

BAR STANDARDS BOARD

REGULATING BARRISTERS

THE PUBLIC ACCESS SCHEME GUIDANCE FOR BARRISTERS

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Scope of this guidance

1. Following an amendment to the Code of Conduct in 2004, a barrister may accept instructions directly from or on behalf of a lay client (paragraph 401(a)(iii) of the Code). This is known as public access. In carrying out public access work a barrister must comply with the Code of Conduct ('the Code') and in particular the Public Access Rules which are contained in Annex F2 of the Code.
2. This document gives guidance on the interpretation of the Code and good practice. You must have regard to it in considering whether to accept and in carrying out public access instructions (paragraph 5 of the Public Access Rules).

Qualification requirements

3. Before a barrister may accept public access instructions, he must:
 - (1) Hold a full practising certificate. If he has less than three years' standing he must have a qualified person readily available to him to provide guidance, if necessary (see paragraph 5 below);
 - (2) Have undertaken and satisfactorily completed a Bar Standards Board approved training course. Details of such courses can be obtained from the Continuing Professional Development Department of the BSB;
 - (3) Notify the Professional Affairs Team of the Bar Council of his intention to undertake such work; and
 - (4) Have insurance cover (paragraph 401(a)(iii) of the Code). BMIF cover satisfies this requirement.

Additional requirements for barristers with less than three years' standing

4. The prohibition on barristers with less than three years' standing undertaking public access work has been removed. However there are two additional requirements with which a barrister under three years' standing must comply.
5. He must have a qualified person available to him to provide guidance. A person shall be a "qualified person" for these purposes if he is public access accredited and has:
 - (a) been entitled to practise and has practised as a barrister or has been authorised to practise by another approved regulator for a period (which need not have been as a member of the same authorised body) of at least six years in the previous eight years;
 - (b) made such practice his primary occupation; and
 - (c) been entitled to exercise a right of audience before every Court in relation to all proceedings.
6. He is also required to:
 - (a) keep a log of the public access cases he has dealt with and record any issues or problems that have arisen; and

(b) where possible and appropriate, seek feedback from public access clients.

7. A pro forma for logging cases is attached at Annex A. The purpose of this requirement is twofold:
 - (a) to assist such barristers to reflect upon and learn from their practice, (in this connection a barrister will need to consider whether seeking feedback from a client involved in an unsuccessful criminal case would be appropriate) and
 - (b) to assist the Bar Standards Board in assessing whether the removal of the prohibition has introduced any unacceptable risk in to the process. Therefore the BSB will sample a selection of these logs to gauge the impact of the rule change.

Nature and scope of public access work

8. A barrister may accept public access instructions in any area of practice. You are reminded that paragraph 603(a) of the Code prohibits you from accepting instructions if you lack sufficient experience or competence to handle the matter. In a public access case you should remember that dealing directly with a lay client may be more difficult or demanding than acting for a professional client and you must be able to handle those demands.
9. Public access does not widen the types of work a barrister may do. You are performing the same functions as you would if you were instructed by a solicitor. Examples of the type of work you may do for a public access client are:
 - Advocacy;
 - Drafting documents;
 - Advising in writing or in conference;
 - Representation in ADR such as mediation or arbitration;
 - Negotiating on behalf of your client;
 - Investigating and collecting evidence. You should however have regard to the Bar Standards Board Guidance 'Part V Code Amendments' on investigating or collecting evidence and taking witness statements. In particular you must not conduct a case in court if you have previously investigated or collected evidence in the case unless you reasonably believe that the investigation and collection of that evidence is unlikely to be challenged;
 - Corresponding on behalf of your client. You may send letters on your Chambers' letterhead or faxes or emails. However you must only conduct correspondence if you are satisfied it is in your client's best interests to do so and you have adequate systems, experience and resources for managing the correspondence (paragraph 401A.1(a) of the Code). Bear in mind that solicitors' offices have systems for logging incoming and outgoing correspondence and dealing with urgent letters in the absence of the fee earner which your Chambers may not be able to offer.

