

Legal Services Board – Decision Notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

Bar Standards Board application for approval of amendments to regulatory arrangements in respect of the Public Access scheme

Introduction

The Legal Services Board (“LSB”) is required by Part 3 of Schedule 4 of the Legal Services Act 2007 (“the Act”) to review and approve or reject the Regulatory Arrangements of the Approved Regulators (“AR”). The Bar Council (“BC”) is an Approved Regulator and whose regulatory functions are carried out through its regulatory arm the Bar Standards Board (“BSB”).

Paragraph 25 of Schedule 4 explains that the LSB must approve a proposed change to the Regulatory Arrangements unless we are “...satisfied that...” the approval would fall within one or more of the criteria specified in sub Paragraph 25(3) (and listed in the footnote below¹). If the LSB is not satisfied that one or more of the criteria are met, then it must approve the application in whole, or at least the parts of it that can be approved when only part of the application meets the criteria.

As provided for by Paragraphs 20(1) and 23(3) of Schedule 4 the LSB has made rules about how the application to alter the Regulatory Arrangements must be made including the contents of that application. The rules highlight the applicant’s obligations under section 28 of the Act to have regard to the Better Regulation Principles. The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub Paragraph 25 (3) (f) requires that each proposed alteration has been made or is likely to be made in accordance with the procedures which apply in relation to making of the alteration. This includes the LSB rules.

The LSB will approve Regulatory Arrangements in so far that they appear to achieve their intended outcome and satisfy the sub Paragraph 25(3) criteria. Most notably there must be no adverse impact on the Regulatory Objectives overall and the alterations and the process by which they have been produced must be consistent with Better Regulation Principles.

We confirmed receipt of the BSB application for approval of amendments to Regulatory Arrangements in respect of the Public Access scheme on Thursday 5 March 2010. This is the decision notice in relation to that application. In the following paragraphs we explain what we were requested to consider, the concerns that we raised in relation to the approval criteria and how these have been resolved in discussion with the BSB.

¹ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the Regulatory Objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

The chronology for handling of this application can be found towards the end of this decision document.

Decision

The BSB application is for approval of the following alterations to the Regulatory Arrangements in respect of the Public Access scheme:

1. Widening of the range of work available under the scheme to include Family, Criminal and Immigration work.
2. Expansion of guidance for Barristers to include information on money laundering and the keeping of records.
3. Amendments to the guidance for Barristers and lay clients.
4. Modification of the Public Access Rules at Annex F2 of the Bar Code of Conduct, along with the addition of an amendment at rule 401(b) of the Code.

Overall we agree with the BSB's assessment that the proposed alterations will facilitate and promote the Regulatory Objectives of the Act.

We are satisfied that, having considered the application in the context of Schedule 4 sub Paragraph 25(3) criteria, we have no grounds for refusing the application made in whole or in part and are therefore granting the application.

Process

As one of the first applications for approval of alterations to the Regulatory Arrangements, and one of three from the BSB, we have taken a pragmatic approach to processing the application and developing a mutual understanding of the approach to approving applications. We have agreed with the BSB to conduct a joint "lessons learned" exercise following completion of the first three BSB applications – "Legal Disciplinary Practices and Partnership of Barristers", "The Structure of the Self-employed Practice" and "Application of the Public Access Scheme"². We will, as a matter of routine, conduct similar exercises following the completion of applications from other Approved Regulators and communicate any generic lessons for both Approved Regulators and the LSB itself as necessary.

In addition to approving the application, there are certain areas upon which we wish to comment in this decision notice. These are the areas that raised issues in relation to the approval criteria as described in the introduction to this document and therefore further clarification was required.

² The application "Legal Disciplinary Practices and Partnership of Barristers" was granted by the LSB on 26 March 2010. "The Structure of the Self-employed Practice" application is under consideration by the LSB at the time of this decision.

Monitoring and evaluation of risks

The main impact of these changes is to widen the existing Public Access scheme into new areas of law. For the first time, Public Access Barristers will be permitted to take on work in relation to Immigration, Criminal and Family cases. The application and supporting information identify several potential risks around the expansion the scheme into these areas, many of which are due to the potential increase in members of the public using Public Access Barristers and taking on more of the work themselves. Barristers are unable to carry out all of the functions of a solicitor, which means that in Public Access cases some of the activities that would usually be carried out by a solicitor are in practice carried out by the lay client. This may include the filing of documents, communication with the court or the preparation of letters before action. Although a Public Access Barrister can draft documents on the client's behalf, they must be sent by the lay client and not from the Barrister or the Barrister's chambers.

At this stage it is not possible to judge definitively whether the impact of these changes to the Public Access scheme will be positive or negative for consumers of legal services, however our view is that Barristers should be free to choose how they practice with restrictions justified by evidence of detrimental impact on the Regulatory Objectives. We are content that the BSB has followed due process by consulting on the amendments and has sought out evidence including research on the outcomes of the current scheme in order to make the decision to extend the scheme. It is not the role of the LSB to revisit this research and make our own assessment of the evidence provided.

Furthermore, these restrictions are being removed on the basis that Barristers will make appropriate decisions about whether or not a case is suitable for Public Access. We agree with the BSB's assessment that this is the right approach and that rather than continue with a blanket restriction on what Barristers are permitted to do, the specific risks posed should be identified and managed through monitoring and evaluation, supported by strong penalties when things go wrong.

We have therefore discussed with the BSB its plans to monitor and evaluate the impact of changes to the scheme and sought reassurance on its ability to do so.

The intention to conduct a full review of the changes in 18 months time is set out in the application. The BSB have assured us that, in addition to this, they will have the ability to monitor and assess the impact of the changes in terms of the specific risks posed both before and after any formal review. One example of how the BSB plans to monitor the scheme on an ongoing basis is through analysis of complaints data. This should include an assessment of whether there is an increase in the severity of complaints relating to the Public Access scheme or whether the number of complaints about Public Access Barristers that lead to disciplinary action or adverse findings by the legal Ombudsman increases following expansion of the scheme into new areas of law. The BSB will also consider how Public Access work can be effectively monitored through the Chambers Monitoring programme.

As these and other restrictions on Barristers are reduced, through the changes proposed in the three applications submitted to us – "Legal Disciplinary Practices and Partnership of Barristers", "The Structure of the Self-employed Practice" and "Application of the Public

Access Scheme”, we consider that the role of the BSB as a regulator will need to continue to evolve. We expect that the BSB will invest in its skills and regulatory capacity to ensure the risks that have been identified along with others that emerge are appropriately monitored, managed and mitigated. This may be accompanied by a change in focus, away from rules and detailed guidance towards a combination of clear outcomes and risk based supervision. The LSB will discuss this issue with the BSB in relation to this specific issue and more generally.

Training

We note that the final report of the Public Access working group made recommendations that training provision needed to support the extension of the scheme – in particular the changes which will allow Barristers to conduct correspondence as this posed particular risks to consumers. Given the nature of the areas of work that the scheme is being extended to – Family, Crime and Immigration – it is likely that there will be an increase in members of the public using the Public Access scheme. The BSB has identified that the importance of ensuring that Barristers taking on Public Access work are able to meet the needs of these clients and to ensure that clients both understand and are in a position to do the work required in the absence of a solicitor

We agree with this assessment and due to the potential impact upon the Regulatory Objective of protecting and promoting the interests of consumers, have sought confirmation from the BSB that all identified training needs will be addressed. This will include amendments to the Public Access Training Course which is provided by the College of Law and which Barristers are required to complete before they can register to do Public Access work.

Connections with the Self Employed Practice application

Following approval of the Self Employed Practice application, the amendments to section IV of the Code will relax certain restrictions on Self Employed Barristers including the restriction on conducting correspondence. The original Public Access application was written before these changes were made and therefore made reference to restrictions that will be lifted following approval of the Self Employed Practice application. Revised versions of the Guidance for Barristers, Guidance for lay clients and the amendments to section F2 of the Code have been provided by the BSB along with an assurance that all changes now align. The revised versions of the guidance form the Regulatory Arrangements which we are approving. This documentation, which can be found later in this document, was published on our website on Friday 19 March and has not attracted comment.

This application makes minor changes to section IV of the Code which has been substantially revised by the Self Employed Practice application. We are therefore approving the updated version of section IV of the code which has been provided by the BSB and which we are assured takes into account all the necessary amendments to facilitate both applications. These alterations will be approved via the Self Employed Practice application.

Chronology

- The Legal Services Board (LSB) confirmed receipt of an application from the Bar Standards Board for approval of amendments to the Regulatory Arrangements in respect of the Public Access Scheme on Friday 5 March 2010.
- The 28 day initial decision period for considering the application ends on Thursday 1 April 2010, 28 calendar days following confirmation of receipt of the application.
- Following discussions with the BSB, revised versions of section F2 of the Code, Guidance for Barristers and Guidance for lay clients were provided on Friday 19 March for consideration alongside the original application. These versions incorporate changes to the code resulting from the Self Employed Practice application.
- The BSB have also provided amendments to section IV of the Code which incorporate changes from both the Public Access and Self Employed Practice applications. These alterations will be approved via the Self Employed Practice application.
- The revised documentation was published on the LSB website on Friday 19 March 2010 and has not attracted comment.
- This Decision Notice is being published on the LSB website on Wednesday 31 March 2010.

Code Amendments – final version submitted by the BSB on Friday 19 March

Amendments to the Code of Conduct

Amendments to Part IV of the Code of Conduct arising from the review of public access are reflected in the revised Part IV submitted as part of the BSB's application to the LSB for approval in respect of the structure of self-employed practice

New text in bold – text to be deleted struck through

The Public Access Rules: Annex F2 of the Bar Code

1. These rules apply to barristers instructed by or on behalf of lay clients (other than licensed access clients) pursuant to paragraph 401(a)(iii) of the Code of Conduct.

2. Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must –

- i) **Be properly qualified by having more than 3 years' practising experience, by having undertaken and satisfactorily completed the appropriate training, and by registering with the Bar Council as a Public Access practitioner; and**
- ii) **Take** such steps as are reasonably necessary to ascertain whether it would be in the best interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.

3. **A barrister may not accept direct instructions from or on behalf of a lay client:**

(1) In or in connection with any matter or proceedings in which it is likely that the lay client would be eligible for public funding;

(2) In or connection with any matter of proceedings in which, in all the circumstances, it would be in the best interests of the client or in the interests of justice for the client to instruct a solicitor or other professional client. A

~~barrister may not accept direct instructions from or on behalf of a lay client:~~

~~(1) in, or in connection with, any matter or proceedings concerning immigration or asylum;~~

~~(2) in, or in connection with:~~

~~(a) any family business or family proceedings (as those terms are defined in section 65 of the Magistrates' Courts Act 1980 or in section 32 of the Matrimonial and Family Proceedings Act 1984 or in section 8 of the Children Act 1989); or~~

~~(b) any criminal cause or matter;~~

~~unless:~~

~~(i) the barrister is instructed by the lay client and not by or through an intermediary on behalf of the lay client; and~~

~~(ii) the barrister is instructed solely:~~

~~(A) to provide advice or draft documents (but not to attend interviews conducted by prosecuting or investigating authorities), other than in connection with proceedings which have been commenced (and, for the avoidance of doubt, proceedings are commenced, inter alia, when the Defendant is charged or a summons is issued); or~~

~~(B) in, or in connection with, proceedings:~~

~~(1) before the European Court of Human Rights or the Courts of the European Communities;~~

- ~~(2) on appeal to the House of Lords or the Privy Council;~~
- ~~(3) on appeal to the Court of Appeal, provided that there is no reason to believe that any party to the proceedings will seek to adduce new evidence;~~
- ~~(4) on appeal to the High Court by way of case stated by a Magistrates' Court or the Crown Court;~~
- ~~(5) on appeal to the Crown Court from a sentence imposed by a Magistrates' Court, provided that there is no reason to believe that the appeal will involve a Newton hearing; or~~
- ~~(6) on appeal to the Child Support Appeal Tribunal or the Child Support Commissioners~~

4. In any case where a barrister is not prohibited ~~by rule 3~~ from accepting instructions, **the barrister must at all times consider the developing** ~~it is a matter for consideration in the~~ circumstances of the case, **and** whether **at any stage** it is in the best interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client. **If, after accepting direct instructions a barrister forms the view that circumstances are such that it would be in the best interests of the client, or in the interests of justice for the lay client to instruct a solicitor or other professional client the barrister must :**

(a) inform the client of his view; and

(b) withdraw from the case in accordance with the provisions of paragraph 608 (a) of the Code unless the client instructs a solicitor or other professional client to act in the case.

