

Legal Services Board – Decision Notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

Bar Standards Board application for approval of amendments to the Bar Code of Conduct - Legal Disciplinary Practices and Partnerships of Barristers

Introduction

The Legal Services Board (“LSB”) is required by Part 3 of Schedule 4 of the Legal Services Act 2007 (“the Act”) to review and approve or reject the Regulatory Arrangements of the Approved Regulators (“AR”). The Bar Council (“BC”) is an Approved Regulator and whose regulatory functions are carried out through its regulatory arm the Bar Standards Board (“BSB”).

Paragraph 25 of Schedule 4 explains that the LSB must approve a proposed change to the Regulatory Arrangements unless we are “...satisfied that...” the approval would fall within one or more of the criteria specified in sub Paragraph 25(3) (and listed in the footnote below¹). If the LSB is not satisfied that one or more of the criteria are met, then it must approve the application in whole, or at least the parts of it that can be approved when only part of the application meets the criteria.

As provided for by Paragraphs 20(1) and 23(3) of Schedule 4 the LSB has made rules about how the application to the Regulatory Arrangements must be made including the contents of that application. The rules highlight the Applicant’s obligations under section 28 of the Act to have regard to the Better Regulation Principles. The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub Paragraph 25 (3) (f) requires that each proposed alteration has been made or is likely to be made in accordance with the procedures which apply in relation to making of the Alteration. This includes the LSB rules.

The LSB will approve Regulatory Arrangements in so far that they appear to achieve their intended outcome and satisfy the sub Paragraph 25(3) criteria. Most notably there must be no adverse impact on the Regulatory Objectives overall and the alterations and the process by which they have been produced must be consistent with Better Regulation Principles.

We received the BSB application for approval of amendments to the Bar Code of Conduct - Legal Disciplinary Practices and Partnerships of Barristers on Monday 1 February 2010. This is the decision notice in relation to that application. In the following paragraphs we explain what we were requested to consider, the concerns that we raised in relation to the approval criteria and how these have been resolved in discussion with the BSB.

¹ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the Regulatory Objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

The chronology for handling of this application can be found towards the end of this decision document.

Decision

The BSB application is for approval of alterations to the Regulatory Arrangements which will, subject to safeguards contained within the code and guidance, lift existing restrictions to allow:

1. Barristers to become managers of Legal Disciplinary Practices (“LDPs”) regulated by the Solicitors Regulation Authority or bodies regulated by other ARs without having to re-qualify as solicitors or another type of authorised person.
2. Barristers to be shareholders in LDPs whether or not they are employees or managers of the LDP in question.
3. Barristers to be permitted to practice in more than one capacity at the same time - in other words part-time as a self-employed barrister within chambers and part-time as a barrister in an employed or managerial capacity.²

Overall we agree with the BSB’s assessment that the proposed alterations will facilitate and promote the Regulatory Objectives of the Act and in particular:

1. Improving Access to Justice
2. Protecting and promoting the interest of consumers
3. Promoting competition
4. Encouraging an independent, strong, diverse and effective legal profession.

We note the letter from the Office of Fair Trading to the BSB which welcomes the application as “a step forward to achieving a less restrictive approach to competition, provided that this is the first step to further rule changes that allow barristers to join other forms of ABS³.” (Extract from letter to Bar Standards Board, 22 February 2010). We agree with the OFT’s assessment that these changes go only part of the way towards opening up the market in the interests of consumers⁴ and look to the BSB to maintain momentum towards delivering the reforms envisaged by the Legal Services Act. The BSB has confirmed at paragraph 4 of the guidance submitted with this application that it will consult on whether barristers will be permitted to become either managers or employees of ABS during 2010/11.

We are satisfied that, having considered the application in the context of Schedule 4 sub Paragraph 25(3) criteria, we have no grounds for refusing the application made in whole or in part and are therefore granting the application.

² For example as an employee or manager within an LDP, or law firm, government body or other law department.

³ Alternative Business Structures

⁴ In line particularly with the Regulatory Objective of protecting and promoting the interest of consumers and the Regulatory Objective of promoting competition

Process

As the first application for approval to changes to the Regulatory Arrangements, and one of three from the BSB, we have taken a pragmatic approach to processing the application and developing a mutual understanding of the approach to approving applications. We have agreed with the BSB to conduct a joint “lessons learned” exercise following completion of the first three BSB applications – “Legal Disciplinary Practices and Partnership of Barristers”, “The Structure of the Self-employed Practice” and “Application of the Public Access Scheme”⁵. We will, as a matter of routine, conduct similar exercises following the completion of applications from other Approved Regulators and communicate any generic lessons for both Approved Regulators and the LSB itself as necessary.

In addition to approving the application, there are certain areas upon which we wish to comment in this decision notice. These are the areas that raised issues in relation to the approval criteria as described in the introduction to this document and therefore further clarification was required.

Definition of “Recognised Body”

In considering the application we were concerned about the definition of “Recognised Body”, as defined at Part X – Definitions, a term that already has specific legislative meaning being defined in the Administration of Justice Act 1985 (“AJA”) and the subsequent impact on the Regulatory Arrangements.

The BSB have used an altered definition to that in the AJA, one which differs from that used by other Approved Regulators and explicitly excludes ABS. We were concerned that regulatory confusion may be caused by deviation from the statutory definition that is being used by other Approved Regulators and that this would not be consistent with the Better Regulation Principles. Following discussions with the BSB, they have included a footnote in the definitions to clarify and explain the different definition and we are content with this.

We also had concerns about the wider implications of this definition, particularly in the replacement of rule 502a, which allows barristers to supply legal services to the public where they act as employees of solicitors, with rule 205b, which only permits barristers to supply legal services to the public where they are employees (or managers) of a “Recognised Body”. This appeared to us to introduce new restrictions to the ways in which barristers can practice than are permitted under the current code of conduct which may impact negatively on the Regulatory Objectives, including that of promoting competition in the provision of services.

We have been reassured by the BSB’s explanation that the proposed alterations were not intended to pre-empt decisions on barristers working in ABS either as managers or employees, on which the BSB will consult during 2010/11. We have also discussed with the BSB our particular concern that this amendment, combined with the definition of

⁵ The applications “The Structure of the Self-employed Practice” and “Application of the Public Access Scheme” are under consideration by the LSB at the time of this decision.

“Recognised Body,” may be perceived by barristers considering the prospective opportunities of ABS as pre-empting a decision against future barrister involvements with ABS. Prior to us making our final decision, the BSB therefore submitted an additional section in the guidance at paragraph 4 which provides context to their position regarding barristers and ABS together with a commitment that these issues will be addressed during 2010/11. We consider that this amendment provides clarity as to the BSB’s current position, which is one of neutrality with regard to future decisions on barrister involvement with ABS.

Review of dual capacity rules (see guidance document paragraph 18)

The amendment to the code of conduct which allows barristers to practice in dual capacity is accompanied by guidance which states that “*particular attention is drawn to the fact that the Board intends to review the rules and guidance for dual practice in light of experience at the expiry of two years from the implementation of the rule changes*” (paragraph 18). We welcome this commitment to review whether the desired outcome has been achieved as is required by rule 9(f) of Rules for Rule Change Applications. However we were concerned that the guidance submitted with the original application suggested that the outcome of the review would be either to continue or to ban allowing barristers to practice in dual capacity and this would potentially impact on the Regulatory Objective of promoting competition by acting as a deterrent to barristers interested in taking advantage of this freedom. The review could, for example, alternatively highlight issues that can be addressed by targeted alterations to dual capacity that do not amount to a ban.

Following discussions with the BSB they have amended their guidance to remove the implication that the relaxation of restrictions on dual capacity would end after a defined two year period, unless positively renewed after the review.

