

COMBAR GUIDANCE ON CONTRACT TERMS

1.	INTRODUCTION	2
2.	IMPORTANT CONSIDERATIONS FOR COMBAR CHAMBERS WHEN CONTRACTING.....	3
A.	CODE OF CONDUCT REQUIREMENTS	3
B.	INSURANCE ASPECTS.....	4
C.	ADMINISTRATION	4
3.	USE OF THE TERMS	4
A.	THE PROVISION OF SERVICES REGULATIONS 2009	4
B.	AGREEMENT TO USE THE COMBAR/CLLS TERMS	5
4.	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	8
E.	CONFLICTS OF INTEREST	9
F.	TERMINATION	10
G.	DEVILLING.....	10
H.	MISCELLANEOUS ADDITIONAL PROVISIONS	10
I.	OPTIONAL CLAUSES	11
5.	REVIEW OF THE COMBAR/CLLS TERMS.....	11

1. INTRODUCTION

1. The Code of Conduct has been amended so that, with effect from 31 January 2013, barristers are 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 2012 (“the Bar Council terms”) or (b) on terms which a barrister or the barrister’s chambers have published as the barrister’s standard terms.
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. By November 2010 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 Combar/CLLS “Agreement for the Supply of Legal Services by a Barrister in a Commercial Case” (“the Combar/CLLS terms”) is the product of the discussions that followed with the CLLS.
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 members of Combar. During the process of negotiation of the terms 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. IMPORTANT CONSIDERATIONS FOR COMBAR CHAMBERS WHEN CONTRACTING

11. The change from the position where barristers have conventionally not contracted for the payment of their fees to the position where barristers do contract to provide their services, is a fundamental one.
12. Some firms will seek to impose their own terms on barristers. Some will seek to amend terms presented by the barrister. Other firms will not yet have thought about the issues at all and may require education about the changes.
13. 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.
14. 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 Code and/or for which the barrister is uninsured.
15. In this note we highlight some of the issues that may arise, both in relation to the Combar/CLLS terms and generally.

a. Code of Conduct requirements

16. 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

17. 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.
18. 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 has 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.
19. The £100,000 extension from BMIF is only available in respect of terms that have been approved by BMIF. It is not presently known whether BMIF intends to require any set of terms which includes a variation (however inconsequential) of the Combar/CLLS terms also to be approved. Pending clarification, barristers contracting on terms that have not been approved by BMIF will wish to exclude liability incurred under any contract, save to the extent that such liability would have been incurred irrespective of the terms of that contract, because otherwise they may be uninsured.

c. Administration

20. The change over to contracting will also have a profound effect on the administration of instructions accepted by barristers in chambers. Hitherto clerking teams have tended not to have to focus on the detailed basis upon which barristers' services are to be provided. In the "new world" of contracts barristers will 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.

3. USE OF THE TERMS

a. The Provision of Services Regulations 2009

21. 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.

22. 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.

http://www.barcouncil.org.uk/media/97493/provision_of_services_guidance.pdf

23. 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. Combar members that are developing their own separate terms may wish to publish a notice along the following lines on their website:

“The barristers in our chambers are in the process of developing the general terms and conditions which apply to the provision of their services. Pending the development of those terms, and save where otherwise expressly agreed, barristers will, if requested, provide their services on the Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012 which may be found at

http://www.barcouncil.org.uk/media/161048/the_new_standard_contractual_terms_for_the_supply_of_legal_services_by_barristers_to_authorized_persons_2012.pdf”

b. Agreement to use the Combar/CLLS terms

24. 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.

25. 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) sufficient details of the case
- d) the payment basis (see below)
- e) the barrister’s hourly rate
- f) if the parties agree, the minimum insurance cover the barrister agrees to take out, and/or a cap on the barrister’s maximum liability.

26. Please note that in all cases the agreed hourly rate should be completed, because clause 7.3 provides this may not be the same as the barrister’s standard hourly rate.

27. In addition, the name of the Lay Client should also normally be provided, and must be provided if payment is to be made on Basis C or Basis D described below.

