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REGULATION OF THE LEGAL PROFESSION

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Regulation of the legal profession in the UK (England and Wales): overview

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INTRODUCTION TO THE REGULATORY FRAMEWORK

On 23 June 2016, a referendum took place and the people of the UK voted to leave the EU. The current legal position is that the UK is a full member of the EU until a process of withdrawal is complete. The answers to this Q&A reflect the current position while the UK remains a full member of the EU.

1. How many categories of lawyer are there in your jurisdiction?

LSA regulated providers

The legislative framework for the regulation of legal services in England and Wales is set out in the Legal Services Act 2007 (LSA). Under the LSA, only individuals and businesses authorised by an "Approved Regulator" (AR) or those exempt from the requirement to be authorised are entitled to provide reserved legal activities. The six reserved legal activities are: the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.

Note that once a professional is authorised to practise reserved legal services by their AR, they become subject to regulation by that AR in respect of the carrying out of reserved legal activities as well as their other legal activities.

The professionals that can be authorised to carry out reserved legal activities under the LSA are:

- **Solicitors.** Solicitors form the largest part of the legal profession and often have direct contact with their clients, providing legal advice and assistance on a range of matters. They represent clients personally in the lower courts (Magistrates' Courts, County Court and tribunals). They may also represent clients in the higher courts (Crown Court, High Court, Court of Appeal and the Supreme Court) where they have obtained higher rights of audience. The AR for solicitors is the Solicitors Regulation Authority (SRA).
- **Barristers.** Barristers form the second largest part of the legal profession that is authorised to conduct reserved legal activities. Barristers are legal advisers and courtroom advocates. The AR for barristers is the Bar Standards Board (BSB).
- **Legal executives.** Practising Fellows of the Chartered Institute of Legal Executives specialise in a particular area of law. The everyday work of a chartered legal executive is similar to that of a solicitor. Chartered legal executives have the option to become solicitors in one or two years after becoming Fellows and usually are exempt from the training contract graduates must complete to qualify as solicitors. The AR for chartered legal executives is CILEx Regulation.
- **Licensed conveyancers.** A licensed conveyancer is a specialist legal professional that deals with property transactions. The AR for licensed conveyancers is the Council for Licensed Conveyancers.
- **Patent attorneys.** Patent attorneys are patent and intellectual property specialists. The AR for patent attorneys is the Intellectual Property Regulation Board.
- **Trade mark attorney.** A trade mark attorney is a person who is qualified to act in matters involving trade mark law and practice and provide legal advice on trade mark and design matters. The AR for trade mark attorneys is the Intellectual Property Regulation Board.
- **Costs lawyers.** Costs lawyers ensure that a firm's clients are properly charged for work undertaken on the client's behalf. They can represent clients in court when there is an issue over costs. The AR for costs lawyers is the Costs Lawyer Standards Board.
- **Notaries.** Notaries are lawyers appointed by the Archbishop of Canterbury. Notaries authenticate and certify signatures and documents. The AR for notaries is the Master of the Faculties.
- **Chartered accountants.** The title "chartered accountant" indicates that the person has undertaken a minimum of three years in-depth training, passed a series of examinations in financial management, auditing, business strategy and taxation, and committed to continuing professional development to keep their skills up to date. The AR for Chartered Accountants is the Institute of Chartered Accountants in England and Wales (ICAEW).

Non-LSA regulated providers

These are individuals and entities that provide legal services as a significant focus of their activity and are authorised and regulated by a regulator that is not an AR under the LSA. They include:

- Authorised Claims Management Companies regulated by the Claims Management Regulator.
- Immigration Advisers regulated by the Office of the Immigration Services Commissioner.

Unregulated providers

Providers that are not authorised and regulated under any legal sector or other specific legislation can provide legal services as a significant focus of their work. Unregulated legal services providers operate outside the areas of reserved legal activities under the LSA, for example, in the following areas:

- Will writing and estate administration.
- Family.
- Intellectual property.
- Employment.

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Solicitors and barristers

As solicitors and barristers form the largest part of the legal profession in England and Wales, the answers below focus primarily on the position in relation to those professionals and, in particular, solicitors.

2. What are the requirements to obtain a practising certificate/licence? How often must this be renewed?

Solicitors

The requirement to hold a practising certificate is governed by the SRA Practice Framework Rules 2011 and by the Solicitors Act 1974.

In summary, and subject to some limited exceptions, the effect of these rules is that in relation to SRA-regulated firms a person must have a practising certificate if they are involved in the firm as a practising solicitor, even if they are not employed in that capacity, and they are:

- A sole practitioner.
- A manager or a member or they have an ownership interest in an authorised body, either directly or through an EU corporate practice which is a manager in the firm.
- An employee, consultant or locum of a sole practitioner or an authorised body if they are on the roll and are employed in connection with the provision of legal services.

A practising certificate must be renewed annually subject to payment of a fee.

Barristers

Barristers are only legally entitled to undertake a reserved legal activity if they have been authorised to do so by the BSB (*LSA*). To practise in England and Wales a barrister must have an annual Practising Certificate. This is renewed online via a process known as Authorisation to Practise subject to payment of a fee.

The Bar's Code of Conduct allows pupils who have completed the non-practising (six-month) period of pupillage to practise as a pupil barrister. By submitting a satisfactorily completed certificate of completion or exemption from the non-practising period of pupillage (first six months) and registering a practising period, pupils will be issued with a provisional practising certificate, which will be valid for the duration of the practising period of pupillage.