Any subsequent changes to the Regulatory Arrangements arising from a review would require LSB approval. Any subsequent application to reinstate restrictions would have to convince us that imposing the restrictions would better facilitate the achievement of the Regulatory Objectives than not imposing them.

Paragraph 31 of the guidance originally submitted with the application, now paragraph 36 in the final version of the guidance.

Paragraph 31 of the guidance accompanying the code changes submitted alongside the original application made reference to procurement or block contracting vehicles, setting out the circumstances in which regulation would apply.

We were concerned that the guidance may have had the unintended effect of steering practitioners towards a particular structure (i.e. one that is controlled by barristers) to the exclusion of others and that this may have consequences on the regulatory objective of promoting competition. We also felt that the Bar Council, as a professional body, would be better placed to provide guidance on particular models and noted that such non-regulatory guidance would not require approval from the LSB.

Following discussions with the BSB, they have amended the guidance so that it explains the circumstances in which regulation applies without steering towards a particular model.

Disciplinary arrangements for barristers employed in LDPs

We had some concerns that the application did not sufficiently explain how disciplinary arrangements would operate in practice for a barrister operating in an entity regulated by a different Approved Regulator – most commonly the Solicitors Regulation Authority and the Solicitors Disciplinary Tribunal. Following discussions with the BSB, they have assured us that this has been fully considered and that appropriate Memoranda of Understanding are being developed to ensure that there is no regulatory gap. We note that the MoU will be part of the Regulatory Arrangements and therefore will form part of a subsequent application to us under the alteration of Regulatory Arrangements process.

Equalities Impact Assessment

Our Rules for Rule Change Applications do not specifically require an Impact Assessment to be submitted alongside an application. Our duty is to consider applications in terms of the criteria in the Act and supporting rules. However, where Approved Regulators have conducted an Impact Assessment as part of the policy making process, we would anticipate that applicants may wish to draw on this analysis within their applications to support their analysis against the required criteria.

We note that the Equalities Impact Assessment submitted with this application is focused upon assessing the full opening up of the market as envisaged by the original passage of the Act rather than the impact of the proposed rule changes. For example a discussion around the potential impact of ABS on the diversity of the legal sector due to the disproportionate number of Black and Minority Ethnic practitioners in small practices was included.

We agree that cumulative impact and long term effects are of fundamental importance. However, in considering whether or not to grant an application, we have to consider factors relevant to that application and so it is our view that any Impact Assessment supporting an application should be focused upon the impacts of applicable rule changes as opposed to the wider impacts of the Act.

On the wider issue of Impact Assessments, our view is that the need to analyse and justify existing regulatory restrictions is equally as important as assessing the impact of any change. Hence we would expect to see evaluations of “do nothing” options and baseline data developed to ensure that Impact Assessments are evidence based.

Chronology

- The LSB confirmed receipt of an application from the BSB for approval of amendments to the Bar Code of Conduct in respect of Legal Disciplinary Partnerships on Monday 1 February 2010.
- The 28 day initial decision period for considering the application originally ended on Sunday 28 February 2010, 28 calendar days following confirmation of receipt of the application.
- Following discussions with the BSB, an extension notice was issued by the LSB on Friday 26 February 2010 extending the initial decision period to Thursday 1 April 2010 to allow time for the BSB to provide additional information to be considered alongside the original application.
- Additional information from the BSB, including amended versions of both the code and guidance, was received on Tuesday 2 March 2010. The revised documentation was published on the LSB website on Wednesday 10 March 2010 and has not attracted comment.
- Following further discussions and a meeting between the BSB and LSB on Thursday 11 March, a final version of the guidance was submitted to the LSB for consideration on Monday 15 March 2010. The LSB has since approved a further minor amendment of adding the title 'Ownership of Interests in Recognised Bodies' before rule 209 of the Code (following submission of a final version of the code on Wednesday 24 March 2010).
- This decision notice is being published on the LSB's website on Friday 26 March 2010.

Code Amendments – final version submitted by the BSB on 24 March 2010

PART I - PRELIMINARY

101. The Eighth Edition of the Code was adopted by the Bar Council on 18 September 2004 and came into force on 31st October 2004.
102. This Code includes the Annexes.
103. Amendments and additions to this Code may be made by Resolution of the Bar Standards Board which shall be operative upon such date as the Resolution shall appoint or if no such date is appointed on the later of:
- (a) the date of the Resolution; and
 - (b) the date when approval of the amendment or addition, if required, is given by the Legal Services Board under Schedule 4 of the Legal Services Act 2007.

Amendments and additions will be published from time to time in such manner as the Bar Standards Board may determine.

General purpose of the Code

104. The general purpose of this Code is to provide the requirements for practice as a barrister and the rules and standards of conduct applicable to barristers which are appropriate in the interests of justice and in particular:
- (a) in relation to self-employed barristers to provide common and enforceable rules and standards which require them:
 - (i) to be completely independent in conduct and in professional standing as sole practitioners;
 - (ii) to act only as consultants instructed by solicitors and other approved persons (save where instructions can be properly dispensed with);
 - (iii) to acknowledge a public obligation based on the paramount need for access to justice to act for any client in cases within their field of practice;
 - (b) to make appropriate provision for:
 - (i) barrister managers, employees and owners of recognised bodies; and

- (ii) employed barristers taking into account the fact that such barristers are employed to provide legal services to or on behalf of their employer.

Application of the Code

105. A barrister must comply with this Code which (save as otherwise provided) applies to all barristers whenever called to the Bar.

105A. Part IV applies only to self-employed barristers.

105B. Section 1 of Part V applies only to employed barristers.

105C.1 Only Parts I, II III, Section 2 of Part V, rules 606.1, 607, 608, 701(a), 701(b)(i), 704, 705, 708, 708.1 and Parts VIII, IX, X and XI apply to barristers practising as managers or employees of recognised bodies regulated by another approved regulator when doing work of a sort that the body is permitted to do.

105C.2 In so applying, rule 606.1 is to be read as if it referred to a barrister or the recognised body being retained rather than receiving instructions.

106. Subject to the International Practice Rules (reproduced in Annex A) this Code applies to International work and whether a barrister is practising in England and Wales or elsewhere.

107. A registered European lawyer must comply with this Code in the manner provided for by the Registered European Lawyers Rules (reproduced in Annex B).

Waiver of the Code

108. The Bar Council shall have the power to waive the duty imposed on a barrister to comply with the provisions of this Code in such circumstances and to such extent as the Bar Council may think fit and either conditionally or unconditionally.

PART II - PRACTISING REQUIREMENTS

General

201. For the purposes of this Code a barrister practises as a barrister if:
- (a) he supplies legal services and in connection with the supply of such services:
 - (i) he holds himself out or allows himself to be held out as a barrister; or
 - (ii) he exercises a right which he has by reason of being a barrister; or
 - (b) he acts as a manager of a recognised body and as such is required by the rules of that body's approved regulator to hold a practising certificate issued by the Bar Standards Board;
 - (c) and any reference to the supply of legal services includes an offer to supply such services.
202. Subject to the provisions of this Code a barrister may practise as a barrister provided that:
- (a) he has complied with any applicable training requirements imposed by the Training Regulations which were in force at the date of his Call to the Bar;
 - (b) he has complied with any applicable requirements of the Continuing Professional Development Regulations (reproduced in Annex C);
 - (c) he has a current practising certificate issued by the Bar Council in accordance with the Practising Certificate Regulations (reproduced in Annex D);
 - (d) he has provided in writing to the Bar Council details of the current address(es) with telephone number(s) of the chambers or office from which he supplies legal services and:-
 - (i) if he is an employed barrister, the name address telephone number and nature of the business of his employer;¹

- (ii) if he is a manager or employee or owner of a recognised body the nature of his role and the name, address, email address, telephone number and name of the recognised body and of its approved regulator.

Rights of audience

203.1 A barrister may exercise any right of audience which he has by reason of being a barrister provided that:

- (a) he is entitled to practise as a barrister in accordance with paragraph 202; and
- (b) if he is of less than three years' standing his principal place of practice is either
 - (i) a chambers or annexe of chambers which is also the principal place of practice of a qualified person who is readily available to provide guidance to the barrister; or
 - (ii) an office of an organisation of which an employee, partner, manager or director is a qualified person who is readily available to provide guidance to the barrister.

203.2 For the purpose of paragraphs 203.1(b) and 204(c)(i) a barrister shall be treated as being of a particular number of years' standing if he:

- (a) has been entitled to practise and has practised as a barrister (other than as a pupil who has not completed pupillage in accordance with the Training Regulations) or as a member of another authorised body;
- (b) has made such practice his primary occupation; and
- (c) has been entitled to exercise a right of audience before every Court in relation to all proceedings

for a period (which need not be continuous and need not have been as a member of the same authorised body) of at least that number of years.

203.3 A person shall be a qualified person for the purpose of paragraph 203.1(b) if he:

- (a) has been entitled to practise and has practised as a barrister (other than as a pupil who has not completed pupillage in accordance with the Training Regulations) or as a member of another authorised body 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) for the previous two years
 - (i) has made such practice his primary occupation, and
 - (ii) has been entitled to exercise a right of audience before every Court in relation to all proceedings;
- (c) is not acting as a qualified person in relation to more than two other people; and
- (d) has not been designated by the Bar Council as unsuitable to be a qualified person.

203.4 This paragraph 203 is subject to the transitional provisions at paragraphs 1102 to 1105.

Supply of legal services to the public

204. A practising barrister may supply legal services to the public provided that:

- (a) he complies with the requirements of paragraph 203.1;
- (b) he is covered by insurance against claims for professional negligence arising out of the supply of his services in such amount and upon such terms as are currently required by the Bar Standards Board or alternatively (in the case of:
 - (i) an employed barrister; or
 - (ii) a barrister practising as a manager or employee of a recognised body)his employer or the body, as the case may be, is covered by such insurance in such amount and upon such terms as are required by the approved regulator of the employer or body (or if none, in such amount and on such terms as are currently required by the Bar Standards Board); and
- (c) In the case of legal services supplied pursuant to paragraph 401(a)(iii):
 - (i) he is more than three years' standing

- (ii) he has complied with such training requirements as may be imposed by the Bar Council; and
- (iii) he has notified the Bar Council that he holds himself out as willing to accept instructions from lay clients.

205. A practising barrister may supply legal services to the public as:-

- (a) a self-employed barrister;
- (b) a manager or employee of a recognised body, subject to the rules of the approved regulator of that body;
- (c) an employed barrister to the extent permitted by paragraph 502.

206.1² A barrister called before 31 July 2000 who is deemed to be practising only by virtue of paragraph 201(a)(i) in England and Wales and who does not and is not required either by the BSB or by any approved regulator to hold a practising certificate under this Code shall not be subject to the rules in this Code applying only to practising barristers provided that:

- (a) If he supplies any legal services to any person:-
 - (i) He provides in writing to the Bar Council details of the current address(es) with telephone number(s) of the office or premises from which he does so, and:-
 - (1) if he is employed, the name address telephone number and nature of the business of his employer;
 - (2) if he is an employee or owner or manager of a recognised body, the name address, email address, telephone number and the name of the recognised body and its approved regulator
 - (ii) Unless he is employed only to offer services to his employer or to the recognised body of which he is an employee he (or, if he is supplying legal services to clients of his employer or a recognised body of which he is an employee) that employer or body is currently insured by insurers authorised to conduct such business against any and all claims in respect of civil liability for professional negligence arising out of or in connection with the supply of legal services for at least the first £250,000 of each and every claim, with an excess not exceeding £500.
- (b) Before supplying legal services to any person, employer or recognised body, and when first dealing with any third party in the course of supplying legal services, he informs them fully and comprehensibly in writing (a) of his status and the fact that he does not hold a practising certificate under this Code, (b) of the relevant limitations under this Code on the legal services he may undertake, (c) that he is not fully regulated by the Bar Standards Board, and (d) of the absence of available compensatory powers for any inadequate professional service he may render.

² Paragraphs 206.1 and 206.2 are effective from 31st July 2005

206.2 A barrister whenever called who is deemed to be practising only by virtue of paragraph 201(a)(i) outside England and Wales, who does not and is not required either by the BSB or by any approved regulator to hold a valid practising certificate under this Code and who is not subject to paragraph 4(e) of the International Practice Rules shall not be subject to the rules in this Code applying only to practising barristers provided that he complies with the provisions of paragraph 206.1.

Acting in a dual capacity

207. A barrister may practice or be involved with the supply of legal services in more than one capacity only in the following circumstances:

(a) in accordance with rule 806; or

(b) after:-

(i) having notified the BSB in writing of an intention so to do and after supplying the BSB with such information as the BSB requires in relation thereto; and

(ii) having agreed with each employer or recognised body with which the barrister is involved a protocol that enables the barrister to avoid or resolve any conflict of interests or duties arising from practice and/or involvement in those capacities.

208. A barrister who practices or is involved with the supply of legal services in more than one capacity pursuant to paragraph 207(b) above must:-

(a) provide a copy of each protocol required by paragraph 207(b)(ii) to the Bar Standards Board on request; and

(b) maintain (and make available to the Bar Standards Board on request) a record of referrals by the barrister to the employer or recognised body and of instructions received by the barrister from the employer or recognised body.

(c) refuse to accept instructions in any case where so acting gives rise to a potential conflict of interest.

- (d) not work in more than one capacity in relation to the same case or issue for the same client at the same time.

- (e) disclose (or procure the disclosure by the recognised body of) the interest to the client in writing before the barrister refers a client to the employer or recognised body or before accepting instructions from the employer or recognised body.

Ownership of Interests in Recognised Bodies

209. If a barrister directly or indirectly has an ownership interest in a recognised body and is in practice other than as a manager or employee of that recognised body, the barrister must:-

- (a) notify the Bar Standards Board in writing of the ownership interest, at or as soon as reasonably practicable after, the time at which that interest is acquired or the barrister starts practising other than as a manager or employee of that recognised body, whichever is the later;
- (b) disclose (or procure the disclosure by the recognised body of) the interest to:-
 - (i) any client of the recognised body who instructs the barrister. If the barrister has the ownership interest at the time that instructions are received by him, disclosure to the client must be made prior to the barrister accepting the instructions. If the ownership interest is acquired after instructions have already been accepted, the ownership interest must be communicated at the time of, or as soon as reasonably practicable after, the barrister's acquisition of that interest and the client must be advised of their right to instruct another barrister.
 - (ii) any person that the barrister refers to the recognised body. If the barrister has the ownership interest at the time that the referral is made, disclosure to the client must be made prior to the barrister making the referral. If the ownership interest is acquired after the referral has already been made, the ownership interest must be communicated at the time of, or as soon as reasonably practicable after, the barrister's acquisition of that interest st.;
- (c) maintain (and make available to the Bar Standards Board on request) a record of referrals by the barrister to the recognised body and of instructions received by the barrister from the recognised body.

PART III - FUNDAMENTAL PRINCIPLES

Applicable to all barristers

301. A barrister must have regard to paragraph 104 and must not:
- (a) engage in conduct whether in pursuit of his profession or otherwise which is:
 - (i) dishonest or otherwise discreditable to a barrister;
 - (ii) prejudicial to the administration of justice; or
 - (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;
 - (b) engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice.

