

COMBAR GUIDANCE ON CONTRACT TERMS

| | | |
|-----------|---------------------------------------------------------------------------|-----------|
| 1. | INTRODUCTION..... | 2 |
| 2. | PRIOR VERSIONS..... | 3 |
| 3. | VERSION 4 | 3 |
| 4. | IMPORTANT CONSIDERATIONS FOR COMBAR CHAMBERS WHEN CONTRACTING..... | 3 |
| A. | PROFESSIONAL REQUIREMENTS | 4 |
| B. | INSURANCE ASPECTS..... | 4 |
| C. | ADMINISTRATION..... | 5 |
| 5. | USE OF THE TERMS | 5 |
| A. | THE PROVISION OF SERVICES REGULATIONS 2009..... | 5 |
| B. | AGREEMENT TO USE THE COMBAR/CLLS TERMS | 5 |
| 6. | CHARACTERISTICS OF THE COMBAR/CLLS TERMS | 6 |
| A. | THE BASIS FOR PAYMENT..... | 6 |
| B. | THE SERVICES | 7 |
| C. | THE POSITION OF THE LAY CLIENT..... | 8 |
| D. | LIABILITY | 9 |
| E. | CONFLICTS OF INTEREST..... | 9 |
| F. | TERMINATION..... | 10 |
| G. | DEVILLING | 11 |
| H. | CONFIDENTIALITY..... | 11 |
| I. | GDPR | 11 |
| J. | KNOW-HOW SYSTEMS..... | 13 |
| K. | PUBLICITY..... | 13 |
| L. | SANCTIONS | 13 |
| M. | OPTIONAL CLAUSES..... | 13 |
| 7. | FURTHER REVIEWS OF THE COMBAR/CLLS TERMS..... | 14 |

1. INTRODUCTION

1. Since 31 January 2013, barristers have been obliged under the Cab Rank Rule to accept instructions which are offered either (a) on the Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons (now 2020) (“the Bar Council terms”) or (b) on terms which a barrister or the barrister’s chambers have published as the barrister’s standard terms.¹
2. The Bar Council terms render solicitors directly liable to pay the barrister’s fees and exclude liabilities other than to the Lay Client.
3. The history of the development of the Bar Council terms showed that those terms were regarded as unacceptable by some solicitors for commercial work. Thus:
 - a) between about 2001 and 2007 some progress had been made in negotiation between the Bar Council and Law Society to develop default terms for contracting with barristers. However, those negotiations broke down irretrievably. The Bar Council terms were accordingly developed by the Bar Council’s Implementation Committee without the agreement of the Law Society; and
 - b) when the Bar Council’s proposed terms were put out for consultation, some of the responses received from solicitors’ organisations indicated that the terms were not acceptable.
4. Against that background, Combar set up a small sub-committee to examine the issues that might arise when contracting with solicitors.
5. Members of that sub-committee met with members of the City of London Law Society’s Litigation Committee (“the CLLS”) to discuss the approach that City solicitors might take to the question of contracting with barristers. An area of concern for Combar was that, in the event that the Bar Council terms were not accepted as the basis for doing business, huge amounts of time and effort might have to be wasted in negotiating terms individually.
6. The original Combar/CLLS “Agreement for the Supply of Legal Services by a Barrister in a Commercial Case” (“the Combar/CLLS terms”) were the product of the discussions that followed with the CLLS. Those discussions have continued from time to time since the publication of the first version of the Combar/CLLS terms.
7. The Combar/CLLS terms do not represent the optimal terms on which Combar barristers might contract with solicitors. On the contrary, the terms represent the outcome of a negotiation and, in certain respects, (most importantly the absence of a default basis for payment of barristers) the Combar/CLLS terms reflect the fact that no common position could be agreed.
8. It should be emphasised that at no stage has Combar indicated to the CLLS that these terms have been agreed by or on behalf of the individuals or chambers that are

¹ See, now, rC30.9.c.

members of Combar. No barrister, from any chambers, and no solicitor, from any firm, has agreed to be bound by these terms if proffered in any particular case.

