Response to LSB's issues with Contractual Terms
reference meeting 8 December 2011
and explanation of present draft

The draft contractual terms are intended to provide a potential framework for the provision of services by a barrister to a solicitor in a way which provides certainty and security for all concerned.

The proposed terms are **not** compulsory.

They do **not** deal with the level of fees which is open to negotiation.

It is intended that the Cab Rank Rule, which facilitates access to justice, should attach to these terms.

In other words, subject to the provisions of the Code, a barrister would be required to take work on these terms.

Since the previous meeting with the LSB, we have obtained advice from leading Counsel who concluded that the revised terms were fully compliant with the law and enforceable.

They are intended to bring up to date the provision of those services in a manner which is in the interests of justice, the consumer and the profession.

Each query raised by Bruce Macmillan ("BM") of the LSB in relation to the previous draft is addressed below with the Bar Standards Board's responses in bold.

(comment 1) 1.1 and 1.2 – definition of services. Query raised as to use of "legal services".
Any ambiguity resolved by removing the word "legal" from 1.1.

(comment 2) 1.2 – definition of instructions and whether they include oral instructions. BM accepted that there will be instances of urgent oral instructions or oral instructions given at court but was concerned that the paragraph started with the word *written* briefs. Agreed to be redrafted (note there is nothing in Bar Code which requires oral instructions to be confirmed in writing). (note see also para 22 below).
Done by removing the word "written".

(comment 3) 1.2 – definition of lay client and the lay client's ability to enforce the terms of this contract against the barrister, pursuant to the Contracts (Rights of Third Parties) Act. BM also tied this up with the provisions relating to liability (clause 10) which are considered separately below.
It is not intended that the lay client be a party to the contract. The lay client's avenues for redress for inadequate professional service are Chambers complaints procedures, a complaint to the Legal Ombudsman and/or an action in negligence. It is not intended that the contractual terms should alter that established position. However, to make the matter clear – see insertion of new clause 16, excluding rights of Third Parties.

(comment 4) 1.2 - definition of lay client and wording "and may include solicitors".

The definition of "Lay Client" has been amended by using the word "person" and by making it clear that the Solicitor can be the "Lay Client" when the instructions are in respect of the Solicitor's own affairs.

(comment 5) 1.2 – definition of Services – BM suggested a definition of Case.
No change made to the definition. "Case" is already defined in 1.2 in wide terms. We do not consider it to be either necessary or desirable to alter this definition.

(comment 6) BM queried whether the definition of legal services included mediation, expert determination, etc. SAQC explained that, in the Code, it would exclude the barrister acting as an arbitrator or mediator but would include the barrister acting for a party in the arbitration or mediation.
No change made to the definition. We consider that it is clear, bearing in mind that these terms are expressed to be in conformity with the Code, that "the Services" relates to the barrister acting qua lawyer, rather than in a judicial or quasi judicial capacity and that there is no need to elaborate, particularly as engagements to act in those capacities usually arise in circumstances different from those to which the terms are intended to apply.

(comment 7) BM also queried why, in the definition of Services, the instructions were limited to the solicitor.
Definition of "Solicitor" amended. These terms only deal with instructions given by or on behalf of solicitors, whether the solicitor in question is a sole trader, a traditional partnership, an LLP or an incorporated entity.

The intention has always been to replace the existing outmoded terms in Appendix G of the Code rather than to produce "omnibus" terms suited to all possible methods by which a barrister can be instructed.

Accordingly, the new terms do not deal with the situation where the party instructing is a different kind of professional (e.g. an in-house barrister, a foreign lawyer, an accountant instructing in a taxation matter etc.) or is the lay client itself, where different considerations and rules apply. Nor do they deal with instructions from entities that are "licensable bodies" under s. 18(1)(b) LSA 2007 (alternative business structures). See the new definition of "Authorised Person" in 1.2. It does, however, cover instructions from in-house solicitors.

Dealing with all of the possible non-solicitor counterparties in a single document would in our view have created a set of terms of excessive complexity and length. The parties not covered by these terms can, of course contract with the barrister on any term that may be agreed.