General restrictions

(A) Restriction on conducting litigation

10. Public access does not put barristers on a par with solicitors. A key difference is that solicitors may conduct litigation on behalf of their client. A barrister in independent practice does not have the right to conduct litigation. If he does so he is not only breaching paragraph 401(b)(ii) of the Code but also committing a criminal offence under the Legal Services Act 2007.
11. In a public access case the client is conducting the litigation as litigant-in-person. You must be careful not to take any steps which could be regarded as the conduct of litigation. The Legal Services Act 2007 defines the conduct of litigation as:
 - (a) the issuing of proceedings before any court 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).
12. The Bar Standards Board takes the view that the following fall within this definition and therefore a barrister **should refuse to do them**:
 - Issuing proceedings or applications;
 - Acknowledging service of proceedings;
 - Giving the barrister's address as the address for service;
 - Filing documents at court or serving documents on another party.
 - Issuing notices of appeal.
13. A barrister may advise his lay client on how to take any of these steps. For example he may advise on the procedure for lodging an appeal; and he may of course draft the grounds of appeal. However the steps in question must be taken by the lay client. Normally public access clients will be expected to be able to perform the activities usually undertaken by a solicitor with little or no prompting. If this is not the case you must consider whether it is proper to act on a public access basis (see paragraphs 19 to 23 below). This consideration is particularly relevant when dealing with vulnerable clients. 'Vulnerable clients' is interpreted widely and will include clients who have English as a second language, who have mental or physical disabilities or who are otherwise vulnerable (i.e. because of their age or immigration status).
14. Certain activities at first blush look like they might fall within the definition of conducting litigation but in fact do not do so. This is generally because it is work that barristers have traditionally done when instructed by solicitors. The following are therefore **permissible**:
 - Lodging documents for hearings. It is proper for barristers or clerks to lodge certain types of documents for hearings, provided that they are

ancillary to the barrister's role as an advocate. Barristers often draft the case summary, chronology, list of issues or position statement. There is nothing wrong with clerks or barristers lodging these sort of documents. However it is likely that lodging a full trial bundle will breach the prohibition on conducting litigation.

- Skeleton arguments. Exchanging skeletons with an opponent or sending skeletons and bundles of authorities to the court is allowed. In a criminal case defence barristers often hand a defence case statement to the Crown or the court and this would also be permitted if instructed directly.
- Covering applications to fix trial dates. Clerks regularly fix trial dates to ensure that the date is convenient for counsel instructed. This is permissible whether instructed by a solicitor and therefore also when instructed directly. Clerks making representations to the Masters in relation to hearing dates is permissible for the same reasons.
- Court orders. Liaising with the other side or the court over the preparation of an order is something barristers often do and is allowed. Clerks regularly deal with the sealing of court orders and so this, too, is permitted.
- Discharging a duty or a courtesy to the court. For example a letter or e-mail to a judge explaining an absence from court or providing dates to avoid or corrections to a draft judgment.
- Signing a statement of truth. A statement of truth may be signed by a legal representative, which is defined as including a barrister (Civil Procedure Rules Part 2.3). Therefore a barrister may sign a statement of truth on behalf of his lay client (*O'Connor v BSB* (2012) Visitors to the Inns of Court, August 17, unrep.) However you should ensure that the provisions of the Civil Procedure Rules are complied with before you do so, in particular Part 22 PD paragraph 3.8.

(B) Code of Conduct restrictions

15. The following are expressly prohibited by the Code of Conduct:

- Receiving or handling clients' money, except as payment for fees. The prohibition against holding clients' money means that a barrister cannot make disbursements on behalf of a client, for example by paying court fees or witnesses' expenses.(Code paragraph 407).
- Undertaking the general management, administration or conduct of a lay client's affairs (Code paragraph 01 (b) (i)).
- Instructing an expert witness or other person on behalf of a lay client, or accepting personal liability for the payment of any such person. It follows that a barrister should not send a letter of instruction to an expert, though he may draft a letter for the lay client to send. He may also give advice as to who an appropriate expert might be and the on the questions to be asked (Code paragraph 401 (b)(ii))

Public funding (legal aid)

16. In each case, before a barrister accepts a public access instruction, it is a Code of Conduct requirement to:

‘Take such steps as are reasonably necessary to ensure that the client is able to make an informed decision about whether to apply for legal aid or whether to proceed with public access.’ (Public Access Rules, paragraph 2(iv))
17. If a lay client qualifies for legal aid it may be, and often will be, in his best interests to instruct a solicitor on a public funding basis. There may however be some situations where the client will prefer to instruct a barrister on public access – for example if his legal aid contributions would be higher than instructing a barrister without a solicitor, or he wants to instruct a more senior barrister, such as a QC, than he would be entitled to on legal aid.
18. It is important that the client is able to make an informed choice about public funding. The model client care letter (see paragraph 28) explains that a barrister cannot be instructed directly on a legal aid basis and gives details of how the client can find out if they are eligible for public funding. Further information about public funding is also available to lay clients in the guidance for clients which is available on the Bar Standard Board’s website. In many cases, particular where it is obvious from the nature of the case or the nature of the client that public funding is unlikely to be available, this will be sufficient. However in other cases you may take the view that it would be in the best interests of the lay client to explore his eligibility for legal aid. In those cases you are likely to want to discuss this with him when you first meet and draw his attention to the sources he can get help from to assess eligibility.

