

GUIDANCE FOR EMPLOYED BARRISTERS

Part 1. General

- 1.1 This guidance has been issued by the Professional Standards Committee, the Professional Conduct and Complaints Committee and the Employed Barristers Committee of the Bar Council. It is intended to apply to employed barristers both in the private and public sectors. It can, obviously, only deal in general terms. It is, simply, guidance on what the Bar Council considers to be the effect of the Code of Conduct as it applies to employed barristers. In the event of any apparent discrepancy between this guidance and the wording of the Code, the Code takes precedence. Employed barristers with queries on individual matters, whether about their rights or their ethical duties, are encouraged to contact the Professional Standards Department at the Bar Council for advice (020 7242 0082).
- 1.2 The Guidance is divided into the following parts:
- **Part 2** deals with the Practising Requirements including the rules concerning the environment in which employed barristers may be employed, the qualification requirements and the insurance requirements;
 - **Part 3** discusses the various activities that barristers may undertake, including rights of audience, rights to conduct litigation, instructing counsel and giving advice in police stations;
 - **Part 4** discusses the people to whom employed barristers may offer legal services;
 - **Part 5** deals with the general ethical duties of employed barristers and how these are enforced.

Part 2. The Practising Requirements

- 2.1 The rules which determine the practising status of employed barristers are relatively complex. The ability of a barrister to practise will depend upon a number of different factors including where the barrister is employed, to whom legal services are offered and the experience of the barrister concerned.

Employment Environment

- 2.2 Barristers may be employed either to offer legal services to their employer only (i.e. as an "in-house" lawyer in a bank or other commercial organisation, in the CPS, Government Legal Service or Local Authority) or, where they are employed by a solicitor or legal advice centre the Legal Services Commission or the Criminal Defence Service, to clients of that employer¹. Employment can include employment under a contract for services (see para 4.11 below). Barristers who are employed in other circumstances (for example, because they are offering advice to clients of accountants or other non-lawyers) are not permitted to practise as employed barristers². For fuller details, see Part 4 of this Guidance.

Qualification Requirements

- 2.3 The requirements as to training differ for barristers who are employed to offer services to their employer from those for barristers who are employed to offer services to clients of their employer.
- 2.4 Barristers who were called to the Bar before January 2002 may act as employed barristers offering legal services in-house (ie not to the public) whether or not they have completed pupillage³. If they have not completed pupillage they are unlikely to have rights of audience as barristers. Barristers who have been called to the Bar after January 2002 must have completed pupillage before they can practise as barristers at all. Barristers who were called after January 2002 because, for example, they started the part-time Bar Vocational Course in October 2000 or, having started the full-time course on that date, were unable to be called for some good reason, may apply to the Professional Conduct and Complaints Committee for a waiver of this pupillage requirement.
- 2.5 Barristers employed in solicitors' offices and who are offering legal services to the public must be entitled to exercise full rights of audience before they can hold themselves out as barristers. This also applies to barristers employed in legal advice centres offering advice to clients. Details of the requirements for this are set out below. Barristers employed in solicitors' offices who do not hold full rights of audience are not entitled to practise as barristers. There is nothing to prevent them being employed by such firms, but they may not hold themselves out as barristers or do any work which they could only do by virtue of being a barrister (for example, by exercising rights of audience in courts where such rights are restricted and they do not have special leave of the court).

¹ See paras 501 and 502 of the Code.

² See para 205 of the Code.

³ This is the effect of the previous Code together with the transitional arrangements in paragraphs 1102 and 1103 of the present edition.

- 2.6 Employed barristers are required to hold a practising certificate and to provide information to the Bar Council about their employer's address and details⁴. For those under a contract for services with an employment agency or consultancy, the relevant address should be the organisation to whom the legal services are actually provided. They must also comply with the continuing education requirements. Failure to do so will result in such barristers being classified as non-practising.
- 2.7 Barristers who are non-practising and hold themselves out as barristers or undertake work which they could only do by reason of being barristers will be guilty of professional misconduct⁵.
- 2.8 Many employed barristers who do not hold themselves out as barristers and do not seek to exercise rights of audience or instruct counsel can choose to be in employment or non-practising. This is particularly the case for barristers in Magistrates' Courts but can apply to many others. Those that choose to be non-practising barristers obviously do not need to hold a practising certificate or to fulfil continuing education requirements.

Insurance

- 2.9 Paragraph 204(b) of the Code requires barristers offering legal services to the public to be insured on terms prescribed by the Bar Council. This requirement does not, obviously, apply to barristers who are supplying legal services to their employer only. Moreover, the Bar Council has not issued any requirements concerning insurance for employed barristers generally. Our understanding is that, generally, employers will indemnify their employees for any action in which the employee is personally liable. Indeed, we are told that it is a requirement of the solicitors' Code that solicitors' insurance should cover acts of their employees. It would, however, be prudent for barristers to confirm this with their employers before taking up any offer of employment. Insurance is often available on the open market for such work if necessary. Employed barristers are not eligible for cover by the Bar Mutual Indemnity Fund.

⁴ Paragraph 202 of the Code.

⁵ This is the effect of paragraph 201 of the Code combined with paragraphs 202-204.

Part 3. Activities Employed Barristers May Undertake

- 3.1 As stated in Part 2, above, employed barristers may provide advice to their employers (or, where permitted, clients of their employers) and undertake all the work normally undertaken by barristers. In addition, they are able to conduct correspondence on behalf of their employer, interview witnesses, take statements and hold money belonging to their employer (with the employer's consent). Special rules apply to appearing in court and conducting litigation.

Rights of Audience

- 3.2 Rights of audience are restricted in magistrates courts, county courts, the Crown Court, the High Court and above. Barristers need to have a right of audience granted by the Bar Council to appear in such courts as barristers (though there is nothing to prevent them appearing there in another capacity - eg that of a solicitor's employee - if the court permits this).
- 3.3 The Code currently provides that, in order to exercise rights of audience, a barrister must (a) have completed pupillage and, (b) for a total of three years following pupillage, practise from the office of a qualified person (during which time they may exercise those rights). A qualified person is defined as a barrister or solicitor who has been in practice for 6 years out of the last 8, has held full higher court rights of audience (ie in both civil and criminal matters) for at least the last 2 years and acts as a qualified person for not more than a total of 3 barristers⁶. Subject to the paragraphs below, barristers who do not or have not complied with these provisions are not entitled to exercise rights of audience or to be employed as barristers in solicitors' offices.

Transitional Arrangements

- 3.4 There are a number of provisions which provide exceptions to this rule in respect of barristers called before the year 2000. Employed barristers who offer legal services to their employer only may exercise limited rights of audience in the county court and below and in uncontested matters in the High Court if:

- (1) they were called before 1989 and have practised as an employed barrister for a total of 5 years; or
- (2) they were called before July 2000 and have completed pupillage.⁷

These rights apply to barristers who are offering services to their employers only. They cannot carry those limited rights into self-employed practice or employment with a solicitor.

Law Centres

- 3.5 Barristers called before July 2000 and who were working in a Law Centre were the subject of special rules under the previous edition of the Code⁸. A Law Centre for

⁶ Paragraph 203 of the Code.

⁷ See para 403 of the 6th Edition of the Code of Conduct and paragraph 1103 of the 7th Edition.

⁸ See Annex H to the 6th Edition.

these purposes was a body that had the services of an employed solicitor⁹. For the purposes of that Code, those who were in full-time employment were deemed to be in independent practice¹⁰ and held full rights of audience¹¹. Barristers who were in that position at the time of the introduction of the new Code retained their rights of audience under that Code¹².

Waivers

- 3.6 The Bar Council has the power to grant waivers for barristers who have been in practice for some years without meeting these criteria. These waivers would entitle them to exercise full rights of audience and/or be treated as qualified persons. Details of the procedure for applying for such waivers can be found on the Bar Council's website (www.barcouncil.org.uk) or obtained from the Education and Training Department. A note setting out the general criteria for the grant of such waivers can be found at Annex 1. Several hundreds of such waivers have been granted already and the Bar Council is keen to exercise these powers in the right cases so that there are sufficient opportunities for more junior members of the Bar to gain pupillage opportunities and practise at the employed Bar.
- 3.7 It should be noted that the Civil Procedure Rules (see, in particular, Part 39, rule 6) permit employees of companies who are authorised by the company and have the permission of the court to represent that company at trial. Non-practising barristers and employed barristers without the appropriate rights of audience may take advantage of this provision as employees of the company, provided that they do not hold themselves out as barristers. In such circumstances, they should simply hold themselves out as employees of the company. If the court asks for their qualification then it is obviously appropriate for them to indicate that they have been called to the Bar but should make it clear that they are not qualified to practise as barristers.

Rights to Conduct Litigation

- 3.8 Since July 2002, the Bar Council has been able to grant rights to conduct litigation to employed barristers. This will enable employed barristers who have been granted these rights to undertake all the functions of conducting litigation previously limited to solicitors (for example, issuing proceedings) on behalf of an employer (or, where permitted, client of the employer). This would, in particular, allow them to act as an address for service and to undertake in their own right other functions associated with litigation which are normally restricted to solicitors. The rules with which barristers must comply are set out at Annex I to the Code of Conduct.
- 3.7 Broadly, in order to exercise a right to conduct litigation as a barrister, a barrister must:
- (1) be entitled to practise;
 - (2) have spent 12 weeks supervised by a qualified person as defined in those rules; and

⁹ See para 901 and the definition of "Law Centre" in the 6th Edition.

¹⁰ See para 901 and the definition of "barrister in independent practice" in the 6th Edition.

¹¹ Annex H para 9 of the 6th Edition.

¹² Para 1103.

(3) if offering services only to his employer, work from the office of a qualified person for one year or, if offering services to clients of his employer, work from the office of a qualified person for three years.

The Bar Council is able to exempt suitably qualified individuals from these requirements. Details are available from the Bar Council's website or from the Education and Training Department.

3.8 Barristers who do not have a right to conduct litigation from the Bar Council, may be able to exercise such a right as an employee of a company under the Civil Procedure Rules. In doing so, they should not hold themselves out as barristers.

Instructing Counsel

3.9 Employed barristers are able to instruct counsel in the course of their employment. They may also instruct counsel on their own personal matters¹³. In instructing counsel, employed barristers should be aware that the instructions are likely to be contractually binding and enforceable in the courts. There is no equivalent to the non-contractual arrangements which govern the relationship between solicitors and self-employed barristers. In particular, there is no arrangement for informal arbitration over fees and no Withdrawal of Credit Scheme.

Acting as a Commissioner for Oaths

3.10 Under section 113 of the Courts and Legal Services Act 1990, employed Barristers are entitled to act as Commissioners for Oaths and to charge the prescribed fees. They may act in this capacity for third parties but obviously should not do so in respect of matters in which they or their employers are parties.

Advice in Police Stations

3.11 Barristers who are employed in solicitors' offices are not subject to the rules prohibiting self-employed barristers providing advice in police stations. In order to get paid as accredited representatives, such barristers will need to undertake the appropriate training and should consult the Legal Services Commission about this.

¹³ See the definition of "professional client" in paragraph 1001 of the Code. The cab-rank rule does not apply to instructions where the barrister is instructing on a personal matter (see para 604).

Part 4. People to Whom Employed Barristers May Provide Services

- 4.1 Employed barristers are permitted to offer legal services to a number of individuals in the course of their employment. The main provisions are set out in paragraphs 501 and 502 of the Code. In particular, it should be noted that barristers offering legal services to clients of their employers (ie in a solicitors' office or legal advice centre) must be qualified to exercise full rights of audience. The following paragraphs set out guidance on particular situations that arise.

Generally

- 4.2 Employed barristers may provide advice to any employee, director or company secretary of the employer in a matter arising out of or relating to that person's employment. This is aimed at ensuring that there is sufficient flexibility to enable advice to be given to all those within the firm who need it. The provision is likely to be wide enough to cover partners and other officers.

Advice to Fellow Employees

- 4.3 Paragraph 501(a) allows the provision of advice to fellow employees and could also include advice to them in respect of employment difficulties with their employer and, with the employer's consent, representing employees at internal disciplinary hearings. A particular example of this occurs in respect of the Army Legal Services where it is perfectly permissible for employees there to provide legal advice to fellow soldiers and to represent members of other services in court martial hearings. Clearly it is essential that the employer should consent to such advice and representation and barristers should not act in circumstances where they have also been advising the employer on the issue or there is a danger of a breach of confidentiality or any other conflict of interest.