Applicable to practising barristers

302. A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.
303. A barrister:
- (a) must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any colleague, professional client or other intermediary or another barrister, the barrister's employer or any recognised body of which the barrister may be an owner or manager);
 - (b) owes his primary duty as between the lay client and any other person to the lay client and must not permit any other person to limit his discretion as to how the interests of the lay client can best be served;
 - (c) when supplying legal services funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service owes his primary duty to the lay client subject only to compliance with paragraph 304.

304. A barrister who supplies legal services funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service must in connection with the supply of such services comply with any duty imposed on him by or under the Access to Justice Act 1999 or any regulations or code in effect under that Act and in particular with the duties set out in Annex E.

305.1.⁶ A barrister must not in relation to any other person (including a client or another barrister or a pupil or an employee or a student member of an Inn of Court) discriminate⁷ directly or indirectly because of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability, age, religion or belief.

305.2.⁸ A barrister must not in relation to any other person, victimise that person for carrying out a protected act as defined in the relevant legislation⁹.

305.3. Deleted from 1st October 2005.

306. A barrister is individually and personally responsible for his own conduct and for his

professional work: he must exercise his own personal judgement in all his professional activities.

307. A barrister must not:

- (a) permit his absolute independence integrity and freedom from external pressures to be compromised;
- (b) do anything (for example accept a present) in such circumstances as may lead to any inference that his independence may be compromised;
- (c) compromise his professional standards in order to please his client the Court or a third party, including any mediator¹⁰;
- (d) give a commission or present or lend any money for any professional purpose to or (save as a remuneration in accordance with the provisions of this Code) accept any money by way of loan or otherwise from any client or any person entitled to instruct him as an intermediary;

⁶ Amended 7th December 2007

⁷ As defined in Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 2005; Employment Equality (Religion or belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006.

⁸ Amended 7th December 2007

⁹ As defined in Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 2005; Employment Equality (Religion or belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006.

¹⁰ Amended 23rd March 2005

- (e) make any payment (other than a payment for advertising or publicity permitted by this Code or in the case of a self-employed barrister remuneration paid to any clerk or other employee or staff of his chambers) to any person for the purpose of procuring professional instructions;

Provided that nothing in paragraph 307(d) or (e) shall prevent a barrister from paying a reasonable fee or fees required by an alternative dispute resolution body that appoints or recommends persons to provide mediation, arbitration or adjudication services, or from entering into such a reasonable fee-sharing arrangement required by such a body, if the payment or arrangement is of a kind similar to that made by other persons who provide such services through the body.¹¹

¹¹ Effective from 1st July 2007

(SEE ALSO THE AMENDMENTS PROPOSED IN “THE STRUCTURE OF SELF-EMPLOYED PRACTICE”

PART IV - SELF-EMPLOYED BARRISTERS

Instructions

401 A self-employed barrister whether or not he is acting for a fee:

- (a) may supply legal services only if appointed by the Court or is instructed:
 - (i) by a professional client; or
 - (ii) by a licensed access client, in which case he must comply with the Licensed Access Rules (reproduced in Annex F1); or
 - (iii) subject to paragraph 204(c), by or on behalf of any other lay client, in which case he must comply with the Public Access Rules (reproduced in Annex F2); or
- (b) must not in the course of his practice:
 - (i) undertake the management administration or general conduct of a lay client's affairs;
 - (ii) conduct litigation or inter-partes work (for example the conduct of correspondence with an opposite party, instructing any expert witness or other person on behalf of his lay client or accepting personal liability for the payment of any such person);
 - (iii) investigate or collect evidence for use in any Court;
 - (iv) except as permitted by paragraph 707, or by the Public Access Rules ,take any proof of evidence in any criminal case;
 - (v) attend at a police station without the presence of a solicitor to advise a suspect or interviewee as to the handling and conduct of police interviews.
 - (vi) act as a supervisor for the purposes of section 84(2) of the Immigration and Asylum Act 1999.
- (c) must not supply legal services for reward otherwise than in the course of his practice except as permitted by paragraph 806.¹²

¹²Amended 11th September 2006

Insurance

402.1 Every self-employed barrister (other than a pupil who is covered under his pupil-supervisor's insurance) and a barrister called to the Bar under part IV(E) of the Consolidated Regulations must be entered as a member with BMIF.¹³

402.2 Every barrister entered as a member with BMIF shall:

- (a) pay immediately when due the appropriate insurance premium required by BMIF for the purpose of insurance against claims for professional negligence for such amount and upon such terms as may be approved by the Bar Council from time to time;
- (b) supply immediately upon being requested to do so such information as BMIF may from time to time require pursuant to its Rules.

Administration and conduct of self-employed practice

403.1 A self-employed barrister must not practise from the office of or in any unincorporated association (including any arrangement which involves sharing the administration of his practice) with any person other than a self-employed barrister or any of the following:

- (a) a registered European lawyer;
- (b) subject to compliance with the Foreign Lawyers (Chambers) Rules (reproduced in Annex H) and with the consent of the Bar Council a foreign lawyer;
- (c) a non-practising barrister
- (d) a person who is:
 - (i) a lawyer from a jurisdiction other than England and Wales;
 - (ii) a retired judge; or
 - (iii) an employed barrister¹⁴

to the extent that that person is practising as an arbitrator or mediator.¹⁵

¹³Amended 7th December 2007

¹⁴Amended 6th April 2006

403.2 A self-employed barrister:

- (a) must take all reasonable steps to ensure that:
 - (i) his practice is efficiently and properly administered having regard to the nature of his practice;
 - (ii) proper records are kept;
 - (iii) he complies with the Terms of Work on which Barristers Offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988 as amended and in force from time to time (reproduced in Annex G1) and with any Withdrawal of Credit Direction issued by the Chairman of the Bar pursuant thereto.
- (b) must have ready access to library facilities which are adequate having regard to the nature of his practice;
- (c) must have regard to any relevant guidance issued by the Bar Council including guidance as to:
 - (i) the administration of chambers;
 - (ii) pupillage and further training; and
 - (iii) good equal opportunities practice in chambers in the form of the Equality and Diversity Code¹⁶ for the Bar.
- (d) in a
 - (i) must deal with all complaints made to him promptly, courteously and in a manner which addresses the issues raised; and
 - (ii) must have and comply with an effective¹⁷ written complaints procedure, and make copies of the procedure available to a client on request.
 - (iii) meet all the requirements set out in Annexe S to the Code¹⁸

¹⁵Amended 1st September 2005

¹⁶Amended 23rd March 2005

¹⁷Amended from 1st May 2008

¹⁸Effective from 1st May 2008

Heads of chambers

404.1 The obligations in this paragraph apply to the following members of chambers:

- (a) any barrister who is head of chambers;
- (b) any barrister who is responsible in whole or in part for the administration of chambers;
- (c) if there is no one within (a) and (b) above, all the members of the chambers.