Interests of the client and interests of justice

19. A barrister cannot accept public access instructions if he forms the view that it is either in the best interests of his client or in the interests of justice for the client to instruct a solicitor or other professional client (Public Access Rules, paragraph 3). This is a continuing duty which you must keep under review during the course of a case.
20. This decision is likely to depend both on the complexity of the case and the capability of the client. A very able or well-resourced client, such as a large corporation, may be able to handle very complex litigation. A less able client may struggle with a straightforward claim.
21. In making this assessment you are likely to reach one of three views:
 - The level of the case and the likely work involved is within the client's capabilities and there is no obvious reason why a solicitor should be instructed.
 - The case is of such complexity or has reached a stage that it is not in the client's interests or the interests of justice to instruct a barrister without a solicitor or other professional client. Having reached such a view you can no longer act on a public access basis. You would be able to act if instructed by a solicitor (or other professional client) and you can make

recommendations as to who could act.

- The case may well become complex and may involve work which the client cannot do, but you do not consider that a solicitor or other professional client needs to be instructed yet.
22. In every case you must make your lay client aware at the outset that there may be circumstances in which you will have to recommend that a solicitor (or other professional client) is instructed, and that you will have to withdraw if that advice is not heeded. There is a paragraph in the model client care letter (see paragraph 28 below) setting this out.
23. It is essential that barristers should consider at every point at which they are instructed whether a client needs to instruct a solicitor and to advise as soon as it becomes clear that this is the case. This is of particular importance where limitation periods are involved or where hearings are imminent. Barristers failing to do this may find themselves at risk of actions in negligence, findings of inadequate professional service by the Office of the Legal Ombudsman or professional misconduct charges by the Bar Standards Board.

Relationship with client

(A) Initial contact

24. It is likely that initial contact will be by a telephone call or email between the client and the barrister or his clerks or the receipt of written instructions in Chambers. You are required to keep a record of the date that instructions were received, the name of the lay client, the name of the case and any requirement of the client as to time limits (Public Access Rules, 9(a)). As you will also need to send a client care letter you will need the client's address.
25. You may take the view that a preliminary meeting is required. This may be necessary to comply with the requirements of the Money Laundering Regulations (see paragraphs 71 to 74 below). If so you should write to the client summarising those regulations and setting out what is required in order to satisfy the identification requirements. A preliminary meeting may be helpful to decide whether you will accept the instructions. It is open to a barrister to accept instructions for the limited purpose of reading papers and advising whether he is able to perform substantive professional work; in such a situation it is open to the barrister to make an arrangement that he is paid a fee for doing so. If it is decided to charge for the preliminary meeting, a client care letter should be sent to the client in the usual way, setting out the charge for the advice and any other work done and making it clear that the barrister does not agree to do more in the first instance than assess whether or not he can assist the client. In many cases, a barrister may consider that it is good client care not to charge for a preliminary meeting.

(B) The basis of the agreement and the client care letter

26. The agreement between barrister and client is contractual. This means that:
- the barrister is bound by the agreement and may be liable in contract for failure to perform;

- it should be clear what is to be done under the contract, the charging rate and any other special terms that may be agreed;
 - the barrister will be able to sue for fees.
27. There are a number of things a barrister must inform his client about at the outset of the agreement. These are set out in paragraph 6 of the Public Access Rules. They include warning a client that you are a sole practitioner and there may be occasions where a clash of professional commitments prevents you from carrying out an instruction.
28. A model client care letter is on the Bar Standards Board website. Provided you have promptly written to your client in the terms of the model letter you will have complied with the notification requirements in paragraph 6. Where the client has previously instructed you in respect of the same matter it may well be unnecessary for you to provide a full client care letter in respect of every new instruction received. Barristers must still ensure that the fundamentals of the client care letter are set out in respect of each new instruction i.e. the work that is to be undertaken, the cost and the payment mechanism. Other matters which you are required to inform your client about, such as the barrister's limitations with respect to litigation, how to complain and the fact the barrister may have to withdraw can be covered by referring the client to the original client care letter.
29. It may also be possible in limited circumstances for you to enter into a retainer or novel fee arrangement with a public access client. However, care should be taken to ensure you continue to observe your general Code duties around independence, conflict of interest and the cab rank rule. Further detailed guidance on this issue is available at the following link:

