GUIDANCE ON PRACTICE IN LDPs AND ENTITIES etc
PERMITTED BY AMENDMENTS TO CODE OF CONDUCT

Amendments to Code of Conduct

1. With effect from [date], the prohibition in the Bar's Code of Conduct on barristers (other than employed barristers) supplying legal services to the public through or on behalf of any other person ceases to have effect. Instead, barristers are permitted from that date to supply legal services to the public in three different ways: as a self-employed barrister (as previously), as a manager or employee of a recognised body, subject to the rules of the approved regulator of that body, or as an employed barrister (to the same extent as previously permitted under rule 502).

2. The significant change is accordingly to permit barristers to practice as managers ~~or employees~~ of "recognised bodies". These are entities of all kinds, or sole principals, authorised to provide reserved~~tricted~~ legal activities~~services~~ by an approved regulator other than the Bar Standards Board (BSB). So, e.g., a law firm regulated by the Solicitors Regulation Authority (SRA) is a recognised body. A "manager" for these purposes is a partner of a firm, a director of a limited company or a member of a limited liability partnership which is a recognised body, as the case may be.

3. Recognised bodies include what are generally known as Legal Disciplinary Practices (LDPs). These are a creature of the Legal Services Act 2007 (the Act). They can have different kinds of qualified lawyer and non-lawyers as managers and employees (or just lawyers). At present, no more than 25% of the managers (or shareholding) in an SRA-regulated LDP can be non-lawyers, and only non-lawyers who are managers can own a shareholding. At present, only the SRA can regulate LDPs that are authorised to conduct litigation and exercise rights of audience, though the Council for Licensed Conveyancers (CLC) also has power to regulate LDPs. At present, recognised bodies can only supply legal services (restricted or not) to the public, not other services such as accountancy or valuation services.

4. In due course, possibly as early as 2011, the restrictions on who can own or participate in LDPs, and on the services that they can provide, may disappear. The Legal Services Board is planning to enable the licensing of bodies under Part V of the Act that can be externally owned and supply other services as well as legal services. These are generally known as ABSs. Some LDPs (those that include non-lawyer managers) will have to become ABSs after a transitional period has expired after the start of the licensable body regime. Any barrister wishing to become a manager of such an LDP must understand that the BSB has not yet considered whether or not it is in the public interest for barristers to be managers or employees of ABSs that go beyond the current model of LDPs, i.e. those that are partly or wholly externally owned and/or that provide services other than legal services. A decision on that issue will not be taken by the BSB until late 2010 or early 2011.

5. It is however now possible for a barrister to become a manager of SRA-regulated LDPs, alongside solicitors, other qualified lawyers and non-lawyers. A barrister can also be a manager of a CLC-regulated LDP but as such cannot conduct litigation or exercise rights of audience. Most barristers who

become managers and employees of recognised bodies are therefore likely to be in SRA-regulated firms.

6. As such, and by virtue of the Act, they will be subject to the whole of the SRA's Code of Conduct, save to the extent that this is expressed to apply only to solicitors or trainee solicitors. Barristers practising in SRA-regulated entities will therefore be amenable to the jurisdiction of the SRA and the Solicitors Disciplinary Tribunal in the event of breaches of the SRA rules of conduct.

7. Barristers practising in SRA-regulated entities will remain subject to certain parts of the Bar's Code of Conduct. These are the provisions that are regarded as necessary or fundamental to all practising barristers. The provisions of the Code that apply to barristers so practising are identified in rule 105C.1 of the Code. The cab-rank rule does not apply to barristers who are managers or employees of recognised bodies, as it does not apply to employed barristers generally. Barristers practising in recognised bodies are strongly advised to ensure that they are aware of the provisions of the Bar's Code that will remain applicable to them. It is a disciplinary offence under the Bar's Code for a barrister to be convicted of a disciplinary offence by another approved regulator, such as the SRA. A barrister so convicted therefore is liable to further disciplinary action by the BSB (rule 901.8) so far as necessary in the public interest and proportionate.

