

## COMBAR/ChBA Guidance Note on Secondments

### Introduction

1. COMBAR and ChBA are aware that an increasing number of their self-employed members are undertaking secondments to professional or lay clients (“the Secondment Institution”), both within this jurisdiction and internationally. There are obvious and considerable benefits to those members and their clients of such secondments, and both COMBAR and ChBA wish to encourage and support this practice.
2. Secondments do however raise a number of regulatory and professional issues which potential secondees will need to consider carefully before commencing any secondment. To assist members and their clerks, COMBAR and ChBA have prepared the following guidance on issues that are likely to arise in connection with and during secondment. Attention is however drawn to the disclaimer at the end of this Guidance.

### Practising and authorisation status

3. COMBAR and ChBA consider that, subject to the possible exceptions below, it is likely that a secondee will be considered to be an “employed” barrister within the meaning of the BSB Handbook (May 2018 edition).
4. An “employed” barrister is defined as being a barrister who provides legal services, whether to (i) an authorised non-BSB body (e.g., a solicitors’ firm regulated by the SRA), (ii) a BSB authorised body (i.e., a body authorised/regulated by the BSB), or (iii) a non-authorised body (i.e., a body not falling within (i) or (ii)<sup>1</sup>) either:
  - “a) *under a contract of employment; or*
  - b) *under a written contract for services which is for a determinate period (subject to any provision for earlier termination on notice)...”<sup>2</sup>*
5. Applying those definitions:

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<sup>1</sup> This may include overseas law firms, notwithstanding that they may be regulated in their own jurisdictions, since they may not be subject to regulation by an “approved regulator” specified in paragraph 1 of Schedule 4 to the Legal Services Act 2007.

<sup>2</sup> Barristers are also considered “employed” by a non-authorised body if they are providing legal services “by virtue of an office under the Crown or in the institutions of the European Union”

- 5.1. It is at least arguable that some secondments will result in a barrister becoming an employee under a contract of employment. Distinguishing between a contract of employment and a contract for services is generally determined by applying the four tests of control, integration, economic reality and mutuality of obligation. How far a barrister is likely to be classed as “employed” will depend on the precise arrangement in place.
  - 5.2. More likely, however, even if the barrister is not engaged under a contract of employment, he or she will be engaged “*under a written contract for services which is for a determinate period (subject to any provision for earlier termination on notice)*”. COMBAR and ChBA consider that this is also likely to cover the situation where the duration of a secondment is not fixed, on the basis that this might be analysed as a rolling contract (or a succession of rolling contracts) for determinate weekly or monthly periods.
6. It is possible that barristers could avoid becoming “employed” within the BSB Handbook definition by not having a written contract with the institution to which he or she is seconded, provided that the barrister is not considered to be an employee. COMBAR and ChBA are certainly aware that in the past many secondments were informal and not the subject of any written agreement. Recent experience, however, is that with the possible exception of very short secondments, Secondment Institutions (particularly solicitors’ firms) will often require a written agreement. In any event, the absence of a written agreement has the potential to give rise to practical and/or professional difficulties, for example in the event that the barrister and the Secondment Institution have differences of opinion on conflicts of interest. There may, moreover, be occasions when a contractual arrangement comes to be implied despite the absence of a written agreement, the uncertainty around which would be undesirable.
7. Members are reminded that whilst they are on secondment, it remains a disciplinary and criminal offence to carry on reserved legal activities for which they are not authorised. Members that do not have a litigation extension to their practising certificates (see rS47 of the BSB Handbook) may not therefore “conduct litigation”.

8. The “conduct of litigation” is defined in paragraph 4(1) of Schedule 2 to the Legal Services Act 2007 as “(a) *issuing of proceeding before any court<sup>3</sup> in England and Wales*”, “(b) *the commencement, prosecution and defence of such proceedings*” and “(c) *the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)*”. The conduct of correspondence is not “conduct of litigation”. Further guidance as to what does and does not constitute the “conduct of litigation” for these purposes may be found in the BSB’s current (September 2017) Guidance on Conducting Litigation: [https://www.barstandardsboard.org.uk/media/1849621/guidance\\_on\\_conducting\\_litigation.pdf](https://www.barstandardsboard.org.uk/media/1849621/guidance_on_conducting_litigation.pdf).
9. Members who are treated as employed by “non-authorised bodies” (such as those seconded to lay clients) and practise in that capacity<sup>4</sup> are subject to the further restrictions on the provision of legal services set out in rS39 of the BSB Handbook.
10. In summary, and with certain exceptions<sup>5</sup>, legal services providing by barristers employed by “non-authorised bodies” may only be provided to that employer or employees or officers of that employer. A further exception to that rule is that legal services may be supplied by a barrister employed by a foreign lawyer to the clients of that foreign lawyer, provided that the legal services consist of foreign work (defined as proceedings taking place or contemplated to take place outside England and Wales, or any matter or contemplated matter where no court or other proceedings are taking place or contemplated not subject to the laws of England and Wales)<sup>6</sup>. In such circumstances, however, even if permitted under the BSB Handbook, the barrister should also take advice on any regulatory restrictions that may apply to the provision of legal services in that particular jurisdiction as a result of local law.

## Dual practice

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<sup>3</sup> The conduct of arbitration proceedings is not a reserved legal activity, and there is accordingly no prohibition on (for example) the commencement of an arbitration.

<sup>4</sup> See further below the discussion on dual practice, by which a barrister may maintain both a self-employed and employed practice.

<sup>5</sup> Including where the barrister is employed by a public authority, a Government department, or a trade association.

<sup>6</sup> rS39.10.

11. For the reasons set out above, COMBAR and ChBA consider that most secondments are likely to lead the barrister being treated as “employed” for the purposes of the BSB Handbook. Equally, however, in most cases, a barrister on secondment is likely to wish to maintain his or her self-employed practice to a greater or lesser extent.
12. In those circumstances, the barrister will need to comply with the dual practising requirements set out in rS18, namely that:
  - 12.1. The barrister must obtain a dual practising certificate; and
  - 12.2. The barrister must have agreed with his or her employer a “*protocol that enables you to avoid or resolve any conflict of interests or duties arising from your practice and/or involvement in those capacities*” (a “Conflicts Protocol”).
13. An application for a dual practising certificate will need to be made to the BSB and should be made in good time ahead of the commencement of any secondment. For members of less than three years’ standing<sup>7</sup>, then in relation to their employed (i.e. secondment based) practise, they will need to be working from an “*office of an organisation of which an employee, partner, manager or director is a relevant qualified person who is readily available to provide guidance to you*” (rS20(b)).<sup>8</sup>
14. As to the requirement for a Conflicts Protocol, a specimen conflicts protocol can be download from the COMBAR and ChBA websites. COMBAR and ChBA are aware that some Secondment Institutions prefer to use their own conflicts protocol. In the event that the specimen conflicts protocol is not used, members are reminded that any conflicts protocol entered into with the Secondment Institution should not be drawn so widely as to put the barrister in contravention of the “cab-rank” rule (rC29). Thus, for example, it would not normally be appropriate to agree to a blanket undertaking not to act against any client of a large international law firm for a lengthy period of time.
15. A barrister may not act in more than one capacity on the same matter at the same time (rS18). This means that it is not permissible for a barrister to act as both a self-employed

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<sup>7</sup> Or one year’s standing in the case of a secondment to a non-authorized body, provided that any right of audience or litigation is conducted only for the employer or its employees or officers.

<sup>8</sup> The requirements which a qualified person has to meet are set out in rS.22 of the Handbook. This requirement is unlikely to pose any particular difficulty where the secondment is to an English law firm, but may pose more significant problems where the secondment is to a non-authorized body.

barrister and as an employed barrister on the same case at the same time. In the event that the barrister is asked to perform legal services that might ordinarily be considered as part of self-employed practice (for example, the exercise of a right of audience at a hearing) clarification should be both sought and given as to the capacity in which the barrister is appearing so as to ensure that this rule is not contravened.