<http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/remuneration-guidance/retainers-and-novel-fee-agreements/>

(C) Non-application of cab rank rule

30. Paragraph 602 of the Code, the 'cab rank' rule, sets out the presumption that barristers will accept work within their expertise and at an appropriate fee unless certain specified exceptions apply. This rule does not apply to public access work and it is the barrister's choice whether or not to accept a public access case.

(D) Non-discrimination rules

31. In deciding not to accept an instruction, you should be mindful of paragraph 601 of the Code. This applies to advocacy work and states that a barrister must not refuse a case on the following grounds:
- a. that the nature of the case is objectionable to him or to any section of the public;
 - b. that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public; or
 - c. on any ground relating to the source of any financial support which may properly be given to the prospective client. (This provision is applicable to publicly funded work and is therefore not relevant in public access cases.)

32. Paragraph 305.1 of the Code states that a barrister must not, in his professional practice, discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, gender re-assignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief or pregnancy and maternity.
33. The effect of these two rules is that, whilst the 'cab rank' rule does not apply to public access cases, you must not discriminate in the way you accept, refuse or carry out public access instructions. Potential clients may feel aggrieved if a barrister refuses to take on a case and may allege that he did so for improper reasons. It would be prudent for a barrister refusing a case to make a brief note of the reasons for so doing in case this is questioned in future.

(E) Withdrawal from a case

34. Paragraph 608 of the Code provides as follows:

A barrister must cease to act and if he is a barrister in self-employed practice must return any instructions:

- (a) if continuing to act would cause him to be professionally embarrassed within the meaning of paragraph 603.

35. The effect of this provision, in conjunction with paragraph 603(h) of the Code, is that, in addition to the usual reasons for withdrawal from a case, barristers are required to cease to act where they have formed the view (for instance, as a result of receiving further information about the case) that it is in the interests of the client or in the interests of justice for the lay client to instruct a solicitor or other professional client.
36. If, as a result of being told that the barrister cannot continue to act without a solicitor or professional client being instructed, the lay client instructs a solicitor or other professional client, then paragraphs 603(h) and 608(a) of the Code will cease to apply and the barrister will be able to continue to act. It is open to a barrister, therefore, to give the lay client the opportunity to instruct a solicitor or other professional client before the barrister finally withdraws from the case.
37. In a public access case, the issue of withdrawing from a case will only arise once the barrister has accepted the instruction. That will usually be when the client care letter is sent. You will need to take care in deciding whether to withdraw not only because you owe a duty under the Code to act in the best interests of your client but also because you may owe him contractual duties. Unless your decision to withdraw is justified by your obligations under the Code you are likely to place yourself in breach of your contract with the lay client.
38. It will therefore very rarely be appropriate for a barrister to withdraw where there is simply a difference of opinion between the barrister and the lay client. In particular, the fact that a lay client legitimately rejects a barrister's advice on tactics or a settlement will not of itself justify the barrister in withdrawing from the case; nor does the fact that a lay client may raise a minor complaint or question about the service provided by the barrister. Where such disagreements arise, however, the barrister would be prudent to make full attendance notes of the discussion and have them agreed by the client.

39. A barrister acting for a lay client who is a party to proceedings must bear in mind the particular difficulties which the lay client might encounter if the barrister withdraws. A hearing may be imminent; or the lay client may experience real difficulty in finding a solicitor willing to take on the case. Where there is a difference of opinion or doubt as to whether a barrister should withdraw, and withdrawal would or might cause difficulties for the lay client, it would be prudent for a barrister to contact the Bar Council Public Access enquiries line (0207 611 1472) for guidance.
40. Where a barrister considers that he is required to withdraw and it appears that, by reason of the proximity of a hearing, a lay client may have difficulty finding another lawyer to take on the case in the time available, the barrister should provide such assistance as is proper to protect the client's position. This can include:
- a. applying to the court for an adjournment if it is necessary to withdraw during the course of the hearing;
 - b. drafting letters for the client to send to the court and the other side seeking an adjournment;
 - c. providing supporting letters for the client explaining that, for professional reasons, he has had to withdraw and, so far as this is possible without breaching confidentiality or prejudicing the lay client's position, explaining the reasons;
 - d. where the matter is urgent or it is otherwise appropriate, contacting solicitors or other suitable intermediaries who may be willing to take on the client's case.