8. The opportunity for barristers to become managers of recognised bodies means that barristers may be exposed, for the first time, to business practices that are unfamiliar to them. In particular, the SRA rules make all managers of recognised bodies responsible for (and entitled to deal with) client monies. This is something that barristers have not previously been entitled to do. In order to qualify, a solicitor has to pass examination papers in accounting for client monies. Any barrister managers of LDPs are strongly urged not personally to deal with client monies until they have received adequate training and have acquired a sufficient understanding of the Solicitors' Accounts Rules. Similarly those with managerial responsibility for handling clients' money should ensure that they are familiar with the relevant Rules. Entitlement to handle client monies is, however, a matter for the SRA as regulator of the entity and subject to that for the regulated entity, and not for the BSB as the professional regulator of the individual barrister.

9. Both the SRA Code (para 1.05) and the Bar's Code (paras 606.1, 701(b)) contain rules that require a barrister not to act beyond his professional competence. Any barrister acting as manager of a recognised body should ensure that he/she does not infringe this rule.

10. The amendments to the Code give barristers who are managers of recognised bodies the right to conduct litigation (employed barristers already have this right), subject to complying with the Employed Barristers (Conduct of Litigation) Rules (Annex I of the Code) and the Approved Regulator's rules. Rule 1(b) of the former requires a period of practice under the supervision of a qualified person who has been entitled to conduct litigation for the previous 2 years unless the BSB grants an exemption on the grounds of relevant experience.

~~10.~~11. The new rules 407, 505 and 507 ~~(f)~~ replace~~s~~ rule 307(f) on client money. For self-employed barristers and all employed barristers, the existing

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prohibition on receiving and handling client money is maintained, but the prohibition does not apply to managers of recognised bodies. They will therefore be able to be responsible for client money, subject to the rules of the Approved Regulator for the entity of which they are a manager. Such rules may include requirements as to training and they will, in any case, be subject to the Code requirements not to undertake any task which they are not competent to handle.

Dual Practice

~~11.~~12. Under the amendments made to the Code, a barrister may now practise in more than one of the ways identified in paragraph 1 above at the same time. That is to say, a barrister may practise in the self-employed model from chambers but work part time as an employed barrister for the Government, or for a law firm regulated by the SRA; or may practice part time in the employment of the Serious Fraud Office and part time as a manager of an LDP. A~~The most~~ common example is expected to be that of young barristers who wish to practise self-employed in publicly-funded criminal or family work, but who may need to be employed part-time in complementary work for a law firm or a Government body.

~~12.~~13. Although such dual practice may be complementary and beneficial, both to the barrister and in the public interest, there are also increased risks of conflicts of interests and duty and added risks that the confidentiality of a client's affairs may be compromised. This is particularly an issue in a case where a barrister conducts a self-employed practice at the same time as working for an employer or recognised body, or where the barrister works for more than one employer or recognised body. The barrister will not be free to disclose to his employer or the body details (or the existence) of clients from his/her self-employed practice or another employer's or body's practice. That means that conflicts of interest and of duty for the barrister will be harder to identify and manage in advance of their arising, in ways that barristers in self-employed practice are used to dealing with and barristers hitherto employed by firms of solicitors may not have had to deal with. On the other hand, in many cases of dual practice, the likelihood of a conflict of this kind will be extremely small, e.g. because the kind or level of work done in self-employed practice is different from the work done for an employer. Barristers considering dual practice should review carefully the risks of conflicts and in relation to maintaining confidentiality of clients' affairs, and should ensure that by one means or another such risks are avoided or dealt with in advance of their arising wherever possible.

~~13.~~14. In order to manage these risks and prevent avoidable conflicts from occurring, rules 207 and 208 of the Code impose restrictions and requirements for barristers who wish to practice in more than one capacity:

(1) *Notification.* The fact of practice in more than one capacity must be notified to the Board in writing and in advance (rule 207(b)(i)). Note that this is an additional requirement going beyond the requirements of rule 202(d) to notify the Board of the identity and contact details of any employer or recognised body. If the Board requires further information about the

capacities in which the barrister is supplying legal services, the barrister must then supply such information as the Board requires.

(2) *Protocol*. The barrister must agree in advance with each of his employers or with each recognised body a written protocol, under which the barrister and the employer or body agree how, consistently with maintaining the confidentiality of clients' affairs, conflicts will be avoided or will be resolved if they exist. The Board would regard it as quite wrong for a self-employed barrister to refuse to act further for a pre-existing client on the basis that his employer or recognised body has subsequently been instructed by someone whose interests conflict or potentially conflict with the interests of the first client. It would equally be wrong, save in extreme circumstances of greater prejudice to a client being caused by refusing to act, for the barrister and the employer or body to continue to act for persons whose interests conflict.

Accordingly, before acting in two or more capacities, a barrister will need to ensure, by the terms of some written protocol agreed with his employer or recognised body, that such conflicts can be avoided or can be resolved if they arise without causing prejudice to either or any clients concerned. Clearly, this is likely to involve the barrister either himself being involved in decisions that his employer or body takes relating to conflicts of interest, or at least in reviewing client lists so that any apparent conflict of interest may be resolved in accordance with the terms of the protocol agreed. The Board does not intend to draft a standard protocol for these purposes, since no one agreement can possibly suit the greatly variable circumstances that may arise. It is the responsibility of the barrister considering practising in more than one capacity to address these issues and reach a satisfactory, written agreement with his employer or body in a way that preserves client confidentiality and avoids or resolves conflicts of interest and duty without prejudicing the interests of clients.

A copy of any such protocol must be provided to the Board on request.

(3) W*orking in only one capacity at the same time on the same matter* (rule 208 (d)). Potential regulatory issues arise where the barrister works on the same matter in more than one capacity. Firstly, the potential for client confusion is self-evident. Secondly, in many circumstances it is unlikely to be in the best interests of the client.

The Bar Standards Board considered prohibiting a barrister from acting in more than one capacity in the same matter, but in the event has decided that such a prohibition would not be proportionate. There will be some circumstances where it may be appropriate for a barrister to act in more than one capacity at different stages of the case. For example, the barrister may work on the case whilst employed by the solicitors' firm, but subsequently the firm may wish to instruct him as a self-employed barrister as advocate at trial. A barrister licensed to carry out public access work may give preliminary advice as a self-employed barrister and subsequently (subject to his doing so being in the client's best interests) may refer the matter to the law firm which employs him when the matter becomes litigious, so that the client can have the benefit of the firm's resources in the litigation, with the barrister conducting the litigation in his or her capacity as an employee or manager of the firm (or working under the supervision of the person doing so). Such an arrangement has the advantage, from the client's perspective, that the client does not pay the firm's overheads when the barrister is carrying out work that

can be done on a self-employed basis but does so only when the barrister's role involves work of a sort that can and should properly be done in their capacity as a manager/employee of the firm.

The risk of client confusion means that it is essential that the barrister makes it clear to the client in writing the capacity in which he is working on the case at each stage. This is necessary so that the client knows when the firm is and is not responsible for the barrister's work and which code of conduct and regulatory regime applies to the barrister's work at any given time.

Whilst in appropriate circumstances a barrister may thus work on the matter in different capacities at different stages of the matter, Rule 208(d) prohibits the barrister from working on the case in different capacities at the same time. "At the same time" is to be distinguished from different stages of the case. Thus a barrister who works in chambers on Monday and Friday and works as an employee of a solicitor's firm on Tuesday, Wednesday and Thursday could not work on the same matter in different capacities on different days of the week.

The barrister must at all times have regard to the best interests of the client (and solicitors have a like duty). There are always particular concerns as to whether the client's best interests are served –where one-off arrangements are made in relation to a specific case and this issue is of particular importance here.. Thus it would be unlikely to be in the best interests of the client for the barrister to enter into a one-off arrangement where a matter on which the barrister has already acted in a self-employed capacity is transferred to the firm which then employs the barrister to do work which could perfectly well have been done by the barrister on a self-employed basis, without the client having to pay the firm's overheads. On the face of it, such an arrangement has no purpose other than to charge the client a higher fee for the barrister's work. In contrast, arrangements which are not one-off may well have other legitimate purposes (such as enabling the barrister to develop a given specialism by securing a flow of work of that type through the firm or ensuring that the barrister can draw directly on relevant resources and personnel available within the firm). It is likely to be prudent to cover such issues in the protocol agreed between barrister and law firm.

It should at all times be borne in mind that both the barrister and the solicitors involved have a duty to act in the client's best interests. Tthe purpose of allowing barristers to practisee in a dual capacity is that this flexibility can promote diversity in the profession and benefit clients: for example, enabling barristers to develop not to enable law firms to charge clients more for work that they would otherwise

[(3) *Only one capacity per case* (rule 208 (d)). The potential for client confusion and other regulatory risks is self-evident if barristers are permitted to act on behalf of a client in the same matter, both as a self-employed barrister on the instructions of an employer or body and also as an agent for that employer or body. Accordingly, no barrister may act as a self-employed barrister for a client on the instructions of his employer or recognised body. Accordingly, if a barrister is to act as advocate or advisor to a client of his employer or firm, he must do so as employee or manager and not in a self-employed capacity.

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~~This restriction does not preclude a barrister from referring a direct or licensed access case to his employer or recognised body or the employer or body from referring the matter to the barrister acting under the Public Access Rules (subject to the restrictions and conditions for referrals explained below). Nor does it prevent a barrister from acting on a self-employed basis for the same client where instructed on a *different* matter, whether under the Public Access Rules, the Licensed Access Rules or by a professional client. In any such case, however, the barrister would be well advised to explain to the client in writing the basis on which he is acting for him on that matter and the basis on which he is involved in the other matter.~~

~~14.~~15. Where acting in a dual capacity, there is nothing to prevent a barrister from referring a client to a firm of which he is an employee or manager, provided of course that the barrister is acting in what he reasonably considers to be the best interests of the client in doing so, that full disclosure of his interest is made, and that no referral fee is paid to him by the firm or any intermediary for the referral(rule 209(b). Similarly, the firm might properly refer the client to the barrister subject again to the barrister ensuring that full disclosure has been made and no referral fee paid.~~, subject to the same restrictions~~. Such referrals should, however, be approached with a degree of caution, as the possibility exists for the referring party to be unduly influenced by his own interests, and for complaints to be made at a later time unless the referral was scrupulously fair and transparent (rule 208 (e)).

16.~~14.~~ In order to ensure that the client is making a properly informed choice as to what is in his best interests, the barrister is therefore required to disclose to the client in writing, before making or accepting the referral, as the case may be, the nature and extent of his interest in the firm, and to advise the client of his right to instruct another barrister or retain another firm of his choice to act for or represent him. The referral should only proceed if the barrister is satisfied that the client fully understands and is able to make his choice freely.

17.~~15~~. The barrister is also required to keep a record of all cases in which he made or received a referral to or from his employer or recognised body ~~-~~(rule 208(b)). The records should be kept for a minimum of 6 years from each referral.

18.~~6~~. Particular attention is drawn to the fact that the Board intends to review the rules and guidance for dual practice in the light of experience at the expiry of 2 years from the implementation of the rule changes. When undertaking this review~~Before allowing dual practice to continue~~, the Board will wish to be assured that greater problems than envisaged have not arisen, that the safeguards are working and can be monitored satisfactorily, and that the regulatory objectives continue to be advanced by allowing dual practice. Barristers should therefore not make changes to their career structure on the assumption that dual practice will necessarily remain permitted under the Code.

Ownership of LDPs

19. Unlike lay people, who can only own shares in an LDP if they are managers of it, there is no restriction in the Act on any qualified lawyer owning shares in an LDP. There is currently no restriction in the Code on barristers owning shares in law firms or LDPs.

~~15.~~20. It is to be expected that barristers who are managers or employees of LDPs may wish to have an ownership interest in the LDP that they manage or that employs them, and such a course is unobjectionable. However, where barristers seek to take an ownership interest in an LDP where they are not involved in the management, entirely different considerations and regulatory risks arise.

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~~16.~~21. The Board has taken the view that a complete ban on such interests, which will normally be for investment purposes, would be disproportionate as it would catch situations where there is no regulatory risk. Accordingly, the amended rules permit ownership but subject to some stringent conditions and safeguards in the public interest. These conditions and safeguards do not apply where the barrister is a manager or employee of the LDP, though the dual practice rules (above) will apply if the barrister is also practising in another capacity at the same time.

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~~17.~~22. However, before taking such ownership interests, barristers must consider carefully the risks and restrictions which arise in consequence of such ownership interests. Those risks are more acute than may appear on the surface, and will, in very many cases, make it impractical for a practising barrister to acquire such an ownership interest unless there is no prospect of having any professional dealings with the LDP concerned in circumstances in which a conflict of interest and duty could arise.

