

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

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## *Introduction*

As a result of regulatory changes, barristers enter into contracts with their instructing solicitors more frequently than was traditionally the case. In order to assist barristers and solicitors in commercial cases, the City of London Law Society and the Commercial Bar Association have negotiated specimen terms (the "Terms") that can, if the parties so wish, be used as a basis for discussions in relation to terms to be agreed for any particular case. Version 1 of the Terms was first published in January 2013, but was succeeded by version 2 with effect from 1 January 2014. Version 2 endeavoured to build on practical experience of using the Terms, aimed to make clearer the effect of certain terms and also to reflect certain regulatory changes. Certain further changes were made in June 2014 in version 2.1, which was succeeded in April 2018 by version 3.0 with amendments to take the GDPR into account.. Version 4 has been issued to take effect on 7 October 2024.

It is envisaged by Combar and the CLLS that where barristers and solicitors contract on the basis of the Terms, it is the Terms in force at the time of making the Agreement to supply Services that will apply to those Services. Accordingly, we would expect barristers and solicitors contracting on the basis of the Terms from October 2024 to be contracting on Version4.0 (unless and until they are replaced).

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

## *Background*

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

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

From 31 January 2013, the Code gave effect to a decision by the Legal Services Board of 27 July 2012, whereby the cab rank rule obliges a barrister to undertake work either on the basis of the Standard Contractual Terms in Annex T1 to the Code or on the basis of standard terms of work published by the barrister. The Standard Contractual Terms in Annex T1 (now the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised

Persons 2012, published on the Bar Standards Board's web-site) necessarily cover a wide range of the possible work by a barrister and, as a result, may not be suitable for commercial work. Barristers in specialist fields, such as commercial work, may therefore wish to adopt their own terms.

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

The Schedule to this Guidance sets out the principal changes between versions 1 and 2 and 4 of the Terms. The only changes between versions 2.1 and 3.0 were to clause 19.5, regarding data protection (see below), which has been wholly replaced in version 4.0.

No one is, or should feel, obliged to use the Terms, which can only offer a starting point for negotiations, hopefully saving the parties time and effort in those negotiations. Some, perhaps all, of the provisions in the Terms will not be appropriate for particular cases; additional terms may be needed; uncertainties and ambiguities may be identified. Individual cases will continue to require individual treatment, and it is the responsibility of solicitors and barristers to ensure that what they agree is appropriate for any particular case, having proper regard for the interests of their shared lay client.

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

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

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

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

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

If the barrister and solicitor wish to contract on the Terms, this may be achieved by the solicitor and the barrister completing the front sheet of the Terms and signing it. Alternatively, it may

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

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

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

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

The barrister and the solicitor may also agree additions, deletions or other amendments to the Terms.

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

### *The Services*

The precise services that the barrister is engaged to perform should in general be set out, or confirmed, in written instructions sent to the barrister (clause 2.3). Solicitors must ensure that instructions are adequate to enable the barrister to carry out the work requested (clause 5.1). The barrister will carry out the work requested within a reasonable time, having regard to the urgency and nature of the instructions. Instructions that are urgent should be marked as such or otherwise expressly stated to be urgent (clause 3.4). In practice, the timescale required for any work should be discussed at the outset.

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

### *Particular hearings*

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

#### *The barrister's personal responsibility*

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

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

Clause 10.3 of the Terms has been amended to clarify that barristers may disclose information to pupils and mini-pupils. However, the barrister will be strictly liable for any breach of confidence by the pupil or mini-pupil.

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

#### *Payment*

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

Basis A is the traditional basis (clauses 9.4 and 9.5). The solicitor will be liable to the barrister to pay the barrister's fees within 30 days of receipt of a fee note sent by the barrister in accordance with the Terms. The solicitor must pay the barrister regardless of whether or when the solicitor is paid by the lay client.

Basis B also makes the solicitor personally liable to pay the barrister's fees, but only if the solicitor is first paid by the lay client or the barrister is unable to collect the fees from the lay client for reasons connected with the solicitor's fault (clauses 9.6 to 9.12). The solicitor must use reasonable endeavours to collect the barrister's fees, which should be no less than those used by the solicitor to collect its own fees. The solicitor must alert the barrister if the solicitor has reason to believe that the lay client may be unable or unwilling to pay the barrister's fees (clause 9.10). If the lay client pays the solicitor in respect of the barrister's fees, the solicitor must pay the barrister within five business days of receipt of that payment. If the lay client does not pay the barrister's fees to the solicitor, the barrister may request an assignment of the claim against the lay client in respect of the barrister's fees so that the barrister can pursue the lay client personally. The solicitor must assist the barrister in this, including by taking any steps regarding the delivery of bills required by the Solicitors Act 1974. Any assignment is likely to be an equitable assignment. Solicitors should ensure that their agreements with their lay clients permit assignment.

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

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

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

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

### *Conflicts of interest*

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

Where a barrister accepts instructions notwithstanding a conflict of interest, the barrister will be liable in damages only where a relevant disciplinary panel has decided there was a conflict of interest (clause 11.3). The rationale behind this provision is that a barrister may be unfairly hindered by reasons of privilege from disputing such allegations in Court. Clause 11.3 is without prejudice to the general jurisdiction of the Court to restrain any barrister (or solicitor) from acting where there is a conflict of interest (clause 11.4).

### *Liability*

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

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

### *Termination*

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

The barrister may terminate the agreement if the barrister is not paid fees due to the barrister or there appears to be an unacceptable risk that they will not be paid by their due date, provided that the barrister first gives notice of the barrister's intention to terminate the agreement (clause 16.4).

### *Data Protection and Security*

In version 4 of the terms, clause 19 (which was previously limited to addressing compliance with GPDR (now, post-Brexit, the UK GDPR) and the Data Protection Act 2018) has been expanded and revised to address data security more generally. In particular, a number of obligations concern not only personal data, but non-personal data as well, for example the requirements concerning data retention (clause 19.3) and record keeping (clause 19.4). They

do not however prevent a barrister processing personal data for a Permitted Purpose, which extends to all purposes as are permitted by law (clause 19.6).

It is expressly agreed that the barrister and solicitor are separate and independent controllers with respect to personal data disclosed by the solicitor (clauses 19.1-2), and that the parties are not joint controllers unless expressly agreed (clause 19.5). The circumstances in which it would be appropriate for them to be joint controllers are likely to be very rare.

The UK GDPR Article 32 obligation to implement appropriate technical and organizational measures to protect personal data is reflected in clause 19.7. The clause also extends the obligation to implement appropriate technical and organizational measures to any confidential information of the solicitor or the Lay Client that the barrister holds pursuant to an agreement subject to these terms.

Clause 19.8 deals with notification of security incidents. The obligation to notify first arises where the barrister becomes 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. At that point, the barrister must notify the solicitor without undue delay (and in any event within 72 hours where possible). 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.

Almost all commercial barristers will subcontract some data processing to others – the obvious example being IT providers – in the course of providing Services under an agreement subject to these terms. The barrister will 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 (clause 19.8).

The Terms are not appropriate in the rare event that a barrister is merely a "processor" of personal data on behalf of the solicitor or Lay Client within the meaning of article 28 of the UK GDPR. If that is the case, more detailed contractual provisions are required in order to comply with the UK GDPR and the Act.



The Terms may also not be appropriate for use in circumstances where the data concerning the data subject falls within the special categories of personal data set out in article 9 of the UK GDPR (ie personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, or the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation). Such circumstances should be considered on a case by case basis.

### *Optional clauses*

The solicitor and the barrister may agree such additions to the Terms as they wish. Clause 21 sets out certain optional clauses the parties may wish to consider and which are referred to in paragraph 7 of the front sheet.

First, the parties may agree that the barrister will maintain minimum insurance cover in a particular sum (clause 21.2). This will be a matter for specific negotiation between the solicitor and the barrister.

Secondly, 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 (clause 21.3).<sup>1</sup> This general limitation on the barrister's liability is intended to apply to claims by the lay client as well as to claims by the solicitor. The solicitor should therefore ensure that the lay client is aware of the limitation and agrees to it.

Thirdly, they may agree that monies on account should be obtained from the lay client and held by the solicitor (barristers are not permitted to hold client monies themselves) (clause 21.4).

Fourthly, they may agree that the barrister's work product may be stored for future reference in the solicitor's knowhow system (clause 21.5). This must be done in accordance with The Law Society's guidance entitled "Use of Counsel's Opinions - copyright and confidentiality". The barrister has no liability arising from use of the barrister's work produce as a result of its storage in the solicitor's knowhow system.

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

### **Combar/CLLS**

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

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

First Edition: 24 January 2013

Second Edition: 1 January 2014 (revised 23 June 2014<sup>2</sup>)

Third Edition: 27 April 2018

Fourth Edition: 7 October 2024

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<sup>2</sup> Changes at the beginning of clause 20.3 and to clause 12.3, as set out in the Schedule.