(F) Complaints

41. The Code requires barristers to have in-house procedures for dealing with complaints (paragraph 403.5(d)(ii)). Such procedures can be a useful source of feedback to Chambers and also a way of retaining client goodwill when mistakes occur. In public access work, particularly contentious matters, Chambers are likely to find that a substantially greater number of complaints come their way from clients who may or may not have legitimate grievances. All such complaints should be addressed and acted upon in an appropriate time.
42. Barristers should have regard to the Bar Standards Board's guidance on complaints handling. In particular, barristers must:
- a. ensure that the client is told about the procedure in the client care letter;
 - b. deal with complaints promptly and according to that procedure as they arise;
 - c. inform the client that, if dissatisfied with the way in which the complaint has been handled, he may refer it to the Legal Ombudsman.

Fees

(A) Notifying the client

43. A barrister who accepts public access instructions must forthwith notify his lay client in clear and readily understandable terms of the work he has agreed to perform and the fees which he proposes to charge or the basis on which his fee will be calculated. You should therefore complete paragraphs 4 and 13 of the model client care letter which deal with these matters.
44. Paragraph 701(f) of the Code requires barristers to keep adequate records to support fees charged, and to provide such records or details to clients on request. Such records should contain separate items for each piece of paperwork and, where these are substantial, separate items for each telephone advice. If the client requires further detail and, notably, the exact work done and the cost of it in respect of each item involved this should be provided.

(B) Payment in advance

45. In certain circumstances, it will be possible to request payment in advance from public access clients without breaching paragraph 407 of the Code which prohibits a barrister handling client money 'other than by receiving payment of remuneration'. It is proper to do so where there is a brief to appear in a trial since the brief fee is normally regarded as payable as soon as the brief is delivered and accepted. In the absence of agreement to the contrary, the standard and traditional arrangement has been that the fee is due even if the case collapses before the hearing. Therefore, if a barrister receives the fee with the brief, he is simply accepting money which is already payable to him. This should be made clear to the client.
46. In the case of paperwork, where a firm fee is fixed in advance, it is possible for a barrister to accept the fee in advance, particularly if the terms of his engagement are expressed to be that the agreed fee is payable forthwith. Obviously, if the barrister failed to undertake the work, for whatever reason, the client would be entitled to restitution of the payment.
47. Barristers are not entitled to accept a payment on account of fees, and are not entitled to accept payment in advance of paperwork when the quantum to be charged is can not to be determined until the work has been completed. Further guidance can be found at:

<http://www.barstandardsboard.org.uk/code-guidance/guidance-on-prohibition-in-handling-client-money/>.

(C) Withholding paperwork until paid

48. Barristers may withhold paperwork until fees have been received. We recommend, however, that it should be made clear to the client at the time of instruction that this will be the arrangement. It should be expressly stated in the client care letter. Barristers should note that while they are permitted to withhold the work they have done, they may not be permitted to withhold the client's papers.

(D) Lien

49. We are not aware of any authority by which barristers gain a general lien on documents belonging to the client until the fees are paid, although there seems to be nothing in the law to invalidate an express agreement made between a barrister and a client permitting the barrister to exercise such a lien.-In the absence of a contractually enforceable lien you should return the papers to your client on request, but first ensure that you have complied with your record keeping obligations (see paragraph 69 below).

(E) Disbursements

50. A barrister may agree with his lay client that he is entitled to charge disbursements, such as travel and accommodation expenses and photocopying. This can include charging for the work of a clerk, administrative assistant or paralegal. Please note that any assistant should not undertake any work that is deemed to be legal services (see part X definitions of the Code). This must be agreed in advance and therefore should be included in the client care letter.