9. Combar and the CLLS have issued a joint guidance note which should be read with the Combar/CLLS terms and which explains how the terms are intended to work in practice. This additional note is being issued by Combar to its members to provide Combar members with further guidance on specific issues affecting barristers and arising out of the terms.
10. **Neither Combar nor the authors of this note accept any responsibility for any advice in this note. Combar and the authors of this note accept no liability whatsoever to anyone for any loss howsoever arising from the content of this note or the Combar/CLLS terms whether caused by negligence or otherwise.**

2. PRIOR VERSIONS

11. Version 2 of the Combar/CLLS terms became available for use from 1 January 2014 (replacing previous versions). A number of tidying up amendments were made. Version 3 of the Combar/CLLS terms became available for use from April 2018 (replacing previous versions). The amendments were limited to Clause 19.5 and were intended to address the introduction of the GDPR.

3. VERSION 4

12. Version 4 of the Combar/CLLS terms becomes available for use from 7 October 2024 (replacing previous versions). The amendments, which are summarised in a table in the joint CLLS/Combar guidance, arise out of comments received during discussion of the Combar/CLLS terms in 2023-2024.
13. Though contracts which have been entered into on the basis of Combar/CLLS terms Versions 1, 2 or 3 (whether modified or not) are likely to continue to be on those terms, it is recommended that those using such terms consider whether to amend existing contracts to Version 4.
14. Combar and CLLS anticipate that it is the Terms in force at the time of making the Agreement to supply Services that will apply to those Services. Accordingly, (unless otherwise specified) we would expect barristers and solicitors entering into new contracts on the basis of the Terms from 7 October 2024 to be contracting on Version 4 (unless and until they are replaced). Previous versions are no longer appropriate for use in relation to new instructions, in particular because of their reference to the Code of Conduct and the Data Protection Act 1998.

4. IMPORTANT CONSIDERATIONS FOR COMBAR CHAMBERS WHEN CONTRACTING

15. The change from the position where barristers had conventionally not contracted for the payment of their fees to the position where barristers do contract to provide their services, has been a fundamental one.
16. Some firms have sought to impose their own terms on barristers. Some have sought to amend terms presented by the barrister.
17. It is the responsibility of every barrister to be aware of the basis upon which he or she is contracting in each case. The issues that will arise in practice - whether contracts have been agreed and if so, what the terms and their meaning and effect are - will be no different to and possibly as complicated as the contractual disputes on which Combar members are regularly instructed to advise.
18. The acceptance by a barrister or clerk of particular contract terms may result in the assumption of obligations and an exposure to risk which compromise a barrister's professional obligations under the BSB Handbook and/or for which the barrister is uninsured.
19. In this note we highlight some of the issues that may arise, both in relation to the Combar/CLLS terms and generally.

a. Professional requirements

20. Clients sometimes require solicitors to sign up to terms restricting the solicitor's entitlement to act for other clients, and it is possible that solicitors might ask barristers to sign similar agreements. Such restraints are likely to be in breach of the cab rank rule. Barristers may be asked to agree to terms purporting to restrict the ability of other members of chambers from acting for particular clients, which is likely to be unacceptable in any circumstances, because barristers have no authority to bind other members of their chambers. Barristers may also be asked to agree to inform the solicitor about other members being instructed in the same case. Such clauses should be scrutinised with care. Obvious difficulties may arise in relation to confidentiality of information within chambers and of information belonging to other clients of the same or other barristers.

b. Insurance aspects

21. Combar members and their clerking teams will need to be careful, when considering terms proposed by solicitors whether they might give rise to uninsured liabilities. BMIF's Terms of Cover exclude claims in respect of liability incurred under any contract, save to the extent that such liability would have been incurred irrespective of the terms of such contract. In other words, barristers are likely to be uninsured in respect of any liability which would not have arisen under the old no-contract basis of work.
22. The Combar/CLLS terms recognise the possibility that performance of the terms might give rise to liabilities to solicitors and lay clients that do not exist at common law. Combar liaised with the BMIF to agree an extension of cover for liabilities

assumed under the Combar/CLLS terms (and which would not otherwise exist at common law) capped in the sum of £100,000. The Combar/CLLS terms include wording that is intended to permit the limitation of liability assumed under the Combar/CLLS terms (and which would not otherwise exist at common law) to the sum of £100,000.