404.2 Any person referred to in paragraph 404.1 must take all reasonable steps to ensure that:

- (a) his chambers are administered competently and efficiently and are properly staffed;
- (b) the affairs of his chambers are conducted in a manner which is fair and equitable for all barristers and pupils;
- (c) proper arrangements are made in his chambers for dealing with pupils and pupillage and, in particular,
 - (i) that all pupillage vacancies are advertised in the manner prescribed by the Bar Council;
 - (ii) that such arrangements are made for the funding of pupils by chambers as the Bar Council may by resolution from time to time require;
 - (iii) that in making arrangements for pupillage, regard is had to the pupillage guidelines issued from time to time by the Bar Council and to the Equality and Diversity Code¹⁹ for the Bar;
- (d) ²⁰Proper arrangements are made in chambers for dealing with equality opportunity issues and in particular,
 - (i) that Chambers appoint at least one Equal Opportunities Officer

¹⁹Amended 23rd March 2005

²⁰Introduced 1st October 2005

- (ii) that Chambers shall have a written Equal Opportunities Policy made available to all members of Chambers and Staff and to the Bar Council when required, which shall set out the policy adopted by Chambers in relation to each of the Action Areas in the Equality and Diversity Code for the Bar and shall have regard to the recommendations in the Code.
 - (iii) that no barrister shall take pupils until the steps set out in (i) and (ii) above have been complied with.
- (e) all barristers practising from his chambers whether they are members of the chambers or not are entered as members with BMIF and have effected insurance in accordance with paragraph 402 (other than any pupil who is covered under his pupil-master's insurance);
- (f) all barristers practising from his chambers comply with paragraph 403.2 (a)(iii);
- (g) all employees and staff in his chambers (i) are competent to carry out their duties, (ii) carry out their duties in a correct and efficient manner, (iii) are made clearly aware of such provisions of this Code as may affect or be relevant to the performance of their duties and (iv) all complaints against them are dealt with in the manner set out in paragraph 403(e) above;
- (h) all registered European lawyers and all foreign lawyers in his chambers comply with this Code to the extent required by the Registered European Lawyers Rules (reproduced in Annex B) and the Foreign Lawyers (Chambers) Rules (reproduced in Annex H);
- (i) fee notes in respect of all work undertaken by all members of chambers and pupils and (unless expressly agreed with the individual) former members and pupils of chambers are sent expeditiously to clients and in the event of non-payment within a reasonable time, pursued efficiently.
- (j) every barrister practising from his chambers has a current practising certificate in accordance with paragraph 202(c) of the Code of Conduct and the Practising Certificate Regulations (reproduced in Annex D).

404.3 In carrying out the obligations referred to in paragraph 404.2 any person referred to in paragraph 404.1 must have regard to any relevant guidance issued by the Bar Council including guidance as to:

- (a) the administration of chambers;
- (b) pupillage and further training; and

- (c) good equal opportunities practice in chambers in the form of the Equality and Diversity Code²¹ for the Bar

Fees and remuneration

405 Subject to paragraph 307 a self-employed barrister may charge for any work undertaken by him (whether or not it involves an appearance in Court) on any basis or by any method he thinks fit provided that such basis or method:

- (a) is permitted by law;
- (b) does not involve the payment of a wage or salary.

406.1 A self-employed barrister who receives fees in respect of work done by another barrister must himself and without delegating the responsibility to anyone else pay forthwith the whole of the fee in respect of that work to that other barrister.

406.2 Subject to paragraph 805 a self-employed barrister who arranges for another barrister to undertake work for him (other than a pupil or a person who has asked to do the work in order to increase his own skill or experience) must himself and without delegating the responsibility to anyone else:

- (a) pay proper financial remuneration for the work done;
- (b) make payment within a reasonable time and in any event within three months after the work has been done unless otherwise agreed in advance with the other person.

Client money securities and other assets

407. A self-employed barrister must not receive or handle client money securities or other assets other than by receiving payment of remuneration.

²¹Amended 23rd March 2005

PART V - EMPLOYED BARRISTERS

Section 1: Barristers employed other than by recognised bodies

501. An employed barrister whilst acting in the course of his employment may supply legal services to his employer and to any of the following persons:
- (a) any employee, director or company secretary of the employer in a matter arising out of or relating to that person's employment;
 - (b) where the employer is a public authority (including the Crown or a Government department or agency or a local authority):
 - (i) another public authority on behalf of which the employer has made arrangements under statute or otherwise to supply any legal services or to perform any of that other public authority's functions as agent or otherwise;
 - (ii) in the case of a barrister employed by or in a Government department or agency, any Minister or Officer of the Crown;
 - (c) where the barrister is or is performing the functions of a justices' clerk, the justices whom he serves;
 - (d) where the barrister is employed by a trade association, any individual member of the association.
502. An employed barrister may supply legal services only to the persons referred to in paragraph 501 and must not supply legal services to any other person save that whilst acting in the course of his employment:
- (a) [deliberately omitted]
 - (b) a barrister employed by the Legal Services Commission may supply legal services to members of the public;
 - (c) a barrister employed by or at a Legal Advice Centre may supply legal services to clients of the Legal Advice Centre;
 - (d) any employed barrister may supply legal services to members of the public free of charge (to any person).

503. A barrister employed to supply legal services under a contract for services may be treated as an employed barrister for the purpose of this Code provided that the contract is:
- (a) in writing;
 - (b) (subject to any provision for earlier termination on notice) for a determinate period;
 - (c) [deliberately omitted]; and
 - (d) not a contract with a recognised body.
504. An employed barrister shall have a right to conduct litigation in relation to every Court and all proceedings before any Court and may exercise that right provided that he complies with the Employed Barristers (Conduct of Litigation) Rules (reproduced in Annex I).
505. An employed barrister must not receive or handle client money securities or other assets other than by receiving payment of remuneration or where the money or other asset belongs to his employer

Section 2: Barristers employed by and/or managers of recognised bodies

506. A barrister who is a manager of or employed by a recognised body shall have a right to conduct litigation in relation to every Court and to all proceedings before a Court and may exercise that right provided that the barrister complies with the Employed Barristers (Conduct of Litigation) Rules (reproduced in Annex I) and with the rules of the approved regulator of the recognised body.
507. A barrister who is employed by a recognised body but is not a manager of that body must not receive or handle client money securities or other assets other than by receiving payment of remuneration or where the money or other asset belongs to that body.

PART VIII - MISCELLANEOUS

Pupils

801. A barrister who is a pupil must:

- (a) comply with Part V of the Consolidated Regulations;
- (b) apply himself full time to his pupillage save that a pupil may with the permission of his pupil-supervisor or head of chambers take part time work which does not in their opinion materially interfere with his pupillage;
- (c) to the extent that paragraph 702 applies to his pupil supervisor or to any person whom he accompanies to court or whose papers he sees, preserve the confidentiality of the affairs of that person's client in accordance with paragraph 702.

802. A barrister who is a pupil may supply legal services as a barrister and exercise a right of audience which he has by reason of being a barrister provided that:

- (a) he has completed or been exempted from the non-practising six months of pupillage; and
- (b) he has the permission of his pupil-supervisor or head of chambers;

provided that such a barrister may during the non-practising six months of pupillage with the permission of his pupil-supervisor or head of chambers accept a noting brief.

803.1 So long as he is a pupil a self-employed barrister may not become or hold himself out as a member of chambers or permit his name to appear anywhere as such a member.

803.2 A barrister who is a pupil of an employed barrister or of a barrister who is a manager or employee of a recognised body, or who pursuant to Regulation 46 of the Consolidated Regulations spends any period of external training with such a barrister or with a solicitor shall be treated for the purpose of the Code as if he were during that period employed by the barrister's employer or by the recognised body or by the solicitor's firm, as the case may be.

Pupil-supervisors

804. A barrister who is a pupil-supervisor must:
- (a) comply with Part V of the Consolidated Regulations;
 - (b) take all reasonable steps to provide his pupil with adequate tuition supervision and experience;
 - (c) have regard to the pupillage guidelines issued from time to time by the Bar Council and to the Equality Code for the Bar.
805. Except where a pupil is in receipt of an award or remuneration which is paid on terms that it is in lieu of payment for any individual item of work, a barrister must pay any pupil (or in the case of an employed barrister ensure that a pupil is paid) for any work done for him which because of its value to him warrants payment.

Legal Advice Centres

806. A barrister may supply legal services at a Legal Advice Centre on a voluntary or part time basis and, if he does so, shall in connection with the supply of those services be treated for the purpose of this Code as if he were employed by the Legal Advice Centre.
807. A barrister who is employed by a Legal Advice Centre:
- (a) must not in any circumstances receive either directly or indirectly any fee or reward for the supply of any legal services to any client of the Legal Advice Centre other than a salary paid by the Legal Advice Centre;
 - (b) must ensure that any fees in respect of legal services supplied by him to any client of the Legal Advice Centre accrue and are paid to the Legal Advice Centre;
 - (c) must not have any financial interest in the Legal Advice Centre.