Companies

- 4.4 Employed barristers may also offer legal services to their employer, whether it is a company limited by shares or limited by guarantee and to any holding company, subsidiary or associated company of their employer. They may also act for a company (or any subsidiary of such company) where their employer, or nominee of their employer, is a majority shareholder or guarantor pursuant to their employer's statutory powers. For the purposes of paragraphs 4.4 and 4.5 references to "holding company" and "subsidiary" shall have the meaning set out in section 736 of the Companies Act 1985, as amended. An Associated Company is likely to have the meaning in Section 297 of the Trade Union and Labour Relations (Consolidation) Act 1992.
- 4.5 Employed Barristers may be directors and/or officers of a company, whether or not they are employed by such company and may give the Board of such company the benefit of their legal knowledge on issues of general principle. Employed Barristers may provide legal services to any company referred to in paragraph 4.4 of which they are also a director and/or officer unless to do so whilst acting as a director of such company would either prejudice their ability to maintain professional independence or prejudice the administration of justice.

Barristers in the Public Service

- 4.6 This section covers in particular barristers who are employed by public authorities, such as Government Departments, local authorities, NHS Trusts and so forth. The Code makes it clear that such barristers may provide services to other public authorities where the employer has made arrangements to supply services to the other authority. Obviously, such barristers should be careful to ensure that conflicts of interest do not arise between their duties to the relevant authorities.
- 4.7 The Code also makes it clear that barristers employed in the Government Legal Service may provide services to ministers or other Officers of the Crown as well as to fellow Civil Servants.
- 4.8 Barristers employed to provide the functions of a justices' clerk may advise the justices whom they serve and, if they hold rights of audience, may appear representing the Justices where they have rights of audience. However, if they have been acting personally as clerk to the court at first instance, they would be embarrassed under paragraph 603 of the Code of Conduct and should not appear.

Trade Associations

- 4.9 A Trade Association is defined as "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."¹⁴
- 4.10 Thus, an employed barrister may provide advice by means of a helpline offering legal advice to members of a trade union or other organisation and barristers employed by such a Trade Union may offer other legal services, including representation in Tribunals or courts (assuming that they have the right to appear in the relevant court) to members of the Union.

Legal Advice Centres

- 4.11 Legal advice centres are defined as centres operated by a charitable or similar non-commercial organisation at which legal services are offered to members of the public without charge (or for a nominal charge) to the client and which either have the services of an employed solicitor or have been designated by the Bar Council¹⁵. Paragraphs 806 and 807 of the Code of Conduct provide that any barrister employed by such a centre
- 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;
 - 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;
 - must not have any financial interest in the legal advice centre.

¹⁴ See the definition in paragraph 1001 of the Code.

¹⁵ See the definition at paragraph 1001 of the Code.

Barristers employed in advice centres are, obviously, subject to all the other rules in the Code and, with respect to rights of audience should refer to paragraph 3.5 above.

- 4.12 Designations as legal advice centres are made by the Professional Conduct and Complaints Committee. They look generally at the organisation and status of the centre. It is usually particularly important that it be a non-profit organisation with full and appropriate insurance.

Free Legal Advice

- 4.13 Paragraph 502(d) allows employed barristers to supply legal services in the course of their employment free of charge to any member of the public or other organisation. Such services are likely to be done in the course of employment if (a) they are done in office hours and using the employer's resources; (b) the employer is aware that the work is being done and consents to it; and (c) the employer takes liability for any negligence. A particular example of such work might be a barrister employed by a charity which does not have the status of a legal advice centre but which nevertheless provides advice or representation to members of the public free of charge.
- 4.14 Work would be unlikely to fall within this category if it were done outside office hours and without the employer's knowledge and consent. This work could not be done as a barrister.
- 4.15 As a result of the definition of "legal services", barristers are permitted to give free legal advice to friends and relations (eg at dinner parties etc). They should be aware of the risks associated with such advice and, in particular, should consider whether they need any insurance to cover this.

