This page sets out some of the more frequently asked questions put to the Bar Council’s Professional Practice Committee concerning the Code of Conduct and related professional matters. Click on the question of interest to go direct to the answer.

If members of the Bar have particular questions about professional conduct matters that they would like to see addressed on this web page they should write to James Woolf at the Bar Council.

Q1. Can I act as a Commissioner for Oaths?

A1. As of 1 January 2010, the right to administer an Oath has been limited to members of the Bar with a practising certificate. Part 2 of Schedule 5 of the Legal Services Act 2007, which came into force on this date, limits the right to administer oaths to “authorised persons”. The 2007 Act defines “authorised persons” as individuals who have “in force a certificate issued by the General Council of the Bar authorising the person to practise as a barrister”. The practical effect of this is that since 1 January 2010 barristers without a current practising certificate are prohibited from acting as a Commissioner for Oaths.

From time to time, the Professional Practice Committee is asked to advise on which activities fall within the terms of reference for a Commissioner for Oaths. This is an area that goes beyond the Code of Conduct and as such cannot be dealt with by the Ethical Enquiries Team.

Q2. I have been approached by a Legal Advice Centre to attend at the Centre to give advice to members of the public. I will do this on a voluntary or part time basis. I am a self-employed barrister. Can I do this?

A2. The Code of Conduct defines a Legal Advice Centre as a charitable or non-commercial organisation where legal services are offered to members of the public free of charge (or for a nominal fee) and which employs or has the services of one or more solicitors (solicitors at Legal Advice Centres must comply with paragraphs 7 (a) & (b) of the Solicitors’ Code of Conduct 2007) or which has been designated by the Bar Council as suitable for the employment or attendance of barristers. A list of Legal Advice Centres designated by the Bar Council can be obtained from the Bar Standards Board.

On the basis that the Legal Advice Centre meets the above definition, you may supply legal services at the Centre on a voluntary or part time basis and be treated, for the purposes of the Code of Conduct, as if you were employed by the Centre.

If you are employed by the Centre you cannot receive, either directly or indirectly, any fee or reward for the supply of legal services to any client of the Centre other than a salary paid by the Centre. You must
ensure that any fees in respect of legal services provided to clients of the Centre accrue and are paid to
the Centre or to the Access to Justice Foundation or other such charity as prescribed by order made by
the Lord Chancellor under s194(8) of the Legal Services Act 2007. Finally, you must not have any
financial interest in the Centre.

Q3. I have a dispute with a builder over work that he has carried out on my home. Is it
appropriate for me to write to him on Chambers’ notepaper setting out what I believe to be my
legal rights?

A3. Members of the Bar should not attempt to gain an advantage or put any pressure on other people
by virtue of their position as barristers. It would not be appropriate for barristers to use their status as an
implied threat to those with whom they are in dispute. Using Chambers’ notepaper in correspondence
about a personal dispute or when conducting personal business could well constitute an implied threat
and leave the barrister open to a justified complaint of professional misconduct. Thought should also be
given as to whether the use of an email address identifying chambers in the context of such a dispute
might also contain an implied threat.

Q4. My instructing solicitor is unable to attend a conference with the lay client. Am I able to meet
the client without the solicitor being present?

A4. There is nothing in the Code of Conduct to prevent you from having a conference on your own with
the client, provided that you are satisfied that it is in the client’s interests for you to do so. There are
however potential dangers that may arise, such as a disagreement over what was said and agreed at
the conference. The solicitor will also need to be informed of what was discussed and decided upon.
It therefore recommended that you have somebody independent present, for example a pupil in
Chambers, to take a note of the conference. This is particularly important if the case is complex or there
are sensitive issues that need to be discussed.

Q5. I have recently acted in a case where the client was unhappy with the outcome. He has
sacked his solicitors and frequently writes to me with questions about potential grounds of
appeal, or telephones to discuss the original hearing. Am I able to engage in correspondence
with the client in this way?

A5. You are unable to give legal advice or representation to a lay client without proper instruction from a
solicitor, unless you are able to undertake work under the Public Access scheme and comply with the
requirements for accepting such work. It is also generally not a good idea to enter into drawn out
correspondence with a former client over events that occurred at court.
There is no requirement for you to provide any factual information about the hearing but you may do so should you wish. The most appropriate way to respond is usually to write to the client advising that you cannot offer any legal advice and suggesting that he contact a new solicitor. You should also explain that you will not be able to respond to any further communications.

Q6. I am a pupil in my first six months and have been asked to take a noting brief. Am I allowed to do so?