4. CHARACTERISTICS OF THE COMBAR/CLLS TERMS

a. The basis for payment

28. In all cases it will be necessary for barristers to give careful thought to the basis on which they are to be paid.
29. 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.
30. 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.
31. 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.
32. 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.
33. If it is not possible to contract on the basis of Basis A, Basis B requires the solicitor to endeavour to collect the barrister's fees in the same way that it collects its own fees (clause 9.10). Once fees are received by the solicitor from the Lay Client, the solicitor must pay them to the barrister within 5 business days (clause 9.9). 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 9.11) and, if requested to do so, to assign any cause of action that it has in respect of the barrister's fees (clause 9.12). When agreeing to Basis B, barristers may well wish to ensure that the solicitor is taking monies on account.
34. 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).

35. 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.
36. When adopting Basis C or D for their agreement, barristers may wish to consider the use of a facility such as BARCO to hold monies on account. Monies held on account will mitigate the credit risk and potential cashflow consequences of contracting directly with the Lay Client. See <http://www.barcouncil.org.uk/for-the-bar/barco/barco-for-barristers/>
37. 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

38. 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).
39. Solicitors must ensure that instructions are adequate to enable the barrister to carry out the work requested (clause 5.1). The barrister will carry out the work requested within a reasonable time, having regard to the urgency and nature of the instructions. Instructions that are urgent should be marked as such (clause 3.5). In practice, the timescale required for any work should be discussed at the outset.
40. 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.
41. 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.

42. 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

43. 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.
44. Clause 2.4 anticipates that the solicitor will normally indicate the person who is to be the Lay Client. The frontsheet of the terms contains a space for those details to be provided.
45. 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

46. 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).
47. As noted at paragraphs 17 to 19 above, entering into a contract potentially gives rise to new liabilities against which barristers have traditionally been uninsured. BMIF has recently confirmed that it will extend its cover to indemnify barristers against liabilities arising solely as a result of entering into a contract up to a limit of £100,000. This limit will be the subject of review in the light of 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.
48. It is not presently known whether BMIF intends to require any set of terms which includes a variation of the Combar/CLLS also to be approved. Pending clarification 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 will need to seek authorisation of any alternative or varied terms from BMIF.

49. Barristers are reminded of the following obligations under BMIF's Terms of Cover:

"4.3 Where any breach of these Terms of Cover has prejudiced Bar Mutual in its handling of any Claim 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 and the sum which would have been payable in the absence of such prejudice....

6.3 The Insured shall not settle any claim for indemnity, contribution or recovery, nor surrender any right to the same, 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

50. Contract terms relating to conflicts of interest may give rise to special difficulty:

- a) Paragraph 603(e) of the Code of Conduct 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 paragraph 603(e) 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.

51. 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. .

52. 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). 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, 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

53. The Combar/CLLS terms (clause 16.1) permit the solicitor to terminate its agreement with immediate effect by giving notice to the barrister.
54. 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.
55. 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 Code and the barrister's contract with the solicitors and should be treated with caution.
56. Termination of the contract does not prejudice any accrued liabilities, rights or remedies of the barrister, the solicitor or the Lay Client.

g. Devilling

57. 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.
58. 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.
59. 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. Miscellaneous additional provisions

60. The Combar/CLLS terms make specific provision relating to confidentiality at clause 10. 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.

61. The COMBAR/CLLS terms make provision relating to copyright at clause 13. During negotiations with the CLLS we became aware that solicitors might additionally require barristers to provide solicitors with the right to make use of original materials produced by the barrister for internal reference/record keeping/know how purposes. The Bar Standards' Board's guidance on Knowledge Management (<http://www.barstandardsboard.org.uk/code-guidance/knowledge-management-guidance-the-future-use-of-counsel's-opinion-by-solicitors-and-other-intermediaries/>) suggests that blanket approval to the use of documents in this way should never be given.
62. 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.
- i. Optional clauses**
63. The solicitor and the barrister may agree such additions to the Combar/CLLS terms as they wish.
64. The Combar/CLLS terms anticipate 2 specific areas in respect of which the barrister and solicitor may wish to make specific provision.
- a) First, 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.
- b) 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.
65. The parties may, of course, agree any further terms appropriate for the particular case.

5. REVIEW OF THE COMBAR/CLLS TERMS

66. 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.
67. 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. Changes to the terms may become necessary, for example as a result of the approach of BMIF and changes to the Code.

24 January 2013