The Bar Council

Public Access FAQs

Purpose:	To provide advice to barristers on issues arising from public access cases
Scope:	All barristers qualified to accept public access instructions
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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.**

1. I have been paid a fee by a public access client for a hearing next week. I have just heard from the court that the hearing has been cancelled due to Corona Virus. Can I pay the money back to the client without breaching the prohibition on holding client money?

Yes. When the fee is received by you it becomes your money (because gC106 in the BSB Handbook says that a fixed fee paid in advance is not client money for the purposes of rC73). If you consider that you are now under a duty to compensate the client, the money you pay to the client is coming out of your funds, and therefore you have not been holding client money. The Direct Access Panel have raised this query with the BSB and following that discussion the Bar Council takes the view that provided you have acted in good faith you will not have breached the general prohibition on holding client money in rule C73. The situation is likely to be different if you acted in bad faith, for example if you accepted a fee already knowing that the hearing was not going ahead or you artificially inflated the fee in order to get the benefit of holding the funds in your account even for a temporary period. You may be able to retain the fee pending the relisting of the hearing, but that is likely to depend on the terms of your client care letter and/or the agreement of your client that you may do so.

2. My public access client wants me to take his case on a CFA. Is this permitted?

CFAs are not available in criminal or family cases. In other areas of work you can take a public access case on a 'no win, no fee' basis. The terms of the agreement must be in writing and there is currently no model agreement that you can use. You also have a duty under Rule C122 to consider whether it would be in your client's best interests to instruct a solicitor, who might also be prepared to act on a CFA basis, rather than instruct you directly. See Bar Council Guidance: Conditional Fee Agreements (CFAs) and Damages-Based Agreements (DBAs) in Public Access.

3. My public access client agreed to pay me in advance, but I have not received the fee. Must I still do the work?

It depends on the terms of your contract with the client. If your client care letter says you will not do any work until payment has been received then, on normal contractual principles, you are not obliged to do the work. Note, however, the requirements of Rule C26.5. This says you may not withdraw from an instruction where payment has been agreed in advance until you give notice to your client. The notice must give him a reasonable opportunity to remedy the non-payment and warn him that you will withdraw if he does not do so.

4. My public access client agreed to pay me in advance, but I have not received the fee. However, I am quite happy to do the work on the basis I can bill her for it. If she doesn't pay I can take action to enforce payment. Is this permissible?

It may be unwise to follow this course. The reason for non-payment may be because your client no longer wants you to do the work – in other words, she has voted with her feet. A better course would be to contact her to find out what her intentions are. It is open to you to vary your contract with the client by agreeing to accept payment after the work has been done, though any such variation ought to be in writing.

5. My public access client says his rich relative is going to pay my fee. However, the relative does not want to instruct me as intermediary. How do I ensure I am going to get paid?

There is nothing to stop you entering into a contract with the relative under which he is liable for your fee. Indeed, an intermediary instruction is an example of such an arrangement. The difference here is that you are not being instructed by the rich relative (whereas in an intermediary case you are receiving your instructions from the intermediary). Normal contractual principles apply, and if this is not your area of law you might want to take appropriate advice as to the terms of the contract. It would undoubtedly be sensible to have a written agreement with the rich relative; however, your duty under Rule C22 (which requires written confirmation of acceptance of instructions, the terms on which you are acting and the basis of charging) and the Public Access Rules only apply to the relationship between you and your client (and client is defined in the Handbook as the person for whom you act). You might suggest to your client that he has his own private financial arrangements with the rich relative and then the client can make the payment for your fees, in the usual way.

6. Can a barrister charge a certain amount to be paid up front and refund any difference should the work be less?

You cannot hold money on account. Rule C73 prohibits you from receiving, holding or handling client 'apart from what the client pays you for your services'. Therefore agreeing to pay a refund to a client if, for example, a case settles or is adjourned will be a breach this prohibition.

