or not to grant such a waiver, and whether to impose any conditions on such a waiver, are matters for the BSB.

1. Am I being asked to provide “legal services” within the meaning of the BSB Handbook?

The definition of “legal services” in the BSB Handbook excludes several important areas of work, e.g. arbitration, law teaching (which might include professional training and the production of legal newsletters) and “libel-reading” for newspapers and publishers. If you undertake these types of work, then you will not be providing legal services for the purposes of the BSB Handbook, and so will be acting outside the scope of those duties and restrictions which apply only where you are supplying or offering to supply legal services: see rC1 and rC2.

2. If they are “legal services”, am I being duly instructed?

Under rules S23 and S24, a self-employed barrister’s instructions to provide legal services must always be from:

- a. A professional client (who may be an employee of the client); or
- b. A licensed access client, in which case you must comply with the licensed access rules; or
- c. any other client (or on behalf of any other client), provided that:
 - i) the matter is a public access instruction and:
 - 1) you are entitled to provide public access work and the instructions are covered by that entitlement, and
 - 2) you have notified the BSB that you are willing to accept instructions from lay clients, and
 - 3) you comply with the public access rules; and
 - ii) if the matter will involve the conduct of litigation by you:
 - 1) you have a litigation extension to your practising certificate, and
 - 2) you have notified the BSB that you are willing to accept instructions from lay clients.

3. Is a self-employed barrister permitted to provide the “legal services” being requested of me?

This is a very common source of problems, since solicitors and corporations have been known to treat junior members of the practising Bar as a species of “paralegal”.

Although the BSB Handbook allows more flexibility than the previous Code of Conduct, rS25 provides that a self-employed barrister may still not manage or administer a lay client’s affairs.

There is one exception to this, however: this does not prevent you from undertaking the management, administration or general conduct of a client’s affairs where such work is foreign work performed by you at or from an office outside England and

Wales which you have established or joined primarily for the purposes of carrying out that particular foreign work or foreign work in general (rS26).

When considering a proposed scheme of work, you would be wise to obtain a clear statement of the legal services expected from you, and you will need to be alert to any subsequent expansion of those services into prohibited areas.

4. Am I being asked to provide legal services in a permissible manner?

Rule S16 prohibits you (as a practising barrister) from supplying legal services other than:

- a. as a self-employed barrister,
- b. as a manager of an authorised (non-BSB) body or as an employed barrister (authorised non-BSB body), but only as permitted by Section 3, B6 of the BSB Handbook;
- c. as an employed barrister (non-authorised body), but only as permitted by Section 3, B7 of the BSB Handbook; or
- d. as a registered European lawyer in any of the above capacities, in which case the equivalent limitations that would have applied if you were practising as a barrister shall apply to your practice as a registered European lawyer.

In the course of practice as a self-employed barrister, you are not permitted to advise the public directly, other than under and in accordance with the Public Access Rules. One practical consequence of this is that you cannot (when acting as a self-employed barrister) advise the public directly on behalf of (for example) a solicitor or a claims handler. Accordingly, a fee arrangement with (for example) a solicitor or claims handler under which you are to advise members of the public who are, in truth, the clients of the solicitor or claims handler, and not your clients, is not permissible if you are authorised to practise only as a self-employed barrister. On this sort of issue, the analysis of the suggested arrangement may overlap with the question whether it would involve you practising as an employed barrister; see question 6 below.

(A self-employed barrister may, however, deal directly with the public via a Legal Advice Centre, in the circumstances set out in the BSB Handbook.)

5. Is the basis of remuneration proposed a permissible one?

There are three aspects to this:

- a. The first aspect concerns whether the payment arrangement is such that you are providing services as an employed barrister: see question 6 below.
- b. The second aspect concerns the need to consider whether the arrangement is permissible in the light of the issues raised in the main text above.
- c. The third aspect is that you need to be alert to identify arrangements that may amount to or involve a referral fee or other commission (including a disguised referral fee), in breach of the BSB Handbook: see, especially, rC8, gC18-gC21, rC10 and gC29-gC32.

