

Aims and purpose of this practice note

Section 83 of the Immigration and Asylum Act 1999 places a statutory duty on the Immigration Services Commissioner requiring her to promote good practice.

This note, which supports that duty, sets out the Commissioner's views regarding OISC regulated advisers working with barristers under the Public Access Scheme (PAS). This note should not be seen as a set of definitive instructions, but rather as a statement on best practice. The note has been developed with assistance from the Bar Standards Board (BSB). Their assistance is gratefully acknowledged.

Attention is drawn to the Commissioner's Code of Standards, specifically Codes 3-9; 11; 15-16; 33-47; 67-69; 81-90

What is covered in this practice note?

The areas covered are :

1. Introduction
2. What is Public Access?
3. OISC Advisers Instructing Barristers
4. What a Barrister Must Do Before Accepting Instructions from an Intermediary

Introduction

1. In March 2010 the Bar Standards Board (BSB) extended its Public Access Scheme (PAS) to immigration matters. This note explains when, and how, OISC regulated advisers should use PAS. The BSB is actively reviewing the position of barristers carrying out Public Access work on behalf of those eligible for public funding¹.

What is Public Access?

2. Under the PAS members of the public may go directly to a barrister without involving a solicitor or other intermediary. Previously it was necessary if a client wanted to employ a barrister for the latter to be instructed through a solicitor or other recognised third party.

OISC Advisers Instructing Barristers

3. A barrister may be asked to perform legal services by an intermediary (a person or organisation) for the benefit of a named client. An immigration adviser or organisation can be such an intermediary. For example, an immigration adviser may want to obtain a legal opinion for their client from a barrister or ask a barrister to represent their client at the First-tier Tribunal (Immigration and Asylum Chamber).
4. The OISC's view is that regulated advisers should use the Licensed Access Scheme² (LAS) when seeking to instruct a barrister. Under that scheme Level 2 advisers can obtain a legal opinion from a barrister and Level 3 advisers can obtain an opinion and instruct the barrister to act as an advocate up to Tribunal level only. If, however, the OISC regulated adviser chooses to use the Public Access route, they must do so only after making themselves familiar with the BSB's *Public Access Scheme – Guidance for Lay Clients*³. Further, OISC regulated advisers acting as an intermediary must do so strictly according to the same terms as if they were instructing the barrister under the LAS.
5. Level 1 advisers must not act as an intermediary.
6. No OISC adviser should seek to use either the PAS or LAS to instruct a barrister to undertake work before the High Court as to do so is contrary to the Legal Services Act 2007 and the OISC's regulatory scheme as defined by section 82 of the Immigration and

¹ <http://www.barstandardsboard.org.uk/news/latest/730.html>

² The Bar Standards Board's (BSB) Public Access Scheme is separate from the Licensed Access scheme (formerly known as BarDIRECT). Under the latter scheme organisations or individuals with appropriate skills and expertise in particular areas of the law can instruct barristers directly in those matters. Licences are usually tailor-made to suit the level of expertise of each organisation, and can cover advice, representation or both. Licences permit licensees to instruct barristers either on their own behalf or on behalf of their clients. OISC-regulated advisers have been permitted to use this scheme since 2001. Level 2 advisers can instruct counsel to obtain a legal opinion, and Level 3 advisers can do so for advocacy. A Practice Note on this subject appears on the OISC website <http://oisc.homeoffice.gov.uk/servefile.aspx?docid=48>. ³ <http://www.barstandardsboard.org.uk/assets/documents/Public%20Access%20Guidance%20for%20Lay%20Clients%20-%20March%202010.pdf>

OISC regulated advisers are not permitted to act as “litigators” for the purposes of the Legal Services Act 2007⁴. It is a criminal offence for an unauthorised person to act as a litigator⁵.

7. It is assumed that the OISC regulated adviser when acting as an intermediary will take on contractual responsibility for payment of the barrister's fees. If they do not wish to do so, the barrister is entitled to ask why they should deal with the intermediary at all rather than directly with the lay client. Code 40 of the OISC's *Code of Standards* makes it clear that the responsibility for paying counsel in such circumstances remains with the regulated adviser.

What a Barrister Must Do Before Accepting Instructions from an Intermediary

8. Before accepting instructions from an intermediary, including an OISC regulated person, a barrister must do the following:
 - ensure that the intermediary is not acting, or proposing to act, as a “litigator” for the purposes of the Legal Services Act 2007. As this is a criminal offence (see above), any barrister who facilitates such activity may also be found criminally liable;
 - ensure that both the intermediary and the lay client understand the true nature of the arrangement. To that end, the barrister is required to send a client care letter to both the intermediary and the lay client. The client care letter to the lay client should be sent to the client's home address, or, if appropriate, to their business address, but not to the intermediary's address. Information about the relevant address is one of the pieces of information which the barrister needs to be given before accepting instructions through an intermediary. It will always be necessary for the barrister to set out what they are being asked to do and the fees likely to be charged in each case.
 - bear in mind the possibility that the intermediary may have negotiated a contingent fee arrangement with the lay client and the potential conflict of interest which could arise as a result between the intermediary and the lay client. The Bar Standards Board's Code of Conduct states that, if a barrister forms the view that there is an actual conflict of interest between the client and the intermediary, for example, because the intermediary has been negligent, they must consider whether it would be in the client's interest to instruct another professional, and, if they consider that it would be, they must so advise and take steps to ensure that such advice reaches the lay client. However, it is not the barrister's duty to police the relationship between the intermediary and the lay client, which is a private matter to them. Codes 14 to 16 of the *Code of Standards* specifically deal with Conflicts of Interest matters as they apply to OISC advisers.

⁴ Section 12 and Scheduled 2

⁵s.70(1), (2) maximum sentence 2 years' imprisonment or unlimited fine

- in cases where the intermediary instructs a barrister to act as an advocate, the barrister must take such steps as appear appropriate to ensure that the lay client does, in fact, wish the barrister to appear for them. In many cases this will involve having a conference with the lay client. A barrister who acts as an advocate in such circumstances must inform the tribunal that they are acting for the lay client. A barrister has the same obligation towards a tribunal to which they submit a skeleton argument. In this respect OISC regulated advisers are reminded of the duties as set out in the *Commissioner's Code of Standards*.
 - have regard to the relevant provisions of the Money Laundering Regulations. Where a barrister is instructed by an intermediary they must normally follow the identification procedures under those Regulations, particularly in identifying the lay client and the intermediary. The only exception is where the intermediary is a regulated professional and informs the barrister by letter or certificate that he or she is a professional within the regulated sector as defined in the Proceeds of Crime Act 2002 and the Money Laundering Regulations and has carried out identification procedures.
9. A barrister is under the same obligation to make themselves satisfied before accepting a case that it is appropriate to do so irrespective of whether they are approached by an intermediary or by the client directly. An important factor will be the nature of the instructions given to the barrister; for example, whether the barrister is being asked to give written advice on a point of law only or if they are being asked to advise or act in a matter involving complex issues of fact.
10. A barrister must adhere to Public Access Rules 3(1), 6, 7 and 8⁶. These Rules include that barristers cannot accept direct instructions from, or on behalf of, a lay client in, or in connection with, any matter or proceedings where it is likely that the lay client would be eligible for public funding.

⁶ <http://www.barstandardsboard.org.uk/standardsandguidance/codeofconduct/section2-annexestothe/code/annexef2-thepublicaccessrules/>