BAR STANDARDS BOARD

REGULATING BARRISTERS

UNREGISTERED BARRISTERS (BARRISTERS WITHOUT PRACTISING CERTIFICATES) – SUPPLYING LEGAL SERVICES AND HOLDING OUT

1. Who is this guidance for?

This guidance relates to 'unregistered barristers', or barristers without practising certificates, who wish to provide legal services to employers or to the public, whether such barristers are employed or self-employed. It also addresses restrictions on 'holding out' as a barrister in connection with the supply of legal services.

It is now a criminal offence for a barrister without a practising certificate to provide legal services which are Reserved Legal Activities under the Legal Services Act 2007. This guidance provides advice on what legal services may be provided by a barrister without a practising certificate and on the rules which must be followed when doing so.

Core duties 5 and 9 of the BSB Handbook apply to unregistered barristers at all times. The other Core Duties apply when supplying legal services, as do certain other rules (see below).

The main Outcome this guidance relates to is Outcome C34 in the BSB Handbook - *Client*s *who receive legal services from unregistered barristers are aware that such unregistered barristers are not subject to the same regulatory safeguards that would apply if they instructed a practising barrister*.

2. Introduction

There are many barristers who do not have a practising certificate either by choice or because they do not qualify for a practising certificate.

Such barristers are now called "Unregistered Barristers" because they are not on the public register of barristers who have practising certificates. It is important to note that the term "non-practising barrister" which has been used in the past should no longer be used as it can cause confusion since some barristers without practising certificates do provide legal services and are, in effect, practising as lawyers.

Many unregistered barristers will have chosen careers other than the law or may be retired and are therefore not covered by this guidance unless they provide any legal services.

Even though the rules which apply only to practising barristers do not apply to them, all unregistered barristers remain members of the profession and members of their Inn and are

expected to conduct themselves in an appropriate manner. In this context, they remain subject to certain Core Duties and Conduct Rules at all times. If they provide legal services, they must comply with all the Core Duties and they have a responsibility not to mislead anyone about their status. These are new requirements introduced by the Handbook. This guidance will assist those barristers to comply with their obligations contained in the BSB Handbook.

3. What are Legal Services and Reserved Legal Activities?

Rule s6 in the BSB Handbook determines that you must not carry on any reserved legal activity unless you are entitled to do so under the Legal Services Act.

Under the Legal Services Act certain legal services are reserved to those who are authorised to provide them. For barristers, only those who have practising certificates are authorised persons. Such services are known as 'reserved legal activities'[1] *which* are as follows:

- the exercise of a right of audience;
- the conduct of litigation;
- reserved instrument activities;
- probate activities;
- notarial activities[2] and
- the administration of oaths.

As it is now a criminal offence to carry out a reserved legal activity without a practising certificate, it is important that unregistered barristers are clear that they are not permitted to carry out these services. In particular, the administration of oaths, which formerly could be performed by any barrister, is now reserved for those with practising certificates. Advocacy is not a reserved legal activity unless it involves the exercise of a right of audience. Thus, advocacy before an arbitrator or other tribunal where rights of audience are not required is not a reserved legal activity.

If you are also a solicitor, or regulated by another approved regulator you may be authorised to carry out reserved legal activities in that capacity. Guidance for those barristers who are dual qualified can be found at paragraph 8.6 below.

As an unregistered barrister, you can provide any legal services that are not reserved legal activities. However there are some important rules in the BSB Handbook which you need to follow in doing so.

Legal services are defined in the definitions section of the Handbook as follows*:*

"[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:

[1] Section 12 of the Legal Services Act 2007
[2] The Bar Council does not authorise any barrister whether practising or not to perform notarial activities.

a) sitting as a judge or arbitrator or acting as a mediator, early neutral evaluation, expert determination and adjudications;
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) 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;
f) 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;

4. Holding out as a barrister

Rule s8 provides that you must not practise as a barrister unless you have a practising certificate, and rule s9 defines practising as a barrister as including holding yourself out as a barrister while providing legal services. The restriction on ‘holding out’ prevents barristers who do not have a practising certificate but who are supplying or offering to supply legal services from using the title ‘barrister’ or otherwise conveying the impression that they are practising as barristers. It is not possible to provide a comprehensive list of the circumstances which might amount to holding out but it is hoped that the following examples will give an idea of what is prohibited.