3. Are there any limitations on lawyers advising throughout your jurisdiction?

There are no geographic limitations placed on lawyers advising throughout England and Wales, provided that they have the relevant authorisation to practice (*see Question 2*) and comply with the relevant code of conduct (*see Question 4*).

4. Are there any written codes of conduct or handbooks, or rules and/or principles that lawyers are required to abide by?

LSA regulatory framework

The five professional principles in the LSA are:

- That authorised persons should act with independence and integrity.
- That authorised persons should maintain proper standards of work.
- That authorised persons should act in the best interests of their clients.
- That persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons, should comply with their duty to the court to act with independence in the interests of justice.
- That the affairs of clients should be kept confidential.

These principles are reflected in the written codes of conduct to which those lawyers carrying out reserved legal services are subject.

In general, the implementation of the LSA has represented a shift towards "outcomes-focused regulation" (OFR). OFR is a move away from the prior rules-based approach to one that focuses on high-level outcomes to govern practice and the quality of outcomes for clients. It is essentially risk-based regulation. However, OFR is not mentioned in the LSA.

Solicitors

The SRA Handbook sets out the standards and requirements that authorised and regulated legal entities and individual solicitors are expected to adhere to on an ongoing basis. Version 16 of the Handbook was published on 1 April 2016.

The SRA Handbook is composed of three different types of standards and requirements:

- **SRA Principles.** These are the ten mandatory ethical and professional standards that all practitioners must adhere to. The principles underpin all other requirements.
- **The SRA Code of Conduct 2011 (SRA Code of Conduct).** This outlines the ethical standards that the SRA expects of practices and practitioners and the outcomes that the SRA expects them to achieve for their client. The SRA also provides "indicative behaviours" (IB) to illustrate how the outcomes might be achieved, but emphasises that these are non-mandatory, and entities can meet the outcomes by other means. This is intended to be consistent with the general principle of OFR.
- A set of requirements and rules relating to particular elements of running a regulated legal service business, in particular the SRA Accounts Rules 2011.

Barristers

Part 2 of the BSB Handbook (BSB Handbook) provides a code of conduct for barristers. The Handbook includes Core Duties (CD), Outcomes (o), Guidance (g), Rules and Regulations (r). The second edition of the BSB Handbook was published in April 2015.

5. What is the key legislation governing the legal profession in the jurisdiction?

The LSA (*see Question 1*).

6. Who has the right to conduct litigation in court?

The conduct of litigation is a reserved activity under the LSA. The following categories of professional have the right to conduct litigation where they have been authorised to do so by their AR:

- Solicitors.
- Barristers.
- Legal executives.
- Patent attorneys.

- Trade mark attorneys.
- Costs lawyers.

The BSB now allows both self-employed and employed barristers to apply to be authorised to conduct litigation. There are three ways in which barristers can be authorised to conduct litigation:

- Self-employed and employed barristers can apply for an extension of their practising certificate by meeting the requirements of rS47 of the Scope of Practice Rules in the BSB Handbook (this process has been in place since 22 January 2014).
- Employed barristers previously authorised to conduct litigation under Annexe I of the old Code of Conduct (8th Edn.) retain their authorisation, provided that they remain in employed practice.
- By being independently entitled to conduct litigation by virtue of primary legislation.

PROFESSIONAL STRUCTURES

7. How are law firms in your jurisdiction usually organised?

Solicitors can be organised as sole practitioners, limited companies, partnerships or limited liability partnerships.

About 80% of barristers are self-employed. Self-employed barristers work in offices called chambers, which they can share with other barristers, but they are all independent practitioners. On completion of their training (including an academic, vocational and apprenticeship stage called pupillage), barristers apply for a permanent position known as tenancy in a set of chambers.

Barristers can also work in an employed capacity in a multi-disciplinary practice (MDP). Most MDPs are regulated by the SRA and are distinguished from law firms by rules permitting non-lawyers to hold ownership interests. Barristers can become owners or managers of MDPs (*see Question 8*).

8. Are multi-disciplinary practices (MDPs) allowed in your jurisdiction?

The LSA aimed to increase competition in the legal services market by allowing new business models known as "Alternative Business Structures" (ABS) to provide legal services. Before the LSA there were generally restrictions on non-lawyers owning or investing in businesses providing regulated legal services. The LSA sets out the regulatory framework for ABS.

ABS allow non-lawyers and lawyers to form companies, invest or be involved in the management of companies providing reserved legal activities. ABS cover a range of different types of business model, including multi-disciplinary firms in which lawyers and non-lawyers work together to provide a range of legal and non-legal services.

Some of the ARs are also licensing authorities (LA), which means that they can license ABS that provide reserved legal activities.

In July 2016, the Ministry of Justice launched a consultation proposing that the regulatory framework be simplified to reduce the regulatory burdens on ABS firms.

9. Are alternative legal service providers common? If so, to what restrictions are they subject, if any?

There are a range of unregulated legal services providers including charities, public bodies, membership bodies and trade unions.

Citizens Advice, for example, provides free advice online, by web chat, by phone and locally in high street premises, community centres, doctors' surgeries, courts and prisons.