23. BMIF's guidance in relation to cover in contract is at <http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Guidance%20Note%20to%20Members%20-%20February%202013.pdf>. COMBAR sought and obtained BMIF's approval to Version 4 of the Combar/CLLS terms.

c. Administration

24. The change over to contracting ought to have had a profound effect on the administration of instructions accepted by barristers in chambers. Prior to 2013 clerking teams tended not to have to focus on the detailed basis upon which barristers' services were to be provided. In the "new world" of contracts barristers want certainty as to the basis of their instruction. "Battles of the forms" should be avoided. The basis on which the contract has been agreed should be recorded and those records retained in the event of dispute.

5. USE OF THE TERMS

25. The Combar/CLLS terms are not appropriate for conditional fee or damages-based agreements and are not designed for use in non-commercial cases at all.

a. The Provision of Services Regulations 2009

26. Article 8(1)(i)-(j) of the Provision of Services Regulations 2009 requires the provider of a service to make available to a recipient of the service the general terms and conditions, if any, used by the provider and the existence of contractual terms, if any, used by the provider concerning the competent courts or the law applicable to the contract.

27. The Bar Council has issued guidance suggesting that, in respect of self-employed barristers practicing in chambers, this information will most conveniently be provided through the chambers website.

https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/annex_5_-_the_provision_of_services_regulations.pdf

b. Agreement to use the Combar/CLLS terms

28. Where the Combar/CLLS terms are to be used to provide the barrister's services, this may be achieved by the solicitor and the barrister completing the front sheet of the Terms and signing it. Alternatively, it may be achieved by an email exchange confirming that the barrister and the solicitor intend to be bound by a contract incorporating the Terms, and setting out the information required by the front sheet of the Terms, together with any amendments agreed. A barrister's clerk has authority for

these purposes to enter into an agreement incorporating the Terms on behalf of a barrister.

29. The information referred to on the front sheet of the Terms that is needed in order to form a contract between the barrister and the client below is as follows:
- a) the name of the barrister
 - b) the name of the instructing solicitor
 - c) the name of the lay client
 - d) sufficient details of the case
 - e) the payment basis (see below)
 - f) the barrister's hourly rate
 - g) if the parties agree:
 - i) the minimum insurance cover the barrister agrees to take out, and/or a cap on the barrister's maximum liability;
 - ii) that sums of money are to be held by the solicitor on account of the barrister's fees; and
 - iii) that the barrister agrees his work product may be stored on the solicitor's knowledge management database.
30. Please note that in all cases the agreed hourly rate should be completed or noted, because clause 7.3 provides this may not be the same as the barrister's standard hourly rate.

6. CHARACTERISTICS OF THE COMBAR/CLLS TERMS

a. The basis for payment

31. In all cases it will be necessary for barristers to give careful thought to the basis on which they are to be paid.
32. The preferred position for barristers in most cases will be that the solicitor should bear direct responsibility for payment, regardless of whether the Lay Client puts the solicitor in funds. That is the basis for payment embodied in the Bar Council terms. It is the basis provided for in Basis A of the Combar/CLLS terms.
33. The CLLS would not, however, agree that in all cases the solicitor should bear direct responsibility for payment of the barrister's fees. Nor would they agree that this should be the default position in the absence of agreement. They proposed that the default position should be that provided for in Basis B, namely payment by the solicitor on a 'pay when paid' basis.
34. The Combar/CLLS terms accordingly include a variety of different options for payment. In addition to Bases A and B, the Combar/CLLS terms anticipate 2 further bases of payment. In Basis C the solicitor as agent for the Lay Client agrees that the Lay Client is directly liable for the payment of fees. Basis D provides for a separate agreement on fees to be made directly between the barrister and Lay Client.