- Describing oneself as a barrister in any printed material used in connection with the provision of legal services: in particular in advertising or publicity, on a card or letterhead, or on premises

- Describing oneself as a barrister to clients or prospective clients

- Describing oneself to clients or prospective clients as a non-practising barrister or barrister-at-law (titles which have been allowed in the past but not in recent years)

- Indicating to opposing parties or their representatives (e.g. in correspondence) that one is a barrister

- Describing oneself as a barrister or (when supplying services to the public) as "counsel", wearing robes, or sitting in a place reserved for counsel, in court

- Using other descriptions in connection with supplying, or offering to supply, legal services which imply that the individual is a barrister (e.g. membership of an Inn of Court)

(These examples are not exhaustive.)

The restriction on holding out only applies in the context of legal services. If you have been called to the Bar, there is no restriction on referring to yourself as a barrister if it is not in connection with the supply of legal services.

It should also be noted that for a BVC or BPTC graduate to mention that he/she is a holder of this qualification, is not considered as holding out as a barrister.

5. What job title can I hold; what can I/my employer put on a business card/letterhead/website etc.?

The fundamental principle is that you must not mislead or allow anyone else to mislead any person to whom you or your employer supply or offer to supply *legal services*.

You can use the title "barrister" when **not** providing *legal services.* See paragraph 3 for activities which are not regarded as *legal services (*"non-legal" services). However, you must be careful not to mislead third parties as to your status as a barrister. This would apply particularly if you were also providing *legal services* to the same people to whom you provide "non-legal" services.

It is important that you/your employer do not use the title barrister, unregistered barrister or non-practising barrister on business cards, promotional material, letterheads, and business names. If you are employed whether by a regulated or unregulated firm, you should make sure that your employer does not use any of these titles in connection with you in its printed material or on its website.

You can use the titles "lawyer" or "legal adviser". If you are self-employed, or work for an unregulated employer, you should not use the title "counsel". However, if you provide legal services only to your employer you may use titles commonly used in companies, such as legal counsel, general counsel, corporate counsel. You may also use the description "of Counsel" if you work for an employer which is an authorised person under the Legal Services Act.

In a curriculum vitae, you can state that you qualified as a barrister.

You can refer to yourself as a BVC/BPTC graduate.

If you are a QC but do not have a practising certificate, you may continue to use the title but if you are providing *legal services* you must explain that you are not practising as a barrister.

6. Why do special rules apply to unregistered barristers who supply legal services?

Legal services, other than reserved legal activities, can be supplied by anyone and are not subject to any special statutory regulation. It would therefore be disproportionate to impose regulatory requirements on unregistered barristers who supply such services just because they are barristers, except where there would otherwise be a clear risk to their potential clients. The risk that needs to be managed is that most potential clients are not aware of the different categories of barrister and will tend to assume that the same regulatory requirements and protections apply to all barristers. Barristers with practising certificates are

subject to important requirements, such as having insurance and keeping their professional knowledge up-to-date, which do not apply to unregistered barristers. Some of their clients also have the right to complain to the Legal Ombudsman. These are important safeguards for clients, who may assume that they will apply whenever they seek legal services from someone they know or believe to be a barrister. The rules discussed below are intended to manage this risk while still allowing unregistered barristers to provide unreserved legal services.

7. What Rules and Duties apply to you as an unregistered barrister providing legal services?

When you are providing legal services all the Core Duties in the BSB Handbook apply to you (see Rules C1.2 and C2.1-2.2). The Core Duties are:

CD1 - You must observe your duty to the court in the administration of justice
CD2 - You must act in the best interests of each client
CD3 - You must act with honesty and integrity
CD4 - You must maintain your independence
CD5 - You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession
CD6 - You must keep the affairs of each client confidential
CD7 - You must provide a competent standard of work and service to each client
CD8 - You must not discriminate unlawfully against any person
CD9 - You must be open and co-operative with your regulators
CD10 - You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations

Even when you are not providing legal services, Core Duties 5 and 9 apply to you.

The Conduct rules (and associated guidance) which apply to unregistered barristers at all times are as follows:

- Rule c8 – Your duty not to do anything which could be seen to undermine your honesty, integrity and independence
- Rule c16 – Your duty to your client is subject to your duty to the court, and your obligations to act with honesty and integrity, and to maintain your independence.
- Rules c64-70 - Duties in relation to provision of information to the BSB and co-operation with the BSB. These duties include the new duty to report serious misconduct by other barristers (see separate guidance).