Some not for profit providers offer free advice to members of the public, while others (such as trade unions and membership bodies) provide advice to those who have subscribed as members.

10. Do restrictions apply to foreign lawyers/law firms practising in your jurisdiction?

There are a number of different routes via which foreign lawyers can practise in England and Wales. This question addresses the situation of those seeking to practise as a solicitor or barrister.

Routes to practise as a solicitor

A qualified lawyer from an overseas jurisdiction may be eligible to transfer to the roll of solicitors of England and Wales under the Qualified Lawyers Transfer Scheme (QLTS) without having to complete the full education and training requirements in the SRA Training Regulations 2014. The route to qualification via the QLTS is set out in the SRA Training Regulations 2014.

A lawyer may be exempt from some or all of the QLTS assessments if they are:

- A lawyer qualified in the EEA/EU/Switzerland and seeking to qualify via Directive 2005/36/EC (recognition of professional qualifications).
- A lawyer qualified in Northern Ireland or Scotland.
- A barrister who has qualified in England and Wales who has completed a pupillage.

Upon successful completion of the qualification stage, a lawyer is eligible for admission to the roll of solicitors and to apply for a practising certificate.

Routes to practise as a barrister

A "Qualified Foreign Lawyer" (that is, a person who is a member of a legal profession regulated in a jurisdiction outside England and Wales and entitled to practise as such) may apply to practise as a barrister in England and Wales. They must provide the BSB with a certificate of good standing, evidence of all academic and professional qualifications, any other supporting documentation and the required fee (currently GBP440).

Transferring European lawyers who want to practise in England and Wales but remain regulated under their own jurisdiction can register with the BSB by completing the European Lawyer - Registration form. If they wish to transfer to the Bar of England and Wales they need to complete the European Lawyer - Admission form.

CLIENT PROTECTION

11. Is there a national regulator of the legal profession?

The Legal Services Board (LSB) is the oversight regulator for the legal services ARs under the LSA. The LSB has regulatory objectives which it shares with the ARs, each of which have direct responsibility for the day-to-day regulation of the different types of legal professionals they regulate.

The ARs and LAs (as relevant) for the professions that they regulate under the LSA, together with the reserved legal activities regulated by the respective regulator, are:

- For solicitors, the AR and LR is the SRA (regarding the exercise of right of audience, the conduct of litigation, reserved

instrument activities, probate activities and the administration of oaths).

- For barristers, the AR is the BSB (regarding the exercise of right of audience, the conduct of litigation, reserved instrument activities, probate activities and the administration of oaths).
- For legal executives, the AR is CILEx Regulation (regarding the exercise of right of audience, the conduct of litigation, reserved instrument activities, probate activities and the administration of oaths).
- For licensed conveyancers, the AR and LA is the Council for Licensed Conveyancers (regarding reserved instrument activities, probate activities and the administration of oaths).
- For patent attorneys, the AR and LA is the Intellectual Property Regulation Board (regarding the exercise of right of audience, the conduct of litigation, reserved instrument activities and the administration of oaths).
- For trade mark attorneys, the AR and LA is the Intellectual Property Regulation Board (regarding the exercise of right of audience, the conduct of litigation, reserved instrument activities and the administration of oaths).
- For costs lawyers, the AR and LA is the Costs Lawyer Standards Board (regarding the exercise of right of audience, the conduct of litigation and the administration of oaths).
- For notaries, the AR is the Master of the Faculties (regarding probate activities, notarial activities and the administration of oaths).
- For chartered accountants, the AR and LA is the Institute of Chartered Accountants in England and Wales (regarding probate activities).

The following are also ARs for probate activities only, but as at July 2016 do not currently authorise anyone to offer this service:

- Institute of Chartered Accountants of Scotland (ICAS).
- Association of Chartered Certified Accountants (ACCA).

Contact details are available via the websites of the respective ARs (*see box, Online resources*).

12. Is there a register of qualified lawyers and, if so, how can it be accessed?

Registers of qualified lawyers can be accessed via the websites of the relevant ARs (*see box, Online resources*).

13. Is membership of a national bar association, law society or similar mandatory?

The representative bodies for the legal professions that are regulated under the LSA are:

- **Solicitors:** Law Society.
- **Barristers:** they must be members of one of the Inns of Court, which are the professional associations for barristers. The Inns also have an educational, supervisory and disciplinary role. The four Inns of Court are:
  - the Honourable Society of Lincoln's Inn;
  - the Honourable Society of the Inner Temple;
  - the Honourable Society of the Middle Temple; and
  - the Honourable Society of Gray's Inn.

The Bar Council represents all barristers in England and Wales.

- **Legal executives:** Chartered Institute of Legal Executives.
- **Licensed conveyancers:** Council for Licensed Conveyancers (AR and LA; there is no representative body).
- **Patent attorneys:** Chartered Institute of Patent Attorneys.
- **Trade mark attorneys:** Institute of Trade Mark Attorneys.
- **Costs lawyers:** Association of Costs Lawyers.
- **Notaries:** Master of the Faculties (AR; there is no representative body).
- **Chartered accountants:** Institute of Chartered Accountants in England and Wales. (There is no separate regulatory body; all decisions relating to legal activities are delegated to the independently chaired Probate Committee.)

Contact details for these bodies are available via their websites (*see box, Online resources*).

14. Is there an independent disciplinary tribunal, and what disciplinary powers do the relevant regulatory bodies have? What sanctions are available?

Solicitors

The Solicitors Disciplinary Tribunal (SDT) is a statutory tribunal under section 46 of The Solicitors Act 1974. The SDT and its administration company, Solicitors Disciplinary Tribunal Administration Ltd, are wholly independent of the SRA.

The SDT adjudicates on alleged breaches of the rules and regulations applicable to solicitors and their firms, including The Solicitors' Code of Conduct 2007, the SRA Code of Conduct 2011, and the SRA Principles 2011. The sanctions available to the SDT include fines, the imposition of restrictions on practice and, in serious and exceptional cases, removal from the roll of solicitors. The SDT does not have the power to award compensation.

Barristers

If the BSB receives a complaint about the conduct of a barrister it investigates that complaint. If the matter is serious enough it may pass the case on to the Bar Tribunals and Adjudication Service (BTAS). BTAS is an independent organisation that arranges disciplinary tribunals. If a barrister is found guilty of professional misconduct, BTAS publishes the finding on its website.

The sanctions available include any, or a combination of, the following:

- Giving advice.
- Warnings.
- Requirements to complete further professional development training.
- Fines of up to GBP50,000 (or GBP15,000 for conduct occurring before 6 January 2014).
- Bans and suspensions from practise.

15. Is indemnity insurance mandatory for practising lawyers? If so, what is the minimum level of cover required and are there any mandatory terms?

Solicitors

Having professional indemnity insurance is a practising requirement; all firms must have a valid policy in place to be able to continue in private practice.

Outcome 7.13 of the SRA Code of Conduct states: "[a solicitor] must assess and purchase the level of professional indemnity insurance cover that is appropriate for [their] current and past practice, taking into account potential levels of claim by [their] clients and others and any alternative arrangements [they or their] client may make."

When arranging cover, solicitors must comply with the SRA Minimum Terms and Conditions. There is no mandatory provider of indemnity insurance for solicitors.

Barristers

All self-employed barristers are required by the BSB to take out professional indemnity insurance with Bar Mutual. Bar Mutual is a not-for-profit company owned and controlled by its members. Self-employed barristers are required to renew their professional indemnity insurance with Bar Mutual on 1 April each year.

Premiums are set in accordance with a rating schedule published each year.

Bar Mutual insures approximately 13,000 self-employed barristers. The minimum level of cover provided by Bar Mutual is GBP500,000. The maximum is GBP2.5 million. Barristers can obtain top-up cover exceeding this amount from other insurers.

16. What are the rules on conflicts of interest?

Solicitors

Chapter 3 of the SRA Code of Conduct deals with the handling of conflicts of interests. A solicitor can never act where there is a conflict, or a significant risk of conflict, between them and their client. If there is a conflict, or a significant risk of a conflict, between two or more current clients, a solicitor must not act for all or both of them unless the matter falls within the scope of the limited exceptions set out at Outcomes 3.6 or 3.7 of the SRA Code of Conduct. In deciding whether to act in these limited circumstances, the overriding consideration must be the best interests of each of the clients concerned and, in particular, whether the benefits to the clients of the solicitor acting for all or both of the clients outweigh the risks.

The ways in which a solicitor may comply with the Outcomes on conflicts of interest include (*IBs 3. 1-3.14, SRA Code of Conduct*):

- "Declining to act for clients whose interests are in direct conflict, for example claimant and defendant in litigation" (*IB(3.2)*).
- "Declining to act for clients where you may need to negotiate on matters of substance on their behalf, for example negotiating on price between a buyer and seller of a property" (*IB(3.3)*).

Barristers

The BSB Handbook (*rC21*) deals with the handling of conflicts of interest.

A barrister must not accept instructions to act in a particular matter if:

- There is a conflict of interest between the barrister's own personal interests and the interests of the prospective client in respect of the particular matter.
- There is a conflict of interest between the prospective client and one or more of the barrister's former or existing clients in respect of the particular matter, unless all of the clients who have an interest in the particular matter give their informed consent to the barrister acting in such circumstances.

17. What actions must a lawyer take when a conflict arises?

See *Question 16.*

18. Can a lawyer act for either of the clients between whom a conflict arises?

See *Question 16.*

19. To whom should complaints about lawyers' professional conduct be made?

Complaints about lawyers should be made to the relevant AR or to the Legal Ombudsman. The Legal Ombudsman is an independent and impartial scheme set up to help resolve legal service disputes.

20. Can lawyers/law firms hold client files, money or property in the event of a dispute about their retainer or fees?

Solicitors

As a general matter, client files, money and property belong to the client and they are entitled to take possession of them unless the lawyer or firm is entitled to exercise a lien over them.

The SRA has not issued guidance on this matter in relation to the current Code of Conduct (2011). In all matters of professional conduct that interplay with the general law and where determination of the correct course of conduct is often fact-specific, individual lawyers should seek their own advice or ethics guidance on what is appropriate in all the circumstances of the case.

Barristers

Barristers are not entitled to hold client funds (*see Question 31*).

As a general matter, client files and property belong to the client and they are entitled to take possession of them unless the lawyer or firm is entitled to exercise a lien over them.

The BSB has not issued guidance on this matter in relation to the current version of the BSB Handbook.

In all matters of professional conduct that interplay with the general law and where determination of the correct course of conduct is often fact-specific, individual lawyers should seek their own advice or ethics guidance on what is appropriate in all the circumstances of the case.

CLIENT ENGAGEMENT

21. What do client engagement communications typically include? Are there any mandatory provisions that must be included? Are there separate provisions for contentious and non-contentious business?

Solicitors

Solicitors often provide an initial letter to the client, called a client care letter, along with any terms of business. While there is no requirement to provide such a letter, this written information may also be used as evidence against complaints of insufficient information or inadequate professional service. In addition, clients must be in a position to make informed decisions about (*Outcome 1.12, SRA Code of Conduct*):

- The services they need.
- How their matter will be handled.
- The options available to them.

The client care letter is often important in demonstrating that these requirements have been met.

The SRA has provided numerous IBs to help solicitors comply with the outcomes in chapter 1 on client care of the SRA Code. Many of these relate to the provision of information for the client.

The Law Society provides website advice on the presentation of a client care letter and terms of business and the additional information that a solicitor may wish to provide in these documents. This advice is based on what the Law Society considers to be good practice.

Barristers

The BSB Handbook (*rC99 to rC103*) deals with the provision of information to clients.

The nature of the engagement letter depends on whether the barrister is instructed by a professional client (for example, a solicitor) or whether they are acting on a direct access basis (*see Question 24*).

A barrister must notify clients in writing when they are instructed, or, if that is not practicable, at the next appropriate opportunity (*rC99*):

- Of their right to make a complaint, including their right to complain to the Legal Ombudsman (if they have such a right), how, and to whom, they can complain, and of any time limits for making a complaint (*rC99.1*).
- If they are doing referral work, that the lay client can complain directly to chambers or the BSB authorised body without going through solicitors (*rC99.2*).

If a barrister is doing direct or public access, or licensed access work using an intermediary, the intermediary must similarly be informed.

If the barrister is doing referral work, they do not need to give a professional client the information set out in rC99.1 and rC99.2, in a separate, specific letter. It is enough to provide it in the ordinary terms of reference letter (or equivalent letter), which they send when they accept instructions. Chambers' websites and literature must display information about the chambers' complaints procedure.

22. Does a legal professional have any on-going obligations in relation to the client?

Solicitors

The obligations set out in the Code of Conduct as to provision of information are continuing obligations. The SRA has provided various IBs to help solicitors comply with the Outcomes, specifically:

- "Clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter" (*O(1.13)*).
- "You inform current clients if you discover any act or omission which could give rise to a claim by them against you" (*O(1.16)*).

The duty to protect confidential information continues despite the end of the retainer and even after the death of the client (see Chapter 4 of the Code of Conduct and *Questions 25* and *26*).

The SRA Accounts Rules 2011 set out detailed requirements on record keeping during and after the retainer.

Barristers

A barrister who accepts public access instructions must either retain, or take reasonable steps to ensure that the lay client will retain, for at least seven years after the date of the last item of work done (*rC129, BSB Handbook*):

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

Confidentiality obligations reflect the general law and survive the retainer (*see Questions 25* and *26*).

23. Can a legal professional refuse to accept an instruction or cease to act?

Solicitors

A solicitor is generally free to decide whether or not to accept instructions in any matter, provided that they do not discriminate unlawfully (see Chapter 2 of the SRA Code of Conduct).

Acting in the following way(s) may tend to show that a solicitor has not achieved the outcomes relating to accepting and receiving instructions and therefore not complied with the SRA Code of Conduct:

- "Acting for a client when instructions are given by someone else, or by only one client when you act jointly for others unless you are satisfied that the person providing the instructions has the authority to do so on behalf of all of the clients" (*IB(1.25)*).
- "Ceasing to act for a client without good reason and without providing reasonable notice" (*IB(1.26)*).
- "Acting for a client when there are reasonable grounds for believing that the instructions are affected by duress or undue influence without satisfying yourself that they represent the client's wishes" (*IB(1.28)*).

Barristers

The "Cab Rank Rule" is shorthand for the professional obligation on barristers to accept instructions via a professional client regardless of any personal dislike of the client or the case (*rC29, BSB Handbook*).

A barrister may refuse to accept instructions where one of the exceptions to the Cab Rank Rule applies, specifically where (*rC30, BSB Handbook*):

- The barrister is required to refuse to accept the instructions pursuant to rC21 (in particular, conflict of interest).
- Accepting the instructions would require the barrister or the named authorised individual to do something other than in the course of their ordinary working time or to cancel a commitment already in their diary.
- The potential liability for professional negligence in respect of the particular matter could exceed the level of professional indemnity insurance which is reasonably available and likely to be available in the market for the barrister to accept.
- The barrister is a Queen's Counsel, and the acceptance of the instructions would require them to act without a junior in circumstances where they reasonably consider that the interests of the client require that a junior should also be instructed.
- Accepting the instructions would require the barrister to do foreign work.
- Accepting the instructions would require the barrister to act for a foreign lawyer (other than a European lawyer, a lawyer from a country that is a member of EFTA, a solicitor or barrister of Northern Ireland or a solicitor or advocate under the law of Scotland).

- The professional client:
  - is not accepting liability for the barrister's fees;
  - represents, in the barrister's reasonable opinion, an unacceptable credit risk; or
  - is instructing the barrister as a lay client and not in their capacity as a professional client.

A barrister is not required to accept instructions in direct access cases (*see Question 24*).

24. Do clients have direct access to all lawyers?

Historically, members of the public (lay clients) did not have direct access to barristers and needed to instruct a barrister via a solicitor. Currently, any person can instruct a barrister directly without having to involve an intermediary (for example, a solicitor). This is called "direct access" or "public access". The barrister's role remains essentially the same as when they are approached by a solicitor or another intermediary. Not all barristers accept direct access work. The BSB maintains a register of barristers who are authorised as direct access barristers on its website, Direct Access Portal.

The term "Licensed Access" replaces the terms "BarDIRECT" and "Direct Professional Access". Organisations or individuals that have an identifiable area of expertise or experience can apply to the BSB to be licensed to instruct barristers directly. The licence holder can instruct any barrister for advice, and in some circumstances representation, on their own behalf or another's behalf in the specialist area.

CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE

25. Are lawyers bound by client confidentiality rules?

Solicitors

Chapter 4 of the SRA Code of Conduct deals with the protection of clients' confidential information and the disclosure of material information to clients.

The protection of confidentiality exists as a concept both as a matter of law and of conduct.

All members of a law firm or in-house practice, including support staff, consultants and locums, owe a duty of confidentiality to their clients.

The duty of confidentiality to all clients must be reconciled with the duty of disclosure to clients. This duty of disclosure is limited to information of which a solicitor is aware which is material to the client's matter. Where the solicitor cannot reconcile these two duties, then the protection of confidential information takes priority. A solicitor should not continue to act for a client for whom they cannot disclose material information, except in very limited circumstances, where safeguards are in place. Such situations often also give rise to a conflict of interests, which is discussed in Chapter 3 of the SRA Code of Conduct.

Barristers

A barrister must keep the affairs of each client confidential (*CD6, BSB Handbook*). This duty may be difficult to reconcile or be inconsistent with other duties of the barrister.

The BSB Handbook's Core Duties are not presented in order of precedence, save that CD1 overrides any other core duty, if and to the extent the two are inconsistent. rC3.5 and rC4 deal specifically with the relationship between CD1 (duty to the court in the administration of justice), CD2 (act in the best interests of each client) and CD6 (confidentiality).

26. Are there any exceptions to the client confidentiality rules?

Solicitors

The Outcomes in Chapter 4 of the Code of Conduct set out how the Principles apply in the context of confidentiality and disclosure. For example, there are exceptions to confidentiality when (*IB(4.4)*):

- The client gives specific informed consent to non-disclosure or a different standard of disclosure arises.
- There is evidence that serious physical or mental injury will be caused to a person(s) if the information is disclosed to the client.
- Legal restrictions effectively prohibit the solicitor from passing the information to the client, such as the provisions in the money-laundering and anti-terrorism legislation.
- It is obvious that privileged documents have been mistakenly disclosed to the solicitor.
- The solicitor has come into possession of information relating to state security or intelligence matters to which the Official Secrets Act 1989 applies.

Barristers

The barrister's duty of confidentiality is subject to an exception if disclosure is required or permitted by law (*rC15.5, BSB Handbook*). For example, the barrister may be obliged to disclose certain matters by the Proceeds of Crime Act 2002.

Disclosure in those circumstances would not amount to a breach of CD6 of the BSB Handbook. In other circumstances, a barrister can only make disclosure of confidential information where the client gives informed consent to the disclosure.

There may be circumstances when the barrister's duty of confidentiality to the client conflicts with their duty to the court (*CD1*). rC4 and Guidance C8 and C11 to C13 of the BSB Handbook provide further information.

For example, if a barrister's client were to tell them that he or she had committed the crime with which he or she was charged, to be able to ensure compliance with rC4 of the BSB Handbook, as well as rC3 and rC6:

- The barrister would not be entitled to disclose that information to the court without the client's consent.
- The client would not be misleading the court if, after the client had entered a plea of "not guilty", the barrister were to test in cross-examination the reliability of the evidence of the prosecution witnesses and then address the jury to the effect that the prosecution had not succeeded in making them sure of the client's guilt.

Similarly, there may be circumstances when the barrister's duty of confidentiality to the client conflicts with their duty to the regulator. rC64 and Guidance C92 to C93 of the BSB Handbook provide further information. In addition, rC66 may also apply (that is, dealings with clerks and other employees or agents).

27. Are communications with lawyers protected from disclosure (that is, privileged) in judicial or other proceedings?

Under English law, privilege operates as an exclusionary rule of evidence. It permits the owner of the privilege to refuse to produce documents or answer questions in relation to the privileged communications in legal or regulatory proceedings.

Privilege belongs to the client and not to their lawyer or other third party (*R v Derby Magistrates Court, ex parte B [1995] UKHL 18*).

Legal advice privilege

Legal advice privilege concerns confidential communications between a lawyer acting in his professional capacity and the lawyer's client, which have come into existence for the purpose of giving or obtaining advice or assistance as to what sensibly and prudently should be done in a relevant legal context. Legal advice privilege may apply in both a litigation and non-litigation context and generally only applies in relation to communications between the lawyer and client.

Litigation privilege

Litigation privilege concerns confidential oral or written communications between the client or the lawyer and third parties or other documents created by or on behalf of the client or the lawyer, which:

- Come into existence once adversarial litigation is in reasonable prospect or has commenced.
- Were created for the sole or dominant purpose of obtaining information or advice in connection with, for the conducting of, or to aid in the conduct of, litigation.

Joint privilege

Joint privilege is a secondary privilege in that it relies on the existence of a primary privilege. It can arise in two situations:

- Under a joint retainer where two or more parties instruct the same lawyer.
- Under a joint interest where two or more parties share a joint interest in the subject-matter of the communication, even if they are not instructing the same lawyer.

Common interest privilege

As with joint privilege, common interest is a secondary privilege that relies on the existence of a primary privilege. Common interest privilege arises where a communication that is privileged in the hands of the sender is sent to another party who has a community of interest with the sender in the subject-matter or in the litigation in connection with which it is produced.

28. Do in-house lawyers have the same legal professional privilege protection as lawyers in private practice?

Under English law, in-house lawyers have the same legal professional privilege protection as lawyers in private practice.

However, it may be necessary to consider the implications of the privilege rules of other countries in appropriate cases. In particular, in an investigation or dawn raid by the European Commission under EU law, EU privilege rules apply which differ from those under English law. The Court of Justice has confirmed the principles underlying the scope of privilege under EU law, which does not generally apply to in-house counsel (or non-EEA qualified counsel).

Accordingly, written communications are protected by EU legal privilege if they (*Case T-253/3 - Akzo Nobel Chemicals and Akcros Chemicals Ltd v Commission; and Case C - 550/07P - Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*):

- Are between an EEA qualified external lawyer and his client and are made for the purpose and in the interests of the client's right of defence.
- Report the text or content of an EEA qualified external lawyer's advice and do not contain any additional internal opinion, comment or amendment.
- Have been prepared exclusively for the purpose of seeking legal advice from an EEA-qualified external lawyer.

FEES

29. How are fees regulated? Is there a tariff system?

There is no regulation of the fees that lawyers can charge. However, in litigation even a successful party does not typically recover all their costs from the opposing (losing) party.

30. What types of fee agreements are most commonly used for contentious and non-contentious business? What formal requirements exist for fee agreements?

Hourly rates are the most common fee arrangements but there are also fixed or capped fee arrangements.

Conditional Fee Agreements (CFAs) and Damages Based Agreements (DBAs) offer an alternative way to fund commercial claims and litigation.

A CFA is an agreement allowing a solicitor and a client to share the risk of the litigation through a financial arrangement under which part or all of the solicitor's fees are only payable by the client in the event of success. In commercial cases (not personal injury CFAs entered into from 1 April 2013), the success fee can be up to 100% of normal fees.

For some matters, barristers may be willing to enter into a CFA for payment of part or all of their fees being subject to achieving defined success criteria. Individual counsel may be reluctant to enter into CFAs for commercial dispute resolution work, or may only be willing to put a relatively small percentage of their fees at risk.

A DBA is an agreement allowing a solicitor and a client to share the risk of litigation. Payment of solicitors' fees, counsel fees and VAT by a client under a DBA is dependent on achieving defined success criteria agreed when the DBA is entered into, and is based on a percentage of the sum recovered from the losing party or opponent.

From 1 April 2013, where parties fund their litigation via CFAs and/or after-the-event (ATE) insurance, the CFA success fee and ATE premium are no longer recoverable from the losing opponent if the case is successful. Parties can still enter into CFAs and take out ATE insurance to fund their litigation, but must bear the additional costs.

CLIENT MONEY

31. How is the holding of client funds regulated?

Solicitors

Solicitors can hold client funds. There are detailed regulatory requirements set by the SRA on how solicitors handle such funds. The purpose of the SRA Accounts Rules 2011 is to keep client money safe.

Solicitors must comply with the Principles set out in the SRA Handbook, and the outcomes in Chapter 7 of the SRA Code of Conduct in relation to the effective financial management of the firm. In particular, they must:

- Keep other people's money separate from money belonging to them or their firm.

- Keep other people's money safely in a bank or building society account identifiable as a client account (except when the rules specifically provide otherwise).
- Use each client's money for that client's matters only.
- Use money held as trustee of a trust for the purposes of that trust only.
- Establish and maintain proper accounting systems, and proper internal controls over those systems, to ensure compliance with the rules.
- Keep proper accounting records to show accurately the position with regard to the money held for each client and trust.
- Account for interest on other people's money in accordance with the rules.
- Co-operate with the SRA in checking compliance with the rules.
- Deliver annual accountants' reports as required by the rules.

Barristers

Except where a barrister is acting in their capacity as a manager of an authorised (non-BSB) body, they must not receive, control or handle client money apart from that which the client pays them for their services (*rC73, BSB Handbook*).

BARCO is a third party company, owned and operated by the Bar Council, which manages the funds required to facilitate ongoing legal services provided by lawyers in England and Wales. BARCO preserves the position in rC73 by operating an escrow service to receive funds from clients, which are required in relation to ongoing legal services for legal fees, alternative dispute resolution costs, disbursements and settlements.

32. Are there rules on money laundering affecting the legal profession?

The Financial Action Taskforce (FATF) has highlighted that criminals may want to use legal professionals precisely because they need expert advice to devise complicated schemes to launder vast amounts of money.

Regulated law firms are required by law, under the Money Laundering Regulations 2007, the Proceeds of Crime Act 2002 and the Terrorism Act 2000, to:

- Have a nominated money laundering reporting officer (MLRO).
- Report suspicious activity that they think may indicate money laundering both internally and to the MLRO and externally to the National Crime Agency.
- Have a system clearly setting out the requirements for making a disclosure of suspicious activity under the Proceeds of Crime Act and the Terrorism Act.
- Undertake customer due diligence to verify the identity of clients, source of funds, beneficial owners and the nature of business transactions.
- Keep records of customer due diligence undertaken.
- Ensure staff are properly trained.

In February 2016, the Bar Council issued new guidance to draw barristers' attention to their obligations in relation to countering money laundering and terrorist financing.

Following *Bowman v Fels* [2005] 1 W.L.R. 3083, lawyers acting in the regulated sector are not bound by money laundering regulations in the course of contentious litigation or the consensual resolution of litigation. However, much transactional work remains subject to the regulations, and the Bar Council suggests that barristers should be cautious in deciding whether a particular piece of work falls within the boundaries of those areas that are caught by money laundering regulation.

NOTARIES

33. Are notaries required for share purchases or transfers, real estate purchases or leases, or company formation?

The most common activities of notaries include:

- Preparing and authenticating powers of attorney for use overseas.
- Dealing with purchase or sale of land and property abroad.
- Authenticating foreign wills and providing documents to deal with the administration of the estates of people who are abroad, or who own property abroad.
- Authenticating personal documents and information for immigration or emigration purposes, or to apply to marry or to work abroad.
- Authenticating company and business documents and transactions or providing certificates as to the status of a company or the identity of its directors.

34. Are notary fees fixed or a percentage of the transaction value?

Notaries advise on the fees for their services. These may comprise a fixed fee per document or as a percentage of the transaction value and they may also charge an additional fee for their services.

35. Can notaries work within law firms?

Yes. About half of notaries are also solicitors and do their general legal work in that capacity. Others (including the Scrivener Notaries) practise only as notaries undertaking commercial and property work (including conveyancing) and family and private client work (including wills, probate and the administration of estates).

36. Is there a national regulatory body for notaries?

The Master of the Faculties is the AR for notaries in respect of probate activities, notarial activities and the administration of oaths. It has also been approved as an LA for ABS (*see Question 8*). There is no separate representative body for the purposes of the regulatory framework of the LSA.

The Notaries Society and the Society of Scrivener Notaries are representative bodies for notaries outside the LSA regulatory framework.

ONLINE RESOURCES

Set out below are links to the websites maintained by the regulators and representative bodies mentioned in this Q&A. These provide copies of codes of conduct, regulations, regulatory guidance as well as other useful information such as how to complain against a lawyer.

Oversight regulator for Approved Regulators under the LSA

W www.legalservicesboard.org.uk/

Description. The official website of the Legal Services Board.

Approved Regulators under the LSA

W www.sra.org.uk/home/home.page

Description. The website of the Solicitors Regulation Authority (solicitors).

W www.barstandardsboard.org.uk/

Description. The website of the Bar Standards Board (barristers).

W www.cilex.org.uk

Description. The website of CILEx Regulation (legal executives).

W www.clc-uk.org/

Description. The website of the Council for Licensed Conveyancers (licensed conveyancers).*

W http://ipreg.org.uk/

Description. The website of the Intellectual Property Regulation Board (patent attorneys and trade mark attorneys)

W www.clsb.info/

Description. The website of the Costs Lawyer Standards Board (costs lawyers).

W www.facultyoffice.org.uk/

Description. The website of the Master of the Faculties (notaries).*

W www.icaew.com/

Description. The website of the Institute of Chartered Accountants in England and Wales (chartered accountants).*

*No separate regulatory and representative body within the LSA regulatory framework.

Representative bodies (part of LSA regulatory framework)

W www.lawsociety.org.uk/

Description. The website of the Law Society (solicitors).

W www.barcouncil.org.uk/

Description. The website of the Bar Council (barristers).

W www.cilex.org.uk/

Description. The website of the Chartered Institute of Legal Executives (legal executives).

W www.cipa.org.uk/

Description. The website of the Chartered Institute of Patent Attorneys (patent attorneys).

W www.itma.org.uk/home

Description. The website of the Institute of Trade Mark Attorneys (trade mark attorneys).

W www.associationofcostslawyers.co.uk/

Description. The website of the Association of Costs Lawyers (costs lawyers).

Other representative bodies (not part of the LSA regulatory framework)

W www.thenotariessociety.org.uk/

Description. The website of the Notaries Society.

W www.scrivener-notaries.org.uk/

Description. The website of the Society of Scrivener Notaries.

W www.conveyancers.org.uk/

Description. The website of the Society of Licensed Conveyancers.

Practical Law **Contributor profile**

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Areas of practice. Suzanne specialises in EU law, competition law and regulation. She has wide experience of competition law matters combining cartel regulation, commercial practices, IP exploitation, merger control, public procurement and State aid.

Suzanne's practice has a particular focus on the interface between competition law and economic regulation. She advises governments, regulators and businesses across the regulated sectors including in the communications, energy, financial services, healthcare/ pharmaceuticals, TMT and water sectors.

Suzanne advises on professional services regulatory matters in the legal services and other regulated sectors, in the UK and internationally.