A6. Provided that your pupil supervisor or head of chambers has given his permission, you can accept a noting brief during your non practising 6. You may also charge for doing so. Pupils are only able to supply legal services and exercise a right of audience once they have completed or been exempted from the non-practising 6 months of pupillage and have the permission of their pupil supervisor or head of chambers.

Q7. I am writing an article to be published in a legal journal. Am I able to describe myself as a barrister?

A7. Yes. Whether or not you hold a practising certificate as a barrister, writing or editing law books, articles or reports is specifically excluded from the definition of "legal services" in Section 1 Part X of the Code of Conduct. You do not therefore need to be instructed by a professional client to write the article, and can refer to yourself as a barrister. The same principle applies for lecturing in or teaching law and examining publications for libel, breach of copyright and the like. Any member of the bar can carry these out and hold himself out as a barrister.

Q8. We are reviewing our advertising strategy for chambers. Are there any principles that we should consider when advertising chambers’ services?

A8. Paragraph 710.2 of the Code of Conduct provides the rules on advertising. Barristers are permitted to advertise in any way that is consistent with the British Codes of Advertising and Sales Promotion. Advertising should therefore not be inaccurate or likely to mislead, and should not bring the Bar into disrepute or diminish confidence in the administration of justice.

Chambers should ensure that advertising does not make comparisons with or criticise other barristers, chambers or members of other professions. For example, the Professional Practice Committee considers that statements such as "the leading set" involve comparisons and would therefore breach the Code of Conduct. While it is permissible to make reference to previous cases (providing that the case is already in the public domain or with the express prior written consent of the client), advertising should not include statements about success rates. Advertising should not be so frequent or obtrusive as to cause annoyance to those to whom it is directed. Chambers can direct advertising towards both lay and professional clients; however, in advertising to lay clients, barristers should make clear that they are only able to provide legal services following instructions from a professional client, unless the barrister is available for Public Access work.

It is open to Chambers to advertise on the Internet. When doing so, it should be made clear that barristers are not able to advise lay clients directly via the Internet and must be instructed by a professional client, unless this work is undertaken under the Public Access scheme.

Chambers should also be aware that the Provision of Service Regulations which came into force on 28 December 2009 make it mandatory for Chambers to provide or make available specific information to those to whom they are supplying a service. The Professional Practice Committee has issued guidance on the relevant terms of the Regulations and has provided advice as to ways in which the requirements may best be met.

Q9. I have been approached by a prospective client who lives in Hong Kong. He does not have a solicitor and wants to instruct me directly. Can I accept?

A9. Provided that the client carries on business or usually resides outside England and Wales, the International Practice Rules at Annex A to the Code of Conduct, permit you to accept the case direct from the client. This is subject to the instructions emanating from outside England and Wales and the work not involving advocacy services. Should the client wish you to represent him at a subsequent hearing before a court or tribunal in England and Wales, he will need to retain English or Welsh solicitors to instruct you.
The International Practice Rules also allow you to accept instructions if the matter is essentially arising, taking place or contemplated outside England and Wales, and is to be substantially performed outside England and Wales. This means that you can appear in a foreign jurisdiction, providing you comply with any applicable rule of conduct prescribed by the law or by any national or local Bar.

Q10. In the course of a conversation with opposing Counsel, I discovered information to which I would not normally have been privy which could affect the way I conduct my lay client’s case. What should I do?

A10. The Code of Conduct does not recognise "Counsel to Counsel" confidentiality. If you learn something which will affect your lay client’s case and which it is in his best interests to know, you should tell him and adjust the way in which you handle the case accordingly.

There is a common, but mistaken, belief, that communications between Counsel are automatically subject to "Counsel to Counsel" confidentiality, with the result that you cannot tell your client anything which opposing Counsel told you unless you have opposing Counsel's permission. The true position is that communications between Counsel are no different from any other communication between the lawyers for opposing parties.

It sometimes happens that opposing Counsel offers to speak to you on a "Counsel to Counsel" basis, or otherwise indicates that he wants you to agree not to tell your client what opposing Counsel is about to tell you. You should not agree to do this without your lay client's permission. You will have to advise your client whether it is in his best interests for you to be given information which you cannot communicate to him. You will need to consider the practical implications of receiving information on this basis. In some cases, it may lead to your becoming professionally embarrassed. (See R v. B. & G. [2004] 1 WLR 2932. for an example of a case in which counsel considered that they were unable to continue once they became aware of relevant information which the Judge ordered them not to communicate to their clients.)

Q11. I am representing a client in a criminal case and during the hearing the client has absconded. The Judge has asked me to remain to assist the court. What should I do?

A11. In this situation you have an absolute discretion whether to continue to act. Should you decide to carry on, the extent of your involvement will depend on whether your instructing solicitors has, in the light of the client absconding, withdrawn from acting or not. If the solicitor is uncertain of their position they should seek professional advice from the Law Society.