Separate guidance is available from the BSB on this third topic, to which you should refer. You may also wish to refer to the Ethics Committee's own document on that subject.

6. Might the proposed work arrangement result in me practising as an 'employed barrister'?

When properly analysed, some work arrangements may involve you providing services as an *employed* barrister for the purposes of the BSB Handbook.

If a work arrangement does involve you providing services as an employed barrister, then you will need to have the necessary practising certificate – one which authorises you either to practise as an employed barrister (if this is the only capacity in which you will be practising), or to practise in a dual capacity (so as to permit you to practise as an employed barrister when you are acting under the work arrangement in question).

This is important. You will be in breach of the BSB Handbook if you provide legal services in a capacity which your practising certificate does not permit, and this might result in you committing a criminal offence.

This issue is discussed in detail in paragraphs 26 to 35 of the main text.

7. Will what I am being asked to do involve me practising in an association with someone who is not a BSB authorised person?

For the purposes of the BSB Handbook, an association is defined as follows:

"where:

- a) *BSB authorised individuals are practising as a chambers; or*

- b) *BSB authorised persons are sharing premises and/or costs and/or using a common vehicle for obtaining or distributing work with any person other than a BSB regulated person, in a manner which does not require the association to be authorised as an entity under the Legal Services Act 2007."*

The terms "BSB authorised person" and "BSB regulated person" are also defined terms.

If you are in an association on more than a one-off basis, then you must notify the BSB that you are in an association, and provide such details of that association as are required by the BSB (rC80).

You should also consider Outcome 25, Rules C81 to C85 and the associated guidance if you are entering into any sort of arrangement with anyone which differs from a standard set of chambers.

Rule C79 makes clear that you may not do anything, practising in 'an association', which you are otherwise prohibited from doing. You should also seek to avoid any arrangements with others - whether amounting to an "association" or not - which might give rise to a risk of breaching your Core Duties, particularly Core Duties 3 to 5 (concerning honesty and integrity, independence, and trust and confidence in the profession).

8. Is the remuneration proposal compatible with my Core Duties as a self-employed barrister?

The fact that you are working under a novel, rather than a conventional, remuneration arrangement does not absolve you in any way from your obligations under the BSB Handbook, including those in Core Duties 3 to 5 (concerning honesty and integrity, independence, and trust and confidence in the profession), Core Duty 7 (competent standard of work and service - see also rC21.8 and rC21.9), rC8 and rC21.10 (not doing anything which could reasonably be seen to undermine your honesty, integrity or independence, and refusing instructions where there is a real prospect that you are not going to be able to maintain your independence), rC15.4 (not permitting anyone to limit your discretion as to how the interests of the client can best be served), rC17 (duty to consider and advise whether the client's best interests are served by different legal representation), and rC20 (personal responsibility for all work and obligation to use your own professional judgment).

You need to be alert to the risk that an unconventional remuneration arrangement (particularly one involving the risk of having to do a large amount of work for a low

flat fee) may lead you into difficulties with maintaining the same high professional standards that would be applied to other work and also to the risk that the paying party may encourage you to cut corners to an unacceptable degree.

You should also not enter into a contract or work arrangement if your (or, to your knowledge, your solicitor's) reason for doing so is to try to do something which would be unethical for a self-employed barrister (or, indeed, for your solicitor). For example, you should not enter into any sort of work arrangement the purpose of which is to try to avoid or undermine the prohibition on referral fees or to disguise a referral fee.

Other issues

This checklist is concerned only with the impact of fee arrangements and work arrangements which might involve you practising as an employer barrister. Other duties and requirements may apply to any particular set of instructions, depending on the circumstances, and there may be other reasons why you should decline to accept instructions. There may also be implications as regards income tax, VAT, and National Insurance contributions.

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