Employment by More than One Employer

- 4.16 Employed barristers may have more than one employer so long as all are notified to the Bar Council. In both cases the employed barrister would need to be in full employment (i.e. on a salary with the employer paying PAYE and NI contributions). Barristers in such circumstances will need to look carefully at questions of conflict of interest. It is hard, in practice, to see how employment by more than one firm of solicitors would work.

Contracts for Services

- 4.17 Paragraph 503 of the Code provides that barristers who work under a contract for services may be employed barristers subject to the conditions set out in that paragraph. These conditions are that the contract must be in writing, for a determinate period and be the only contract under which the barrister is offering legal services. The last requirement can be waived by the Bar Council in appropriate circumstances. The aim of that paragraph is to allow barristers who in fact are in precisely the same sort of environment as an employed barrister with a single employer (but possibly on a temporary arrangement or employed through an agency) to be treated as if they are employed on a contract of employment. The waiver provisions exist to allow barristers to have the equivalent of two part-time jobs or to allow a barrister to complete work under one contract while beginning another. The aim was not to allow barristers to work under a multitude of different contracts so that

effectively they are offering legal services to the public. Barristers acting under contracts for services should consider carefully whether they need to have their own insurance.

Acting as a Salaried Partner or Director of a Firm of Solicitors

4.18 The Professional Conduct and Complaints Committee has taken the view that a salaried partner in a solicitors firm is a partner for the purposes of paragraph 205 of the Code and that such an individual is not, therefore, an employed barrister. It has also taken the view that a position as Director of a Limited Liability Partnership would also be contrary to this paragraph.

Part 5. Duties of Employed Barristers

- 5.1 Employed barristers are under exactly the same obligations as barristers in self-employed practice (save for those in Part IV of the Code which relate particularly to those in private practice). Section 42 of the Access to Justice Act 1999 makes this clear. This is not always apparent to or understood by employers. Where barristers are asked to undertake work in a way which is contrary to the Code they should explain the duty that they are under. If necessary, they should refuse to have anything further to do with the matter. Action taken by an employer against the barrister in such circumstances may give grounds for action in the Employment Tribunals.
- 5.2 For the purposes of the Code, an employer is treated as a barrister's client and the duties owed to a client should be read as being owed to the employer. Where, however, the barrister is employed in a firm of solicitor, the duty is to the ultimate client¹⁶

Employees of the Government Legal Service

- 5.3 A barrister employed in the Government Legal Service is subject to and must have regard to the Civil Service Code and also to the Code governing lawyers in the Civil Service.

Employees of the Crown Prosecution Service

- 5.4 A barrister employed in the Crown Prosecution Service is subject to and must have regard to guidance issued to Crown Prosecutors by the Service.

Duty to the Court and Disclosure

- 5.5 The duty not to mislead the court¹⁷ and to disclose documents that are legally disclosable applies to employed barristers. A barrister has a duty to advise the employer or client to comply with any duty to disclose and should refuse to mislead the court. If the instructions involve misleading the court, or if the employer refuses to allow a document to be disclosed, the barrister should cease to act¹⁸. There is no duty to disclose the matter to the court once the barrister has withdrawn.

Independence

- 5.6 Employed barristers should be aware of paragraph 307 which provides that they must maintain their independence. That paragraph suggests that the acceptance of gifts in circumstances that might lead to an inference that their independence has been compromised would be contrary to the Code. Where a barrister is offering legal services to an employer only and not to clients, declaration to the employer of a gift from a third party would probably be sufficient to ensure that this paragraph was not breached. This would be less likely to apply where the barrister is employed by a firm of solicitors.

¹⁶ See paragraph 303 of the Code.

¹⁷ Paragraph 302 of the Code.

¹⁸ Paragraph 608 of the Code.

Conflicts of Interest and Confidentiality

5.7 Barristers employed to offer advice to their employers alone are less likely than others to find themselves with difficulties of conflicts of interest. They should be aware, however, that conflicts can arise in the following circumstances:

- Between their own individual interests and those of the employer – particularly where the barrister has an outside personal interest;
- Between the interests of fellow employees whom they have been advising and those of the employer;
- Where they are employed by one or more employers by conflicts between those employers.

Generally, employed barristers should cease to deal with a matter in which there is a conflict. It would also be prudent, particularly where it is part of the job to advise individual employees or there is a likely conflict between two employers, to have suitable arrangements set up to deal with such conflicts and to protect both the barrister and the client.

5.8 The duty of confidentiality is owed either to the employer or to the client of the employer concerned. Particular difficulties can arise where an employed barrister changes employer, particularly where the new employer is in the same sector as the previous one. Barristers in these circumstances should be aware of paragraph 603(f) which provides that they should not act in circumstances where there is a danger that information confidential to their former employer could be used for the benefit of their new employer unless they have received the consent of the former employer.

Accepting and Returning Work

5.9 Employed barristers are also subject to similar duties to self-employed barristers in respect of taking on work. Although the "cab-rank" rule does not apply to employed barristers, the non-discrimination rule in paragraph 601 does apply in relation to advocacy. Paragraph 603 which sets out the occasions on which barristers are required to refuse work applies also. Employed barristers are under the same duty as barristers in private practice to ensure that they act with appropriate competence. They should refuse to undertake work for which they do not have the appropriate experience or qualification. It is for the individual to judge whether he or she has the competence to deal with a particular matter or whether it should be outsourced or passed to a more senior colleague. Similarly, the barrister should withdraw there is a danger of a breach of confidentiality or conflict of interest or if the instructions require a breach of the Code or of the law.

5.10 Barristers, when considering whether to withdraw from a case, should pay particular attention to paragraphs 608, 609 and 610(d). Paragraph 608 requires barristers to withdraw if it becomes clear that one of the situations set out in paragraph 603 has arisen and, amongst others, if the client or employer refuses to permit disclosure of a document which should be disclosed. If those situations arise, the barrister is required to withdraw, whatever the effect on the client. Paragraph 609 deals with circumstances in which the barrister has a discretion to withdraw (for example if professional conduct is being impugned), but it is subject to paragraph 610(d) which

prohibits barristers from withdrawing in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice to the client.

- 5.11 Finally, barristers should have regard to the general duties in Part VII of the Code in respect of the general conduct of their work.

Conflicts between Barristers and Solicitor Employers

- 5.12 It is worth pointing out that we believe that the bulk of the Code applicable to employed barristers corresponds to the duties imposed on solicitors by the Law Society's Code. The Bar Council does not consider that, in practice, there are likely to be any conflicts between the duties of a barrister and those of a solicitor employer but, if there are, barristers should contact the Bar Council for guidance.

Complaints

- 5.13 Employed barristers may be the subject of complaints from a number of different sources: opposite parties, the general public, judges and others. The Bar Council will look at such complaints but will pay particular attention to whether the employer has been informed of the complaint and looked into it. It is generally reluctant to interfere in actions committed by barristers in the course of their employment which are legitimately within the scope of that employment. Obviously, this could not apply to cases involving dishonesty, misleading the court or discourtesy to third parties likely to bring the Bar into disrepute.
- 5.14 Employed barristers can also be subject to findings of inadequate professional service and could be required to pay their employer (or the solicitor's client) compensation for this.

Regulation of Barristers in Solicitors' Offices

- 5.15 Barristers in solicitors' offices are, primarily, subject to the jurisdiction of the Bar Council in relation to their own professional conduct and the Bar Council will consider complaints against them and, if necessary, take disciplinary action. Barristers should also note, however, that the Office for the Supervision of Solicitors (OSS) can look at their conduct when considering a complaint against the firm generally. Barristers should co-operate with such investigations. Although the OSS cannot make findings with regard to a barrister's professional conduct, they can bring an action in the Solicitors' Disciplinary Tribunal for a declaration that an individual is not suitable to be employed by solicitors. Where there is a doubt about who should look at an individual complaint, the Bar Council and the OSS will discuss this question between them. Generally, the approach that will be taken is that complaints which affect the barrister's personal conduct will be considered by the Bar Council, while those which are more to do with the way in which the solicitor's practice is run will be considered by the OSS.

Professional Conduct and Complaints Committee
Professional Standards Committee
Employed Barristers Committee

December 2003