5. A barrister must have regard to guidance published from time to time by the Bar Council in considering whether to accept and in carrying out any public access instructions.

6. A barrister who accepts public access instructions must forthwith notify his lay client in writing, and in clear and readily understandable terms, of:

- (a) the work which the barrister has agreed to perform;
- (b) the fact that in performing his work the barrister will be subject to the requirements of the Code of Conduct and, in particular, paragraphs 401(b) and 608;
- (c) the fact that the barrister cannot be expected to perform the functions of a solicitor or other authorised litigator and in particular to fulfil limitation obligations, disclosure obligations and other obligations arising out of or related to the conduct of litigation;
- (d) the fact that the barrister is a sole practitioner, is not a member of a firm and does not take on any arranging role;
- (e) in any case where the barrister has been instructed by an intermediary:
 - (i) the fact that the barrister is independent of and has no liability for the intermediary; and
 - (ii) the fact that the intermediary is the agent of the lay client and not the agent of the barrister;
- (f) the fact that the barrister may be prevented from completing the work by reason of his professional duties or conflicting professional obligations, and what the client can expect of the barrister in such a situation;
- (g) the fees which the barrister proposes to charge for that work, or the basis on which his

fee will be calculated;

(h) the barrister's contact arrangements; and

(i) the barristers' complaints procedure and that of the General Council of the Bar.

7. Save in exceptional circumstances, a barrister will have complied with rule 6 above if he has written promptly to the lay client in the terms of the draft letter annexed hereto.

8. In any case where a barrister has been instructed by an intermediary, he must give the notice required by rule 6 above both:

(a) directly to the lay client; and

(b) to the intermediary.

9. A barrister who accepts public access instructions must keep a case record which sets out:

(a) the date of receipt of the instructions, the name of the lay client, the name of the case, and any requirements of the client as to time limits;

(b) the date on which the instructions were accepted;

(c) the dates of subsequent instructions, of the despatch of advices and other written work, of conferences and of telephone conversations;

(d) when agreed, the fee.

10. A barrister who accepts public access instructions must either himself retain or take reasonable steps to ensure that the lay client will retain for at least seven years after the date of the last item of work done:

(a) copies of all instructions (including supplemental instructions);

(b) copies of all advices given and documents drafted or approved;

(c) the originals, copies or a list of all documents enclosed with any instructions;

(d) notes of all conferences and of all advice given on the telephone.

11.—A barrister who has accepted public access instructions may undertake correspondence where it is ancillary to permitted work, and in accordance with the guidance published by the Bar Standards Board.

12. Save where otherwise agreed:

(a) A barrister shall be entitled to copy all documents received from his lay client, and to retain such copies permanently.

(b) A barrister shall return all documents received from his lay client on demand, whether or not the barrister has been paid for any work done for the lay client.

(c) A barrister shall not be required to deliver to his lay client any documents drafted by the barrister in advance of receiving payment from the lay client for all work done for that client.

(d) A barrister who has accepted public access instructions in any matter may take a proof of evidence from his client in that matter **provided that the barrister reasonably believes that the investigation and collection of that evidence is unlikely to be challenged.**

Guidance for Barristers – final version submitted by the BSB on Friday 19 March

1. When the public access scheme was originally introduced in 2004, the Bar Council undertook to review its operation in three years' time. This review fell to a working group of the Bar Standards Board, which consulted twice with public access barristers, clients and interested parties, and carried out a full evaluation of the working of the scheme. This guidance represents the findings of the working group and hence supercedes all previous guidance.

To summarise the implementation of the recommendations of the working group:

- The sending and receiving of some correspondence is now permitted under the public access scheme.
- However, barristers are still forbidden from carrying out litigation.
- It is now possible to carry out public access work in all areas of law. This supercedes the previous prohibition on the conduct of public access work in the areas of crime, family and immigration.
- However, barristers are reminded of their duties under the Bar Code and the public access rules only to take on work they are able to carry out to an appropriate standard, and to assess at all stages whether the case would be better served by the instruction of a solicitor.

These conclusions are set out in more detail below. The full report of the working group can be seen at:
<http://www.barstandardsboard.org.uk/consultations/closedconsultations/>.

The Code of Conduct has been amended to permit barristers in self-employed practice to undertake work on direct instructions from lay clients, without the need for a solicitor or other professional client to be instructed. The rules governing such public access can be found at Annex F2 to the Code. This document provides guidance on the interpretation of the Code and on good practice. You are required to have regard to it by paragraph 403.2(c) of the Code.

2. These amendments to the Code represent, for those who take advantage of them, a major change in the way in which barristers may practise. The absence of a solicitor is likely to change substantially the relationship between the lay client and the barrister. Even though the tasks that the barrister performs will not necessarily increase, the exposure to the lay client will inevitably be greater. It is essential that barristers who are contemplating accepting public access instructions should be aware of the ramifications of such a decision and have regard to this revised guidance.
3. The following points should be stated at the outset:

- (1) The fact that barristers are permitted to accept instructions directly from lay clients does not affect the scope of the work that barristers may undertake: it is essential that barristers should understand and be familiar with the limitations on the work they may do, which are set out in paragraphs 8- 48 below.
- (2) Barristers are not obliged to accept any public access instructions: the "cab-rank rule" does not apply where the instructions are not tendered by a professional client, but barristers who are willing in principle to accept public access instructions must observe the "non-discrimination" rule (see paragraph 50 below).
- (3) Before accepting instructions directly from a lay client, barristers will need to give thought to how their relationship with the lay client will operate and make sure that the client is aware of what barristers can and cannot do. Barristers will need to make decisions on whether it is in the interests of the client or of justice for them to accept work in an individual case and guidance on this is set out in paragraphs 53 *et seq* below.
- (4) Barristers must pay close attention to the provisions of the Proceeds of Crime Act 2002 ("POCA") and the Money Laundering Regulations 2003 ("Money Laundering Regulations"). In public access cases, disclosure under POCA will normally be the sole responsibility of the barrister. Further, the subject matter of public access work may well constitute relevant business for the purposes of the Money Laundering Regulations. Barristers who are considering undertaking public access work must have regard both to the relevant provisions of the POCA and the Money Laundering Regulations, and to the January 2008 guidance issued by the Bar Council on POCA and the new 2007 Money Laundering Regulations.

FIRST STEPS

4. As a general rule, before a barrister may accept any public access instructions, he or she must:
 - (1) have practised for a total of three years following completion of pupillage;

- (2) have attended a training course designated by the Bar Standards Board - details of such courses can be obtained from the Continuing Professional Development Department of the Bar Standards Board and
 - (3) have notified the Records department of the Bar Council of the intention to undertake such work.
5. The first two of these requirements may be waived by the Bar Standards Board and are likely to be waived if the applicant is a former solicitor or can demonstrate experience in an environment where public access to clients has been common. Such applications, which should set out the reasons why the applicant believes that it is appropriate that the Bar Standards Board grant such a waiver, should be made to Joanne Dixon, Secretary to the Qualifications Committee at the offices of the Bar Standards Board.

THE NATURE OF PUBLIC ACCESS WORK

6. Barristers who perform professional services directly for lay clients will continue to perform the same basic functions as when instructed by a professional client: in particular, giving legal advice, drafting documents and, in appropriate cases, advocacy. The purpose of allowing lay clients to instruct barristers directly is to remove unnecessary barriers to the provision of barristers' services and to save costs by cutting out superfluous intermediaries. It is no part of the purpose of allowing public lay access that barristers should assume professional roles for which they are unprepared by training or unfitted by professional infrastructure.
7. The specialisation of the services that barristers offer exists for reasons of policy, is reflected in statute and is underpinned by the Bar's Code of Conduct. The policy was affirmed in the Kentridge Report, which has been approved by the Bar Council. The Report stated:-

“An essential condition of permitting public access in our view is that there should be no expansion in the functions that barristers are permitted to undertake.”

GENERAL RESTRICTIONS ON BARRISTERS' WORK

8. Barristers should remember that there are important limitations on the scope of the work that they are permitted to undertake. It is worth stressing that the relevant restrictions apply whenever a barrister is instructed and do not simply apply to public access work. However, the fact that no solicitor has been instructed may lead a lay client to ask the barrister to undertake prohibited work. Barristers must make it clear that they cannot do so, and must refuse to do so.
9. Barristers performing professional services directly for a lay client will continue to perform the same types of service as provided when instructed by a professional client.

Policy consideration: the two regulatory roles

10. The fundamental reason of policy for the limited scope of barrister services is connected with professional regulation. Both branches of the legal profession have been subject to strict professional codes since at least the 19th century. In more recent years there has been movement towards a greater role for the state in the regulation of the legal profession, as there has also been in relation to other fields such as financial services.
11. The foundation of the present regulation of the legal profession is the Courts and Legal Services Act 1990 which identified two activities which were only to be undertaken by persons who had been granted a right by an "authorised body". These two activities are:

by s.27: rights of audience -- "advocates"

by s.28: the right to conduct litigation -- "litigators"
12. This statute reflects the fact that the nature of regulation required varies with the professional function being undertaken. Specifically, the nature of regulation required for a law firm, which is undertaking day to day administration of client affairs and handling client money is significantly different from that required for a sole practitioner whose work involves advocacy in court or the desk work of drafting pleadings or writing advices.
13. The Bar Standards Board unreservedly accepts this distinction in regulatory requirements. Since the Access to Justice Act 1999 the Bar Standards Board has had the right to confer rights to conduct litigation on barristers if it wishes to do so. It has decided not to do so for barristers who are offering legal services to the public.

The reason is that if it were to do so it would entail the setting up of new and extensive regulatory mechanisms. These would be costly, involving a significant increase in Bar practising certificate fees. They would also probably be found by barristers to involve irritating red tape and to distract them from the core functions which they carry out.

14. The Bar has, therefore, chosen to retain its traditional, and in most respects less burdensome, regulation. This not only benefits barristers, but also benefits our lay clients.³
15. An illustration of the differences in regulation of barristers, on the one hand, and litigators, on the other, may be provided by the manner in which inspections are carried out. It is well known that if the Law Society has concerns about a practice it may without warning send in investigators who take control of the firm's records: typically the purpose is to subject the accounting records to stringent auditing to ascertain whether client funds have been interfered with. It may be less well known that the Bar Standards Board also can, and does, institute inspections of chambers about which it has concerns. But the character of the investigation is rather different. Rather than being undertaken by auditors, it will usually be undertaken by a QC and a junior. Rather than looking at financial records, they will more likely be looking at the administration of the clerks room, or even whether the chambers possesses a suitable library of legal textbooks. Moreover, unlike the Law Society, the Bar Standards Board has no power to shut down a set of chambers.
16. Therefore, one of the fundamental decisions which had to be taken by the Bar when it was considering the OFT suggestion of public access was -- public access for what services? One model would have been public access for litigator as well as barrister services. Another was access only for conventional barrister services. The Committee chaired by Sir Sydney Kentridge QC recommended the latter. The Kentridge Report stated:-

An essential condition of permitting direct access in our view is that there should be no expansion in the functions that barristers are permitted to undertake.
17. This policy was approved by the Bar Council, and was implemented in the Code changes and original Public Access Rules. It has not changed. The purpose of public access is to remove unnecessary barriers to the provision of barrister services, and to save costs by cutting out superfluous intermediaries. It is no part of the purpose of public access that barristers in self-employed practice should assume professional

³ Sir David Clementi's Consultation Paper "Review of the Regulatory Framework for Legal Services in England & Wales: A Consultation Paper" March 2004 para 9 recognises that higher costs to a provider of a service is likely ultimately to mean higher cost to its consumers.

roles for which they are unprepared by training or unfitted by professional infrastructure. The cost-saving aim of direct lay access would be undermined if barristers found themselves driven to assume a regulatory framework equivalent to that of the Law Society.