(F) Over-charging and disputes

51. It is likely that clients will, on occasion, seek to dispute the amount that is charged by a barrister or to claim that they have been overcharged. The scope for such disputes is obviously greatly reduced if there is clarity about the charging arrangements beforehand.
52. It is obviously appropriate for the barrister to seek to resolve the dispute informally if this is possible. Otherwise two options exist:
- a. the client can refuse to pay and the dispute may have to be resolved by litigation;
 - b. the client can complain to the Office of the Legal Ombudsman ("LeO"), if he considers that the barrister has provided inadequate professional services. In appropriate cases LeO has the power to fine the barrister and/or order that fees be repaid. Complaints may also be made to the Bar Standards Board where the alleged conduct may amount to professional misconduct.

(G) Conditional Fee Agreements (CFA) and Damages-based Agreements

53. While in principle there is nothing to prevent barristers undertaking public access work on a conditional fee basis, particular care should be taken in these circumstances.
54. There is no standard or model CFA between a barrister and a lay client. The agreement would have to comply with the Courts and Legal Services Act 1990, ss. 58 and 58A. Whilst the Law Society Code requires solicitors to explain the cost implications of the CFA to a lay client there is no equivalent guidance for barristers. You may not be in a position to advise a client properly about insurance cover.
55. You should also consider the question of payment. Payment in advance or on completion of a particular piece of work would not be possible since, by

definition, no fee is payable until success had been achieved. Any money paid in advance would be the client's money and barristers are not permitted to hold this. However, the Bar Standards Board is developing criteria for the approval of third party payment services and barristers will be able to take advantage of such services as and when approved. The Bar Council has obtained approval from the Financial Services Authority for its third party payment service (BARCO) and we are content. There are also occasions on which the barrister may have great difficulty in actually finding out whether success has been achieved. This would happen if, for example, the client were required to instruct a solicitor to conduct litigation and the barrister were not instructed further, or if the client reached a settlement with the other side. For these reasons, we consider that it will rarely be practical for barristers to undertake public access work on a CFA basis.

Intermediaries

56. A barrister may find himself asked to perform legal services by a person or organisation that is an intermediary, for the benefit of a named client. For example, an independent financial adviser may wish to take advice for a client, or arrange to have a document drafted. A son or daughter may want to instruct you on behalf of an elderly parent. A sponsor in this country may wish you to act in an immigration matter for a person who is out of the country. There is no objection in principle to a barrister accepting instructions from such an intermediary, but care must be taken in respect of a number of matters.
57. The barrister must ensure that the intermediary is not acting, or proposing to act, as a 'litigator'. It is a criminal offence under the Legal Services Act 2007 for an unauthorised person to act as a litigator, and a barrister who facilitated such activity might also be criminally liable.
58. The barrister must ensure that both intermediary and lay client understand the true nature of the arrangement. To this end, the barrister should send a client care letter to both intermediary and lay client. It is assumed that the intermediary will undertake contractual responsibility for the barrister's fees: if the intermediary does not wish to do so, the barrister would be entitled to enquire why he should deal with the intermediary at all, rather than directly with the lay client. Model letters to both intermediary and lay client are on the Bar Council's website.
59. The barrister should bear in mind the possibility that the intermediary may have negotiated a contingent fee arrangement with the lay client and the potential conflict of interest which could thus arise between intermediary and lay client. Barristers are already familiar with the risks of potential conflicts of interest between solicitors and lay clients where conditional fee agreements have been made; but in the case of unregulated intermediaries they may feel that there is an even greater need to be alert to the risk that the manner in which information is transmitted to the barrister may have been coloured by the intermediary's own commercial interests.
60. By paragraph 703 of the Code, if a barrister forms the view that there is a conflict of interest between client and intermediary, for example, because the intermediary has been negligent, he must consider whether it would be in the client's interest to instruct another professional, and, if he considers it would be, he must both so advise and take steps to ensure that such advice reaches the

lay client. However, it is not the barrister's duty to police the relationship between intermediary and lay client, which is a private matter to them.

61. Where the intermediary instructs the barrister to perform advocacy services, for example before a domestic tribunal or in an arbitration, the barrister must take such steps as appear appropriate to ensure that the lay client does, in fact, wish the barrister to appear for him. In many cases this will involve having a conference with the lay client. A barrister performing advocacy services informs the tribunal that he acts for the lay client, and must ensure that this is correct. A barrister has the same obligation to a tribunal to which he sends a skeleton argument.
62. The barrister must have regard to the relevant provisions of the Money Laundering Regulations (see paragraphs 71 to 74 below). Where instructed by an intermediary, the identification procedures must normally be followed in respect of the lay client by the barrister. The only exception will be where the intermediary is himself a regulated professional and informs the barrister by letter or certificate that he is a professional within the regulated sector as defined in POCA and the Money Laundering Regulations and that he has carried out identification procedures
63. A barrister who is approached by an intermediary remains under the same obligation to satisfy himself before accepting the case that it is appropriate to do so without a solicitor or other professional client as he would be under if he were approached by the client direct. If the barrister is familiar with the intermediary and the way in which the intermediary operates then this will be a relevant factor, but will not obviate the need for the barrister in respect of each prospective case to satisfy himself that no solicitor is required.
64. The client care letter to the lay client should be sent to the client's home or, as appropriate, business address and not to the intermediary's address. In consequence such address will be one of the pieces of information which a barrister will need before accepting instructions through an intermediary.
65. It is prohibited for a barrister to pay or receive a referral fee to/from an intermediary or any other person for introducing a client or providing him with work. Full guidance on referral fees can be found at:

<https://www.barstandardsboard.org.uk/code-guidance/commission-and-payment-by-barristers-for-work/>

Administration and record keeping

66. When taking on public access work, Chambers need to be aware that the expectations of lay clients are likely to be very different from those of solicitors. They will not necessarily understand that barristers work on a different basis from solicitors and that it will not always be possible to speak directly to the barrister and that there are limits to what can and cannot be done by barristers. This should be made clear at an early stage and may be something that you would want to discuss with a client at a preliminary meeting. Barristers and clerks may need to adopt a flexible approach to dealing directly with the public and keep under review whether Chambers' administration should be adjusted accordingly.

67. In the absence of a solicitor it will be crucial for the barrister to maintain records about his role in providing advice to the client in case questions or complaints arise afterwards. In particular, if it is not clear from other documentation, the barrister should maintain a record of:
- a. the initial contact with the client;
 - b. the work he has been asked to do;
 - c. the dates of conferences and notes of advice given;
 - d. records of telephone conversations and advice given;
 - e. significant changes to instructions; and
 - f. hearings attended and advice given.

These records should be retained for at least seven years

68. It is likely that lay clients will provide the barrister with original documents. It is for each barrister to decide, in consultation with the client, whether he wishes to retain those documents or work from copies. It is perfectly appropriate to charge for photocopying the documents but you should make it clear in your client care letter what the charge will be. The barrister may also be asked to store the original documents on behalf of the client, but barristers are strongly discouraged from agreeing to do so. There will rarely be any reason for the barrister to retain originals, and there will normally be positive reasons for not doing so. If the case reaches the stage where documents have to be disclosed and inspected this will be undertaken by the lay client, or by a solicitor on his behalf, not by the barrister. The following matters should be kept in mind:
- a. the original documents belong to the client and, unless otherwise agreed (for example because a lien has been agreed), must be returned to the client on demand at any stage;
 - b. if the barrister agrees to store original documents for the client the barrister must keep the documents in a secure place and may be liable in negligence for failing to do so;
 - c. it will almost always be impractical for barristers to store original documents for long periods of time unless Chambers are prepared to guarantee such a service even after the barrister has left Chambers or ceased to practise. If originals are retained the barrister should specify to the client a date by which they must be collected or will be returned.

69. In any case it is prudent to keep papers following the conclusion of the case because there might be an appeal, a complaint or an action for professional negligence. If a solicitor is instructed that obligation generally falls on the solicitor. In a public access case the obligation falls on the barrister. You must keep for a period of seven years the originals, copies or a list of all documents you have received or take reasonable steps to ensure that the lay client will do so.