Dual qualification

- 808.1 A barrister who is a member of another authorised body and currently entitled to practise as such shall not practise as a barrister.
- 808.2 A barrister who becomes entitled to practise as a member of another authorised body shall forthwith inform the Bar Council and the Inn(s) of Court of which he is a member in writing of that fact.

808.3 A barrister who:

- (a) has had his name struck off the roll of solicitors or been excluded from membership of an authorised body; or
- (b) has at any time been found guilty of any professional misconduct or is the subject of any continuing disciplinary proceedings in relation to his professional conduct as a member of an authorised body; or
- (c) has at any time been refused a practising certificate as a solicitor or had his practising certificate suspended or made subject to a condition

shall not practise as a barrister until the PCC has considered his case and, if it decides to refer the case to a Disciplinary Tribunal, until the case is finally determined.

808.4²² A barrister who is a member of another authorised body and currently entitled to practise as a member of that body shall not be deemed to be practising as a barrister if he holds himself out as a barrister provided that before supplying legal services to any person or employer, and when first dealing with any third party in the course of supplying legal services, he informs them fully and comprehensibly in writing (a) of his status and the fact that he does not hold a practising certificate under this Code, (b) of the relevant limitations under this Code on the legal services he may undertake, (c) that he is not fully regulated by the Bar Council, and (d) of the absence of available compensatory powers for any inadequate professional services he may render.

Foreign lawyers

809 A barrister called to the Bar under Part IV (E) of the Consolidated Regulations (temporary membership of the Bar) may not practise as a barrister other than to conduct the case or cases specified in the certificate referred to in Regulation 39. They must either be insured with BMIF or covered by insurance against claims for professional negligence arising out of the supply of his services in England and Wales in such amount and upon such terms as are currently required by the Bar Council and have delivered to the Bar Council a copy of the current insurance policy or the current certificate of insurance issued by the insurer.²³

²² Paragraph 808.4 is effective from 31st July 2005

²³ Amended 7th December 2007

PART IX - COMPLIANCE

- 901.1 Any failure by a barrister to comply with the provisions of paragraph 202 (a) to (d), 203(1)(a), 204(b), 402, 403(b)(c) and (d), 404, 405, 406, 701, 709, 801(a), 804 or 905(a)(i), (d) or (e) of this Code (to the extent that the rule or rules in question apply to him, as to which see paragraphs 105A to 105C above) or with the training requirements imposed by the Consolidated Regulations in force at the date of his Call to the Bar or with the Continuing Professional Development Regulations or the Practising Certificate Regulations shall render him liable to a written warning from the Bar Council and/or the imposition of a fixed financial penalty of £100 (or such other sum as may be prescribed by the Bar Council from time to time) or any financial penalty prescribed by the said Regulations for non-compliance therewith. Liability under this paragraph is strict.
- 901.2 Any failure by a barrister to pay a financial penalty within the time prescribed by the Regulations or stipulated by the Bar Council (or any extension thereof) shall constitute professional misconduct.
- 901.3 In the event that a barrister is given a written warning by the Bar Council, or a financial penalty is imposed upon him for an infringement of the aforementioned provisions of the Code, the barrister shall have a right of appeal to a panel under the provisions of paragraph 23 (3) and (4) of the Disciplinary Rules. The time for bringing such an appeal shall be 28 days from the date upon which the written warning or notice seeking payment of the penalty is deemed to have been received by the Barrister. However, unless the Bar Council agrees or the appeal panel otherwise rules, an appeal shall not operate as a suspension of the requirement to pay the financial penalty or an extension of the time for so doing.
- 901.4 Any failure by a barrister to comply with the provisions of paragraph 202 of the Code shall constitute professional misconduct if the barrister concerned has failed take the necessary action to cure any relevant non-compliance with the preconditions to practise set out therein, or has failed to pay any financial penalty imposed on him within any time limit prescribed by the relevant Regulations or specified by the Bar Council (or any extension thereof).
- 901.5²⁴ (1) Any serious failure to comply with the provisions of the Code referred to in paragraph 901.1 above shall constitute professional misconduct.
- (2) A failure to comply with those provisions may be a serious failure:
- a. due to the nature of the failure; or
 - b. due to the extent of the failure; or
 - c. because the failure in question is combined with a failure to comply with any other provision of the Code (whether or not that provision is mentioned in paragraph 901.1); or

²⁴ Amended 18 March 2008

- d. if the barrister has previously failed to comply with the same or any other provision of the Code (whether or not that provision is mentioned in paragraph 901.1).

901.6 If a barrister is given two or more separate written warnings by the Bar Council in a period of three years for infringement of any of the provisions of the Code referred to in paragraph 901.1, or is subjected to an automatic financial penalty for any failure to comply with any such provision of the Code on two separate occasions within a period of three years, then any further failure by him to comply with the provisions of the Code within a period of two years after the later of the written warnings or financial penalties shall constitute professional misconduct even if that failure, taken by itself, would not otherwise be regarded as professional misconduct.

901.7 Any failure by a barrister to comply with any provision of this Code other than those referred to in paragraph 901.1 above shall constitute professional misconduct.

901.8 It shall be misconduct under this Code for a barrister to be convicted of misconduct under the rules of another approved regulator and the barrister shall be liable to disciplinary action by the Board accordingly.

902. If the declaration made by a barrister on Call to the Bar is found to have been false in any material respect or if the barrister is found to have engaged before Call in conduct which is dishonest or otherwise discreditable to a barrister and which was not, before Call, fairly disclosed in writing to the Benchers of the Inn calling him or if any undertaking given by a barrister on Call to the Bar is breached in any material respect that shall constitute professional misconduct.

903. A barrister is subject to:

- a. the Complaints Rules (reproduced in Annex J);
- b. the Disciplinary Tribunals Regulations (reproduced in Annex K);
- c. the Summary Procedure Rules (reproduced in Annex L);
- d. the Hearings before the Visitors Rules (reproduced in Annex M);
- e. the Interim Suspension Rules (reproduced at Annex N);
- f. the Fitness to Practise Rules (reproduced at Annex O);
- g. the Adjudication Panel and Appeals Rules (reproduced at Annex P) which are concerned with inadequate professional service.

904. Pursuant to the Rules referred to in paragraph 903 a barrister may be directed to provide redress to a lay client for inadequate professional service whether or not such inadequate professional service also constitutes professional misconduct.

905. A barrister must:

a. if he is practising, or the Bar Standards Board has reason to believe may be practising, as a barrister:

i. respond promptly to any requirement from the Bar Standards Board for comments on or documents relating to the arrangements made for administering his practice and chambers or office whether or not any complaint has been received or raised arising out of those arrangements;

ii. permit the Bar Standards Board or any agent appointed by it to inspect forthwith and on request and at any time which is reasonable having regard to the circumstances and the urgency of the matter any premises from which he practises or is believed to practise as a barrister the arrangements made for administering his practice and chambers or office, and any records relating to such practice and to the administration of his chambers or office.

b. report promptly to the Bar Standards Board if:

i. he is a manager of a recognised body which is the subject of an intervention by the approved regulator of that body;

ii. he is charged with an indictable²⁵ offence;

iii. he is convicted of any relevant criminal offence;

iiia. he is charged with a disciplinary offence by another approved regulator or professional body; or

iv. he is convicted of a disciplinary offence by another professional body;

c. report promptly to the Bar Council if;

i. bankruptcy proceedings are initiated in respect of or against him;

²⁵ Effective from 20th June 2008

- ii. directors disqualification proceedings are initiated against him;
 - iii. a bankruptcy order or directors disqualification order is made against him; or
 - iv. if he enters into an individual voluntary arrangement with his creditors;
- d. where a complaint about a barrister has been made to or by the Bar Council, or where the Bar Council has reasonable grounds for believing that a breach of this Code may have occurred or is about to occur, or where a circumstance referred to in sub-paragraph (b) or (c) above has been reported to the Bar Council, respond promptly to any request from the Bar Council for comments or information on the matter whether it relates to him or to another barrister;
- e. respond promptly to any letter of notification sent to him or attend before any tribunal panel body or person when so required pursuant to the rules referred to in paragraph 903;
- f. comply in due time with any sentence or suspension imposed or direction made or undertaking accepted by a tribunal panel body or person pursuant to the rules referred to in paragraph 903.

provided for the avoidance of doubt that nothing in this paragraph shall require a barrister to disclose or produce any document or information protected by law or in circumstances to which paragraph 702, or the equivalent rule of another approved regulator to which he is subject, applies.

PART X - DEFINITIONS

1001. In this Code except where otherwise indicated:

"the Act" means the Courts and Legal Services Act 1990 and where the context permits includes any orders or regulations made pursuant to powers conferred thereby;

"the Act of 1985" means the Administration of Justice Act 1985;

"the Act of 2007" means the Legal Services Act 2007;

"Adjudication Panel" means an adjudication panel constituted under the Adjudication and Appeals Rules (reproduced in Annex P);

"advocacy services" means advocacy services as defined in Section 119 of the Act;

"Appointments Board" means the Board established by the Bar Council to make appointments to the Bar Standards Board and its regulatory committees;¹

"approved regulator" has the same meaning as in section 20(2) of the Act of 2007;

"authorised body" means any body other than the Bar Council authorised under the Act to grant rights of audience or rights to conduct litigation;

"authorised litigator" means an authorised litigator as defined in Section 119 of the Act;

"bankruptcy order" includes a bankruptcy order made pursuant to the Insolvency Act 1986 and any similar order made in any jurisdiction in the world;

¹ Amended 1st January 2006

"Bar" means the Bar of England and Wales;

"Bar Council" means The General Council of the Bar as constituted from time to time or a Committee thereof;

"barrister" means an individual who has been called to the Bar by one of the Inns of Court and who has not ceased to be a member of the Bar; and in Parts III (other than paragraph 301), VI, VII and VIII of this Code means a practising barrister;

"Bar Standards Board" means the Board established to exercise and oversee the regulatory functions of the Bar Council;¹

"BMIF" means Bar Mutual Indemnity Fund Limited;

"brief" means instructions to a barrister to appear as an advocate before a Court;

"Call" means Call to the Bar in accordance with the Consolidated Regulations;

"chambers" means a place at or from which one or more self-employed barristers carry on their practices and also refers where the context so requires to all the barristers (excluding pupils) who for the time being carry on their practices at or from that place;

"client" means lay client or intermediary;

"company" means a company regulated by an approved regulator;

"complaint" means an allegation by any person or by the Bar Council of its own motion of professional misconduct or of inadequate professional service and includes a legal aid complaint;

“Complaints Commissioner” means the person appointed as such under Regulation 17A of the Bar Council Constitution.

“the Complaints Committee” means the Complaints Committee of the Bar Standards Board or its successor;

“conditional fee agreement” means a conditional fee agreement as defined in Section 58 of the Act;

“Consolidated Regulations” means the Consolidated Regulations of the Inns of Court;

“Court” includes any court or tribunal or any other person or body whether sitting in public or in private before whom a barrister appears or may appear as an advocate;

“Director” means a director of a company, and includes the director of a recognised body which is a company, and in relation to a *societas Europaea* includes:

- (a) in a two-tier system, a member of the management organ and a member of the supervisory organ; and
- (b) in a one-tier system, a member of the administrative organ

“Disciplinary Tribunal” means a disciplinary tribunal constituted under the Disciplinary Tribunals Regulations (reproduced in Annex K);

“employed barrister” means a practising barrister who is employed other than by a recognised body either under a contract of employment or by virtue of an office under the Crown or in the institutions of the European Communities and who supplies legal services as a barrister in the course of his employment;

“employer” means a person by whom an employed barrister is employed as such and any holding subsidiary or associated company corporate body or firm of that person;

“English law” includes international law and the law of the European Communities;

“Establishment Directive” means Directive 98/5/EC of the European Parliament and of the Council of February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

“European lawyer” means a person who is a national of a Member State and who is authorised in any Member State to pursue professional activities under any of the professional titles appearing in article 2(2) of the European Communities (Lawyer's Practice) Order 1999, but who is not any of the following:

- (a) a solicitor or barrister of England and Wales or Northern Ireland; or
- (b) a solicitor or advocate under the law of Scotland.

“foreign lawyer” means a person (other than a registered European lawyer or a practising barrister of the bar of England and Wales) who is authorised by a competent professional body to practise in a system of law other than English law;

“Hearings before the Visitors” means an appeal hearing constituted under the Hearings before the Visitors Rules 2005 (reproduced in Annex M);

“home professional body” means the body in a Member State which authorises a European lawyer to pursue professional activities under any of the professional titles appearing in article 2(2) of the European Communities (Lawyer's Practice) Order 1999 and, if he is authorised in more than one Member States, it shall mean any such body;

“home professional title” means, in relation to a European lawyer, the professional title or any of the professional titles specified in relation to his home State in article 2(2) of the European Communities (Lawyer's Practice) Order 1999 under which he is authorised in his home State to pursue professional activities;

“home State” means the Member State in which a European lawyer acquired the authorisation to pursue professional activities under his home professional title and, if he is authorised in more than one Member State, it shall mean any such Member State;

"inadequate professional service" means such conduct towards a lay client or performance of professional services for that client which falls significantly short of that which is to be reasonably expected of a barrister in all the circumstances;

"incorporated solicitors' practice" means a body recognised under section 9 of the Act of 1985;

"indictable offence" carries the definition set out in the Serious Organised Crime and Police Act 2005 as defined in Schedule 1 of the Interpretation Act 1978 as "an offence which, if committed by an adult is triable on indictment whether it is exclusively so triable or triable either way";

"Informal Hearing Panel" means an informal hearing panel constituted under paragraph 43 of the Complaints Rules (reproduced in Annex J);

"instructions" means instructions or directions in whatever form (including a brief) given to a practising barrister to supply legal services whether in a contentious or in a non-contentious matter and "instructed" shall have a corresponding meaning;

"Interim Suspension Panel" means a panel constituted under the Interim Suspension Rules (reproduced in Annex N);

"intermediary" means any person by whom a self-employed barrister is instructed on behalf of a lay client and includes a professional client who is not also the lay client;

"International work" shall have the meaning set out in the International Practice Rules (reproduced in Annex A);

"JRC" means the Joint Regulations Committee of the Bar Council or any successor body exercising the same responsibilities by whatever name called;²

"lay client" means the person on whose behalf a practising barrister (or where appropriate in the case of an employed barrister his employer) is instructed;

² Amended 1st January 2006

“lay member” means a lay person appointed by the Appointments Board to be a member of the Bar Standards Board or one of its regulatory committees;²

“lay representative” means either

- (a) a lay person appointed by the President of the Council of the Inns of Court to serve on Disciplinary Tribunals, Summary Procedure Panels, Informal Hearings Panels Interim Suspension Panels and Appeal Panels therefrom, Adjudication Panels, Adjudication Appeal Panels and Medical Panels and Review Panels therefrom; or
- (b) a lay person appointed by the Lord Chief Justice to serve on Hearings before the Visitors

save that no person may be appointed as a lay representative:

- (i) if they are a member of the Complaints Committee or of the Bar Council or any of its other Committees; or
- (ii) if they were a member of the Complaints Committee at any time when the matter which the Tribunal or panel is dealing with was considered by the Complaints Committee;