(comment 8) regarding definition of legal services. BM asked about including overseas instructions and should they not be covered by the Cab Rank Rule.
It was explained that the Code has completely separate rules relating to overseas work. The Standards Committee of the BSB had looked at whether overseas work could be included in the Cab Rank Rule and found it was not feasible or reasonable for several reasons. There is the risk that barristers would be obliged to accept instructions from other jurisdictions where they know nothing about the regulatory regime and/or where they could not be satisfied that the same standards of conduct were expected in those jurisdictions resulting in barristers coming under pressure to do something that they should not (or doing so inadvertently) as well as possibly facing difficulties, particularly having regard to the

difficulties that would be encountered in pursuing payment.

In addition, please see previous answer.

(comment 9): definition of solicitors. BM said there was not a consistency of definitions. cf with 1.1.5.
Definitions amended.

(comment 10) re definition of solicitors – inclusion of government bodies, charities, ombudsperson, etc.?
Definition amended in part. As to ambit of the terms, please see answer to comment 7.

(comment 11) – battle of the forms reference clause 2.
2.3 removed

BM was concerned about the expectation in the terms that the solicitor was conversant with the Bar Code and wanted specific references.
Where appropriate, references to specific paragraphs of the Bar Code of Conduct inserted and new clause 2.5 inserted providing that the Codes of Conduct for both the Bar and Solicitors take priority. However, it is considered impracticable to include all references in full if the terms are to remain compact and succinct.

(comment 12) - ref clause 2.4: agreement to agree or a framework agreement?
We do not consider that any change is required here. As mentioned at our meeting, it is impractical to define where one set of services ends and another starts for all possible kinds of instructions and it was accordingly considered necessary to deal with "further services in relation to the same Case" so as to provide a contractual framework in cases of doubt or difficulty. However, both parties are free to renegotiate before further instructions are given.

(comment 13) – clause 2.5.1 - how does it affect the Cab Rank Rule?
No change to Terms. Having considered the matter, there is no scope for including the areas referred to in 2.5.1 and 2.5.2 (now 2.4.1 and 2.4.2) in the new terms, as these areas are covered by specific terms.

(comment 14) – clause 2.5.2 – CFA should be defined. Answer, it is defined in the Bar Code. BM wanted it cross referenced in the contractual terms.
Definition of CFA inserted

(comment 15) – clause 3.5 – BM particularly concerned with the phrase "or otherwise" – how did that tie up with the no liability point in 4.2 or the Cab Rank Rule?
Clause deleted

(comment 16) – clause 4.1, phrase "not he accepts the instructions" – BM asked if that meant 3.1 had been fulfilled and questioned its meaning
No change to the Terms. We do not consider that any change is required here. By notifying acceptance under Clause 4.1, the barrister is in effect starting the clock running as regards

both parties' obligations – see 4.5. This is however subject to the new 4.4 if money laundering obligations cannot be satisfied.

(comment 17) – clause 4.3: BM asked regarding the due diligence required by the Money Laundering Regulations how it worked with 4.1. Can a solicitor receiving confirmation under 4.1 know that this means 4.7 has been complied with? Concluded that the clause was slightly ambiguous and needed tightening up.
Clause redrafted (including insertion of new clause 4.4)

(comment 18) – clause 4.3: BM concerned about the phrase "including consenting". Is it "hereby consenting" or "consenting if requested to do so"?
As above, clause redrafted

(comment 19) – clause 4.4 – BM asked about the position of subsequent or supplemental instructions. He asked what is meant by acceptance and by agreement.
No change. Instructions that are clearly new or further instructions, for example, to conduct the appeal of the case in which the barrister appeared in the court below, would be fresh instructions. We do not consider it necessary to elaborate further.

(comment 20) – clause 4.4. – BM asked if the last part of 4.2 was redundant as there would be no contract. 4.2 is prior to the formation of the contract.
Clause redrafted

(comment 21 and 22) – clauses 5.4 and 5.5 – BM asked if it complied with current Information Commissioner guidance.
Position checked and clause 5.5 redrafted.

(comment 23) – clause 6.1.2. BM, following on from the above points, referred to the need to protect the barrister's electronic storage systems as, if they are networked for email they are probably also hackable. He also had concerns about the theft of computer hardware and documents.
No change. Clause 6 deals with email and allows the Barrister to use it unless otherwise agreed. In return for that entitlement, the Barrister promises to keep email secure and virus free. It does not seem appropriate to widen this particular clause to cover all other systems. However, clause 7. 1 deals with other systems and now makes fuller reference to the barrister's responsibilities under the DPA.