70. Electronic storage is permissible providing it complies with the Bar Council's 'Guidance on Information Security'.

Money laundering and proceeds of crime

71. The Bar Council has produced detailed guidance on the Money Laundering Regulations 2007 and the Proceeds of Crime Act 2002. This guidance applies to all instructions, whether public access or not. The following is a brief summary of the guidance and reference should be made to the Bar Council's detailed guidance.
72. The Money Laundering Regulations apply to barristers who are asked to advise at the planning or execution stage in transactions which involve either:
- (a) the buying or selling of real property or business entities;
 - (b) the creation, operation, or management of trusts, companies or similar structures.
73. It follows that much of the work done by barristers will not trigger any obligations under the Regulations. The Bar Council's view is that members of the Bar most likely to find themselves falling within the ambit of the Regulations are members of the Chancery Bar involved in non-contentious advisory work, and in particular, those self-employed barristers who are instructed to advise clients at the planning/execution stage of real property/business transactions, or in relation to setting up companies, trusts or similar structures. Whilst many contentious matters will conclude with a negotiated settlement that could arguably be considered, for the purposes of the Regulations, to be transactions, the Bar Council takes the view that, having regard to the reasoning of the court in *Bowman v Fels* [2005] EWCA 226, advising or acting in connection with an agreement that is intended to compromise a genuine dispute will not fall within the Regulations.
74. The requirements upon barristers who conduct relevant business are clearly set out in the Bar Council guidance. In short they are:
- Customer due diligence – e.g. (i) identifying the client or beneficial owner prior to the establishment of the business relationship, or the execution of the transaction, (ii) obtaining information about the business relationship or transaction, (iii) monitoring the business relationship on an ongoing basis.
 - Record keeping procedures – records of all relevant transactions and evidence of client identity must be maintained for five years from the date on which the last transaction was completed.
 - Procedures to forestall money laundering, and training staff – all barristers and sets of Chambers who undertake work within the ambit of the Regulations should have in place and operate general systems and procedures for ensuring compliance with the Regulations. This includes training staff on the law relating to money laundering/terrorist financing and on how to recognise and deal with transactions and other activities which may be related to money laundering/terrorist financing.
75. The Proceeds of Crime Act makes it an offence to enter into or become concerned in an arrangement which you know or suspect facilitates (by

whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

76. In light of *Bowman v Fels*, the Bar Council's view is that this offence cannot be committed by a barrister whilst he is engaged in the ordinary course of litigation. However if the barrister suspects that the litigation is a sham or is asked to provide advice which he foresees may be used for money laundering purposes he should make a disclosure. The guidance sets out the disclosure requirements.

Solicitors and professional clients

77. Two main issues arise in respect of solicitors and other professional clients in relation to public access work:
- a. acceptance of work where there is already a solicitor or professional client advising the lay client; and
 - b. the recommendation of solicitors to public access clients.
78. There is no objection to a barrister accepting instructions from a client where a solicitor is currently instructed in the matter, if the solicitor is aware that the client is doing so. There is no obligation on the solicitor to instruct the barrister directly and, in some cases, solicitors having done the necessary preparatory work will be content for the lay client then to brief the barrister directly. In such circumstances, however, it is important that the barrister should:
- a. consider whether there is any reason why the solicitor needs to instruct the barrister directly (for example, because the matter is complex or the lay client cannot properly undertake the litigation component of the case);
 - b. be satisfied that the solicitor is aware that the client is instructing the barrister.

If satisfied that the client does not require a solicitor's involvement, then the barrister may accept the case.

79. A more difficult question arises where the solicitor does not know that the client is coming to the barrister for advice. In some cases, the client will be seeking advice on the conduct of the solicitor or for a second opinion. Here there is no reason why the barrister should not provide advice. The barrister should not inform the solicitor of this without the client's consent. Where a case is litigious it is advisable for the barrister, if permissible by the client, to liaise with the solicitor as necessary
80. It is possible that clients will wish to seek counsel's advice directly in respect of matters for which a public funding certificate is already in existence and where the certificate does not extend to counsel's advice. Counsel should be alert to guard against any breach of the rules against "topping up". Where the client has indicated that they already have a solicitor, counsel should seek to establish whether or not a certificate is in existence in respect of such work.
81. If a barrister decides that a lay client should instruct a solicitor or professional client, the client may well ask the barrister to recommend a particular individual. A

barrister may properly do this (and, if prudent, may well suggest suitable names) provided that:

- a. the barrister has reasonable grounds to believe that the solicitor or professional client is competent to do the work; and
- b. the barrister receives no payment for the referral; and
- c. the solicitor is free to instruct another barrister.

ANNEX A

PRO FORMA FOR USE BY BARRISTERS WITH LESS THAN THREE YEARS' STANDING

Name of Barrister:.....

Date of call (month/year):.....

Chambers/entity:.....

<p>Basic case details e.g. month and year accepted, when concluded and area of law</p>	
<p>Case issues e.g. any difficulties in the client undertaking the litigation component, problems/matters that required advice to be sought from a 'qualified person', matters that required additional research or learning, was it necessary to involve a solicitor or withdraw.</p>	

Summary of any complaint raised by the client and, if so, nature of complaint and how resolved	
Summary of any other comments or feedback received from the client about the service provided and any steps taken to address feedback	