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~~18.~~23. Where a barrister has an ownership interest in a LDP, it will be inappropriate for the barrister to act where the LDP is itself an opposing party to litigation. Where the financial interest is non-trivial it will be inappropriate for the barrister to act where the LDP acts for an opposing party, as the barrister will have a financial interest on both sides of the litigation. This may require the barrister to cease to act where the opposing party's lawyers change in the course of the litigation and the LDP in which the barrister has an interest is instructed. Although it will be permissible for the barrister to obtain the informed consent of the client to acting in such circumstances, it is essential that the client is fully aware of the issues involved, and in particular when the client is not a sophisticated user of legal services, there may be real risks of misunderstanding.

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~~19.~~24. There is no objection in principle to the LDP in which the barrister has an interest instructing the barrister. However such instruction gives rise to potential issues of lack of independence and as to whether the LDP is necessarily acting in the best interests of the client.

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~~20.~~25. Whilst ownership by barristers of interests in LDPs gives rise to the same kinds of issues and concerns as dual practice (see para 11 above), the issues here are significantly more acute. Barristers' involvement is likely to be less obvious to clients. It is essential that such interests are disclosed to clients, where material, and disclosed to the Board so that the impact of them can be monitored as part of the Board's general jurisdiction to ensure that barristers practise is a way that protects and promotes clients' and the public interest above their own private interests.

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~~21.~~26. Barristers are advised to consider carefully the implications of owning an interest in an LDP, either directly or indirectly, in circumstances in which they are not employees or managers of that LDP. As explained

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below, in some cases ownership would require the barrister to take steps to manage or avoid conflicts that might arise. The responsibility to avoid causing prejudice to his client is, in these circumstances, that of the barrister.

~~22.~~27. In order to manage the risks and avoid conflicts of interest and duty from occurring, rules 209 of the Code imposes restrictions and requirements for barristers who wish to own interests in LDPs:

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(1) *Notification.* The fact of an ownership interest must be notified to the Board in writing. The interest must be notified as soon as practicable after the interest is acquired or the barrister ceases to be an employee or manager of the LDP in question, as the case may be. At present, the rules do not require the extent or nature of the ownership interest to be disclosed to the Board. The Board intends to keep that matter under review and the rules may change in future. If the extent or nature of the interest is material to any client of the barrister, however, that does not mean that the extent or nature need not be disclosed to the client, as explained below.

(2) *Conflict of interest and duty*. If a barrister has a more than trivial ownership interest in an LDP, then, as explained above, there is scope for a conflict or potential conflict to arise between a barrister and his client, where the LDP is acting for another party or for a person with a conflicting interest. It is the responsibility of the barrister to ensure that conflicts are avoided. Save in exceptional circumstances, a barrister must not act or continue to act where there is a conflict or possible conflict between his interests and those of his client or his duty to his client.

Where the barrister has only a relatively small interest in the LDP, it is unlikely to be realistic for the barrister to agree a protocol with the LDP in the way that an employee or manager of the LDP can and should do (see para 12(2) above). However, if the barrister is a significant shareholder, it may be appropriate for such a written agreement to be made, to ensure that any conflicts of interest and duty that arise can be resolved easily and without prejudicing either client. It is the barrister's responsibility, if he is considering owning a significant shareholding in an LDP, to take appropriate steps to prevent any conflict arising that prejudices the interests of his client. In a case where a later conflict was known to be a real possibility, that would require the barrister to disclose his interest in the LDP (and where material the extent or nature of the interest) and advise the client of his right to instruct another barrister, so that the client can decide at an early stage whether or not to instruct (or continue to instruct) the barrister. For these purposes, a significant shareholding is a holding of such an amount, or with such rights, that a reasonable person with knowledge of the facts would be likely to conclude that there was a real risk of the barrister not being able wholly to disregard his interest in acting for his client. Any shareholding of over 10% or which constitutes more than 5% of the barrister's portfolio is always likely to be regarded as significant.

(3) *Receipt of instructions from the LDP.* There is no reason why a self-employed barrister should not receive instructions from a recognised body in which he has an ownership interest. If the barrister is not an employee or manager of the body, there is no scope for confusion as to the capacity in which the barrister is acting for the client. The only issue is accordingly one of informed consent from the client to the barrister's acting for him.