35. The inclusion of these various options is not intended to suggest that each of them is equally appropriate or desirable in any given case. On the contrary, Bases B, C and D transfer the credit risk in respect of the Lay Client from the solicitor to the barrister. Barristers may consider that they are ill-equipped to assess that credit risk. If it is not possible to assess the credit risk of a particular Lay Client and/or if the credit risk is considered too high, then barristers will probably wish to contract on Basis A.
36. If it is not possible to contract on the basis of Basis A, Basis B requires the solicitor to use reasonable endeavours to collect the barrister's fees, which are not to be less than those used by the solicitor to collect its own fees (clause 9.9). Once fees are received by the solicitor from the Lay Client, the solicitor must pay them to the barrister within 5 business days (clause 9.8). The solicitor is also required to advise the barrister promptly if it has reason to believe the Lay Client will be unable to pay the barrister's fees (clause 9.10) and, if requested to do so, to assign any cause of action that it has in respect of the barrister's fees (clause 9.11). Clause 16.4(b) permits the barrister to terminate the agreement if fees have not been paid by their due date or there appears to be an unacceptable risk that fees properly due will not be paid by the their due date and no satisfactory proposals have been made for managing that risk.
37. When agreeing to Basis B, barristers may well wish to ensure that the lay client pays sums on account of fees. Clause 21.4 provides an option for sums to be held by the solicitor on account. Monies held on account will mitigate the credit risk and potential cashflow consequences associated with Basis B.
38. Basis C will only be appropriate where the barrister is content to contract through the solicitor directly with the Lay Client. Where Option C applies, the solicitor warrants that it has authority from the Lay Client to agree that the Lay Client will pay the barrister's fees (clause 18.2). However, the Lay Client is also required to sign or confirm in writing its agreement to the terms and the agreement should not come into effect until that is done (clause 2.2).
39. Where barristers are considering applying Basis D (separate contract with the Lay Client) – and indeed where barristers are content to accept the credit risk posed by a client – barristers should consider carefully whether any contract with the solicitor is required at all.
40. As with Basis B, when adopting Basis C or D for their agreement, barristers should consider whether and how the credit risk assumed by the barrister might be mitigated, for example, by having a solicitor hold monies on account.
41. In any case where a barrister seeks to contract on the basis of the Combar/CLLS terms, it will be necessary for the barrister to record the payment basis which is agreed between the barrister and solicitor. This is reflected on the frontsheet of the Combar/CLLS terms.

b. The services

42. The precise services that the barrister is engaged to perform should in general be set out, or confirmed, in written instructions sent to the barrister (clause 2.3).
43. Solicitors must ensure that instructions are adequate to enable the barrister to carry out the work requested (clause 5.1). The barrister will carry out the work requested within a reasonable time, having regard to the urgency and nature of the instructions. Instructions that are urgent should be marked as such (clause 3.4). In practice, the timescale required for any work should be discussed at the outset.
44. During the course of negotiations with the CLLS, the CLLS suggested a clause providing that the barrister was instructed in the expectation that the barrister would be available to advise on and appear at any hearings in the case, up to and including the trial and any post-judgment hearings. That clause does not appear in the Combar/CLLS terms. Such a clause is likely to be problematic given the difficulty in many cases in knowing what hearings might take place and when. For example a barrister may, without fault, be unable to appear at a hearing which is fixed without reference to his or her availability or in some circumstances may come under professional obligation to return a brief.
45. The CLLS also suggested the use of a clause to the effect that a barrister should not accept other instructions during the case if there was a reasonable prospect that accepting those instructions would adversely affect the barrister's ability to supply the services in accordance with the terms. That clause does not appear in the Combar/CLLS terms. Such a clause is likely to place an unreasonable fetter on the Cab Rank rule. In addition, issues of legal professional privilege would be likely to restrict a barrister's ability to respond to an allegation of non-compliance.
46. Such a clause is not necessary to address the problem of double-booking. If a barrister is instructed for a particular hearing, then it is the barrister's obligation to appear at that hearing. It is never acceptable for a barrister voluntarily to accept more than one booking for the same time without the informed consent of the solicitor making the second booking. However, it is important for solicitors and clients to be aware that circumstances can occasionally arise where even though the barrister has been booked for a particular hearing, other professional obligations may prevent the barrister from being able to carry out the booked hearing without fault on the barrister's part - for example, where a trial goes on longer than expected. In such circumstances, the barrister may terminate the agreement under clause 16.3 of the Combar/CLLS terms.

c. The position of the Lay Client

47. By clause 4.1 of the Combar/CLLS terms, the barrister and solicitor both acknowledge and agree that (subject to their duties to the Court), each owes a primary duty to the Lay Client.
48. Clause 2.4 requires the solicitor to indicate the person who is to be the Lay Client. The frontsheet of the terms contains a space for those details to be provided.