In addition, the following Conduct Rules and associated guidance apply when providing legal services:

- Rules c4 and c5 – your duty to your client is subject to your duty to the court , and your duty to the court does not require you to breach your duty to keep the affairs of your client confidential

- Rule c19 – not misleading clients
- Rules c144 and 145 – rules relating to information which unregistered barristers must give to inexperienced clients

Rule c19 is a new rule which applies to all barristers. It provides that **you must not mislead** anyone to whom you supply or offer to supply *legal services*. For unregistered barristers this means:

- You must not use the title "barrister" in connection with the supply of or offer to supply *legal services.* This is known as "holding out" and is explained further in section 4. Similarly, you should not use the description "unregistered barrister" when supplying or offering to supply *legal services* except to the very limited extent discussed in paragraph 8 below and subject to explaining what the term means. Barristers who were registered under paragraph 206 of the previous Code may continue to use the title "barrister", but must comply with the terms of rule s15.[3]

- You must not mislead clients or employers about:

  - your status;
  - the extent to which you are regulated;
  - the services you can supply and
  - your insurance cover

In order to comply with the obligation not to mislead clients or employers, you will need to consider what information you should give them about your status as discussed further in paragraph 8 below. In certain circumstances, the Handbook prescribes the information you must give (see below).

Rules c144-145 set out the information which must be provided by unregistered barristers when providing legal services to an inexperienced client (see paragraph 8.4 below)

8. Information to be given by unregistered barristers to employers, clients or prospective clients

This section describes what information you may, or in some cases **must**, give to those with whom you deal. Keep in mind the purpose of giving the information as discussed in paragraph 6 above. Check which of the following applies to you. When you provide the explanation required by rule c144 or suggested by this guidance, the BSB would not normally consider this as constituting holding yourself out as a barrister.

8.1 I provide *legal services* only to my employer

You may describe yourself orally as an unregistered barrister or a barrister without a practising certificate, to your employer, colleagues and any third parties with whom you deal

[3] There are special rules for those barristers registered under paragraph 206 of the 8th edition of the Code of Conduct.

and you should explain what this means if there is any risk of anyone being misled. You may also state on a CV that you have been called to the Bar.

8.2 I work for a regulated professional body and provide services to clients

This applies to unregistered barristers working for solicitors firms, other bodies which are authorised under the Legal Services Act such as licensed conveyancers, or other regulated professional firms such as accountants or Patent Agents.

You may describe yourself to your employer and colleagues as an unregistered barrister or a barrister without a practising certificate and you should explain what this means if there is any risk of anyone being misled. You should **not** describe yourself as a barrister or unregistered barrister to clients of your employer but if you are asked whether you are a barrister or if it becomes known that you are, you may say that you are an unregistered barrister and explain what this means. You should seek to ensure that any publicity put out by your employer does not describe you as a barrister. You must also comply with any regulatory requirements of the professional body which regulates your employer.

8.3 I am self-employed and I provide unreserved *legal services* to experienced business clients

This applies to those barristers dealing with larger businesses or firms which can be expected to make informed judgments about sourcing legal services.

You may not advertise or refer to yourself as a barrister but in tendering for work you may state to a prospective client that you are an unregistered barrister provided that you explain to the client what this means. If you are in any doubt, a written statement should be provided along the same lines as that detailed in paragraph 8.4 below. Whilst we strongly advise all barristers providing legal services to carry professional indemnity insurance, if you decide not to insure then you should so advise clients or prospective clients.

8.4 I am self-employed and supply unreserved *legal services* to inexperienced clients, such as individuals, small companies and charities.

If you supply legal services to inexperienced clients, rule c144 applies to you. Inexperienced clients are defined as including individuals and small organisations which would be entitled under the Legal Ombudsman Scheme Rules to make a complaint to the Legal Ombudsman if you were a practising barrister.[4] As you are not practising as a barrister your clients have no redress under this scheme so you are required to make your status very clear to them. But other clients, for example slightly larger organisations which only occasionally require legal services, may also be inexperienced. If you are in any doubt as to whether your client has sufficient experience to understand the implications of instructing an unregistered barrister instead of a practising barrister, then you should give them the written statement detailed in this paragraph.

[4] They provide that complaints may be made by micro enterprises (headcount below 10 and turnover or balance sheet total of 2 million euros or less), charities with an income of £1million or less and clubs and other organisations with a turnover of £1 million or less). See http://www.legalombudsman.org.uk/.

Where rule c144 applies, you **must** explain to your client:

- that you are not acting as a barrister
- that you are not subject to certain Conduct Rules applying to practising barristers and the Bar Standards Board cannot consider complaints against you in relation to these rules but only in relation to the rules which do apply to you
- if you are not covered by professional indemnity insurance you must say so
- that your client has no right to complain to the Legal Ombudsman

Your client must also confirm in writing that they have received this explanation.