If the solicitors decide to withdraw, your role is limited. You should act on the basis that your instructions have been withdrawn and you should not use any material contained in the brief except for anything that has been established in evidence before the court. You should ensure that the Judge instructs the jury that this is the basis on which you are prepared to assist the Court.

If the instructing solicitor does not withdraw from the case, you are free to conduct the case in accordance with any instructions that you have received and on the basis that the client is still present in Court but has decided not to give evidence. You can use any material contained within the brief and may cross-examine witness for the prosecution and call witnesses for the defence.

Q12. I This may be an issue for which the remedy lies in law rather than with the Bar Council.

A12. This may be an issue for which the remedy lies in law rather than with the Bar Council.

However, there is a duty imposed on all Heads of Chambers by the Code of Conduct at paragraph 404 to ensure that chambers are run fairly and equitably. If it is true that there were significant liabilities of which you were not informed, then this could well be a breach of the Head of Chamber’s duties to you under the Code and it is open to you to complain to the Bar Standards Board about this.

The Bar Council also offers a free arbitration service for resolving disputes between chambers and their members. Please contact Jess Campbell on 0207 242 0082 for more information about this service.

Q13. I am instructed in a residence and contact case to represent the father. In conference, the father has told me that if he does not get custody of the child he will make sure that no one else will. I am very concerned by what he might do to the child. However, he has told me that I must not mention what he said to anyone else. Am I able to breach client confidentiality and report the matter to the proper authorities?
A13. The view of the Professional Practice Committee is that you should first satisfy yourself that the threat is genuine. If you are satisfied, paragraph 702 of the Code of Conduct allows a barrister to breach his duty of confidentiality "as permitted by law"; broadly, the law permits you to do so where there is a danger of harm to a third party. In such circumstances a barrister should report the threat to the police or other agency (such as the local authority social services department) able to take appropriate protective measures. This subject is also covered in more detail in the guidance document Disclosure of Unhelpful Material Disclosed to Counsel in Family Proceedings. If you are in any doubt you should contact the Ethical Enquiries Line.

Q14. I am an employed barrister working for a firm of solicitors. I have been invited to become a partner. Am I able to do so?

A14. Yes, you are now able to become a partner in a firm of solicitors. The prohibition on barristers supplying legal services to the public through or on behalf of any other person (including a partnership company or other corporate body) has been removed from the Code of Conduct. The relevant provision (paragraph 205) has been amended to allow legal services to be supplied to the public by self employed barristers, managers or employees of Recognised Bodies and employed barristers (if the employed barristers do not charge and are supplying the legal services whilst acting in the course of their employment).

Managers of Recognised Bodies are regulated by the SRA, as the regulator of the entity, although residual regulation of personal professional conduct continues to be by the BSB. The precise provisions which apply to barristers practising as managers or employees of Recognised Bodies are listed at 105C.1 of the Code of Conduct.

Q15. I have been asked to be a non-executive director of a company. Is this permitted under the Code of Conduct?

A15. For the purposes of the Code of Conduct, being a non-executive director does not fall within the definition of offering a legal service. A barrister can therefore be a non-executive director. The Code also exempts from the definition of legal services giving to the other directors the benefit of his learning and experience on matters of general legal principle applicable to the affairs of the company.

Any barrister who takes up such a post should be aware of paragraph 3.7 of Section 3 of the Code of Conduct, which says that a barrister should not appear for or against any company in which he has directly or indirectly a significant pecuniary interest. They would also need to consider whether or not their independence would be compromised if they acted in legal proceedings involving the company.

Q16. I have a clash of cases on the same day. Which one should I choose?

A16. The following guidance has been issued to assist Counsel in making that decision, but you should bear in mind that it is ultimately your responsibility to decide which case is the most important for you to attend:

i) criminal cases take precedence over civil;
ii) a part-heard case takes precedence over a new matter;
iii) a case for which a fixed date has been obtained takes precedence over a "floater"

If none of the above apply, you should take into consideration the amount of work that you have done on the case, the length of time that you have been instructed on each case, each case's complexity and difficulty and, perhaps most importantly, which lay client will be most prejudiced by someone else taking the case over at short notice. You should of course notify your instructing solicitors immediately it becomes apparent that you might not be able to conduct the case.

Q17. Can I be instructed as leading counsel for 2 clients in separate cases where there is a danger of a clash of cases? Both clients have consented to me representing them and being absent for part of the case. I have advised both clients that if the first client withdraws this consent I would have to return the second case altogether.

A17. A Disciplinary Tribunal has ruled on a complaint raising similar issues. The Tribunal took the view that counsel should have considered their duty to the clients and to maintaining confidence in the legal profession and the administration of justice generally.