The BSB Handbook contains guidance on this rule which includes the following (gC107):

If the client can reasonably be expected to understand such an arrangement, you may agree that when the work has been done, you will pay the client any difference between that fixed fee and (if lower) the fee which has actually been earned based on the time spent, provided that it is clear that you will not hold the difference between the fixed fee and the fee which has been earned on trust for the client. That difference will not be client money if you can demonstrate that this was expressly agreed in writing, on clear terms understood by the client, and before payment of the fixed fee. You should also consider carefully whether such an arrangement is in the client's interest, taking into account the nature of the instructions, the client and whether the client fully understands the implications. Any abuse of an agreement to pay a fixed fee subject to reimbursement, the effect of which is that you receive more money than is reasonable for the case at the outset, will be considered to be holding client money and a breach of rC73. For this reason, you should take extreme care if contracting with a client in this way.

If you are adopting this payment structure, then your client care letter should clearly identify this in express terms.

The Handbook also permits the use of escrow accounts into which clients can deposit funds for you to draw upon as fees become due (see Rule C74).

7. Can I accept fee payments in instalments?

Yes. It is open to you and your public access client to agree the basis on which you will be paid. In many cases this will be by way of a fixed fee paid in advance (see Guidance C106) but it might also be by installment payments. Rule C22 requires you to confirm in writing to your client 'the basis of charging'. This suggests that any arrangements regarding installment payments should be set out in writing.

8. I have been approached by a client who already has a solicitor instructed on legal aid. She has received advice about her prospects of success which she is unhappy with. She wants to instruct me on public access to give him a second opinion. Can I?

No. This would breach the prohibition on 'topping-up'.

9. I have been approached by a potential public access client who is unhappy with his solicitor. He wants to revoke his legal aid certificate and instruct me on a public access basis. However, his solicitor is refusing to release papers until they receive confirmation that I have been instructed.

This raises three issues. Firstly, you need to comply with the requirements of Rule C120.4 which states that before taking on public access instructions you must:

> 'take such steps as are reasonably necessary to ensure that the client is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access'.

Secondly, you must not breach the prohibition on 'topping-up'. The Bar Standards Board's (BSB) Public Access Guidance says:

> 'It is possible that clients will wish to seek counsel's advice directly in respect of matters for which a public funding certificate is already in existence and where the certificate does not extend to counsel's advice.

> Counsel should be alert to guard against any breach of the rules against "topping up". Where the client has indicated that they already have a solicitor, counsel should seek to establish whether or not a certificate is in existence in respect of such work.'

Thirdly, the question of whether the solicitor must release the papers. This depends on legal issues relating to the contract between the client and the lay client which may differ from case to case. It is beyond the scope of these FAQs to consider those issues. However, assuming the legal aid certificate has been revoked and the client has instructed you on a public access basis, there is nothing wrong in confirming to a third party at the request of your client that you have been instructed.

10. My clerk quoted a public access client a fee of £750 plus VAT to represent her at her forthcoming hearing. The client immediately transferred that sum to my Chambers' account, even though I had not sent her a client care letter. What should I do?

The Code of Conduct does not necessarily require you to send a client care letter before you are engaged. Rule C125 requires you to notify your public access client of a number of things 'forthwith'. Rule C24 requires you to confirm your acceptance of instructions and your terms before doing any work unless it is not reasonably practicable to do so, in which case you should do so as reasonably practicable. Therefore, you could send a client care letter as soon as possible to regularise the position. However, if you are not going to accept the instruction for whatever reason you should return the money straightaway. It is unlikely that returning a payment which was essentially made in error would be seen as a breach of the prohibition on handling client money in Rule C73.

11. Should my qualified person also be public access qualified?

Yes. Barristers under three years' standing must have a qualified person as defined by Rule S22 who is named on their practising certificate to give advice and support. Barristers under three years standing can now become public access qualified (the previous prohibition having been removed in 2013) but if they do any public access work their qualified person must himself or herself be registered with the Bar Council as a public access practitioner (Rule C121).

12. Can a pupil do public access work?

In order to accept public access instructions, you must (a) have a full practising certificate, (b) have completed an approved training course, and (c) have registered with the Bar Council as a public access practitioner (Rule C120). Subject to a limited number of exceptions, only barristers who have successfully completed 12 months pupillage will be eligible for a full practising certificate (Rule S46). Therefore, only pupils who have a full practising certificate, such as 'third six' pupils, could qualify to do public access cases.