A suggested form of statement is contained in Annex 1.

These requirements do not apply to legal services provided when working for a Legal Advice Centre[5] as defined in the Code, or if you are authorised to provide reserved legal activities by another Approved Regulator[6] (see paragraph 8.6 below). They do however apply if you were formerly registered under rule 206 of the previous version of the Code. You may also wish to refer to the definition of legal services in paragraph 3 above in deciding whether you are providing legal services.

8.5 I am employed by an unregulated organisation which provides unreserved *legal services* to the public

The same requirements apply as if you were self-employed depending on whether the client is an experienced large business or an inexperienced client such as an individual or small business. You should follow the guidance in paragraph 8.3 or 8.4 above as appropriate. It is your responsibility and not your employer's to see that the relevant information is given and you should advise your employer of the rules so that they do not hold you out as a barrister.

Barristers who do not hold practising certificates (including first six pupils) are permitted to provide free legal advice to clients of a legal advice centre, providing they do not hold themselves out as barristers and do not undertake or offer to undertake any reserved legal services.

8.6 I am authorised to carry out legal services by another Approved Regulator

Under the LSA, only Approved Regulators can authorise the carrying out of reserved legal activities (see above). The following Approved Regulators can currently authorise the conduct of litigation and/or exercise of rights of audience: the Law Society (acting by the Solicitors Regulation Authority), the Chartered Institute of Legal Executives, the Chartered Institute of Patent Agents and the Institute of Trade Mark Attorneys.

[5] Rule c145.3 and section S B9.
[6] Rule c145.4

Rule s43 determines that, if you are authorised by another Approved Regulator to carry on a reserved legal activity and currently permitted to practise by that Approved Regulator, you must not practise as a barrister and you are not eligible for a practising certificate. If you are practising as a person authorised by one of the other Approved Regulators, you may hold yourself out as a barrister in addition to your other qualification, provided that you comply with Rule s14. This Rule requires that, in these circumstances, if you hold yourself out as a barrister or a registered European lawyer, when supplying legal services to any person or employer for the first time, you must inform them clearly in writing at the earliest opportunity that you are not practising as a barrister or a registered European lawyer.

9. What are the Rules for Pupils?

In your first six, as you do not have a practising certificate, you cannot supply legal services as a practising barrister but you can accept a noting brief with permission of your pupil supervisor or head of Chambers. You may describe yourself as a pupil barrister in that capacity. If you provide unreserved legal services in any other capacity, for example if providing pro bono advice, you should not describe yourself as a barrister or a pupil barrister and should follow the rules and guidance for unregistered barristers.

In your second six, when you have a provisional practising certificate, you may provide legal services in accordance with Rule S19. You may describe yourself as a pupil barrister and you should ensure that the client understands your status.

10. Further Help and Advice

It is recognised that the rules are complex. Further advice and information is available from the BSB on 020 7611 1444 or call the Bar Council Ethical Services (020 7611 1307) for advice.

Annex 1 – Explanation to clients

The Code of Conduct

Suggested statement to be given in accordance with Rule c144

This statement, or an explanation containing the same information on the points shown in bold, must be given to any inexperienced client to whom you offer to provide *legal services* and you must receive written confirmation that they have received it before providing any such services.

Your name: **Date:**

This statement is to explain my status in offering to provide you with legal services.

Although I am qualified as a barrister, **I am not entitled to practise as a barrister**. **I do not have a practising certificate** and am not on the register of practising barristers.

Therefore, in providing any legal services to you I am not acting as a barrister and **I am not subject to many of the rules which regulate practising barristers.**

This limits the services I can provide to you. I can provide you with legal advice and represent you before certain Tribunals but **I cannot represent you in Court**.

I aim to provide you with a good service and if you have any concerns about what I do for you, please let me know and I will try to resolve the problem. But you should know that **you would have only limited rights to complain about me to anyone else.**

The Legal Ombudsman, which can adjudicate on complaints about poor service by practising barristers, cannot consider any complaint against me.

If I cannot resolve your concerns, **you can complain to the Bar Standards Board** and it will investigate whether I have failed to comply with any of the rules which apply to me but it cannot investigate possible breaches of rules which apply only to practising barristers

I am [am not] covered by professional indemnity insurance.

Signed: Date:

I confirm that I have received the above statement from [ ].

Signed: Date: