



The Bar Council

Solicitor not on the record

Purpose:	To provide assistance to barristers who find out that their solicitor is not on the court record
Scope of application:	All practising barristers
Issued by:	The Ethics Committee
Issued:	April 2019
Last reviewed:	June 2022
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.

Issue: a barrister is instructed by an instructing solicitor to represent a lay client at a hearing. The barrister is told or finds out that the solicitor is not on the court record. What should the barrister do?

Answer: nothing.

1. A barrister can provide reserved legal activities (including advocacy at court) if s/he is instructed by a professional client, a licensed access client or a public access client. There is nothing in the BSB Handbook or the Legal Services Act which requires that the person instructing the barrister to attend court must have conduct of the litigation.
2. Indeed, it is axiomatic that when a barrister is instructed by a licensed access client, the licence holder will not have conduct of the litigation. The same applies in a public access case when the barrister is instructed by an intermediary.
3. The Law Society recognises that solicitors may act for a client on a limited retainer. This is called ‘unbundling’. It is usually so that the client can save money.

The Law Society Unbundling Civil Legal Services practice note¹ (updated 12th April 2022) says: 'The essence of unbundling in its purest form is that the case remains client-led so the solicitor does not necessarily: accept service of documents, send out correspondence in the firm's name or otherwise communicate with third parties, incur disbursements or go on the court record.' The practice note says that when providing an unbundled service the solicitor should not go on the court record. It gives pointers as to the type of case which may and may not be suitable for unbundling.

4. It is likely that in most cases where a barrister is instructed by a solicitor who is not on the record, the reason for this is that the solicitor has agreed to provide an unbundled service. There is nothing which prohibits the solicitor offering, as part of the unbundled package, an agreement to instruct a barrister on the client's behalf. Indeed, there might be very good reason why a lay client would want to use the knowledge and experience of a solicitor to select suitable counsel and ensure s/he is properly briefed. Notably the Law Society's practice note makes it clear that there is nothing to stop a solicitor on an unbundled retainer – who is therefore not on the court record - appearing as an advocate. It further says, 'You may wish to consider providing representation at court on an unbundled basis'. This seems to acknowledge, correctly, that there is nothing prohibiting such a solicitor instructing counsel to represent a lay client at court.

5. It would be wrong for a barrister to interfere with the solicitor/client relationship by (a) telling the client that they must get a different solicitor who will go on the record or (b) deciding they will conduct the litigation themselves if they have the conducting litigation extension to their practising certificate.

6. The barrister is not doing anything unlawful or in breach of the Handbook by accepting instructions from a professional client, whether or not the professional client is on the court record. Therefore, absent any special factors which might require the barrister to refuse the instruction, the barrister does not need to do anything.

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB**

¹ <https://www.lawsociety.org.uk/topics/civil-litigation/unbundling-civil-legal-services#un1>

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