(comment 24) - clause 7.1. Again, following from previous comments, BM asked if the Barrister accepting that (s)he is Data Controller in relation to the physical storage and IT systems operated for him by his chambers and does (s)he have the appropriate current registration with the Information Commissioner?
Clause amended. However it is considered that this is a matter for each individual barrister and any other data controller within the barrister's chambers.

(comment 25) – clause 7.1 – and, as per comments 22, 23 and 24, likewise the solicitor. BM concerned about the holding of personal data.
Clause amended

(comment 26) – clause 8.2 – regarding the phrase "and his other pre-existing professional obligations", BM asked if this was in the Bar Code of Conduct and, if yes, to be cross referenced with the specific paragraph.
Reference to specific paragraph of the Bar Code of Conduct inserted

(comment 27) - clause 8.3 –rogue square brackets.
Corrected

(comment 28) – clause 10.1.1 – BM asked what the mechanism for enforcement by the Lay Client was. BM also said that under 8.1, the barrister had contracted with the solicitor to take care of the lay client, so why exclude the solicitor?
Limited amendment. We consider that only a limited change is required here. As already explained, these terms regulate the relationship between barrister and solicitor – not barrister and lay client, which is not contractual in any event. They do not seek to restrict or affect the barrister's duty of care to the lay client, but do seek to exclude the barrister's liability towards anyone else (see new Clause 16) except where that is prohibited by law (see new 10.2), including the solicitor. In this regard, please also see the response to comment 29 below.

(comment 29) – clause 10.1.1 – following on from the above, BM queried the Solicitor and other parties. Is the clause too onerous? Is it enforceable?
No change made. There are extremely limited circumstances in which, in the absence of 10.1, a barrister might be liable in damages to the solicitor for breach of contract under these terms. The most likely is where the barrister's negligence leads to the solicitor being unable to recover a conditional fee. Whether the exclusion of liability in that situation is reasonable in the context of the unfair contracts legislation will vary from case to case and accordingly, it is inappropriate that it should be dealt with here.

(comment 30) – clause 10.2. BM felt that there should be a duty on the barrister to advise of a likely change, such as an outstanding appeal or legislation pending.
Clause redrafted for clarity. The provision which states that the barrister is not obliged to deal with subsequent changes in the law etc. has been removed but we nevertheless consider that the nature of the barrister's instructions will not require the barrister to have a continuing contractual obligation to advise on changes unless that is specifically agreed.

(comment 31) – clause 11.2. BM asked what happens if a fee cannot be agreed.
Clause redrafted.

(comment 32) – clause 11.3.2 – BM said this could be perceived as unreasonable for the client because a fee for a job is a fee for a job where you price at entry and keep it that way.
Clause redrafted. It should be noted that there are Bar Code provisions to prevent returning instructions or withdrawing from a case in such a manner as to prejudice the lay client.

(comment 33) – clause 11.4 BM asked how is "reasonable" calculated.

No change. On reflection, it was not felt that additional words could take the matter further. The Standards Committee of the BSB had discussed this matter at some length but concluded that it was not possible to amend the term.

(comment 34) – clause 12.1. BM said there is no notices and delivery clause and asked how delivery was determined.
New clause 18 inserted regarding Notices and Delivery

(comment 35) – clause 12.2. BM asked if there is any reason why this is not on an agreed basis and frequency. Is it the case that it can only be in relation to agreed sums? Should there be an agreed definition of what is completion of a part?
No change. We do not consider it practical to lay down a rigid timetable for billing. It is anticipated that in many cases this will be agreed between the parties on an ad hoc basis.

(comment 36) – clause 12.2. BM asked if the meaning of the 3 month limit was that, if the barrister failed to bill before the 3 months, he had lost is right to invoice for his fees. Answer yes.
This is confirmed.

(comment 37) – clause 12.4. BM thought that "time being of the essence" in this context is unreasonable.
No change. We do not consider this to be at all unreasonable in the context of the solicitor-barrister relationship. Its effect is to permit the barrister to sue for unpaid fees immediately they are overdue (note that the due date is 30 days from delivery of the invoice).

