



Guidance for professional clients and OISC Advisers on instructing immigration barristers

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This guidance was produced by the Bar Standards Board in collaboration with the Solicitors Regulation Authority and the Office of the Immigration Services Commissioner.

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Section 1: Introduction

Definitions

Client: any person or company who seeks the advice of a legal professional

Professional client: any person who is authorised to provide legal services by an approved regulator (such as a solicitor or legal executive) but does not include OISC-regulated advisers

Intermediary: any person through whom a self-employed barrister or BSB entity is instructed. For the purposes of this guidance it does not include a professional client but may include OISC advisers acting under public or licensed access

OISC Adviser: Immigration advisers regulated by the Office of the Immigration Services Commissioner (OISC).

Background

In May 2016, the Bar Standards Board (BSB) published a report on its Immigration Thematic Review (ITR). The ITR highlighted issues that clients faced in seeking legal advice from barristers supplying immigration services. These issues fell into three broad 'themes', which were:

- Access to justice;
- Poorly informed consumers; and
- Quality of advice and standards of service.

Under the third theme, it was recognised that barristers' services are provided at the end of a typical legal supply chain; therefore, the quality of service they are able to provide can be affected by difficulties that emerge at earlier stages in the supply chain.

One area where problems arise in the supply chain, as identified in the ITR, is when professional clients and OISC

regulated advisers instruct barristers. A number of barristers interviewed as part of the ITR highlighted issues that can arise during instruction which can limit the effectiveness of the service barristers provide.

Purpose of the guidance

This guidance aims to provide professional clients and OISC-regulated immigration advisers with useful information on instructing immigration barristers. OISC-regulated advisers should refer to general guidance for professional clients and follow that in addition to those sections specifically targeted at them. This guidance may also be useful for other intermediaries. It will enable them better to advise their clients and provide a better service for their clients when instructing a barrister.

Section 2: Responsibilities of the barrister

Accepting instructions from a professional client

When a barrister is instructed, it is usually to provide expert legal advice or representation. A barrister can be instructed in various ways. One way is through a professional client. Upon instruction from a professional client, a barrister should send them a client care letter. A client care letter is an important part of the agreement, as it will outline all the important details required for a shared understanding between the professional client and the barrister, which will ultimately benefit the immigration client. The client care letter will outline what work the barrister is going to do, when it will be done, how the client will be charged and how complaints can be made about the barrister's service.

If the scope of the instructions is changed by the professional client (eg where further services are required related to the same client's case), then the barrister is not

required to send a second client care letter. Rather, the barrister will be viewed as accepting instructions once they begin the work, on the same terms as originally agreed, unless they say otherwise.

If a barrister decides to cease acting ('returns instructions'), then they will only do so after either seeking the immigration client's consent, or clearly explaining to them or to the professional client their reasons for returning instructions.

If you are a solicitor and provide immigration or asylum advice under a legal aid contract, you must obtain Immigration and Asylum Accreditation from the Law Society. Membership provides recognised quality standards for asylum practitioners and can be used as a quality mark for solicitors and OISC advisers. For more information, please visit the Law Society's website.¹

Accepting instructions in public and licensed access work

Public access

Another way a barrister can be instructed is through public access. Public access is where a barrister has undertaken additional training and is permitted to work directly with clients, and there is no professional client. If a barrister is permitted to conduct public access work, it will appear on their record on the barristers' register. The BSB produces separate guidance for barristers,² clients³ and intermediaries⁴ on the public access scheme. A high-level summary is provided

at Annex A for information, but any clients seeking to instruct barristers through public access (or their intermediary) should refer to that guidance.

Licensed access

The BSB also operates a licensed access scheme. This enables certain "licensed" clients to instruct any barrister (whether or not public access trained) directly. The client must either hold a licence issued by the BSB or be a member of a professional body specified in the schedules to the BSB's Licensed Access Recognition Regulations.

Accepting instructions from OISC advisers

Barristers who are accepting work from an OISC-regulated advisor via public or licensed access should take steps to ensure they are aware of what that adviser is entitled to do. OISC advisers can act as intermediaries under the public access scheme or they can apply to be licensed under the licensed access scheme. In either case, they can only undertake work that is permitted by OISC rules.

If you are an OISC adviser doing immigration work on a legal aid contract, you must also obtain Immigration and Asylum Accreditation from the Law Society.⁵ The Law Society sets its own competency levels expected of an immigration/asylum adviser based on the capacity you provide them in. For example, different rules apply to trainee casework assistants, casework assistants, senior

1. <http://www.lawsociety.org.uk/support-services/accreditation/immigration-asylum/>

2. https://www.barstandardsboard.org.uk/media/1945304/the_public_access_scheme_guidance_for_barristers_february_2018_final_.pdf

3. https://www.barstandardsboard.org.uk/media/1666529/2_the_public_access_scheme_guidance_for_lay_clients.pdf

4. https://www.barstandardsboard.org.uk/media/1945304/the_public_access_scheme_guidance_for_barristers_february_2018_final_.pdf (Page 15 onwards)

5. <http://www.lawsociety.org.uk/support-services/accreditation/immigration-asylum/>

caseworkers and supervising senior caseworkers. If you provide immigration services in any of these capacities, you must comply with both OISC's and the Law Society's competency levels (as appropriate).

Level 1

Advisers authorised at OISC Level 1 are not permitted to instruct a barrister or act as an intermediary in order to instruct a barrister through the licensed access or public access schemes.

Level 2

Advisers at Level 2 are able to instruct barristers via the BSB's licensed access scheme (if they have been licensed by the BSB) or act as intermediaries under the public access scheme, but for *advice only* in immigration and asylum matters. This prevents Level 2 advisers from using the licence, or the public access scheme, to instruct barristers to represent clients in any court or tribunal.

If advisers authorised at OISC Level 2 act as intermediaries under the public access scheme it is important to consider that the public access route may require much more involvement from the client, and so is unsuitable for clients who may struggle to understand the legal process.

Level 3

OISC advisers at Level 3 are able to instruct barristers via the BSB's licensed access scheme (if they have been licensed by the BSB) or act as intermediaries under the public access scheme, for both advice and to represent clients before the Tribunal.

If being instructed via the BSB's licensed access scheme, the barrister should check the OISC advisers licence to ensure they are permitted to accept the work they will be doing. If it has not been sent, the barrister should request it.

If the OISC adviser is acting as an intermediary under the public access scheme, the barrister must ensure that the intermediary and client understand the true nature of the arrangement. To this end, they should send a client care letter to both the OISC adviser and the client. The OISC adviser may undertake contractual liability for the barrister's fees. If the intermediary does not wish to do so, the barrister may wish to consider why they should deal with an intermediary at all, rather than directly with the client. Model letters to both the intermediary and client are on the BSB's website.⁶

Conducting litigation

Some barristers are authorised to conduct litigation; and with this comes additional responsibilities the barrister must consider. Barristers who are authorised to conduct litigation by the BSB will be appear on the Barristers' Register as having the right to do so. A barrister who is conducting litigation will be responsible for the administrative management of the case, including issuing/commencing proceedings and performing work related to the management of those proceedings (eg going on the record, serving documents etc).

The BSB's guidance on conducting litigation provides a more detailed explanation of what the BSB considers to be litigation.

6. <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>

Litigation will normally be the responsibility of the professional client, where there is one, but in cases where the professional client appoints a barrister who is also handling the conduct of litigation, it may be useful for the professional client and the barrister to agree who will keep the immigration client updated on case management details, such as hearing dates.

Section 3: Responsibilities of the professional client

Before selecting a barrister

Professional clients will be instructed by clients to provide immigration advice and services which are specific to the client's needs. It is the primary responsibility of the professional client to fully understand these needs and advise or act in the client's best interest to meet them.

In order to achieve this, professional clients will need to:

- gather the relevant information from the client;
- ensure the client is asked pertinent questions and given sufficient time to gather necessary information or documents;
- ensure the client understands both their current position and the merits of any suggested application or course of action;
- ensure the client is aware of the costs that will be associated with any suggested course of action and that these have been agreed in advance of the work commencing;
- inform the client regularly about the progress of their case; and
- inform the client of any outcomes

in writing and in a timely fashion allowing them to give further instruction when necessary.

Selecting a barrister

A professional client should consider the client's needs in determining whether it is in their best interests to instruct a barrister, either for advice or advocacy services. They will be responsible for identifying a set of Chambers or sole practitioner with expertise in the relevant field.

The professional client should explain to the client why they believe such assistance is required, why a specific Chambers or barrister has been identified and obtain the client's agreement to instruct. The professional client will be expected to work competently and effectively with the barrister to progress the case in the client's best interests.

Where a barrister has been instructed to represent the client at an immigration hearing (whether oral or written) the professional client will normally hold overall responsibility for ensuring all necessary paperwork that is required by the tribunal has been submitted and all necessary procedures complied with, even if it has been agreed that such documents will be drafted or submitted by the barrister (where the barrister is authorised to conduct litigation).

Section 4: Additional responsibilities in relation to OISC Advisers

OISC advisers should refer to the general guidance for professional clients on engaging a barrister. This section provides further guidance to OISC advisers.

The BSB licensed access scheme allows certain individuals with a particular

expertise to instruct barristers directly on matters related to that expertise. OISC advisers can instruct barristers directly on immigration matters, if they are licensed to do so by the Bar Standards Board. They are also allowed to instruct a barrister as a public access intermediary. A summary of what different levels of OISC adviser are permitted to do under OISC rules is provided above in section two.

When instructing a barrister via licensed access, it is good practice for the OISC advisor to send the barrister a copy of the licence so that they can establish whether the instructions fall within the remit of the licence.

An OISC adviser who instructs a barrister through the licensed access scheme is contractually liable for the barrister's fee. Where these costs are to be passed on to the client through the adviser's fees, they will need to be agreed with the client in writing before the barrister is instructed

Judicial review

There are special considerations for judicial review cases. No OISC adviser is permitted to act as an intermediary in judicial review matters being pursued through the public access route.

Only OISC advisers authorised in the category of judicial Review Case Management (JRCM) may instruct a barrister via the BSB's licensed access scheme and must instruct a barrister who has permission to conduct litigation. Further details about the responsibilities of OISC advisers instructing counsel in judicial review matters can be found in the OISC's Practice Note - Judicial Review Case Management.

<https://assets.publishing.service.gov.uk/government/uploads/system/>

[uploads/attachment_data/file/607605/Practice_Note - Judicial Review Case Management3.pdf](https://assets.publishing.service.gov.uk/government/uploads/attachment_data/file/607605/Practice_Note_-_Judicial_Review_Case_Management3.pdf)

Section 4: Supporting barristers

There are some key issues which are dependent on the professional client that can affect the standard of service a barrister is able to provide to the client. These are quality of paperwork/files, client preparation for the legal system and payment of fees.

Considerations relating to files/ paperwork

Immigration cases are particularly reliant on documentation relating to identity, nationality, length of stay and factors relating to asylum (eg medical reports). Therefore, it is vital that the professional client ensures that the barrister has received all necessary files and paperwork prior to delivering their service.

It may be useful for the professional client to invite the immigration client to check any documentation that is to be sent to the barrister before sending it, in order to ensure that everything is captured and there are no discrepancies.

In asylum cases, the professional client may wish to consider requesting additional evidence, such as information about the client's mental health, physical scarring or medical assessments.

Once the information has been sent to the barrister, they may suggest further evidence that could be helpful to the case and agree with the professional client how this should be obtained.

Where the barrister is to appear at court, the professional client should in the first instance discuss with the barrister what

level of feedback they require on a bundle and by what date the barrister would need to receive it.

This is important as there are many variables that may affect how far in advance papers will be needed, such as the need for a conference, the seniority of the barrister, the complexity of the case and whether the case is an appeal in which the barrister was not instructed at first instance.

Generally, bundles ought to be received at least five working days prior to the hearing. However, in instances where the professional client wants input from the barrister on the contents of the bundle (eg reading draft witness statements or advising on a draft expert report) then it is best to allow another one or two weeks for comment, depending on the degree of feedback required.

For asylum appeals, barristers would normally expect papers to be delivered at least two weeks in advance, as a conference is often required in advance of the hearing.

It may damage the client's prospects if important files are sent to the barrister at very short notice before a hearing.

Client preparation for the legal process

Evidence shows that many consumers of legal services do not understand the differences between the role of a solicitor and a barrister. The professional client should explain this to the client so that they know what service to expect from the barrister.

Clients in immigration cases are likely to be unfamiliar with the legal process in England and Wales. Professional clients should ensure their clients are prepared for

the legal process and know what to expect, particularly in the courtroom.

If the immigration client is appearing in court or before an immigration tribunal, then it is important to outline the court process to them in a way they can understand. This may include providing them with an estimation of how long proceedings may take, outlining what will happen at each stage of the process, highlighting any questions they are likely to be asked, noting what will happen at the end of the hearing and outlining what the outcome of the hearing will mean for the client.

If the client has language needs, the professional client should ensure that they obtain an appropriate interpreter for all parts of the legal process. It is important to note, for example, that interpreters provided by the court will not be able to interpret for the immigration client during conference with their barrister.