### **Professional indemnity insurance**

16. Practising barristers are required under rC76 to have adequate insurance which covers all legal services supplied to the public. This rule continues to apply where the barrister is seconded to an institution which supplies legal services to the public (e.g., a solicitors' firm). Even where a barrister is not providing legal services to the public (for example, where seconded to and providing legal services only to one employer), it would be prudent for the barrister to maintain professional indemnity insurance to guard against the potential for a personal uninsured liability.
17. Where a barrister is seconded to a Secondment Institution that is required to maintain professional indemnity insurance, in many cases the secondee will be covered by the institution's insurance. In the case of solicitors, clause 1.3 of the SRA Minimum terms and Conditions of Professional Indemnity Insurance (October 2017) requires the firm's indemnity insurance to cover "employees" and "former employees", which are defined to include any person "*seconded to work in the insured firm's practice*".
18. Notwithstanding this rule, members are advised to include express provision in any secondment agreement that they are covered by the firm's professional indemnity insurance (and will continue to be so for at least six years after the expiration of any period of secondment). Members are also advised to include in any secondment agreement a waiver of any rights of subrogation against the barrister.
19. In other cases, where the Secondment Institution is not obliged to (and does not in fact) cover the secondee under its own professional indemnity insurance, coverage is available under the Terms of Cover of the Bar Mutual Indemnity Fund ("Bar Mutual"), subject to the terms and conditions of that coverage, and provided always that:
  - 19.1. prior to commencement of the secondment, the barrister was a self-employed practising barrister as defined in the BSB Handbook; and

- 19.2. the total period of secondment does not exceed six months.
20. Further guidance can be found in the Bar Mutual’s Guidance Note on Cover for Secondments (November 2017): [https://www.barmutual.co.uk/fileadmin/uploads/barmutual/2017\\_documents/BMIF\\_Secondments\\_Guidance\\_Nov2017\\_.pdf](https://www.barmutual.co.uk/fileadmin/uploads/barmutual/2017_documents/BMIF_Secondments_Guidance_Nov2017_.pdf). For international secondments, reference should also be made to the Bar Mutual’s Guidance Note on International Practice (April 2018): [https://www.barmutual.co.uk/fileadmin/uploads/barmutual/2018\\_documents/Bar\\_Mutual\\_Guidance\\_Note\\_on\\_International\\_Practice\\_26042018.pdf](https://www.barmutual.co.uk/fileadmin/uploads/barmutual/2018_documents/Bar_Mutual_Guidance_Note_on_International_Practice_26042018.pdf).
21. Members should be careful not to agree to wider obligations to the Secondment Institution or other clients than would be covered by their professional indemnity insurance (such as liabilities which would not arise other than pursuant to the relevant contract).<sup>9</sup>

### **International secondments**

22. The above Guidance is intended to apply, from a domestic regulatory perspective, to situations where the Secondment Institutions is based outside the jurisdiction. Members are however strongly advised to seek local law advice about any applicable regulatory requirements, which are necessary outside the scope of this Guidance.

### **Tax and VAT**

23. Members are reminded to seek advice from an accountant on the tax and VAT treatment on income derived from secondments, which lies outside the scope of this Guidance.

*Disclaimer: Although every effort has been made to prepare this guidance with reasonable skill and care, this guidance does not constitute and should not be treated as constituting legal advice. COMBAR and ChBA undertake no liability (whether in negligence or otherwise) in connection with this guidance and any reliance thereon by their members. Members are reminded that they must satisfy themselves that they have discharged any applicable regulatory and professional obligations in connection with any secondment undertaken.*

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<sup>9</sup> See Clause 3.1(x) of the BMIF Terms of Cover.