49. Where Basis C applies the Lay Client is a party to the contract with the barrister. However, even where Bases A, B or D are agreed, the Lay Client (for whose benefit the barrister's services are provided) may be able to enforce the agreement under the Contracts (Rights of Third Parties) Act 1999 (clause 4.4).

d. Liability

50. Unless a limitation of liability is agreed, nothing in the Terms is intended to affect the barrister's liability to the lay client or to the solicitor as a matter of general law, or vice versa (clause 12.3). The barrister must maintain insurance cover for that liability as required by the BSB Handbook or, if higher, as agreed with the solicitor (clause 12.2).
51. As noted at paragraphs 21 to 23 above, entering into a contract potentially gives rise to new liabilities against which barristers have traditionally been uninsured. Barristers are encouraged to keep abreast of the latest caselaw in this regard: for example McFarland-Cruickshanks v England Kerr Hands Solicitors Ltd [2021] EWHC 525 (Comm).
52. BMIF has confirmed that it will extend its cover to indemnify barristers against liabilities arising solely as a result of entering into a contract up to a limit of £100,000. This limit will be the subject of review in the light of BMIF's claims experience over time. In accordance with this extension, clause 12.4 limits a barrister's liability to the lay client or the solicitor which is exclusively contractual to £100,000.
53. Barristers who do not contract on the basis of the Combar/CLLS terms but wish to benefit from the extension of cover provided by the BMIF should seek authorisation of any alternative or varied terms from BMIF.
54. Barristers are reminded of the following obligations under BMIF's Terms of Cover:

"4.4 Where any breach of these Terms of Cover has prejudiced Bar Mutual in its handling of any Claim or Disciplinary Proceedings against the Insured, the Insured responsible for such breach shall reimburse to Bar Mutual the difference between the sum paid by Bar Mutual in respect of the Claim or Disciplinary Proceedings and the sum which would have been payable in the absence of such prejudice....

6.3 The Insured shall not settle any Claim or Disciplinary Proceedings or surrender any right to claim indemnity, contribution or recovery in respect of a Claim, without the prior written consent of Bar Mutual. The Insured shall not admit liability for any Claim or incur any costs or expenses in connection therewith or incur any costs or expenses in connection with Disciplinary Proceedings without the prior written consent of Bar Mutual."

e. Conflicts of interest

55. Contract terms relating to conflicts of interest may give rise to special difficulty:
- a) Rule rC21 of the BSB Handbook requires barristers not to accept instructions if there is or appears to be a conflict or risk of conflict either between the

- interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting those instructions).
- b) However, if there is no conflict or risk of conflict, a barrister may be required to accept instructions under the Cab Rank rule.
 - c) Accordingly, an error of judgment by a barrister as to the risk of a conflict exposes a barrister to criticism on the one hand under rule rC21 or on the other under the Cab Rank rule.
 - d) It will be difficult to assess whether the barrister has acted in breach of either provision without consideration of both sets of instructions.
56. The Combar/CLLS terms provide at clause 11.1 that by entering into the agreement the barrister confirms that to the best of his or her knowledge based on the information available at the time, the barrister has no conflict of interest.
57. Under the Combar/CLLS terms, where a barrister accepts instructions notwithstanding a conflict of interest, the barrister will be liable in damages only where a relevant disciplinary panel has decided there was a conflict of interest (clause 11.3(b)). The rationale behind this provision is that a barrister may be unfairly hindered by reasons of privilege from disputing such allegations in Court. Clause 11.3(b) is, of course, without prejudice to the general jurisdiction of the Court to restrain any barrister (or solicitor) from acting where there is a conflict of interest.
- f. Termination**
58. The Combar/CLLS terms (clause 16.1) permit the solicitor to terminate its agreement with immediate effect by giving notice to the barrister.
59. Clause 16.2 of the Combar/CLLS terms, like clause 13.2 of the Bar Council terms, provides for the agreement to terminate automatically as soon as the barrister is professionally obliged to withdraw from the case. Clause 16.3 permits the Barrister to terminate the agreement, where the barrister is entitled to withdraw from the case. In addition, the barrister may (on giving appropriate notice) terminate the agreement for failure to pay fees on time or where there appears to be an unacceptable risk that this will be the case for which no satisfactory proposals have been made to mitigate that risk.
60. During our discussions with the CLLS we became aware that solicitors might seek to impose greater restrictions on the barrister's right to terminate the agreement, for example requiring the agreement of the solicitor or a suitable replacement barrister to be available. Such restrictions may result in a conflict between the BSB Handbook and the barrister's contract with the solicitors and should be treated with caution.
61. Termination of the contract does not prejudice any accrued liabilities, rights or remedies of the barrister, the solicitor or the Lay Client.

g. Devilling

62. Clause 6 of the Combar/CLLS terms requires the barrister to take sole responsibility for the provision of services. If the barrister wishes to involve another barrister (or any other third party) in the performance of the services, the barrister should seek the agreement of the solicitor.
63. As the joint guidance with the CLLS indicates, this clause is not intended to prevent a barrister making proper use of a pupil who is in training with the barrister's chambers. Nor is it intended to prevent a barrister from seeking the assistance of another barrister in order, for example, to check certain points of law or to locate comment on a particular authority.
64. The clause will have the effect of preventing substantial undisclosed devilling of work. That is properly a consequence of barristers normally being paid on the basis of an hourly rate applied to the hours actually spent by the barrister (see, for example, clause 12.3 of the Bar Council's terms). The clause does not preclude disclosed and agreed arrangements in relation to devilling.

h. Confidential Information

65. Clause 10 expressly provides that pupils and mini-pupils are entitled to see confidential material, although the barrister is strictly liable for any breach of confidentiality by a pupil or mini pupil. BMIF has confirmed that cover will be available for such liability under barristers' professional indemnity cover.
66. Barristers will however need to exercise care with secondees or interns who are not pupils or mini pupils. They will need their solicitors' consent to them reading confidential information. BMIF has stated that it will not provide cover (via the barrister's insurance) for an individual on secondment.
67. During the course of our discussions with the CLLS, we learned that solicitors might seek to impose terms that required barristers promptly to inform the solicitors if another barrister in chambers was instructed by a party adverse to the lay client. Such a clause is almost certainly inappropriate for a contract with a barrister in a chambers of independent self-employed barristers.
68. The handling of confidential (and other) data is also dealt with under clause 19 (see below).

i. Data Protection and Security

69. Combar members will be aware of their significant obligations concerning the protection of personal data under data protection law and, regarding confidentiality, under the BSB Handbook. Combar does not propose to provide guidance on the meaning and effect of such provisions, nor on the very important topic of information security, but refers members to the information available on the Bar Council's ethics hub (at <https://www.barcouncilethics.co.uk/subject/it/>).