The Solicitors Regulation Authority has identified some examples of good practice that can be applied to professional clients working with interpreters. These include:

- making sure interpreters can explain information to clients in a way that the individual client understands;
- providing a discreet opportunity to the client to raise any concerns about the proposed interpreter;
- sensitively considering the client's circumstances and cultural/social background to make sure an appropriate interpreter is selected;
- explaining the role of the interpreter to both the client and the interpreter and making clear who is responsible for payment of all relevant fees; and

- undertaking checks to review the quality of interpreters and their work.

Managing client vulnerability

In cases where there is a professional client, barristers will often have limited contact with the client prior to the hearing; therefore, it is particularly important that the professional client identify any vulnerabilities and inform the barrister about them.

With cases which involve professional clients, the responsibility for managing client vulnerability lies with the professional client. However, it would be ideal for the barrister to be informed of any vulnerabilities upon instruction.

If there is an intermediary involved in a public access case, it should be clear who is managing client vulnerability. It is good practice for the intermediary to manage client vulnerability, but it is the barristers' responsibility to ensure vulnerability is managed, and the barrister should not assume the intermediary is going to do this.

The Law Society has published a detailed practice note for solicitors working with vulnerable clients. For immigration advisers, the OISC has also published a practice note on meeting the needs of vulnerable clients.⁷

Barristers also have a responsibility to ensure vulnerable clients are catered for. Professional clients may wish to review the guidance published by the BSB for immigration barristers working with vulnerable clients, so they are aware of what good practice looks like.

More information on identifying client vulnerabilities can be found in the BSB's Vulnerability Good Practice Guide for immigration clients at:

https://www.barstandardsboard.org.uk/media/1929040/immigration_vulnerability_guidance_2018.pdf.

Both the SRA and the OISC publish guidance for practitioners on working with vulnerable clients, which should be read to supplement this guidance.

Payment of fees

OISC advisers, solicitors and legal executives are required to provide good information about costs to their clients during the legal process, which should include information about barristers' fees.

It is important for the professional client to ensure that the client is aware of who is responsible for paying fees, how they will be paid (eg if the client's money is to be held on account) and how much the barrister's final fee amounts to.

As barristers' fees can be unpredictable due to instructions being varied or hearings being moved/cancelled, it can be useful for a professional client to keep their client informed of fees incurred and projected costs throughout the case.

It is good practice for a barrister to provide, where possible, an estimate of the fees that may be incurred if the professional client requests one. This may then be conveyed to the client by the professional client, with the caveat that the final fee may differ.

7. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/574531/Practice_Note_on_Meeting_the_Needs_of_Vulnerable_Clients.pdf

Barristers will maintain records to support the fees charged in a case and will provide clients with these records or details of the work performed in order to verify their fee.

When fees are to be paid, the basis on which they will be accrued and who is responsible for paying them will form part of the agreement between the barrister and the professional client when the barrister is instructed.

In cases where a professional client is instructing the barrister, the professional client will usually take responsibility for ensuring that the fees are paid. Terms will usually be agreed to cover when the payment of fees is expected (eg within 30 days of the barrister's invoice being sent to the professional client.)

Annex A – additional responsibilities in relation to public access cases

Upon accepting public access instructions for an immigration case, a barrister must send the client care letter directly to the client, outlining what work the barrister is going to do, when it will be done, how the client will be charged for the work and how to complain if the client believes the service is inadequate. If there is an intermediary involved, the barrister should send the client care letter to them too.

In public access cases, it is the responsibility of the barrister to retain or ensure the client retains:

- Copies of all instructions;
- Copies of all advice given and documents drafted or approved;
- The originals, copies or a list of all documents enclosed with any instructions; and
- Notes of all conferences and of all advice given on the telephone.

As immigration cases have significant consequences, and clients may be in situations or have characteristics that make them vulnerable, the barrister is expected to ensure that the client is suited to this type of work. Factors that the barrister will consider when assessing a client's suitability for using the public access scheme include:

- The client's English language ability;
- The client's age;
- The client's understanding of, or ability to understand, the UK legal system;
- Any mental health issues the client may have;
- Any physical or mental disability that could affect the client's ability to conduct litigation (if required);
- Any vulnerability or trauma the client may have arising from the matter at issue (particularly if they are seeking asylum);
- Factors that may limit the time that a client can dedicate to conducting litigation (eg caring responsibilities).

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