13. My clerk says that all public access clients have to produce their passport before we can accept instructions. Is this right?

No. There is no requirement in the BSB Handbook for a barrister to check the identity of his client before accepting instructions. You will have to verify the identity of your client if the Money Laundering Regulations apply. However, they only apply in limited circumstances – basically where you are assisting in the planning or execution of certain types of financial transactions or giving tax advice. Those financial transactions are the buying or selling of real property or business entities and the creation, operation or management of trusts, companies or similar structures. For more detailed information see the Bar Council's guidance paper on Money Laundering and Terrorist Financing, but essentially the money laundering checks are not required if your instructions relate to actual litigation or its consensual resolution.

Many professionals do undertake KYC (Know Your Client) checks on every new client. There is nothing to stop you insisting that all clients provide evidence of identity even if in cases where it is not a mandatory obligation. Indeed, given the risk of becoming an innocently involved in fraud, it may well be prudent to do so.

Importantly, if you fall within the scope of the Money Laundering Regulations, you will have to check all direct access clients before accepting instructions. If you are instructed under licensed access, you may rely on the money laundering checks carried out by your UK-regulated instructing professionals (external accountants, tax advisers, insolvency practitioners, etc.) but subject to conditions. You can either a) immediately request copies of identity documents obtained by those instructing you for your records or b) obtain their agreement to provide copies immediately upon request and to retain copies of the data and documents in accordance with the Regulations. It should be noted that you still remain liable for any non-compliance with the Regulations even when you rely on a regulated person so risk assessment is recommended.

The Money Laundering Regulations have been recently extended in scope with effect from 10 January 2020 (see amendments here). In particular, the amendments provide a broader definition of 'tax adviser' to include any person who provides aid, assistance or advice on the tax affairs of another person. There are also additional requirements in relation to Customer Due Diligence checks.

Further guidance on the subject can be found in the Anti-Money Laundering Guidance for the Legal Sector as approved by HM Treasury.

14. Must I be public access qualified to do a pro bono case?

Not if your instructions come from the Bar Pro Bono Unit. The Unit has a licence which authorises it to instruct counsel. However, if you are acting pro bono for a member of the public or an organisation who is instructing you directly, and not via the Bar Pro Bono Unit, you will need to be public access qualified.

15. Can I conduct Correspondence on behalf of my Direct Access Client?

Yes. You may undertake correspondence on behalf of your direct access client. Letters, faxes and e-mails can be sent on your Chambers' letterhead. Note, however, that in some circumstances the nature and extent of the correspondence, particularly taken in conjunction with other work you are undertaking for your public access client, may amount to the conduct of litigation – see *Baxter v Doble*[1] which says that the court will look at the entirety of the activities undertaken to assist the client and then decide whether, taken in the round, they amount to the conduct of litigation.

However, you must only conduct correspondence if you are satisfied that it is in your client's best interest for you to do so and you must have adequate systems, experience and resources to manage the correspondence (for example, to ensure that letters received in response are promptly attended to).

Normal etiquette applies. If the other side is legally represented in respect of the matter the correspondence pertains to, you should correspond with the other party's legal representative rather than the party themselves. Care must be taken to ensure you do not continue in correspondence in a manner that might be considered by the BSB as conducting litigation. See Bar Council

[1] [2023] EWHC 486 (KB)

Guidance: Direct Access and Conducting Litigation at Page 10, para 25 onwards. See also BSB Guidance: Conducting Litigation (paragraphs 3-6).

16. I have been asked by my direct access client to contact his witnesses and take their statements in advance of a trial. Can I do this?

There is no longer a rule which prohibits a self-employed barrister from investigating or collecting evidence generally. You may therefore interview the potential witness and prepare their statement and/or take a proof of evidence. However, you should be cautious about doing so as it may preclude you from appearing as an advocate in the case in the future.

This is because Rule C21.10 and guidance note C73 make it clear that your core duties (1, 2 & 4) require you to maintain your independence, perform your duty to the court and act in the best interests of your client. You may not be able to comply with all of these duties if you are likely to be called as a witness - which risk arises if there is any challenge to the nature of the evidence (e.g. if the evidence was illegally obtained) or the circumstances in which it was investigated or collected.

Further guidance from the BSB "Investigating and collecting evidence and taking-witness statements" can be found here.

Therefore, you should only consider taking statements from witnesses (or investigating or collecting other evidence) if you will not subsequently be instructed as an advocate in the case, or if the nature of the evidence or the circumstances in which it was investigated or collected (as opposed to the evidence itself) are such that it is very unlikely to be challenged later.

This is so whether you are the only counsel instructed or you are a junior member of a team of counsel (even if you anticipate that at trial the advocacy will be undertaken by other barristers in the team).

If you do accept instructions to interview a witness and take their statement in a case where you are also (or expect to be) instructed to act as the advocate, before undertaking the work you should discuss the position with your client. You should clearly warn him of the risks involved in your carrying out the instructions, namely that if any challenge is raised to the nature of the evidence or the circumstances in which it was collected you may no longer be able to act for your client as the advocate in his case. You may also wish to advise him of alternative options.

When undertaking the instructions you must also have clearly in mind the danger of unconsciously affecting or contaminating the evidence that the witness gives.

Alternative ways of addressing this situation if your client is not willing or able to take the statements himself (or it is inappropriate for him to do so) would be for the client to instruct an agent (solicitor, legal executive or other direct access barrister) to take the statements.

17. How does the GDPR affect my public access work?

The GDPR (General Data Protection Regulation) came into force on 25 May 2018. It affects all barristers, not just those doing public access work, and the Bar Council has produced guidance on the GDPR which is available here. There are three main ways in which it affects public access work. The first is the requirement to include in your client care letter a 'privacy notice'. This will include an explanation of the purpose for which you will hold personal data and the lawful basis for doing so. A full explanation of the requirements of a privacy notice is beyond the scope of this FAQ but guidance can be found here on the Information Commissioner's Office website. The second is that similar privacy notices may have to be given to non-clients for some of the work that public access barristers do – for instance, drafting a witness statement will require such a notice to be given to the witness. Third, barristers are required to adopt procedures to ensure that data is retained for no longer than necessary. The Bar Council Data Retention guidance provides more detailed information on how to comply with the retention requirements of the GDPR.

18. I normally send the papers back to my instructing solicitors at the end of a case. Now that I am a direct access barrister, what are my obligations with the papers?

a) The seven-year rule (rC129, rC141)

Rule C129 (rC141 in the case of Licensed Access) requires you to retain (or to take reasonable steps to ensure the client will retain) the following documents for 7 years after the last item of work done:

i) copies of all instructions; advices given
ii) documents drafted or approved;
iii) documents enclosed with instructions (or a list thereof);
iv) notes of all conferences and advice given on the telephone.

Remember that emails and all electronic documents pertaining to the case also form part of your case papers.

Whilst the rules permit the delegation of the retention of papers to the client, this presents significant risks and you should think very carefully before doing so. For example, if your work on the case is later called into question, and you only have copies of your advice or pleadings—and the client has the source documents—you will have lost control of the documents forming the basis of your advice and may be in difficulty if you have to explain your conclusions. Moreover, clients may lose or destroy documents or simply not keep them with any consistency.

The GDPR also has a bearing on the retention of case papers. As data controller, if you delegate retention of the documents to a client, they become a data processor. Those documents will almost without exception contain personal data of individuals other than the client, such as witnesses. Pursuant to the GDPR, it may be necessary to enter into a formal 'controller-processor agreement' with the client. It is doubtful that they could reasonably be expected to agree to the obligations which such an agreement must include. It is also doubtful that clients will be able to provide the guarantees required by Article 28 GDPR to ensure that their processing will be compliant with the regulations and ensure protection of data subjects' rights. Given these significant implications, it may simply not be feasible for a barrister to require clients to retain documents at his or her behest.

b) Retaining copies of documents

The Bar Standards Board's Public Access Scheme Guidance for Barristers offers some suggestions about dealing with clients' original documents. In the light of this you may consider it good practice that if a client sends or hands to you original documents, you then take copies immediately (or as soon as reasonably practicable) and hand the originals back.

Rule C131 allows you to retain copies of the client's documents "permanently". However, the GDPR only permits you to retain personal data for as long as is necessary for the purposes of your processing. For more on this see the Bar Council's Data Retention Policy guidance. There is unlikely to be any justification for permanent retention of documents. Retention for 7 years can be justified under the GDPR given that it is mandatory under rC129. There may be types of cases where you are required to retain papers for a longer period. As a matter of good practice you should set out the applicable retention period in your client care letter.

Any copy documents taken for anti-money laundering checks must be retained for 5 years; however as these arguably form part of the client's file it makes sense to retain them for a minimum of 7 years, with all their other papers.

The manner in which you retain documents, whether in hard copy or electronic form, must be secure. See Bar Council guidance on Information Security and Cloud Computing.

19. Where can I find guidance on public access work?

The BSB produces guidance for barristers, clerks and lay clients on the public access scheme. Rule C124 in the Code of Conduct requires barristers doing public access work to have regard to the BSB's guidance. Guidance on what constitutes the conduct of litigation is found here on the BSB's website and in the Bar Council's guidance on Direct Access Work. There is a dedicated page on the Practice and Ethics Hub for Direct Access. On this page you can find guidance documents dealing with Client Care Letters, the Consumer Contract Regulations and Outsourcing.

20. Can I exercise a lien over the papers provided by my public access client?

The BSB handbook states at rC131: "Save where otherwise agreed: …… .2 you shall return all documents received from your lay *client* on demand, whether or not you have been paid for any work done for the lay *client*;"

Consequently, **unless** your client care letter or other correspondence **clearly** indicates that you are entitled to retain documents provided in the absence of payment, **and** this has been accepted by your client, **you must not** exercise a lien over papers.

If **you do have a clear agreement** with your public access client that you are entitled to keep documents received from them in the absence of payment, then you **MAY** be entitled to exercise a lien over the papers. The primary consideration will be the construction of the agreement which creates the right to a lien.

Even if you have a clear agreement, and **can** exercise a lien, careful consideration should be given to whether you **should** do so.

By analogy with the complex law concerning solicitors liens, other factors which **may** be relevant include (but are not limited to): whether retention of the documents will interfere with the course of justice; whether the rights of a third

party would be affected by your exercise of a lien; and whether, how, when and why the direct access relationship between barrister and lay client terminated and who terminated it (the barrister or lay client).

Practically, barristers who seek to exercise a lien over original documents may face an application for delivery up of those documents. The risks of such an application may not be preferable to pursuing other means of enforcing payment of fees due, particularly as such a claim may not be covered by your Bar Mutual insurance policy (see definition of claims in paragraph 11 of the policy).

NOTE: you cannot exercise a lien over papers which do not belong to your public access client and a lien will not give you a better title to the document than that of your client. You may therefore have an obligation to hand over retained documents to a third party. You may also need to deliver the papers to any subsequent legal representative of the lay client, albeit subject to the lien.

If you decide to return original documents, you are entitled under rC131 to copy all documents received from your lay client and retain copies in accordance with data protection rules and your privacy notice.

21. **Chambers has had an enquiry from a person wanting to instruct a barrister in a direct access matter regarding an elderly gentleman who has a dispute with his care home. The person says they are helping out and will be responsible for the client's fees. As a Chambers, we are uncomfortable with this arrangement. We are used to IFAs and other professionals instructing chambers on an intermediary basis but not this set of circumstances. Can the barrister accept the instructions, and take payment, from this third party? If so, what steps should be taken to ensure we comply with rules, guidance and good practice?**

The BSB Handbook defines 'intermediary' as *"any person by whom a self-employed barrister or BSB entity is instructed on behalf of a client excluding a professional client who is not also the client"*. There is no objection in principle to being instructed by this third party as intermediary. The following points should be noted.

The intermediary must not be acting or proposing to act as 'litigator'. This would be a criminal offence under the Legal Services Act 2007.

The barrister is required to send two client care letters – one to the client and one to the intermediary. Precedents for these letters are found on the BSB website in their Code Guidance section. The barrister must ensure that s/he

sends the client care letter to the client at his/her home or business address and not via the intermediary.

It is permissible to take payment from the intermediary. Indeed, the model client care letters envisage that your contract will be with the intermediary and s/he will be responsible for paying your fees. It is also permissible to take your instructions from the intermediary. However, it is important to note that your duty to act in the best interests of your client (Core Duty 2) is owed to the lay client, not the intermediary. Though the BSB guidance says you are not under an obligation to police the relationship between the intermediary and client, because of CD2 you should be alive to any potential conflict of interest between them.

The next FAQ question considers the position when the intermediary is engaging you on behalf of a lay client who may lack capacity.

22. I have been instructed by an intermediary on behalf of an elderly gentleman who is in dispute with his care home. It appears that the gentleman is suffering from dementia and I am concerned that he does not have capacity to instruct me. Should I refuse to act?

Not necessarily. In an intermediary case you can take your instructions from, and receive payment from, the intermediary (see previous FAQ). Indeed, if you have already accepted the instruction you can only withdraw in the circumstances set out in rule C25 and C26. If litigation is commenced and the intermediary is appointed as litigation friend then the intermediary becomes your client (though you are still under an obligation to ensure the litigation friend's interests do not conflict with those of the elderly gentleman).

If you have concerns about the capacity of a client, you should consider whether your duty to act in the best interests of your client (Core Duty 2) requires you to take any action. You may also want to consider whether, in accordance with rule C120, this would be a case where the best interests of the client would be served by instructing a solicitor. That might be the case, for example, if there was a need to investigate the capacity issue and to instruct an expert to give an opinion on the gentleman's capacity.

23. I am considering signing up with an agency which will refer public access clients to me in return for a fee. Is this acceptable?

The issue to consider is whether the arrangement breaches the prohibition on referral fees. Rule C10 in the Handbook says you must not pay or receive a referral fee. The definition of 'referral fee' in the Handbook is 'any payment or other consideration made in return for the referral of professional instructions by an intermediary'. The definition further states that a payment for the provision of a particular service or for some other reason, and not for the provision or referral of professional instructions is not a referral fee. Whether the particular arrangement breaches the rule is going to be fact specific, but you should refer to the BSB Guidance on Referral and Marketing Arrangements. There is also guidance on the Bar Council's Ethics Hub about the prohibition of referral fees. This is not an easy area and the Bar Council will not generally get involved in giving advice on the propriety or otherwise of commercial schemes.

24. I have been engaged by a client under the Public Access rules who is an undischarged bankrupt. I only discovered that the client was a bankrupt after my letter of engagement was signed and my fee was paid. Am I in breach of the BSB Handbook such that I should withdraw from the case? If not, does the bankruptcy invalidate the client agreement?

There are no rules in the BSB Handbook that expressly govern a public access barrister's engagement by a bankrupt individual or by an insolvent corporate entity. Nor are there any rules which regulate the manner in which a barrister should approach any client who might be at risk of becoming insolvent.

You are not in breach of any professional rule merely by being instructed by someone who was bankrupt at the time you were instructed - or by someone who became bankrupt during your engagement.

However, if payment of your fee is made after a bankruptcy order out of funds comprised in the bankruptcy estate (e.g. payment made from a bank account balance that has vested in the trustee in bankruptcy) then the payment to the barrister would be voidable, as the bankrupt no longer owns the funds and cannot not use them for his own means.

If payment is made after the bankruptcy order is granted out of funds not comprised in the bankruptcy estate (e.g. payment is made from the bankrupt's post-bankruptcy income) then the barrister's fee is unencumbered.

As a matter of good practice and to protect your own interests, it would be prudent to get confirmation from the trustee in bankruptcy as to the status of any funds that the bankrupt intends to use (or has already used) for payment of your fee.

More information on Insolvent and Financially Distressed Clients is available here.

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 Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please refer to the professional practice and ethics section of the Bar Council's website here.