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Regardless of the size of the barrister's interest in the LDP, the existence of that interest must be disclosed to the client in writing before the instructions are accepted, and the client must be advised of his right to instruct another barrister to act for him. If the barrister's interest in the LDP is acquired after he is first instructed by the client, disclosure in the same terms should be made in writing as soon as reasonably practicable after the interest is acquired.

~~23.~~28. Where a barrister has an ownership interest in an LDP, there is nothing to prevent a barrister from referring a client to that LDP, provided of course that the barrister is acting in what he reasonably considers to be the best interests of the client in doing so, that full disclosure of his interest is made, and that no referral fee is paid to him by the firm or any intermediary for the referral. Similarly, the LDP might properly refer the client to the barrister, subject to the same restrictions. Such referrals should, however, be approached with a degree of caution, as the possibility exists for the referring party to be unduly influenced by his interests, and for complaints to be made at a later time unless the referral was scrupulously fair and transparent.

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~~24.~~29. In order to ensure that the client is making a properly informed choice as to what is in his best interests, the barrister is therefore required to disclose to the client in writing, before making or accepting the referral, as the case may be, the nature and extent of his interest in the LDP, and to advise the client of his right to instruct another barrister or retain another firm of his choice to act for or represent him. The referral should only proceed if the barrister is satisfied that the client fully understands and is able to make his choice freely.

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~~25.~~30. The barrister is also required to keep a record of all cases in which he made or received a referral to or from the LDP, and of instructions received from the LDP. The records should be kept for a minimum of 6 years from each referral (209 (c)).

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~~26.~~31. Particular attention is drawn to the fact that the Board intends to review the rules and guidance for ownership interests in the light of experience at the expiry of 2 years from the implementation of the rule changes. The Board will wish to be assured that greater problems than envisaged have not arisen, that the safeguards are working and can be monitored satisfactorily, and that the regulatory objectives continue to be advanced by allowing such ownership.

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Consequences of amendment of rule 205

~~27.~~32. The old rule that prohibited barristers (other than employed barristers) from supplying legal services through or on behalf of another person has now been revoked. In its place, the new rule permits barristers to practise in three different ways: see paragraph 1 above.

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~~28.~~33. The revocation of the old rule should not, however, be taken as an indication that practise through or on behalf of other persons is now generally permitted. Currently, the permitted modes of practice are those identified in the new rule: self-employment, employment, and as manager or employee of a recognised body (regulated by an approved regulator other than the Board).

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~~29.~~34. Barristers cannot therefore practice in partnership together or through an entity controlled by them. If such a firm or entity is itself supplying restricted legal services (such as advocacy and the conduct of litigation), it must be regulated under the Act. Any supply of restricted legal services where the supplier is not regulated is a criminal offence under section 14 of the Act, which comes into force on January 1, 2010.

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~~30.~~35. The Bar Council (nominally the approved regulator for the Bar) does not currently have the power to regulate firms or entities, and the SRA will not regulate such firms and entities comprised only of barristers. The Board will be consulting early in 2010 on whether or not the Bar Council should acquire the power itself to regulate barrister-only entities, or entities comprising a mix of lawyers and non-lawyers, and if so what kinds of entity and under what regulatory regime. Significant constitutional and rule changes and administrative arrangements will be required before it can do so.

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~~31.~~36. Where an entity is not itself carrying on a reserved legal activity, e.g. some procurement or block contracting vehicles or other intermediaries, there is no need for it to be regulated. Use of limited companies ancillary to self-employed practice appears therefore to be perfectly lawful, provided that they are not themselves carrying on reserved legal activities. In practical terms, this appears to the Board to depend on certain conditions being met. First, the entity must be the creature of the barristers, who are carrying on the reserved legal activities, not the barristers the agents of the entity. Secondly, the entity must not be contracting to *provide* legal services, only to procure that others provide them, otherwise it is possible that it would be taken to be carrying on reserved legal activities. Thirdly, the arrangements for payment of the vehicle must not amount to referral fees in breach of rules 307(d) or (e) of the Code.

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~~32.~~37. Any barristers considering the use of such a vehicle would be well-advised to obtain specialist legal advice on the structure and operation of the entity in relation to the terms of the Act.

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