70. In very general terms, however, Barristers should note that they are data controllers for the purposes of the UK GDPR and the Data Protection Act 2018, and are therefore bound, amongst other things, to implement appropriate technical and organisational measures to ensure an appropriate level of security of personal data including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage. (Although there are occasional suggestions from Solicitors that a Barrister is not a data controller, but a data processor, the circumstances in which that may be the case is likely to be very rare—see <https://www.barcouncilethics.co.uk/documents/joint-data-controllers-under-the-gdpr/>— and in such cases Combar/CLLS terms may not be appropriate in any event).
71. Given these statutory and regulatory obligations, the recent rise of cyber-threats targeting the legal sector, the nature of modern commercial practice, and the existence of other relevant initiatives to address cyber-resilience (such as the Bar Council/Law Society Cyber Security Questionnaire and the Cyber and Information Security Affirmation: <https://www.barcouncil.org.uk/resource/cyber-questionnaire-by-the-law-society-and-bar-council.html>), it is appropriate for the Combar/CLLS terms to deal in more detail with this topic also.
72. Revision 4 therefore not only refers to Applicable Data Protection Law (a term intended to capture, insofar as it relates to the Barrister, those data protection laws to which they are subject in any event), and incorporates and modifies certain principles of Applicable Data Protection Law as contractual terms (always subject to the limits of liability discussed above), but also makes provision for similar standards of protection to apply to non-personal confidential data. The terms do not affect the Barrister’s entitlement to process data as permitted or required by law.
73. Amongst other things, a Barrister is required by clause 19.8 without undue delay (and in any event within 72 hours, where possible) to notify the Solicitor upon becoming aware that a security incident has led to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, the Solicitor’s or Lay Client’s personal data or confidential information. The Barrister must also notify the Lay Client, subject to the Solicitor providing reasonable cooperation (such as furnishing the appropriate contact details). After initial notification, the Barrister is under an ongoing obligation to provide relevant updates. That obligation is not absolute but is rather an obligation to take “reasonable” steps. What is reasonable will depend on the circumstances, but may involve consideration of factors such as (for example) the extent to which information is reasonably available, the incident management processes that have been put in place to handle the incident, requirements of any cyber insurance policies, and the nature and extent of the security breach. Clause 19.8 also includes obligations in relation to investigation, remedy and mitigation. Those obligations are again subject to a qualification of reasonableness.
74. Almost all Combar members will subcontract some data processing to others – the obvious example being IT services providers. A Barrister may typically not be in a position to be able to ensure that such third-party processors comply with data protection obligations or implement appropriate measures to protect against security

breaches; however, the Barrister is required to take reasonable steps to satisfy themselves of the position and that there are appropriate measures in place to allow the Barrister to comply with its reporting obligations.

j. Know-how systems

75. The BSB issued Knowledge Management Guidance, approved by the Law Society, in 2005, which raised a number of concerns about the practice of solicitors storing barristers' work on their know-how systems. If a barrister wishes to give consent to his or her work being stored by solicitors, clause 20.6 provides a solution, whereby the solicitor warrants that the work will be stored in accordance with the Law Society's guidance, which addresses the concerns raised by the BSB.

k. Publicity

76. Clause 17 of the Combar/CLLS terms concerns publicity. We are aware of blanket terms seeking to prevent a barrister publicising his instruction in a matter without agreement of the solicitor and the client. Such a clause should not be necessary where the fact of the barrister's instruction is already in the public domain.

l. Sanctions

77. Clause 20.6 requires the solicitor to notify the barrister if the solicitor has reasonable cause to suppose that a person that has been designated owns or controls the Lay Client. Clause 20.7 seeks to defer any liability that a barrister might have in damages for any period when payment might contravene sanctions.

m. Optional clauses

78. The solicitor and the barrister may agree such additions to the Combar/CLLS terms as they wish.
79. The Combar/CLLS terms anticipate 5 specific areas in respect of which the barrister and solicitor may wish to make specific provision.
- a) First, limitation of liability arising solely under contract. If no figure is inserted, the limit is £100,000. Barristers should be aware they will not be covered by BMIF for sums greater than £100,000.
 - b) Secondly, they may agree that the barrister will maintain minimum insurance cover in a particular sum. This will be a matter for specific negotiation between the solicitor and the barrister.
 - c) Thirdly, they may agree to limit the barrister's liability to a particular sum, chosen by reference to the circumstances of the case and the level of insurance cover reasonably available to the barrister.
 - d) Fourthly, they may agree that the solicitor should take money on account of fees.

- e) Fifthly, they may agree that the barrister's work may be stored by the solicitor on a know-how database.
80. The parties may, of course, agree any further terms appropriate for the particular case.

7. FURTHER REVIEWS OF THE COMBAR/CLLS TERMS

81. Combar is not in a position to provide assistance to Combar members as to the appropriate terms to use for individual cases or to advise as to the meaning and effect of the Combar/CLLS terms.
82. However, Combar and CLLS will continue to keep the Combar/CLLS terms under review and Combar would welcome feedback from Combar members as to their use and operation in practice.

Effective date: 7 October 2024