**Schedule**  
**Principal changes between versions 1.4 and 2.1 and 4.0 of the Terms**

Clause in version 1.4	Clause in version 2.0	Clause in version 4.0	Change
Cover sheet	Cover sheet	Cover sheet	v.2 Addition of paragraphs 7(d), (e) and (f) reflecting new optional clauses in clause 20. v.4 Addition of introduction, removal of prior 7(e) (reference to BARCO), clarification that details of lay client required
Clause 1.2	Clause 1.2	Clause 1.2	v.2 Change of definition from the Code to the BSB Handbook (and corresponding changes in the rest of the Terms) following the introduction of the BSB Handbook on 1 January 2014. v.4 Introduction of definitions on Data Protection
		Clause 2.4	v.4 Clarification that details of lay client must be provided.
Clause 3.4	Clause 3.4		v.2 Addition of "if the Instructions are in writing or otherwise expressly stated to be urgent" to cover the possibility that Instructions might not be in writing.
	Clause 4.3	Clause 4.3	v.4 Confirmation that no third party has rights under the CRTPA 1999
	Clause 5.2	Clause 5.2	v.4 Solicitor to provide barrister's complaints procedure to lay client if required to do so by barrister, to avoid need for barrister to have to contact the lay client directly
	Clause 6.1	Clause 6.1	v.4 Confirmation that barrister responsible for performance of work by devil instructed in accordance with first sentence of clause.
	Clause 9,2	Clause 9,2	v.4 Provides for interest on fees due under Basis B to run from date that they became due from the lay client to the solicitor
Clause 9.4	-		Deleted because it duplicated provisions already expressly covered under each of the payment bases.
	Clause 9.8	Clause 9,8	v.4 Confirms that solicitor is not liable to pay fees or interest on them under Basis B until payment received.
	Clause 9.9	Clause 9.9	v.4 Confirming type of endeavours required by solicitor to collect barrister's fees under Basis B.
Clause 9.11	Clause 9.10		v.2 Additional words at the end of the clause clarifying the circumstances in which the solicitor must inform the barrister if the solicitor has reason to believe that the lay client will be unable or unwilling to pay the barrister's fees.
Clause 9.12	Clause 9.11		v.2 Additional requirements on the solicitor to assist the barrister if the barrister takes an assignment of the claim against the lay client for the barrister's fees, including a requirement to deliver a bill of costs in accordance with section 69 of the Solicitor's Act 1974.

-	Clause 9.12		v.2 New clause providing that if the barrister's claim against the lay client fails, the solicitor will pay the barrister's fees to the extent that the failure arose from the solicitor's negligence and was not caused by any breach of duty by the barrister.
	Clause 9.13	Clause 9.13	v.4 Providing for agreement of payment schedules under Basis C.
	Clause 9.14	Clause 9.14	v.4 Confirming that solicitor receives invoice under Basis C on behalf of lay client.
	Clause 10.2(b)	Clause 10.2(b)	v.4 Confirming that where devil is agreed under clause 6.1, disclosure is permitted to the devil.
-	Clause 10.2(e)		v.2 New sub-clause allowing the barrister to disclose confidential information to a pupil or mini-pupil.
-	Clause 10.3		v.2 New clause making the barrister strictly liable for any breach of confidence by a pupil or mini-pupil to whom the barrister has disclosed confidential information.
-	Clause 10.4		v.2 New clause requiring the barrister to notify the solicitor if the barrister receives a request for disclosure of confidential information.
-	Clause 11.4		v.2 New clause clarifying that clause 11.3 limits the ability of the lay client or solicitor to claim damages but not to seek an injunction to prevent the barrister continuing to act if a conflict of interest arises.
	Clause 13.1	Clause 13.1	v.4 Confirming that where Clause 21.5 applies, the barrister grants the solicitor and lay client the right to use work product for know-how and equivalent purposes on the terms set out in that clause.
	Clause 14.2	Clause 14.2	v.4 Confirming that solicitor may request use of reasonable endeavours by barrister to delete electronic documents
	Clause 15.3	Clause 15.3	v.4 Providing for solicitor and barrister to discuss any process for deletion of electronic documents
		Clause 16.4(b)	v.4 Permitting barrister to terminate if there appears to the barrister (acting reasonably) to be an unacceptable risk that fees properly due to the barrister will not be paid by their due date,
	Clause 16.4(b)	Clause 16.4(c)	v.4 Adjustment to reflect introduction of clause 16.4(b).
	Clause 16.4(c)	Clause 16.4(d)	v.4 Adjustment to reflect introduction of clause 16.4(b).
Clause 18.1	Clause 18.1		v.2 Addition at the end of the clause: "in accordance with the terms (including the payment schedule) agreed between the Barrister and the Solicitor."
		Clause 19	v.4 See above.

	Clause 19.6	Clause 20.5	v.4 Update to reference to Bar Council terms.
		Clause 20.6	v.4 Introduction of provision to require solicitor to notify barrister of risk that lay client is affected by sanctions.
		Clause 20.7	v.4 Deferral of liability to pay any sum to lay client where to do so would cause the barrister to be in breach of sanctions.
	Clause 20.2	Clause 21.2	v. 4 Rewritten for clarification that where a minimum insurance figure is stated, the barrister shall maintain professional indemnity cover in that sum
Clause 20.3	Clause 20.3	Clause 21.3	v. 2 Additions at the beginning of the clause to clarify that any cap applies to all liability (including under clause 12.3, to which a corresponding amendment has been made) and at the end of the clause clarifying that, for claims against the barrister that sound only in contract, the limitation of liability in clause 12.4 continues to apply to those claims even if there is a higher overall cap on the barrister's liability.  v.4 Rewritten for clarification that, in the event that a limit of liability is agreed, it shall apply to the barrister's liability save where the barrister is solely liable as a result of breach of the terms (in which case the liability is in any event limited as set out in clause 12.4).
-	Clause 20.4		v.2 New optional clause if the solicitor is to hold monies on account of the barrister's fees.
-	Clause 20.5	Deleted	New optional clause if BARCO is to hold monies on account of the barrister's fees.  v.4 Deleted due to abolition of BARCO.
-	Clause 20.6		v.2 New optional clause addressing storage of the barrister's work product in the solicitor's knowhow system.

The only changes between versions 2.1 and 3.0 are to clause 19.5 in respect of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (see the text above on Data Protection).