"legal aid complaint" shall mean a complaint so described in section 40 of the Act of 1985 as amended by the Access to Justice Act 1999;

"Legal Advice Centre" means a centre operated by a charitable or similar non-commercial organisation at which legal services are habitually provided to members of the public without charge (or for a nominal charge) to the client and:

- (a) which employs or has the services of one or more solicitors pursuant to paragraph 7(a) of the Employed Solicitors' Code 1990 or for whom the Law Society has granted a waiver, or
- (b) which has been and remains designated by the Bar Council as suitable for the employment or attendance of barristers subject to such conditions as may be imposed by the Bar Council in relation to insurance or any other matter whatsoever;

"legal services" includes legal advice representation and drafting or settling any statement of case witness statement affidavit or other legal document but does not include:

- (a) sitting as a judge or arbitrator or acting as a mediator;

- (b) lecturing in or teaching law or writing or editing law books articles or reports;
- (c) examining newspapers, periodicals, books, scripts and other publications for libel, breach of copyright, contempt of court and the like;
- (d) communicating to or in the press or other media;
- (e) exercising the powers of a commissioner for oaths;
- (f) giving advice on legal matters free to a friend or relative or acting as unpaid or honorary legal adviser to any charitable benevolent or philanthropic institution;
- (g) in relation to a barrister who is a non-executive director of a company or a trustee or governor of a charitable benevolent or philanthropic institution or a trustee of any private trust, giving to the other directors trustees or governors the benefit of his learning and experience on matters of general legal principle applicable to the affairs of the company institution or trust;

“Legal Services Commission” means a body established by or under Section 1 or Section 2 of the Access to Justice Act 1999 and includes any body established and maintained by such a body;

“Licensed Access client” means a person or organisation approved as such by the Bar Council in accordance with the Licensed Access Recognition Regulations (reproduced in Annex F);

“litigation services” means litigation services as defined in Section 119 of the Act;

“LLP” means a limited liability partnership formed by being incorporated under the Limited Liability Partnerships Act 2000;

“Manager” means a barrister who is:

- (a) a partner in a partnership;
- (b) a member of an LLP; or
- (c) a director of a company

which is a recognised body;

“Mediation”²⁶ mediation is a process whereby the parties to a dispute appoint a neutral person (mediator) to assist them in the resolution of their dispute;

“Medical Panel” means a panel constituted under the Fitness to Practise Rules (reproduced in Annex O);

“Member State” means a state which is a member of the European Communities;

"non-practising barrister" means a barrister who is not a practising barrister;

“owner” in relation to a body means a person with any ownership interest in that body;

“partner” means a person who is or is held out as a partner in an unincorporated firm;

“partnership” means an unincorporated partnership, and includes any unincorporated firm in which persons are or are held out as partners, but does not include an LLP;

"practising barrister" means a barrister who is practising as such within the meaning of paragraph 201;

“the President” means the President of the Council of the Inns of Court;

"professional client" means a solicitor or other professional person by whom a self-employed barrister is instructed that is to say:

²⁶ Amended 23rd March 2005

- (a) a solicitor, solicitors' firm, LLP or company, recognised body regulated by the Solicitors Regulation Authority, authorised litigator, Parliamentary agent, patent agent, European Patent Attorney¹, trade mark agent, Notary or a European lawyer registered with the Law Society of England and Wales;
- (b) a licensed conveyancer in a matter in which the licensed conveyancer is providing conveyancing services;
- (c) an employed barrister or registered European lawyer;
- (d) any practising barrister or registered European lawyer acting on his own behalf;
- (e) a foreign lawyer in a matter which does not involve the barrister supplying advocacy services;
- (f) a Scottish or Northern Irish Solicitor
- (g) the representative of any body (such as a Legal Advice Centre or Pro Bono or Free Representation Unit) which arranges for the supply of legal services to the public without a fee, and which has been and remains designated by the Bar Council (subject to such conditions as may be imposed by the Bar Council in relation to insurance or any other matter whatsoever) as suitable for the instruction of barristers, and which instructs a barrister to supply legal services without a fee;

"professional misconduct" shall bear the meaning given in paragraphs 901 and 902;

"the public" includes any lay client of a practising barrister (or in the case of an employed barrister of the barrister's employer) other than any of the persons referred to in Paragraph 501;

"public access instructions" means instructions given to a barrister by or on behalf of a lay client pursuant to paragraph 401(a)(iii);

"the Qualifications Committee" means the Qualifications Committee of the Bar Standards Board or its successor;⁶

“the Quality Assurance Committee” means the Quality Assurance Committee of the Bar Standards Board or its successor;

“recognised body” means a partnership, LLP, company or sole principal authorised to provide reserved legal services by an approved regulator other than the Bar Standards Board other than a licensable body as defined in s. 72 of the Act of 2007 but does not include a body which is deemed to be authorised by reason of s. 18(3) of the Act of 2007²⁷;

“registered European lawyer” means a European lawyer registered as such by the Bar Council and by an Inn pursuant to a direction of the JRC under Regulation 30 of the Consolidated Regulations;

“relevant criminal offence” means any criminal offence committed in any part of the world except:

- (a) an offence committed in the United Kingdom which is a fixed penalty offence for the purposes of the Road Traffic Offenders Act 1988 or any statutory modification or replacement thereof for the time being in force;
- (b) an offence committed in the United Kingdom or abroad which is dealt with by a procedure substantially similar to that applicable to such a fixed penalty offence; and
- (c) an offence whose main ingredient is the unlawful parking of a motor vehicle;

"right of audience" means a right of audience as defined in Section 119 of the Act;

"right to conduct litigation" means a right to conduct litigation as defined in Section 119 of the Act;

"self-employed barrister" means a practising barrister other than:-

- (a) a barrister who is a manager or employee of a recognised body; and

²⁷ The definition of this term is different to the statutory definition because it purposely excludes Alternative Business Structures, in line with decisions made at the November 2009 Board meeting.

- (b) an employed barrister acting in the course of his employment;

“solicitor” means a solicitor of the Supreme Court of England and Wales;

“the Standards Committee” means the Standards Committee of the Bar Standards Board or its successor;

“Summary Procedure Panel” means a panel constituted under the Summary Procedure Rules (reproduced in Annex L);

“trade association” means a body of persons (whether incorporated or not) which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members, and does not include any association formed primarily for the purpose of securing legal assistance for its members;

any reference to the masculine shall be deemed to include the feminine and any reference to the singular shall include the plural.

Guidance – final version submitted by the BSB on 15 March 2010

**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 of "recognised bodies". These are entities of all kinds, or sole principals, authorised to provide reserved legal activities 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 nonlawyers, 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, and that therefore remains an open question at this stage. A decision on whether barristers will be permitted to become either managers or employees of ABSs will be addressed by consultation during 2010/11. The BSB is also conscious of the need to resolve the position of those who are employed within those LDPs that will become ABSs in advance of the anticipated start of the ABS regime in October 2011, so that transitional arrangements could, if necessary, be made in good time. This, too, will be addressed in the consultation.

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. The practicalities of managing disciplinary procedures, when individuals are subject to the regimes of more than one Approved Regulator, will be addressed through the development of Memoranda of Understanding between the relevant Approved Regulators.

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.

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

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 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.

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.

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) *Working 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. The purpose of allowing barristers to practise 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

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. 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. 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.. 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.. 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, 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.

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.

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.

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.

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.

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.

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 in a way that protects and promotes clients' and the public interest above their own private interests.

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 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

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:

(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. 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.

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.

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.

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)).

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.

Consequences of amendment of rule 205

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.

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).

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.

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 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.

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.

Firstly, this must mean that the barristers, who are carrying on the reserved legal activities, must not be 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.

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.