(comment 38) – clause 12.4 regarding set-off. BM said this was an unacceptable practice as you would be holding someone to ransom.
No change. This clause does not force the payment of fees that are in dispute – it is only intended to prevent attempts to set off *other* possible liabilities of the barrister. That is not considered to be unreasonable.

Clause 12.6.2 – BM asked if it is appropriate that a barrister could sue because payment was a day late, due to no fault of the solicitor (example given of power failure by the bank).
No change. This follows from time being of the essence. We do not however consider the timing of the right to sue as leading to any form of unreasonableness here.

(comment 39) – clause 12.6.3 How would this be enforced? Could it be seen as too onerous and clear unreasonable potential for detriment to client?
Clause amended, incorporating specific Bar Code of Conduct provision of not acting in a manner prejudicial to the lay client.

(comment 40) – clause 12.7 BM asked if the provision was to the exclusion of other remedies. It was explained that it was permissive.
We confirm that 12.7 does not exclude other remedies.

(comment 41) – clause 12.7. BM asked, in relation to when the 30 days of the Award starts, is it the date of publication?

The Joint Tribunal Standing Orders, drawn up jointly by the Law Society and Bar Council, provide for payment within 14 days of date of notification.

(comment 42) – clause 13.2. BM said "case" should be "case" as in the defined terms.
Capital letters inserted as appropriate.

(comment 43) clause 13.3. BM said the barrister's termination of the agreement ought to be in writing.
Clause redrafted, including insertion of appropriate Bar Code of Conduct reference.

(comment 44) clause 14.1 BM asked about the situation of force majeure. He was advised this is covered in the Bar Code. BM asked about what if the solicitor could not fulfil his obligation – e.g. power failure at bank when trying to pay the barrister, or the court flooded, or the solicitor cannot make the new hearing date.
No change. The only situations in which we see force majeure operating here are where the barrister is prevented from working for some reason or if the solicitor is prevented from paying (the failure of the bank to pay example).

We have considered whether an amendment is needed here, but consider that the Code offers sufficient protection for the barrister and that the only realistic way in which the solicitor could have a liability to the barrister as a result of force majeure is where payment is delayed. Since failure to be paid by the lay client is not (and should not be) an acceptable reason for non-payment (12.4) this limits force majeure issues to temporary delays in funds transmission, which in practical terms can be ignored – a single day's delay is not going to result in the issuing of proceedings.

(comment 45) clause 14.1. BM had raised in his comment the failure to allow for the SRA Audit (of its outsourcers such as barristers) as required by the new Solicitors Code, under O7.10(b) and how this raises a section 54 (Legal Services Act) conflict of rules point.
No change and there is no conflict with 0.710(b) of the Solicitors Code of Conduct. This was advised by the SRA in an email on the 16 December 2011 to the BSB, which was forwarded to the LSB.

Discussion moved to the nature of the contract. Is it a tri-partite agreement? What of agency law regarding solicitor and lay client (or possibly barrister and clerk).
We confirm that these terms are intended to be between barrister and solicitor as principals. This is the traditional arrangement and these terms do not seek to disturb it.

(comment 46) clause 15.2. BM said the agreement should allow for the fact that the SRA Code might change, or the law change which might necessitate a change in the contract. He also advised that the definition of a regulatory body should be widened.
Please see new definition of the SRA Code in 1.2

(comment 47) clause 16 *(now clause 17)*. BM asked what would happen if you removed a key component from the agreement.
Please see clause 15.2

(comment 48) clause 17.1 *(now clause 19.1)* – reference English Law. BM asked what about Welsh law? He thought Welsh law of severance differed. In addition, to comply with the Welsh Language Act, a Welsh version should be available.
Clause amended to refer to the law of England and Wales. The BSB will comply with its legal obligations under the Welsh Language legislation.

(comment 49) clause 17.2 *(now clause 19.2)*– BM did not understand how the phrase "unless any alternative dispute resolution procedure is agreed between the parties" tied in with clause 16.1 (now 17.1).
No change. Clause 19.2 does not operate if the parties agree some other form of dispute resolution – such as the use of the joint tribunal as envisaged in 12.7. We do not see any conflict with 17.1 – the parties are free to agree any other method of dispute resolution, but in the absence of such agreement, 19.2 operates.

A copy of the new Contractual Terms, incorporating the amendments above, is attached.

Bar Standards Board
18/01/12