

**Combar/CLLS  
Guidance note on the Agreement for the Supply of Services by a Barrister in a  
Commercial Case**

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### *Introduction*

As a result of regulatory changes, barristers will enter into contracts with their instructing solicitors more frequently than has traditionally been the case. In order to assist barristers and solicitors in commercial cases, the City of London Law Society and the Commercial Bar Association have negotiated specimen terms that can, if the parties so wish, be used as a basis for discussions in relation to terms to be agreed for any particular case.

It should be emphasised that these terms have not been agreed by the chambers or firms which are members of Combar or CLLS. No barrister, from any chambers, and no solicitor, from any firm, has agreed to be bound by these terms if proffered in any particular case.

### *Background*

Until the coming into force of section 61(1) of the Courts and Legal Services Act 1990, a barrister was unable to enter into a contract with the barrister's instructing solicitors or with the barrister's lay client. One consequence was that a barrister was unable to sue for unpaid fees.

In 2001, the Bar's Code of Conduct (the "Code") was changed in order to allow barristers to agree contracts in writing with solicitors. Barristers were not, however, required to enter into contracts and, in particular, barristers were not obliged by the "cab rank" rule to accept work on a contractual basis. The *Terms of work on which Barristers Offer their Services to Solicitors* set out in Annexe G1 to the Code expressly provided that they did not create legal relations. As a result, barristers continued, in the main, to be instructed on a non-contractual basis.

From 31 January 2013, the Code gives effect to a decision by the Legal Services Board of 27 July 2012, whereby the cab rank rule will oblige a barrister to undertake work either on the basis of the Standard Contractual Terms in Annex T1 to the Code or on the basis of standard terms of work published by the barrister. The Standard Contractual Terms in Annex T1 necessarily cover a wide range of the possible work by a barrister and, as a result, may not be suitable for commercial work. Barristers in specialist fields, such as commercial work, may therefore wish to adopt their own terms.

It would be costly and time-consuming for all barristers to draft their own terms, and for barristers and solicitors to negotiate contracts for individual cases, starting in each case with a blank sheet of paper. For that reason, Combar and the City of London Law Society have negotiated specimen contractual terms (the "Terms") that are available to solicitors and barristers should they wish to use them.

No one is, or should feel, obliged to use the Terms, which can only offer a starting point for negotiations, hopefully saving the parties time and effort in those negotiations. Some, perhaps all, of the provisions in the Terms will not be appropriate for particular cases;

additional terms may be needed; uncertainties and ambiguities may be identified. Individual cases will continue to require individual treatment, and it is the responsibility of solicitors and barristers to ensure that what they agree is appropriate for any particular case, having proper regard for the interests of their shared lay client.

Solicitors instruct barristers on behalf of their clients. The Terms set out the agreement between a barrister and a solicitor. With one exception (payment Basis C discussed below) the lay client will not be a party to the agreement incorporating the Terms. Both solicitors and barristers accept that their primary obligations are (aside from the duties to the Court) to their lay clients, rather than to each other.

This guidance note explains briefly how the Terms are intended to work in practice. The explanation in this note is not comprehensive. References to clauses below are references to clauses of the Terms.

The Terms are not appropriate for conditional fee or damages based agreements.

#### *Entering into an agreement incorporating the Terms*

The engagement of a barrister should in practice be preceded by a discussion between the solicitor and the barrister (including, for these purposes, the barrister's clerk) in order to explain the nature of the work, to ascertain the barrister's availability, to allow possible conflicts of interest to be checked and, perhaps, to negotiate fees.

If the barrister and solicitor wish to contract on the Terms, this may be achieved by the solicitor and the barrister completing the front sheet of the Terms and signing it. Alternatively, it may be achieved by an email exchange confirming that the barrister and the solicitor intend to be bound by a contract incorporating the Terms, and setting out the information required by the front sheet of the Terms, together with any amendments agreed. A barrister's clerk has authority for these purposes to enter into an agreement incorporating the Terms on behalf of a barrister.

The information referred to on the front sheet of the Terms that is needed in order to form a contract between the barrister and the client below is as follows:

- the name of the barrister
- the name of the instructing solicitor
- sufficient details of the case
- the payment basis (see below)

Other terms may also be required depending upon the basis upon which the barrister is instructed (eg the barrister's hourly rate, minimum insurance cover and liability cap).

In addition, the name of the lay client should also normally be provided, and must be provided if payment is to be made on Basis C or Basis D (clause [2.4]; see below). The barrister and the solicitor may also agree additions, deletions or other amendments to the Terms.

If payment is agreed on Basis C, the lay client must also sign the agreement or otherwise confirm in writing its agreement to be bound by the Terms (clause 2.2). If payment is to be made on another Basis, the lay client is not a party to the agreement but may still enforce the Terms under the Contracts (Rights of Third Parties) Act 1999 (clause 4.4). The Terms do not limit any rights the lay client would otherwise have as a matter of the general law (clause 12.3).

### *The Services*

The precise services that the barrister is engaged to perform should in general be set out, or confirmed, in written instructions sent to the barrister (clause 2.3). Solicitors must ensure that instructions are adequate to enable the barrister to carry out the work requested (clause 5.1). The barrister will carry out the work requested within a reasonable time, having regard to the urgency and nature of the instructions. Instructions that are urgent should be marked as such (clause 3.5). In practice, the timescale required for any work should be discussed at the outset.

Instructions may also state whether the barrister is being instructed for a single piece of work (eg to advise on a point of law or to appear at a single hearing) or whether it is anticipated that the barrister will be instructed for the duration of the case in question.

### *Particular hearings*

If a barrister is instructed for a particular hearing, then it is the barrister's obligation to appear at that hearing. It is never acceptable for a barrister voluntarily to accept more than one booking for the same time without the informed consent of the solicitor making the second booking. However, it is important for solicitors and clients to be aware that circumstances can occasionally arise where even though the barrister has been booked for a particular hearing, other professional obligations may prevent the barrister from being able to carry out the booked hearing without fault on the barrister's part - for example, where a trial goes on longer than expected. In such circumstances, the barrister may terminate the agreement under clause 16.3.

### *The barrister's personal responsibility*

A solicitor who instructs a barrister expects the barrister to carry out the work concerned personally and not to subcontract the work to others (clause 6.1). If a barrister needs assistance or if the barrister considers that it would be sensible for someone else to be engaged in relation to the work, the barrister should discuss this with the solicitor.

This is not, however, intended to prevent a barrister making proper use of a pupil who is in training with the barrister's chambers. Nor is it intended to prevent a barrister from seeking the assistance of another barrister in order, for example, to check certain points of law or to locate comment on a particular authority. In doing this, however, the barrister must comply with the barrister's obligations of confidentiality (clause 10), and will remain responsible in full for the performance of the work the barrister is instructed to undertake.

The barrister must exercise reasonable skill and care in supplying the services, subject to and in accordance with the Code (clauses 3.2 and 3.3). This reflects the obligation the barrister owes at common law with regard to performance of the barrister's work.

### *Payment*

Historically, a solicitor has been personally responsible for a barrister's fees regardless of whether the solicitor received payment from the lay client. The Terms retain this as an option (Basis A) but also offer three other options (Basis B, Basis C and Basis D: clause 9). In order to enter into a contract, the barrister and solicitor must select one of these Bases. The Terms do not set out a default Basis that will apply in the absence of the choice by the parties.

Basis A is the traditional basis (clauses 9.5 and 9.6). The solicitor will be liable to the barrister to pay the barrister's fees within 30 days of receipt of a fee note sent by the barrister in accordance with the Terms. The solicitor must pay the barrister regardless of whether or when the solicitor is paid by the lay client.

Basis B also makes the solicitor personally liable to pay the barrister's fees, but only if the solicitor is first paid by the lay client (clauses 9.7 to 9.12). The solicitor must endeavour to collect the barrister's fees in the same manner that the solicitor collects the solicitor's own fees. If the lay client pays the solicitor in respect of the barrister's fees, the solicitor must pay the barrister within five business days of receipt of that payment. If the lay client does not pay the barrister's fees to the solicitor, the barrister may request an assignment of the claim against the lay client in respect of the barrister's fees so that the barrister can pursue the lay client personally. Any assignment is likely to be an equitable assignment. Solicitors should ensure that their agreements with their lay clients permit assignment.

Basis C provides for the lay client to have direct responsibility to the barrister for payment of the barrister's fees (clause 9.13 to 9.16). The solicitor will negotiate the barrister's fees on behalf of the lay client (in respect of which the solicitor provides a warranty of authority: clause 18.2), but has no responsibility for payment of the barrister's fees. The barrister will send fee notes directly to the lay client and will be paid directly by the lay client. In order to create a contractual obligation on the lay client to pay the barrister's fees, the lay client must therefore be a party to the agreement between the solicitor and barrister. The solicitor must ensure that the lay client understands that the lay client is entering into a contract with the

barrister, the terms of that contract, and that the lay client will receive fee notes from the barrister and must pay any sums due directly to the barrister.

Basis D provides for fees to be agreed exclusively between the barrister and the lay client, with no involvement or liability on the part of the solicitor (clause 9.17). The agreement between the barrister and the lay client in relation to fees will be separate from the agreement between the solicitor and the barrister incorporating the Terms.

Whatever the Basis chosen, the level of the barrister's fees and how they should be determined is a matter for agreement (clause 7.1). The default position is that fees will be calculated on the basis of a reasonable hourly rate for the work in question (clause 7.2) and, for this purpose, the barrister should notify the solicitor of the barrister's hourly rates at the outset, which must also be included on the front sheet of the Terms (clause 7.3).

Clause 8.3 provides that if work ceases before the case has been completed, the Barrister will only be entitled to fees for work actually done, unless otherwise agreed. Obvious examples of circumstances in which the parties may agree fees are payable other than by reference to the actual work done are where the parties have agreed a brief fee or staged payments for a brief fee.

#### *Conflicts of interest*

A barrister must ensure before accepting instructions on a case that doing so will not lead to the barrister having any conflict of interest (clause 11.1).

Where a barrister accepts instructions notwithstanding a conflict of interest, the barrister will be liable in damages only where a relevant disciplinary panel has decided there was a conflict of interest (clause 11.3). The rationale behind this provision is that a barrister may be unfairly hindered by reasons of privilege from disputing such allegations in Court. Clause 11.3 is without prejudice to the general jurisdiction of the Court to restrain any barrister (or solicitor) from acting where there is a conflict of interest.

#### *Liability*

Nothing in the Terms is intended to affect the barrister's liability to the lay client or to the solicitor as a matter of general law, or vice versa (clause 12.3). The barrister must maintain insurance cover for that liability as required by the Code or, if higher, as agreed with the solicitor (clause 12.2).

Entering into a contract potentially gives rise to new liabilities against which barristers have traditionally been uninsured. Bar Mutual has recently confirmed that it will extend its cover to indemnify barristers against liabilities arising solely as a result of entering into a contract up to a limit of £100,000. This limit will be the subject of review in the light of Bar Mutual's claims experience over time. In accordance with this extension, clause 12.4 limits a

barrister's liability to the lay client or the solicitor which is exclusively contractual to £100,000.

### *Termination*

The solicitor or the lay client may terminate the agreement with the barrister at any time without any liability beyond liabilities already accrued (clauses 16.1 and 16.5). The agreement may also terminate if required under the Code (clauses 16.2 and 16.3).

The barrister may terminate the agreement if the barrister is not paid fees due to the barrister, provided that the barrister first gives notice of the barrister's intention to terminate the agreement (clause 16.4).

### *Optional clauses*

The solicitor and the barrister may agree such additions to the Terms as they wish. Clause 20 sets out certain optional clauses the parties may wish to consider.

First, the parties may agree that the barrister will maintain minimum insurance cover in a particular sum. This will be a matter for specific negotiation between the solicitor and the barrister.

Secondly, they may agree that contract should limit the barrister's liability to a particular sum, chosen by reference to the circumstances of the case and the level of insurance cover reasonably available to the barrister.<sup>1</sup>

The parties may, of course, agree any further terms appropriate for the particular case.

### **Combar/CLLS**

**Combar, CLLS and anyone who has drafted, negotiated and/or reviewed the Terms and this note accept no liability whatsoever to anyone for any loss howsoever arising whether caused by negligence or otherwise.**

Date: 24 January 2013

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<sup>1</sup> The Bar Council has given guidance to barristers on limiting liability at <https://www.barstandardsboard.org.uk/code-guidance/the-extent-to-which-a-barrister-can-limit-their-indemnity-insurance-liability/>