18. Accordingly, the restrictions on function in Bar Code of Conduct 401(b) apply to public access work as much as to any other work. These prohibit a barrister in self-employed practice *inter alia* from:

*undertaking the management administration or general conduct of a lay client's affairs;

*instructing an expert witness or other person on behalf of his lay client or accepting personal liability for the payment of any such person;

*in any other respect conducting litigation;

19. When the provisions of the Legal Services Act 2007 come into force the position may change considerably. When section 18 is brought into force the right to conduct litigation and the entitlement to exercise rights of audience can be granted by most approved regulators. This guidance has been prepared on the basis of the current state of the legislation and will be updated as and when the situation changes.

The Code reflects the statutory distinction in regulation

23. Amongst the aspects of barrister activity which have thrown up particular questions in the public access context are (a) conduct of litigation, (b) negotiation, and (c) taking witness statements.

The Conduct of Litigation

24. The most significant restriction under the general law on the work that barristers may do concerns the conduct of litigation. The right to conduct litigation is limited by the Courts and Legal Services Act 1990 to litigants themselves and to solicitors and other persons authorised under the Act ("authorised litigators")⁴. Barristers in self-employed practice are **not** authorised litigators and a barrister who does any act in the purported exercise of a right to conduct litigation will be guilty of a criminal offence.⁵ **It is therefore crucial that barristers ensure that they do not conduct litigation.**

⁴ See ss 28, 31.

⁵ See s 70.

25. Barristers in Public Access work may send and receive correspondence where it is ancillary to already recognised and permitted Barrister functions, such as:-

- Advocacy (for example e-mails attaching Skeleton Arguments and/or copy authorities);
- Drafting (for example letters of claim, which are technical documents now routinely drafted by Counsel in PA cases);
- Negotiation and ADR (for example without prejudice or open letters making offers to settle, e-mails exchanging travelling draft Consent Orders as attachments, or letters or e-mails suggesting arrangements for the setting up of a Mediation).
- Discharging a duty (or courtesy) to the Court (for example a letter or e-mail to a Judge explaining an absence from Court, or providing dates to avoid, or a draft Order for approval, or copy authorities).

By contrast, the service by a Barrister of a pleading or witness statement under cover of a letter or an e-mail is not permitted. That would be the conduct of litigation and not merely ancillary to a Barrister function. It would be the assumption of a solicitor function and it is therefore prohibited.

26. The Courts and Legal Services Act defines the right to conduct litigation as the right:⁶

"(a) to issue proceedings before any court; and

(b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)."

27. While we cannot give definitive advice on the interpretation of the law, it is clear that undertaking the following work is likely to amount to conducting litigation:

- (1) issuing proceedings;
- (2) acknowledging service of proceedings;
- (3) giving the barrister's address as the address for service of the party for whom the barrister is acting;
- (4) signing a statement of truth on behalf of a client;

⁶ See s 119.

(5) issuing applications and taking other formal steps in proceedings;

(6) issuing notices of appeal.

28. There is nothing to prevent a barrister from providing drafts of documents required to be issued by a litigant and advising a litigant as to formal steps which need to be taken in proceedings, or in corresponding with the opposing side regarding the case, as per the case of *Andre Agassi v Robinson (HMIT) & (1) Bar Council (2) Law Society (Interveners)* [2005] EWCA Civ 1507, in which the Court of Appeal held that such correspondence is not part of the conduct of litigation. But the formal steps in the proceedings themselves must be taken either by the litigant personally or by an authorised litigator on behalf of the litigant; a barrister must not take or assume responsibility for taking such steps.

Issuing documents in the High Court

29. The Bar Council issued guidance on the issuing of documents in the High Court in May 2004:-

(a) Lodging bundles for hearings

It is proper for barristers or clerks to lodge bundles for hearings, provided that they are doing so on behalf of barristers. Barristers often draft the case summary, chronology etc; these are either contained within a separate bundle or are placed at the front of the main bundle. There is nothing wrong with clerks lodging either sort of bundle.

(b) Covering applications to fix trial dates on behalf of solicitors

Clerks regularly fix trial dates to ensure that the date fixed is convenient for counsel instructed. They do so on behalf of barristers and as a result this is permissible under the Code of Conduct.

(c) Issuing applications for hearings, which will involve receiving a cheque from the solicitor to pay the fee on the application.

Issuing applications is the work of the solicitor and it would be unacceptable for a barrister or his clerk to do it. A barrister who carries out, or permits his clerk to carry out, such work would be in breach Paragraph 401(b) of the Code of Conduct. Moreover, issuing proceedings amounts to the conduct of litigation for the purposes of the Courts and Legal Services Act, self-employed barristers do not have the right to do so and would be likely to commit an offence if they did.

It is arguable that a barrister, in receiving the cheque to pay the court fee for issuing the proceedings, would be in breach of Paragraph 307 of the Code of Conduct, as barristers are not permitted to hold client money or security. There is no protection for the client if the barrister loses the cheque or is negligent and they would not be covered by the BMIF for this work.

If the lay client is present, it may be appropriate for a barrister to provide some general assistance to them in issuing the proceedings themselves but only if they have been instructed by a solicitor to do so. Again, the barrister should not hold the cheque or issue the proceedings on behalf of the client.

It follows that issuing claim forms is equally unacceptable.

(d) Making representations to the Masters in relation to hearing dates

We understand that this is done regularly on an informal basis. If the Masters are prepared to hear the clerks on such applications, it is permissible, provided that they are doing so on behalf of a barrister.

(e) Sealing Court Orders

Clerks regularly deal with the sealing of court orders. The Code of Conduct does not prohibit such work.

Negotiation

30. The fact that a barrister is instructed on a public access basis does not affect in any way his ability to participate in negotiations. The normal negotiating activities that a barrister may participate in are neither enlarged nor reduced by the fact that the barrister is instructed directly by a lay client.

31. For the avoidance of doubt, the following guidelines are offered as to what a barrister may undertake in respect of negotiations.
32. It is a normal part of barrister work to negotiate with counsel on the other side. Sometimes this happens at the door of the court; sometimes on the telephone. In modern conditions it happens with increased frequency at mediations. The Bar Council today regards the attendance of barristers at mediations as mainstream barrister work.
33. Negotiations between barristers may involve the exchange of draft agreed orders or the like, including the writing of letters to each other.
The above principles are not affected by the existence of e-mail.
34. There has never been any objection to a barrister negotiating with a solicitor for an opposing party. This normally occurs when the opposing party has not instructed counsel, and might also happen if counsel for the opposing party asked for some discussion to take place with his solicitor. Hence in such circumstances there is no objection to a barrister speaking to the solicitor for the other side on the telephone or face to face. However, barristers should be extremely careful at the start of the conversation to make it clear that the discussion is "without prejudice".
35. If an opposing party is represented by neither a solicitor nor a barrister, there is no objection to a barrister negotiating directly with that litigant in person. A careful note should always be made of any such conversation. Again, barristers should be careful at the start of the conversation to make it clear that the discussion is "without prejudice". It is suggested that barristers should exercise extreme care before undertaking any conversation or negotiation on the telephone with an opposing litigant in person.
36. It may well be that on occasions when correspondence alone has failed to resolve a dispute the lay client will wish oral negotiations to take place and will wish the barrister to be involved. There is, of course, no inherent objection to a barrister being instructed to attend a mediation on public access, subject to the usual requirement for the barrister to consider whether it is in the interests of the client or of justice for a solicitor to be instructed.
37. Whether acting on public access or not, barristers advising in the pre-action phase are urged to consider whether mediation would be in the interests of their client, and, if so, to encourage them to propose ADR. Barristers acting on public access should

also be ready to suggest names of suitable mediators for their clients' consideration.

Taking witness statements

38. There is no longer a rule which prohibits a self-employed barrister from investigating or collecting evidence generally or therefore from taking statements from potential witnesses. However rule 401(b)(iii) of the Code provides that a self-employed barrister must not in the course of his practice conduct a case in court if the barrister has previously investigated or collected evidence for that case unless the barrister reasonably believes that the investigation and collection of that evidence is unlikely to be challenged.
39. The Bar Standards Board issued extensive guidance in April 2010 on this point titled 'Investigating or collecting evidence and taking witnesses statements' – rather than rehearsing that guidance here you are advised to have regard to when deciding whether or not it is appropriate for you, when undertaking a public access case, to investigate or collect evidence for use in that particular case.

Other Code of Conduct Prohibitions

40. In addition to the restrictions discussed above, there are a number of other activities which barristers are prohibited by the Bar's Code of Conduct from undertaking. Thus, a barrister must not⁷:
- (a) receive or handle clients' money;
 - (b) undertake the general management, administration or conduct of a lay client's affairs
 - (c) conduct litigation (for example, instructing any expert witness or other person on behalf of a lay client, or accepting personal liability for the payment of any such person);
41. The prohibition against handling clients' money means that a barrister cannot make disbursements on behalf of a client (e.g. by paying court fees or expert's fees). The

⁷ Paras 307(f), 401(b).

circumstances in which barristers may request payment of their own fees in advance without infringing the prohibition are considered below.

42. While the prohibition against conducting litigation or “inter-partes” work means that a barrister cannot issue or serve claim forms, statements of case, application notices of other formal documents required for court proceedings, a barrister may draft such documents and give advice about what steps need to be taken to issue and serve them.

Summary: restrictions on barrister activities

43. These restrictions mean that a barrister cannot:
- (a) file and serve proceedings, statements of case or application notices - though such documents can be drafted.
 - (b) disclose documents in the control of the client - though advice can be given in respect of documents put before a barrister as to what should and should not be disclosed.
 - (c) send letters of instruction to experts - though advice as to who an appropriate expert might be and on the questions to be asked, can be given and there is nothing to prevent a barrister asking an expert to undertake further work to which the client consents and for which the client agrees to pay. A barrister may, of course, draft a letter of instruction for the lay client to send to the expert.
 - (d) accept any responsibility for the payment of experts.
 - (e) lodge bundles of documents for use in court, or file documents with the court, save for those normally provided by barristers in the course of their role as advocate (eg authorities, core documents, skeleton arguments or written submissions);

- (f) pay court fees
- (g) handle retain or disburse money for the client
- (h) file documents with the court on behalf of clients, save for documents such as skeleton arguments or written submissions which barristers normally provide as part of their role as advocate;
- (i) find witnesses

This list is illustrative and not exhaustive. It aims to show the areas where members of the Bar need to exercise caution. Barristers will need to be aware of these restrictions when explaining to clients the extent of the services which they can offer. They should also consider the ability of the client (and of any intermediary) to undertake the relevant activities if they are likely to be necessary.

DECIDING WHETHER OR NOT TO ACCEPT PUBLIC ACCESS WORK

44. In all public access cases, barristers must assess at all stages whether the case would be better served by the instruction of a solicitor. Clearly each case will need to be judged on its individual merits, but the following factors may affect whether a case is taken on or not:

- Complexity of the case
- Nature of the lay client (some lay clients may be better suited to dealing with a barrister directly than others)
- Capacity of the lay client to carry out the facets of the case that the barrister cannot (correspondence with the Court, filing of documents etc)
- Availability of the barrister related to the probable length of the case
- Whether the administration of justice requires a solicitor
- Whether the client, for whatever reason, is unable to communicate easily with the barrister and therefore, for example, requires an interpreter. The need for an interpreter to be instructed in the case would greatly increase the likelihood that the case would not be suited to the public access scheme. However, each case should be considered individually

This requirement on the barrister is discussed in greater detail below.

Application of the "cab-rank" and non-discrimination rules

45. Paragraphs 601 and 602 of the Code of Conduct set out two basic rules governing the acceptance of work. Paragraph 602, the "cab-rank" rule, sets out the presumption that barristers will accept work within their expertise and at an appropriate fee unless certain specified exceptions⁸ apply. This rule does not apply to public access work and barristers are perfectly entitled to refuse a case on the grounds that they do not choose to work on a public access basis.
46. Paragraph 601 applies to advocacy work and states that, where the cab-rank rule does not apply, a barrister must not refuse a case on the following grounds:
- a. *that the nature of the case is objectionable to him or to any section of the public;*
 - b. *that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;*
 - c. *on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available as part of the Community Legal Service or Criminal Defence Service).*

This last provision is subject to the fact that public funding is not available for public access work and the consequential prohibition on a barrister taking a case on public access where public funding would be available to the client.

47. The effect of paragraph 305 is, of course, that it prohibits discrimination on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability or political persuasion.
48. There are many legitimate reasons why a barrister may (and, on occasion, must) decide that it is inappropriate for him or her to accept a case on a public access basis. These include:

⁸ See paras 603 and 604

- a. the case is complex and will need work undertaken by a solicitor or other qualified person;
- b. the lay client's interests require a solicitor's involvement;
- c. the fee is insufficient.
- d. Public funding would be available to the client if a solicitor was instructed.

Potential clients may feel aggrieved if a barrister refuses to take on a case and may allege that he or she did so for improper reasons. It would be prudent for a barrister refusing a case to make a brief note of the reasons for so doing in case this is questioned in future.

TYPES OF WORK SUITABLE FOR PUBLIC ACCESS

49. Paragraph 603 of the Code of Conduct provides as follows:

603 A barrister must not accept any instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:

....

- g) if the barrister is instructed by or on behalf of a lay client who has not also instructed a solicitor or other professional client, and if the barrister is satisfied that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.*

50. It has previously been the case that barristers have been prevented from accepting almost all types of family, criminal and immigration work under the public access scheme. Following the BSB's review of the working of the scheme, these areas are now available to public access barristers. The BSB feels that widening the range of available work is in the public interest and does not in itself pose any identifiable risks to the public or profession. However, in every case involving public access by a lay client the barrister is still required, at every stage, to keep in mind whether or not the case is suitable for public access.

51. Rule 2 of the Public Access Rules provides:

- 2 *Before accepting any public access instructions from or on behalf of a lay client who has not also instructed a solicitor or other professional client, a barrister must take such steps as are reasonably necessary to ascertain whether it would be in the best interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.*
52. It is not possible to define with precision the exact types of work which will be suitable for public access work. However, the general characteristics of such work can readily be identified. The two most important factors will be:
- (1) the nature of the task which the lay client wishes to have performed;
- (2) the ability of the lay client to understand the requirements of his or her case and to arrange for him or herself the performance of the services which would normally be performed by a solicitor. The selection of cases suitable for public access work by a barrister will involve a judgment on the interplay of those two factors.
53. The paradigm case of a suitable piece of work is the giving of an opinion on an area of law within a barrister's special competence. Even here, however, not every instruction to advise will be appropriate for public access: for many lay clients may lack the ability to assemble the information required by the barrister. Often commercial clients will be better placed to assemble such information than private individuals: businesses generally have the ability to collate documents from files and understand the factors likely to be relevant to the impact of the law in their fields of activity. But even commercial clients will not always be able to prepare all the information necessary for an advice, especially if statements from witnesses are necessary.
54. The experience of licensed professional access has shown that a well-informed non-lawyer client can successfully instruct a barrister in such hearings as a planning inquiry or a hearing before tax commissioners. Public access will enable barristers to be instructed for advocacy services before inquiries and tribunals by informed clients outside the professions and bodies who can currently instruct the Bar direct. But the greater the role which contested evidence of fact will play in any such hearing, the less likely it is that it will be suitable for a barrister to accept advocacy instructions on public access, even from a well resourced commercial client.
55. A barrister should not normally agree to perform any drafting or advocacy role in civil litigation unless fully satisfied that the lay client is able and has the resources and facilities to perform for him- or herself, after taking any requisite legal advice from the barrister, the activities which a solicitor would normally perform. For example, it will be the responsibility of the lay client to ensure that all necessary disclosure of documents is made.

56. Barristers are unlikely to be able to conduct a means assessment to establish whether a client will qualify for public funding. Nor are barristers at present able to apply to the Legal Services Commission for public funding on behalf of a client. Therefore, when approached by a person whose circumstances are not such as to make it obvious that he will not be eligible for public funding, the barrister should advise the client that he cannot investigate the possibility of public funding and should advise the client to approach a solicitor to investigate this possibility.

JUDGING THE INTERESTS OF THE CLIENT AND THE INTERESTS OF JUSTICE

57. It will in each case be crucial for the barrister to assess in the light of the problem brought to him or her whether or not it is in the interests of the client or in the interests of justice that the barrister alone be instructed. Failure to do so may well cause difficulty and, possibly, damage both to the client and the barrister. The barrister, having considered the likely work involved in the case, will need to make a judgement on whether the client needs extra help or not.
58. This judgement has to be made by reference to what it is that the barrister is being asked to do by the public access instructions. For instance, a barrister might be asked by public access instructions (a) to advise how the client should progress his or her dispute and (b) to draft Particulars of Claim. In such a case, the barrister might take the view that (a) he or she could advise the client in general terms how to progress the dispute (including advising the client to instruct a solicitor or other professional client); but that (b) he or she could not accept, on a public access basis, the instructions to draft Particulars of Claim, since it was in the interests of the client or the interests of justice for the client to instruct a solicitor or other professional client.
59. As a result of this consideration, the barrister is likely to reach one of three views:
- a. The level of the case and the likely work involved in carrying out the public access instructions is within the client's capabilities and there is no obvious reason why a solicitor should be instructed. In such cases, the barrister should warn the client that, if the situation changes, he or she may have to advise that a solicitor be instructed.
 - b. The case has reached a stage or it is of such complexity that it cannot be in the client's interests or the interests of justice to instruct a barrister without a solicitor and the public access instructions should be refused. In such a case, the barrister will be able, in explaining his or her reasons for refusing to

accept the public access instructions, to explain that he or she would be able to act for the lay client if the lay client were to instruct a solicitor or other professional client and, if asked to recommend a solicitor or other professional client, the barrister will be able to do so.

- c. The case may well become complex and may involve work which the client cannot do, but the barrister does not consider that a solicitor or other professional client needs to be instructed before the barrister accepts instructions to give initial advice on a public access basis (including, if appropriate, recommending a solicitor or other professional client). In such cases, the barrister should make clear to the client (a) the extent of the work that he or she can do; (b) the likely point at which a solicitor may need to be instructed; and (c) that the barrister will have to withdraw at that point if a solicitor is not retained.

This presupposes, of course, that there is no other reason, for example a conflict of interest, why the barrister should not take on the case.

60. It is obviously prudent for a barrister to make a note, if there has been any doubt, of the reasons why he or she accepted or rejected a case. It would be sensible also at least to keep a note of the documents that have been reviewed even if copies of them are not actually retained.
61. It is essential that, where a case is accepted, the lay client should be aware that the barrister may have to recommend that a solicitor be instructed and may have to withdraw if that advice is not heeded. This is made clear in the suggested client care letter, and should be included in any client care letter that is sent.

WITHDRAWAL FROM A CASE

62. Paragraph 608(a) of the Code of Conduct provides as follows:

A barrister must cease to act and if he is a barrister in self-employed practice must return any instructions:

- i. if continuing to act would cause him to be professionally embarrassed within the meaning of paragraph 603 ...;*

63. The effect of this provision, in conjunction with paragraph 603(h) of the Code of Conduct (set out in paragraph 53 above), is that, in addition to the usual reasons for withdrawal from a case, barristers are required to cease to act where they have formed the view (for instance, as a result of receiving further information about the case) that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.
64. If, as result of being told that the barrister cannot continue to act without a solicitor or professional client being instructed, the lay client instructs a solicitor or other professional client, then paragraphs 603(h) and 608(a) of the Code of Conduct will cease to apply and the barrister will be able to continue to act. It is open to a barrister, therefore, to give the lay client the opportunity to instruct a solicitor or other professional client before the barrister finally withdraws from the case.
65. Paragraphs 57 to 59 above will apply, *mutatis mutandis*, in any case where a barrister, after accepting public access instructions, has reason to question whether or not it is in the interests of the client or the interests of justice for a solicitor or other lay client to be instructed. Depending upon the circumstances of the case, the barrister may conclude:
- a. that it is not in fact in the interests of the client or the interests of justice for the lay client to instruct a solicitor or other professional client, in which case the barrister will continue to carry out his or her public access instructions;
 - b. that the nature of the case is such that the barrister cannot carry out any part of his or her public access instructions unless a solicitor or other professional client is instructed, in which case the barrister will explain to the lay client that he or she cannot continue to carry out the public access instructions unless the lay client instructs a solicitor or other professional client (and if the lay client does instruct a solicitor or other professional client, then paragraphs 603(h) and 608(a) of the Code of Conduct will cease to apply and the barrister will be able to carry out his or her instructions); or
 - c. that the barrister is able to carry out part of his or her public access instructions (e.g. to provide general advice), but that it is in the interests of the client or the interests of justice that the lay client instructs a solicitor or other professional client in relation to the balance of the public access instructions (e.g. to draft documents), in which case the barrister will explain

to the lay client what he or she can and cannot do without a solicitor or other professional client being instructed.

66. Barristers will need to take care when deciding whether or not to withdraw from a case. In particular, they will need to have good objective reasons for taking the view that a solicitor needs to be instructed. This may be because work needs to be done which, in the barrister's view, the client is not capable of undertaking or because the way in which the client is conducting the case (for example, by being inappropriately dilatory or by dealing dishonestly with the other side or improperly with witnesses) means that it is impossible for the barrister to have confidence in his or her ability to perform his or her duties to the court.
67. It will very rarely be appropriate for a barrister to withdraw where there is simply a difference of opinion between the barrister and the lay client. In particular, the fact that a lay client legitimately rejects a barrister's advice on tactics or a settlement will not of itself justify the barrister in withdrawing from the case. Nor does the fact that a lay client may raise a minor complaint or question about the service provided by the barrister. Where such disagreements arise, however, the barrister would be prudent to make full attendance notes of the discussion and have them agreed by the client.
68. A barrister acting for a lay client who is a party to proceedings must bear in mind the particular difficulties which the lay client might encounter if the barrister withdraws. A hearing may be imminent; or the lay client may experience real difficulty in finding a solicitor willing to take on the case. Where there is a difference of opinion or doubt as to whether a barrister should withdraw, and withdrawal would or might cause difficulties for the lay client, it would be prudent for a barrister to contact the Bar Council for guidance.
69. Where a barrister considers that he or she is required to withdraw and it appears that, by reason of the proximity of a hearing, a lay client may have difficulty finding another lawyer to take on the case in the time available, the barrister should provide such assistance as is proper to protect the client's position. This can include:
 - a. applying to the court for an adjournment if it is necessary to withdraw during the course of the hearing;
 - b. drafting letters for the client to send to the court and the other side seeking an adjournment;

- c. providing supporting letters for the client explaining that, for professional reasons, he or she has had to withdraw and, so far as this is possible without breaching confidentiality or prejudicing the lay client's position, explaining the reasons;
 - d. where the matter is urgent or it is otherwise appropriate, contacting solicitors or other suitable intermediaries who may be willing to take on the client's case.
70. It is essential that barristers should consider at every point at which they are instructed whether a client needs to instruct a solicitor and to advise as soon as it becomes clear that this is the case. This is of particular importance where limitation periods are involved or where hearings are imminent. Barristers failing to do this may find themselves at risk of actions in negligence or findings of inadequate professional service by the Bar Standards Board.

ESTABLISHING THE RELATIONSHIP WITH THE CLIENT

71. It is likely that the initial contact between the client and the barrister will take the form of a telephone call between the client and the clerks, or a telephone call between the client and the barrister, or the receipt of written instructions in chambers, or some combination of the three. The barrister and his clerks should from this point onwards bear in mind the provisions of POCA and of the Money Laundering Regulations.
72. Following initial contact and before establishing any relationship with the client, the barrister must consider two matters:
- a. whether the case is one to which the Money Laundering Regulations apply and if so what identification is required from the client to establish the client's identity and whether a preliminary meeting is required in order to satisfy him or herself as to the identity of the client.
 - b. Whether a preliminary meeting is appropriate in order to decide whether or not to proceed with the instructions.
73. If the Money Laundering Regulations do apply, the barrister must go through the identification procedures as soon as reasonably practicable after the initial contact is made and before any relationship with the client proceeds further.
74. If, following the initial contact, the barrister considers that he or she may be willing to accept instructions, but that a preliminary meeting is required for one or both of the purposes mentioned in paragraph 49 above then he or she should write to the client informing the client of the appropriateness of a preliminary meeting and, if the Money Laundering Regulations apply, summarising those regulations and setting out what is

required in order to satisfy the identification requirements. Where the Money Laundering Regulations apply the client must be informed that instructions cannot be accepted until after the identification procedures have been completed satisfactorily; therefore, the client should be asked to bring necessary identification documents to the meeting. Where a preliminary meeting is appropriate before accepting the instructions the client should be informed of this in the letter.

75. If a preliminary meeting takes place solely for the purpose of complying with the Money Laundering Regulations, then the procedures to be followed at the meeting will be as set out in the Bar Council Guidance on Money Laundering. If a preliminary meeting takes place for the dual purposes both of complying with the Money Laundering Regulations and in order to decide whether to accept the instructions, then it may be logical and practical for the barrister first to decide whether to accept the instructions; if, but only if he decides that he will accept the instructions, he should then at the same meeting move on to carry out the identification procedures.
76. It is open to a barrister to accept instructions for the limited purpose of reading papers and advising whether he or she is able to perform substantive professional work; in such a situation it is open to the barrister to make an arrangement that he or she is paid a fee for doing so. If it is decided to charge for the preliminary meeting, a client care letter should be sent to the client in the usual way, setting out the charge for the advice and any other work done and making it clear that the barrister does not agree to do more in the first instance than assess whether or not he or she can assist the client. In many cases, a barrister may consider that it is good client care not to charge for such a preliminary meeting unless it is obviously going to be lengthy. If there ever were a situation in which a barrister considered that the mere activity of advising whether he would be able to accept the case involved "relevant business" then the Money Laundering Regulations would have to be complied with at this stage. If the Money Laundering Regulations will apply to the later substantive work, if the barrister undertakes it, then both barrister and client may find it convenient to have carried out identification procedures at this stage.
77. If the barrister decides not to charge for the work and the purpose of any preliminary meeting is simply to assess whether or not the barrister can take on the work, then there is no need for any client care letter to be sent out before the meeting and if the Money Laundering Regulations apply then the identification procedure can take place at the meeting. It will obviously be sensible at that meeting for the barrister to go through the sort of issues that are contained in the client care letter to be sure that the client understands them.
78. If, at the end of the meeting, it is decided either that the client will not instruct the barrister or that the barrister is not willing to accept the instructions, then it is suggested that the reason for this should be recorded in writing. It would be good practice in most circumstances for the barrister to write to the client noting that they

will no longer be involved and, in the event that the Money Laundering Regulations have not applied to the advice undertaken up to this stage, returning any papers.

79. If it is agreed that the barrister will undertake work then, if a client care letter has not already been sent, one should be sent now. But, if one has already been sent but the basis of charging or the extent of the work to be undertaken has changed, the barrister should write confirming instructions and the new arrangement.
80. In some cases, however, a meeting will be unnecessary. Typically, this will be because the client is a regular client of the barrister or because the work so obviously does not need a solicitor that any meeting would be redundant. If this is the case then, as soon as the barrister has satisfied him or herself that this is the case (and that a meeting is not required in order to comply with the Money Laundering Regulations), a standard client care letter should be sent acknowledging the instructions and confirming the basis of charging.

INTERMEDIARIES

Scope of this issue

81. A barrister may find him or herself asked to perform legal services by a person or organisation, that is by an intermediary, for the benefit of a named client. For example, an independent financial adviser may wish to take tax advice for a client, or to arrange for a will to be drafted, or to have a trust deed drafted⁹. There is no objection in principle to a barrister accepting instructions from such an intermediary, but care must be taken in respect of a number of matters.
82. Firstly, the barrister must ensure that the intermediary is not acting, or proposing to act as a "litigator" for the purpose of the Courts and Legal Services Act 1990¹⁰. It is a criminal offence for an unauthorised person to act as a litigator¹¹, and a barrister who facilitated such activity might also be criminally liable.

⁹ A body called the "Institute of Financial Services" has arranged for its members to be within the BarDIRECT scheme, but our researches have indicated that its membership is small, and that the vast majority of independent financial advisers do not belong to it.

¹⁰ section 28

¹¹ s.70(1), (2): maximum sentence 2 years imprisonment or an unlimited fine.

83. Secondly, the barrister must ensure that both intermediary and lay client understand the true nature of the arrangement. To this end, the barrister should send a client care letter to both intermediary and lay client. It is assumed that the intermediary will undertake contractual responsibility for the barrister's fees: if the intermediary does not wish to do so, the barrister would be entitled to enquire why he should deal with the intermediary at all, rather than directly with the lay client. Model letters to both intermediary and lay client are available.
84. Thirdly, the barrister should bear in mind the possibility that the intermediary may have negotiated a contingent fee arrangement with the lay client and the potential conflict of interest which could thus arise between intermediary and lay client. Barristers are already familiar with the risks of potential conflicts of interest between solicitors and lay clients where conditional fee agreements have been made; but in the case of unregulated intermediaries they may feel that there is an even greater need to be alert to the risk that the manner in which information is transmitted to the barrister may have been coloured by the intermediary's own commercial interests.
85. By paragraph 703 of the Code, if a barrister forms the view that there is an actual conflict of interest between client and intermediary, for example, because the intermediary has been negligent, he must consider whether it would be in the client's interest to instruct another professional, and, if he considers it would be, he must both so advise and take steps to ensure that such advice reaches the lay client. However, it is not the barrister's duty to police the relationship between intermediary and lay client, which is a private matter to them.
86. Fourthly, in the relatively rare case where the intermediary instructs the barrister to perform advocacy services, for example before a domestic tribunal or in an arbitration, the barrister must take such steps as appear appropriate to ensure that the lay client does, in fact, wish the barrister to appear for him or her. In many cases this will involve having a conference with the lay client. A barrister performing advocacy services informs the tribunal that he or she acts for the lay client, and must ensure that this is correct. A barrister has the same obligation to a tribunal to which he sends a skeleton argument.
87. Fifthly, the barrister must have regard to the relevant provisions of the Money Laundering Regulations. Where instructed by an intermediary, the identification procedures must normally be followed in respect of the lay client by the barrister. The only exception will be where the intermediary is himself a regulated professional and informs the barrister by letter or certificate that he is a professional within the

regulated sector as defined in POCA and the Money Laundering Regulations and that he has carried out identification procedures

88. A barrister who is approached by an intermediary remains under the same obligation to satisfy him- or herself before accepting the case that it is appropriate to do so without a solicitor or other professional client as he or she would be under if he were approached by the client direct. If the barrister is familiar with the intermediary and the way in which the intermediary operates then this will be a relevant factor, but will not obviate the need for the barrister in respect of each prospective case to satisfy him- or herself that no solicitor is required. An important factor will be the nature of the instructions given to the barrister, for example whether the barrister is being asked to advise on paper on a point of law or whether he or she is asked to advise or act in connection with a matter involving complex issues of fact.
89. A barrister must at all times adhere to Public Access Rules 6, 7 and 8.
90. The client care letter to the lay client should be sent to the client's home or, as appropriate, business address and not to the intermediary's address. In consequence such address will be one of the pieces of information which a barrister will need before accepting instructions through an intermediary.
91. Where the client is a company or a regular client of Chambers, it may well be unnecessary for a barrister to provide such a letter in respect of every instruction received, this is particularly the case where the client clearly knows chambers and understands the procedures. Nevertheless, it will always be essential for barristers to set out what they are being asked to do and the fees likely to be charged in each case.

FEES

Rates

92. The Bar Council does not set scales of fees for barristers and the amount to be paid to a barrister for any individual piece of work is for negotiation between the barrister, the clerk and the client. Unless the fees were obviously grossly excessive either for the level of work being done or the seniority and experience of the barrister, then it is unlikely that the Bar Council would seek to look into the arrangement.

The Basis of the Agreement

93. The agreement between barrister and client will be contractual unless this is specifically excluded from the agreement (and it is hard to see what advantage such an exclusion would bring). This means that:
- a. the barrister is bound by the agreement and may be liable in contract for failure to perform;
 - b. the agreement should make it clear that there will be occasions where the barrister's duties under the Code of Conduct take precedence over the contract and that the barrister will not be liable if he or she has to withdraw as a result of this;
 - c. it should be clear what is to be done under the contract, the charging rate and any other special terms that may be agreed;
 - d. the barrister will be able to sue for fees.
94. Model client care letters have been drafted. There are three versions: one to a client in a non-intermediary case, one to an intermediary, and one to a lay client in an intermediary case. If a barrister uses these drafts, he will, save in exceptional circumstances, be deemed to have complied with the requirements in the Public Access Rules as to information which must be given to the client.
95. It should also be noted that the Withdrawal of Credit Scheme will not apply to public access work and that the Bar Council does not, of itself, have any mechanism for dealing with disputes over fees other than by way of a complaint of inadequate professional service.

Notification to clients

96. It is essential that the lay client should be aware in advance of the basis on which fees will be charged. In cases where the barrister has a reasonable idea of how much work will be involved it will be feasible for a fixed fee to be arranged in advance. This should occur as often as possible in public access work and invariably when the work involves a brief, as opposed to paperwork.

97. However, it has to be recognised that in cases of complex paper work it is not feasible to determine in advance how much work will be involved: in such cases the agreement of an hourly rate will be the only sensible fee agreement. In such situations, consideration should be given to fixing a cost ceiling above which work will not be continued without further authority from the client.

Fee notes

98. The Code¹² requires barristers to keep adequate records to support fees charged, and to provide such records or details to clients on request. Such records should contain separate items for each piece of paperwork and, where these are substantial, separate items for each telephone advice. If the client requires further detail and, notably, the exact work done and the cost of it in respect of each item involved this should be provided.

Over-charging and Disputes

99. It is likely that clients will, on occasion, seek to dispute the amount that is charged by a barrister or to claim that they have been overcharged. The scope for such disputes is obviously greatly reduced if there is clarity about the charging arrangements beforehand.
100. It is obviously appropriate for the barrister to seek to resolve the dispute informally if this is possible. Otherwise two options exist:
- a. the client can refuse to pay and raise the issue of reasonableness in the courts when sued by the barrister;
 - b. the client can complain to the Bar Standards Board which is able, if it considers that the barrister has provided inadequate professional services or overcharged to the extent that it amounts to professional misconduct, to require the barrister to reduce or repay fees.

ENSURING PAYMENT OF FEES

101. Barristers will not enjoy the same level of protection against non-payment of fees that has existed in respect of instructions from solicitors or, albeit to a more limited extent, in the cases of some recognised professions under the licensed access scheme. In particular, the Withdrawal of Credit scheme and other mechanisms for dealing with solicitors will not exist. Barristers may wish to consider the following options to protect their fees.

Payment in advance

¹² Code: paragraph 701(f)

102. In certain circumstances, it will be possible to request payment in advance from public access clients without breaching Paragraph 307(f) of the Code which prohibits a barrister handling client money “other than by receiving payment or remuneration”. It is proper to do so where there is a brief to appear in a trial since the brief fee is normally regarded as payable as soon as the brief is delivered and accepted. In the absence of agreement to the contrary, the standard and traditional arrangement has been that the fee is due even if the case collapses before the hearing. Therefore, if a barrister receives fee with brief, he or she is simply accepting money which is already payable to him or her. This should be made clear to the client.
103. In the case of paperwork, where a firm fee is fixed in advance, it may be possible for a barrister to accept the fee in advance, particularly if the terms of his or her engagement are expressed to be that the agreed fee is payable forthwith. Obviously, if the barrister failed to undertake the work, for whatever reason, the client would be entitled to restitution of the payment.
104. Barristers are **NOT** entitled to accept a payment on account of fees, and are not entitled to accept payment in advance of paperwork when the quantum to be charged is not to be determined until the work has been completed.

Other Methods of Securing Fees

105. Since there will be some situations in which barristers cannot accept payment in advance, barristers may wish to consider other possible measures by which they may protect their position in respect of payment of fees from a public access lay client.

Withholding paperwork until paid

106. Barristers may withhold paperwork until fees have been received. We recommend, however, that it should be made clear to the client at the time of instruction that this will be the arrangement. It should be expressly stated in the client care letter. Barristers should note that while they are permitted to withhold the work they have done, they may not be permitted to withhold the client's papers. That is addressed in the following paragraphs.

Lien

107. We are not aware of any authority by which barristers gain a general lien on documents belonging to the client until the fees are paid. While there seems to be nothing in the law to invalidate an express agreement made between a barrister and a client permitting the barrister to exercise such a lien, it is doubtful whether in practice a lien would be of much assistance to a barrister. By reason of the limitation of barrister functions, the activities which conventionally would have been performed by the solicitor will be performed by the lay client. So the lay client will already have all the correspondence files etc.

CONDITIONAL FEES

108. The "cab-rank" rule does not apply to conditional fee agreements. While in principle there is nothing to prevent barristers undertaking work on a conditional fee basis, there are likely to be considerable problems with their doing so in public access contentious work. This is particularly true given that, under the rules, barristers will not be permitted to conduct correspondence with the other party, issue applications and serve notices (eg as to the existence of a CFA). Barristers can only supply advocacy services, not litigation services under the rules.
109. If considering this, barristers must familiarise themselves with the Conditional Fee Agreements Regulations 2000 and, in particular, the provisions of Rule 4. It is unlikely that a barrister will be in a position to give the advice required by these Regulations.
110. Barristers should also consider the question of payment. Payment in advance or on completion of a particular piece of work would not be possible since, by definition, no fee is payable until success had been achieved. Any money paid in advance would be the client's money and barristers are not permitted to hold this. There are also occasions on which the barrister may have great difficulty in actually finding out whether success has been achieved. This would happen if, for example, the client were required to instruct a solicitor to conduct litigation and the barrister were not instructed further, or if the client reached a settlement with the other side. For these reasons, we consider that it will rarely be practical for barristers to undertake public access work on a CFA basis.

SOLICITORS AND PROFESSIONAL CLIENTS

111. Two main issues arise in respect of solicitors and other professional clients in relation to public access work:
- a. acceptance of work where there is already a solicitor or professional client advising the lay client; and
 - b. the recommendation of solicitors to public access clients.

Solicitor Currently Instructed

112. There is no objection to a barrister accepting instructions from a client where a solicitor is currently instructed in the matter, if the solicitor is aware that the client is doing so. There is no obligation on the solicitor to instruct the barrister directly and, in some cases, solicitors having done the necessary preparatory work will be content for the lay client then to brief the barrister directly. In such circumstances, however, it is important that the barrister should:

- a. consider whether there is any reason why the solicitor needs to instruct the barrister directly (for example, because the matter is complex);
- b. be satisfied that the solicitor is aware that the client is instructing the barrister.

If satisfied that the client does not require a solicitor's involvement, then the barrister may accept the case.

113. A more difficult question arises where the solicitor does not know that the client is coming to the barrister for advice. In some cases, the client will be seeking advice on the conduct of the solicitor or for a second opinion. Here there is no reason why the barrister should not provide advice. The barrister should not inform the solicitor of this without the client's consent.
114. 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 a certificate is in existence in respect of such work or not.
115. In other circumstances, however, the barrister should, in general, not take on a case, particularly if it is litigious, unless able to contact the solicitor and liaise with that individual as necessary.

Recommendation of Solicitors

116. If a barrister decides that a lay client should instruct a solicitor or professional client, the client may well ask the barrister to recommend a particular individual. A barrister may properly do this (and, if prudent, may well suggest suitable names) provided that:
 - a. the barrister has reasonable grounds to believe that the solicitor or professional client is competent to do the work; and
 - b. the barrister receives no payment for the referral; and
 - c. the solicitor is free to instruct another barrister.

CHAMBERS ADMINISTRATION

117. When taking on public access work, Chambers need to be aware that the expectations of lay clients are likely to be very different from those of solicitors. They will not necessarily understand that barristers work on a different basis from solicitors and that it will not always be possible to speak directly to the barrister and that there are limits to what can and cannot be done by barristers. This obviously needs to be

made clear to them at an early stage and has been discussed in the guidance on establishing the relationship with the client.

RECORDS

118. In the absence of a solicitor it will be crucial for the barrister to maintain records about his or her role in providing advice to the client in case questions or complaints arise afterwards. In particular, if it is not clear from other documentation, the barrister should maintain notes of:

- a. the initial contact with the client;
- b. the work he or she has been asked to do;
- c. the dates of conferences and notes of advice given;
- d. records of telephone conversations and advice given;
- e. significant changes to instructions;
- f. hearings attended and advice given.

These records should be retained for at least seven years.

DOCUMENTS

119. It is likely that lay clients will provide the barrister with original documents in order for advice to be given. It is for each barrister to decide, in consultation with the client, whether he or she wishes to retain those documents or work from copies. It is perfectly appropriate to charge for photocopying the documents. The barrister may well also be asked to store the original documents on behalf of the client, but

barristers are strongly discouraged from agreeing to do so. There will rarely be any reason for the barrister to retain originals, and there will normally be positive reasons for not doing so. If the case reaches the stage where documents have to be disclosed and inspected this will be undertaken by the lay client, or by a solicitor on his behalf, not by the barrister. The following matters should be kept in mind:

- a. the original documents belong to the client and, unless otherwise agreed (for example because a lien has been agreed), must be returned to the client on demand at any stage;
 - b. the barrister will need to retain copies of all documents throughout his or her involvement with a case;
 - c. if the barrister agrees to store original documents for the client the barrister must keep the documents in a secure place and may be liable in negligence for failing to do so;
 - d. it will almost always be impractical for barristers to store original documents for long periods of time unless Chambers are prepared to guarantee such a service even after the barrister has left Chambers or ceased to practise and the barrister should specify to the client a date by which the papers must be collected or will be returned.
120. It is, nevertheless, prudent for documents or copies of such documents to be retained either in case of an appeal or any action for negligence against the barrister. For this reason, barristers are not merely entitled to take copies of documents but are required either to do so themselves and store them for seven years or satisfy themselves that the client will do so.

MONEY LAUNDERING

121. Guidance on the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2007 has been published by the Bar Council (see para 3(4) above). The most recent guidance is dated January 2008 and can be found on the Bar Council's website. In addition, some specialist bar associations have published or are in the course of publishing their own guidance. Barristers accepting public access work must keep in mind and follow that guidance.

122. The new Money Laundering Regulations 2007 came into force on 15 December 2007 and replaced and repealed the 2003 Regulations. The guidance explains what type of work/practice falls within the ambit of 'relevant business' and, where the Regulations do bite, explains what the requirements are on individual members of the Bar.
123. The members of the Bar most likely to find themselves falling within the ambit of the Regulations are members of the Chancery Bar involved in non-contentious advisory work, and in particular, those self-employed barristers who are instructed to advise clients at the planning/execution stage of real property/business transactions, or in relation to setting up companies, trusts or similar structures. Whilst many contentious matters will conclude with a negotiated settlement that could arguable be considered, for the purposes of the Regulations, to be transactions, the Bar Council takes the view that, having regard to the reasoning of the court in *Bowman v Fels*, advising or acting in connection with an agreement that is intended to compromise a genuine dispute will not fall within the Regulations.
124. The requirements upon barristers who conduct relevant business are clearly set out in the Bar Council guidance. In short they are:
- Customer due diligence – eg (i) identifying the client or beneficial owner prior to the establishment of the business relationship, or the execution of the transaction, (ii) obtaining information about the business relationship or transaction, (iii) monitoring the business relationship on an ongoing basis
 - Record keeping procedures – records of all relevant transactions and evidence of client identity must be maintained for five years from the date on which the last transaction was completed.
 - Procedures to forestall money laundering, and training staff – all barristers and sets of Chambers who undertake work within the ambit of the Regulations should have in place and operate general systems and procedures for ensuring compliance with the Regulations. This includes training staff on the law relating to money laundering/terrorist financing and on how to recognise and deal with transactions and other activities which may be related to money laundering/terrorist financing.
125. As set out at 3(4) above in public access cases, disclosure under POCA will normally be the sole responsibility of the barrister. Further, the subject matter of public access work may well constitute relevant business for the purposes of the Money Laundering Regulations. It is therefore particularly important that barristers who undertake public access work are aware of the guidance issued by the Bar Council and keep up to date with developments in this area of law.

COMPLAINTS

126. The Code of Conduct requires barristers to have in-house procedures for dealing with complaints¹³. Such procedures can be a useful source of feedback to Chambers and also a way of retaining client goodwill when mistakes occur. In public access work, particularly contentious matters, Chambers are likely to find that a substantially greater number of complaints come their way from clients who may or may not have legitimate grievances. All such complaints should be addressed and acted upon in an appropriate time.
127. Barristers should have regard to the Bar Standards Board's guidance on complaints handling. In particular, barristers must:
- a. ensure that the client is told about the procedure in the initial letter;
 - b. deal with complaints promptly and according to that procedure as they arise;
 - c. inform the client that, if dissatisfied with the way in which the complaint has been handled, they may refer it to the Bar Standards Board.

¹³ Code, para 404.2

The public access scheme

Guidance for lay clients

Introduction

The purpose of this Guide is to explain how the public access scheme works and to show how lay clients can use it to instruct barristers.

What is public access?

Members of the public may now go directly to a barrister without having to involve an instructing solicitor or other intermediary. In the past it was necessary for clients to use a solicitor or other recognised third party through whom the barrister would be instructed.

Although the barrister's role remains essentially the same, members of the public may instruct a barrister directly through the public access scheme.

What are the advantages of the public access scheme?

The main advantage of the public access scheme is that it could potentially save you money whilst giving you access to the Bar, since you would be paying for a barrister only instead of a barrister and solicitor. However, although the barrister would be able to deal with most

aspects of the case, you could have to assist in some limited areas, generally with filing documents with the court. This is explained in more detail below, at page 2.

Is my case suitable for public access?

Public access is available in all types of work that barristers can do, except for work funded out of legal aid. It is most suitable for reasonably straightforward cases. It is likely to be inappropriate in cases involving children. If you are not sure whether your case would be suitable for public access, you should contact an appropriate barrister (see below) of his or her clerk and seek an initial view. If the barrister considers that your case would benefit from the involvement of a solicitor, he or she will tell you so. . A barrister may choose whether or not to take a public access case. The factors which he or she will take into account are discussed on page 4 below.

How do I make use of the public access scheme?

To use the scheme, you would have to instruct a barrister yourself. Further details of how to do this are given at page 6 of this guidance.

The public access scheme

The difference between the services offered by a barrister and a solicitor

Barristers specialise in providing expert legal advice, advocacy and the drafting of documents.

The services offered by barristers are different from those offered by solicitors for two main reasons.

1) First the different service offered:

Barristers are trained as specialist advisers and advocates. This means that they become involved where expert legal advice is needed, where documents need to be drafted for their clients to use, or for advocacy (presenting a case in court or before some other tribunal or organisation).

Solicitors also give advice to and draft documents for their clients to use or may instruct a barrister to provide this service. Some solicitors also provide advocacy services to their clients, although many prefer to instruct a barrister to do this.

2) By law, barristers are not able to provide some of the services that solicitors offer. On the other hand, some solicitors do not themselves provide advocacy services. At present only a solicitor may conduct litigation and take the formal steps that are necessary to progress and action. Your barrister will advise you if he or she considers that anything you want done is something that only a solicitor can provide.

Some examples of work which a barrister is allowed to do:

- a) A barrister may appear on your behalf at Court.
- b) A barrister may give you legal advice.
- c) A barrister may draft documents for you, such as a will.
- d) A barrister may advise you on the formal steps which need to be taken in proceedings before a court or other organisation and draft formal documents for use in those proceedings.
- e) A barrister may draft and send letters for you on his Chambers' headed paper.
- f) If a witness statement from you is required in proceedings, a barrister may prepare that statement from what you tell him or her. A barrister may also help to prepare witness statements from another person based on the information which that person has provided.

g) Where a case requires an expert witness (for example, a surveyor), a barrister may advise you on the choice of a suitable expert and may draft a letter of instruction which you can then send to the expert as a letter from you on your own notepaper.

What a barrister cannot do on your behalf:

The following are examples of work that a barrister is not allowed to do:

a) A barrister cannot issue proceedings on your behalf or to issue other applications or to take other formal steps in court or other proceedings. You would have to send the documents to the court, although the barrister could help prepare them for you.

b) A barrister is not allowed to instruct an expert witness on your behalf.

c) A barrister is not allowed to take responsibility for the handling of clients' affairs, or to handle clients' money.

Is my case suitable for public access?

In considering whether your case is suitable for Public access, the barrister is likely to take into account

a) The nature of the work which you wish him or her to undertake

b) Your ability to deal with any aspects of the case which would normally be carried out by a solicitor that cannot be covered by a public access barrister.

Much depends on the circumstances of your case. Here are some possibilities:

a) The barrister might decide that your case is suitable for public access and that there is no need for the involvement of a solicitor. If circumstances change, the barrister may have to advise you that a solicitor will need to be instructed.

b) Although your case may become unsuitable for public access in the future, it is suitable for public access for the time being. In such a case, the barrister will inform you

i) of the work which is suitable for public access

ii) the likely point at which your case will become unsuitable for public access and

iii) that he or she will have to withdraw at that stage if you do not instruct a solicitor.

c) Your case is such that (whether because of its complexity, or because of the stage which it has reached) it is not suitable for public access and that a solicitor is required. In this situation, you should be told by the barrister why your case is not suitable and that he or she would be prepared to act for you if instructed by a solicitor. In such circumstances you can ask the barrister to recommend a suitable solicitor to you.

If the barrister decides to accept your instructions, you will be sent a client care letter.

Is a barrister obliged to accept public access work?

A barrister may choose whether or not to accept public access work. This choice is restricted in that it is impermissible to refuse to take on a case for specific reasons, relating to discrimination, which are set out below.

When deciding whether to accept instructions in a case, a barrister must consider whether that case is suitable for public access. If he or she decides that it is not suitable, he or she must decline the instructions. Throughout the case, the barrister remains under a continuing duty to consider whether a case remains suitable for public access, and he or she must refuse to continue to act on a public access basis if it is no longer suitable.

A barrister may not refuse to accept instructions:

a) On the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability or political persuasion; and

b) In the case of advocacy work, on the grounds:

i) That the nature of the case is objectionable to him or her or to any section of the public; or

ii) That your conduct, opinions or beliefs are unacceptable to him or her or to any section of the public.

Does a barrister need special training to take public access work?

Barristers must satisfy a number of conditions before they can accept public access work.

Subject to limited exceptions, before a barrister is permitted to accept public access work he or she must have:

a) practised for a total of three years following the completion of training

b) attended a “public access” training course approved by the Bar Standards Board and

c) given certain notices which are required to be given by the Bar Code of Conduct.

Instructing a public access barrister

How do I find a barrister?

It is important to instruct a barrister who specialises in the appropriate area of law for your case. If you do not know whom to instruct, there are a number of ways of finding the right barrister.

The Bar Council has a directory of public access barristers on its website, at:

<http://www.barcouncil.org.uk/about/find-a-barrister/public-access-directory/>

There are also legal directories – for example, the Bar Directory (which may be found via the Bar Council’s website), Chambers & Partners Guide to the Legal Profession, or the Legal 500. In addition, many sets of Chambers publish their own web sites which contain information about the set of Chambers as a whole, and the individual barrister members.

Alternatively, if you know of a set of barristers’ Chambers which undertake your sort of case, you can telephone them and ask the Senior Clerk or Practice Manager to make a recommendation.

How do I instruct a barrister?

Try to clarify in your own mind the nature of your problem and what it is that you want the barrister to do.

Telephone the Senior Clerk or Practice Manager of the set of Chambers in which the barrister practises and tell him or her that you wish to instruct the barrister directly. He or she will tell you what to do next.

Alternatively, if the barrister practises as a sole practitioner, you should contact the barrister’s place of work. You will have to explain that you wish to instruct the barrister directly and the nature of the work which you wish the barrister to undertake for you. You may be asked to send written instructions, setting out the factual background to your case and what it is that you want the barrister to do. Alternatively, the barrister may decide that it would be appropriate in the first instance to discuss the matter with you on the telephone or at a preliminary meeting to decide on the best way forward.

Proof of your identity

In certain circumstances, the barrister will be required by law to carry out certain identification procedures. These must be followed as soon as reasonably practicable after you have first made contact with the barrister - it is likely that this will take place after you make the initial contact described above. Whether these procedures apply and, if so, how they should be followed, need to be considered by the barrister when you first make contact.

Where the procedure applies, the barrister will require satisfactory evidence of your identity – that is, proof of your name, date of birth and current address.

The type of evidence required will depend on the circumstances. For example:

- a) If you are acting as an individual, you may be required to produce in person your current passport or other national identity card or a new form of driving licence (with a photograph) together with a recent utility bill, bank or building society statement.
- b) If you are acting on behalf of a company, you will need to produce a certified copy of the Certificate of Incorporation, the latest accounts filed at Companies House and evidence that you are authorised to act on behalf of the company.

To carry out the procedures properly, the barrister may well have to have a meeting with you. You will be told what to bring to that meeting. The barrister is required to take copies of the documents which you bring and to retain those copies for 5 years.

What happens next?

The barrister will have to decide whether your case is suitable for public access. He or she may charge you for this preliminary work.

If your case is suitable for public access, you and the barrister will have to agree the terms on which he or she is to carry out the work. Those terms will be set out in a client care letter which will be sent to you.

If your case is not suitable for public access, the barrister will tell you so. If you wish, he or she may recommend a suitable solicitor for you to instruct.

Some cases obviously will be suitable for public access. In such a case, and provided that (a) the barrister is willing to undertake the work, (b) agreement can be reached about the charge which will be made for that work and (c) where appropriate, you have provided satisfactory proof of your identity, your instructions will be accepted and a client care letter will be sent to you. The role and importance of the client care letter is described below.

In other cases, the barrister may suggest that you have a preliminary meeting before deciding whether or not to proceed with the instructions.

It is also open to a barrister to accept instructions to read the papers and advise whether or not he or she is able to perform the work which you wish him or her to undertake. If instructions are accepted for these limited purposes, it is important that you are both clear as to whether a charge is to be made. If preliminary work is to be carried out and a charge made for that work, you will be sent a client care letter.

The client care letter

The client care letter records the terms of the agreement between you and the barrister. It is a very important document and you must read it carefully.

It contains a description of the work to be undertaken, the basis on which you will be charged for that work, and the other terms of the agreement between you and the barrister. If you are unclear about, or disagree with any of the contents of that letter, you must raise your concerns with the barrister immediately.

How will I be charged?

A barrister usually charges according to their level of experience, the complexity of the case and the length of time involved in dealing with it. It is important that the cost to you, and the stage at which the fee is payable is agreed at the outset, and that the terms of the agreement are clear to both you and the barrister.

There are no formal scales of fees for barristers' work. Generally, barristers charge according to their level of experience and the complexity and length of time involved in any particular matter. The amount to be charged for any particular piece of work, and when the fee becomes payable, is a matter for negotiation between you, the barrister and his or her clerk. All public access barristers are independent self-employed practitioners, competing with each other. If you consider the fee proposed by one barrister to be too high, try another barrister.

It is very important that you and the barrister agree from the outset the basis upon which you are to be charged for work and the time at which the fee will become payable.

Where the fee relates to a hearing, the barrister is normally entitled to the fee, whether or not the hearing goes ahead. If that is to be the case, the barrister will tell you. You may, if you wish, try to agree a different basis for payment of the fee in such a case.

In other cases (whether for a conference or for paperwork), it may be possible to fix a fee in advance for the work. However, that will not be possible in every case. Where it is not possible, you should ask for an estimate. You may be able to agree with the barrister that there should be a "ceiling" on the fee charged for a particular piece of work.

If you agree a fee in advance of the work being done, then the barrister may require that fee to be paid before carrying out the work. Where a fee is not fixed in advance and the work involves the production of paperwork (for example, the drafting of a contract), the barrister may nevertheless require you to pay for the work after he or she has completed it and before releasing it to you. If that is to be the case, the barrister should tell you at the outset.

Although conditional fee agreements (agreements under which a fee becomes payable only in the event of success in a case) are possible, it is unlikely that barristers will be willing or able to undertake public access work on a conditional fee basis, save in very rare cases.

The barrister is required to keep sufficient records to justify the fees that he or she is charging. You are entitled to ask for details to justify the fee that you are being charged.

What if I qualify or may qualify for public funding?

If you could be eligible for public funding, a barrister has to advise you to approach a solicitor.

It is unlikely that a barrister will be able to carry out the means assessment required to establish whether you would qualify for public funding. Further, at present, barristers are not able to apply to the Legal Services Commission for public funding on your behalf. If it appears that you may qualify for public funding, therefore, a barrister has to advise you to approach a solicitor with a franchise from the legal Services Commission to investigate this possibility.

Can a barrister stop acting for me after he or she has accepted my instructions?

In public access cases, the barrister must stop acting for you if he or she considers that the case is no longer suitable for public access. The barrister may be able to assist if, as a consequence of no longer continuing to act for you, you will or may experience difficulties in relation to an imminent hearing.

In public access cases, a barrister is also required to cease to act where he or she has formed the view that it is in your interests or the interests of justice that you instruct a solicitor or other professional person. In such cases:

a) Your barrister is under a continuing duty to consider whether your case remains a suitable case for public access. If he or she forms the view that it is not, you will be advised of this fact. If you then instruct a solicitor or other professional person able to provide instructions to the barrister, he or she may continue to act for you. If you do not, your barrister must cease to act for you.

b) If you are a party to proceedings in which a hearing is imminent, and you are likely to have difficulty in finding a solicitor in time for the hearing, your barrister should provide you with such assistance as is proper to protect your position. Although your barrister may not continue to work for you on a public access basis, he or she may be able to assist you by, for example:

i) Drafting letters for you to send, asking for an adjournment of the hearing

ii) Writing a letter to the court in support of that application, explaining that he or she has had to withdraw and, if appropriate, the reasons for it

iii) Assisting you to find solicitors.

Can I instruct a barrister directly when I have already instructed solicitors?

You may instruct a barrister directly even though you have already instructed solicitors. If you do so, the barrister will still have to consider whether he or she should accept your instructions. However, the fact that you have retained solicitors is not of itself a reason for refusing to accept your instructions; nor may the barrister contact your solicitors without your

permission. However, there may be cases (for example, where your case involves existing litigation) where a barrister will refuse to accept your instructions unless you give him or her permission to contact and liaise with your solicitors and you also give your solicitors the necessary permission to provide information to the barrister.

Confidentiality and compulsory disclosure of information

Your barrister will be under a strict professional duty to keep your affairs confidential. Legal professional privilege protects your communications with your barrister from disclosure. The only exception is that any lawyer may be required by law to disclose information to governmental or other regulatory authorities, and to do so without first obtaining your consent to such disclosure or telling you that he or she has made it.

Complaints

In the first instance, you should try the complaints system maintained by the barrister or his or her Chambers. Should this not help, the Bar Standards Board operates a complaints system. If you are not satisfied with the way in which the Bar Council has considered your complaint, you may take the matter up with the Legal Services Ombudsman.

A barrister is required to deal with all complaints courteously, promptly and in a manner that addresses the issues raised by the complaint. He or she is also required to have a written complaints procedure that should be made available to you if you ask for it. Whatever the nature of your complaint, therefore, you should take the matter up with the barrister in the first instance, or his or her Senior Clerk or Head of Chambers. The nature and speed of any response will depend upon the precise circumstances. For example, if your complaint is that the barrister has been negligent, he or she is required to inform his or her insurers and those insurers may need to be consulted about the response.

If this is not possible, or you are unhappy with the manner in which the barrister has dealt with your complaint, you should contact the BSB, the regulator for barristers. We investigate complaints against barristers and take action against those who break the rules of the code of conduct. We do this in the interests of the public and to maintain the good name and standards of the profession. There is no charge for making a complaint to us.

The address and phone number is:

Complaints and Investigations Department,

Bar Standards Board

289-293 High Holborn

London
WC1V 7HZ

Main Switchboard: 020 7611 1444

Fax: 020 7611 1342

If you are not satisfied with the way in which the Bar Standards Board considered your complaint, you may contact the Legal Services Ombudsman to investigate how we handled it. The Ombudsman is not a lawyer. If the Ombudsman thinks that the complaint was not investigated properly, she can recommend that the complaint be reconsidered or that the BSB and/or the barrister pays compensation.

The Ombudsman's address is:

The Legal Services Ombudsman

3rd Floor

Sunlight House

Quay Street

Manchester
M3 3JZ.

E-mail. enquiries.lso@oslo.gsi.gov.uk

Website: www.olso.org

Lo-call number: 0845 6010794 (charged at local rates and available nationally)

March 2010

Guidance for lay clients – final version submitted by the BSB on Friday 19 March

The public access scheme

Guidance for lay clients

Introduction

The purpose of this Guide is to explain how the public access scheme works and to show how lay clients can use it to instruct barristers.

What is public access?

Members of the public may now go directly to a barrister without having to involve an instructing solicitor or other intermediary. In the past it was necessary for clients to use a solicitor or other recognised third party through whom the barrister would be instructed.

Although the barrister's role remains essentially the same, members of the public may instruct a barrister directly through the public access scheme.

What are the advantages of the public access scheme?

The main advantage of the public access scheme is that it could potentially save you money whilst giving you access to the Bar, since you would be paying for a barrister only instead of a barrister and solicitor. However, although the barrister would be able to deal with most aspects of the case, you could have to assist in some limited areas, generally with filing documents with the court. This is explained in more detail below, at page 2.

Is my case suitable for public access?

Public access is available in all types of work that barristers can do, except for work funded out of legal aid. It is most suitable for reasonably straightforward cases. It is likely to be inappropriate in cases involving children. If you are not sure whether your case would be suitable for public access, you should contact an appropriate barrister (see below) of his or her clerk and seek an initial view. If the barrister considers that your case would benefit from the involvement of a solicitor, he or she will tell you so. A barrister may choose whether or not to take a public access case. The factors which he or she will take into account are discussed on page 4 below.

How do I make use of the public access scheme?

To use the scheme, you would have to instruct a barrister yourself. Further details of how to do this are given at page 6 of this guidance.

The public access scheme

The difference between the services offered by a barrister and a solicitor

Barristers specialise in providing expert legal advice, advocacy and the drafting of documents.

The services offered by barristers are different from those offered by solicitors for two main reasons.

1) First the different service offered:

Barristers are trained as specialist advisers and advocates. This means that they become involved where expert legal advice is needed, where documents need to be drafted for their clients to use, or for advocacy (presenting a case in court or before some other tribunal or organisation).

Solicitors also give advice to and draft documents for their clients to use or may instruct a barrister to provide this service. Some solicitors also provide advocacy services to their clients, although many prefer to instruct a barrister to do this.

2) By law, barristers are not able to provide some of the services that solicitors offer. On the other hand, some solicitors do not themselves provide advocacy services. At present only a solicitor may conduct litigation and take the formal steps that are necessary to progress and action. Your barrister will advise you if he or she considers that anything you want done is something that only a solicitor can provide.

Some examples of work which a barrister is allowed to do:

- a) A barrister may appear on your behalf at Court.
- b) A barrister may give you legal advice.

- c) A barrister may draft documents for you, such as a will.
- d) A barrister may advise you on the formal steps which need to be taken in proceedings before a court or other organisation and draft formal documents for use in those proceedings.
- e) A barrister may draft and send letters for you on his Chambers' headed paper.
- f) If a witness statement from you is required in proceedings, a barrister may prepare that statement from what you tell him or her. A barrister may also help to prepare witness statements from another person based on the information which that person has provided.
- g) Where a case requires an expert witness (for example, a surveyor), a barrister may advise you on the choice of a suitable expert and may draft a letter of instruction which you can then send to the expert as a letter from you on your own notepaper.

What a barrister cannot do on your behalf:

The following are examples of work that a barrister is not allowed to do:

- a) A barrister cannot issue proceedings on your behalf or to issue other applications or to take other formal steps in court or other proceedings. You would have to send the documents to the court, although the barrister could help prepare them for you.
- b) A barrister is not allowed to instruct an expert witness on your behalf.
- c) A barrister is not allowed to take responsibility for the handling of clients' affairs, or to handle clients' money.

Is my case suitable for public access?

In considering whether your case is suitable for Public access, the barrister is likely to take into account

- a) The nature of the work which you wish him or her to undertake

b) Your ability to deal with any aspects of the case which would normally be carried out by a solicitor that cannot be covered by a public access barrister.

Much depends on the circumstances of your case. Here are some possibilities:

a) The barrister might decide that your case is suitable for public access and that there is no need for the involvement of a solicitor. If circumstances change, the barrister may have to advise you that a solicitor will need to be instructed.

b) Although your case may become unsuitable for public access in the future, it is suitable for public access for the time being. In such a case, the barrister will inform you

i) of the work which is suitable for public access

ii) the likely point at which your case will become unsuitable for public access and

iii) that he or she will have to withdraw at that stage if you do not instruct a solicitor.

c) Your case is such that (whether because of its complexity, or because of the stage which it has reached) it is not suitable for public access and that a solicitor is required. In this situation, you should be told by the barrister why your case is not suitable and that he or she would be prepared to act for you if instructed by a solicitor. In such circumstances you can ask the barrister to recommend a suitable solicitor to you.

If the barrister decides to accept your instructions, you will be sent a client care letter.

Is a barrister obliged to accept public access work?

A barrister may choose whether or not to accept public access work. This choice is restricted in that it is impermissible to refuse to take on a case for specific reasons, relating to discrimination, which are set out below.

When deciding whether to accept instructions in a case, a barrister must consider whether that case is suitable for public access. If he or she decides that it is not

suitable, he or she must decline the instructions. Throughout the case, the barrister remains under a continuing duty to consider whether a case remains suitable for public access, and he or she must refuse to continue to act on a public access basis if it is no longer suitable.

A barrister may not refuse to accept instructions:

a) On the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability or political persuasion; and

b) In the case of advocacy work, on the grounds:

i) That the nature of the case is objectionable to him or her or to any section of the public; or

ii) That your conduct, opinions or beliefs are unacceptable to him or her or to any section of the public.

Does a barrister need special training to take public access work?

Barristers must satisfy a number of conditions before they can accept public access work.

Subject to limited exceptions, before a barrister is permitted to accept public access work he or she must have:

a) practised for a total of three years following the completion of training

b) attended a “public access” training course approved by the Bar Standards Board and

c) given certain notices which are required to be given by the Bar Code of Conduct.

Instructing a public access barrister

How do I find a barrister?

It is important to instruct a barrister who specialises in the appropriate area of law for your case. If you do not know whom to instruct, there are a number of ways of finding the right barrister.

The Bar Council has a directory of public access barristers on its website, at:

<http://www.barcouncil.org.uk/about/find-a-barrister/public-access-directory/>

There are also legal directories – for example, the Bar Directory (which may be found via the Bar Council's website), Chambers & Partners Guide to the Legal Profession, or the Legal 500. In addition, many sets of Chambers publish their own web sites which contain information about the set of Chambers as a whole, and the individual barrister members.

Alternatively, if you know of a set of barristers' Chambers which undertake your sort of case, you can telephone them and ask the Senior Clerk or Practice Manager to make a recommendation.

How do I instruct a barrister?

Try to clarify in your own mind the nature of your problem and what it is that you want the barrister to do.

Telephone the Senior Clerk or Practice Manager of the set of Chambers in which the barrister practises and tell him or her that you wish to instruct the barrister directly. He or she will tell you what to do next.

Alternatively, if the barrister practises as a sole practitioner, you should contact the barrister's place of work. You will have to explain that you wish to instruct the barrister directly and the nature of the work which you wish the barrister to undertake for you. You may be asked to send written instructions, setting out the factual background to your case and what it is that you want the barrister to do. Alternatively, the barrister may decide that it would be appropriate in the first

instance to discuss the matter with you on the telephone or at a preliminary meeting to decide on the best way forward.

Proof of your identity

In certain circumstances, the barrister will be required by law to carry out certain identification procedures. These must be followed as soon as reasonably practicable after you have first made contact with the barrister - it is likely that this will take place after you make the initial contact described above. Whether these procedures apply and, if so, how they should be followed, need to be considered by the barrister when you first make contact.

Where the procedure applies, the barrister will require satisfactory evidence of your identity – that is, proof of your name, date of birth and current address. The type of evidence required will depend on the circumstances. For example:

- a) If you are acting as an individual, you may be required to produce in person your current passport or other national identity card or a new form of driving licence (with a photograph) together with a recent utility bill, bank or building society statement.
- b) If you are acting on behalf of a company, you will need to produce a certified copy of the Certificate of Incorporation, the latest accounts filed at Companies House and evidence that you are authorised to act on behalf of the company.

To carry out the procedures properly, the barrister may well have to have a meeting with you. You will be told what to bring to that meeting. The barrister is required to take copies of the documents which you bring and to retain those copies for 5 years.

What happens next?

The barrister will have to decide whether your case is suitable for public access. He or she may charge you for this Preliminary work.

If your case is suitable for public access, you and the barrister will have to agree the terms on which he or she is to carry out the work. Those terms will be set out in a client care letter which will be sent to you.

If your case is not suitable for public access, the barrister will tell you so. If you wish, he or she may recommend a suitable solicitor for you to instruct.

Some cases obviously will be suitable for public access. In such a case, and provided that (a) the barrister is willing to undertake the work, (b) agreement can be reached about the charge which will be made for that work and (c) where appropriate, you have provided satisfactory proof of your identity, your instructions will be accepted and a client care letter will be sent to you. The role and importance of the client care letter is described below.

In other cases, the barrister may suggest that you have a preliminary meeting before deciding whether or not to proceed with the instructions.

It is also open to a barrister to accept instructions to read the papers and advise whether or not he or she is able to perform the work which you wish him or her to undertake. If instructions are accepted for these limited purposes, it is important that you are both clear as to whether a charge is to be made. If preliminary work is to be carried out and a charge made for that work, you will be sent a client care letter.

The client care letter

The client care letter records the terms of the agreement between you and the barrister. It is a very important document and you must read it carefully.

It contains a description of the work to be undertaken, the basis on which you will be charged for that work, and the other terms of the agreement between you and the barrister. If you are unclear about, or disagree with any of the contents of that letter, you must raise your concerns with the barrister immediately.

How will I be charged?

A barrister usually charges according to their level of experience, the complexity of the case and the length of time involved in dealing with it. It is important that the cost to you, and the stage at which the fee is payable is agreed at the outset, and that the terms of the agreement are clear to both you and the barrister.

There are no formal scales of fees for barristers' work. Generally, barristers charge according to their level of experience and the complexity and length of time involved in any particular matter. The amount to be charged for any particular piece of work, and when the fee becomes payable, is a matter for negotiation between you, the barrister and his or her clerk. All public access barristers are independent self-employed practitioners, competing with each other. If you consider the fee proposed by one barrister to be too high, try another barrister.

It is very important that you and the barrister agree from the outset the basis upon which you are to be charged for work and the time at which the fee will become payable.

Where the fee relates to a hearing, the barrister is normally entitled to the fee, whether or not the hearing goes ahead. If that is to be the case, the barrister will tell you. You may, if you wish, try to agree a different basis for payment of the fee in such a case.

In other cases (whether for a conference or for paperwork), it may be possible to fix a fee in advance for the work. However, that will not be possible in every case. Where it is not possible, you should ask for an estimate. You may be able to agree with the barrister that there should be a "ceiling" on the fee charged for a particular piece of work.

If you agree a fee in advance of the work being done, then the barrister may require that fee to be paid before carrying out the work. Where a fee is not fixed in advance and the work involves the production of paperwork (for example, the drafting of a contract), the barrister may nevertheless require you to pay for the work after he or she has completed it and before releasing it to you. If that is to be the case, the barrister should tell you at the outset.

Although conditional fee agreements (agreements under which a fee becomes payable only in the event of success in a case) are possible, it is unlikely that barristers will be willing or able to undertake public access work on a conditional fee basis, save in very rare cases.

The barrister is required to keep sufficient records to justify the fees that he or she is charging. You are entitled to ask for details to justify the fee that you are being charged.

What if I qualify or may qualify for public funding?

If you could be eligible for public funding, a barrister has to advise you to approach a solicitor.

It is unlikely that a barrister will be able to carry out the means assessment required to establish whether you would qualify for public funding. Further, at present, barristers are not able to apply to the Legal Services Commission for public funding on your behalf. If it appears that you may qualify for public funding, therefore, a barrister has to advise you to approach a solicitor with a franchise from the legal Services Commission to investigate this possibility.

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- i) Drafting letters for you to send, asking for an adjournment of the hearing
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