If the first client withdraws consent late in the day, the complexity of the second case could mean that alternative counsel would require a lengthy period of time to be instructed and master the brief, and the second trial may need to be adjourned. This could result in considerable cost to the public purse, depending on the availability of the other counsel in the case, of trial Judge and of witnesses and the additional time the defendant would need to spend in custody.
However, there may be situations where consent has been given by both of the clients and professional clients where it would be reasonable to accept both cases. For example, if the first case is likely to settle and the second is reasonably straightforward; therefore, if the case does not settle it would not prejudice the client by them having alternative counsel as they would have adequate time to prepare.

Counsel should consider their position carefully if they find themselves in a similar situation. If they have any doubt they should contact the Ethical Enquiries Line.

**Q18. I have been approached to appear on a television/radio discussion programme to put forward the legal position on a particular area of the law. Can I do this?**

**A18.** Yes, there is nothing in the Code of Conduct that prohibits you from discussing generally the legal standpoint on a given issue. However, you should avoid being drawn into giving advice on a specific person’s case or addressing a particular person’s legal difficulty as, without being properly instructed, this might place you in breach of paragraph 401(a) of the Code.

If you have been approached to appear in the light of a particular case in which you were instructed, paragraph 709.1 of the Code of Conduct says that you should not express personal opinions to the media about the case if it is still current (i.e. is still in progress or the time limit for an appeal has not been exhausted). You should also be sure that you do not breach your duty of confidentiality to your lay client without their consent, as set out in paragraph 702 of the Code.

**Q19. I have been instructed to advise in a professional negligence action against a solicitor. I do not know the solicitor but the firm of which is he is a member instructs me occasionally. Should I accept the instructions?**

**A19.** If you have any current instructions from that firm, you should not accept the new instructions since there will be a clear conflict of interest between your client in the negligence action and the firm as a whole. The fact that the solicitor concerned has not instructed you himself is not relevant since the firm, as a whole, is likely to be involved.

If you have no current instructions from the firm, then you need consider whether paragraphs 603(f) and (d) of the Code are relevant. The first prevents you from acting where you have knowledge of confidential information from a previous client which would give your new client an undue advantage. Unless you are very familiar with the firm, this is unlikely to be relevant. The second provision prohibits you from acting where there is some connection which might compromise your professional independence or cause the administration of justice to be or appear to be prejudiced.

In this case, the difficulty is likely to be one of “appearance of prejudice”. Counsel should consider how recent and frequent the instructions have been, the complexity of the cases involved and whether further instructions are likely to be forthcoming. The question to ask would be whether the client might understandably, albeit wrongly, think that your connection with the firm would affect your willingness to represent them with full independence. It is an area in which considerable caution is needed. At the very least, the connection should be disclosed to the client in order that they can confirm that they are content for Counsel to act.

**Q20. I have been asked to act in a case in which the opposing client is known to me from student days. Can I accept?**

**A20.** Similar considerations apply to those above and it would be sensible also to consider the judgment of the Court of Appeal in Kjell Tore Skjevesland v Geveran Trading Co Ltd [2002] EWCA Civ 1567, which sets out some useful guidance on the provisions of paragraph 603(d). The answer will depend very much on the facts of each individual case, but the Court of Appeal made it clear that, in that case, the connection between counsel and the individual concerned (a slight acquaintance with the wife of a party many years before) was sufficiently remote for there to be no question of any appearance of prejudice to the administration of justice.

**Q21. I would like to practise as a sole practitioner. What must I do?**

**A21.** The Code of Conduct provides that, before you can practise on your own, you must have been in practice for at least 3 years following the completion of pupillage from a Chambers or Chambers or office where there has been a barrister or solicitor who has been in practice for 6 years out of the last 8 and who, for the previous two years, has made such a practice his primary occupation and held full rights of audience. The overwhelming majority of Chambers will have such a person. Employed
barristers who have been in practice for a number of years but who have not been in the office of a qualified person can apply to the Bar Council for a waiver.

The time includes all time spent in full-time practice after completion of a year’s pupillage. Third 6 month pupillages, squatting and door tenancies all count towards this period providing work has been done from the office of a qualified person and it has been your primary occupation. If the door tenancy has, for example, been combined with a large amount of time spent lecturing or on other work it will not count for the purpose of fulfilling the 3 year requirement.

If you meet these requirements, you should inform our records section of the address from which you will practise and also the BMIF. The Code of Conduct requires you to have access to adequate library facilities for your practice and to the ethics & standards provisions to ensure that your practice is administered properly. You do not need to have a clerk. There is further guidance available in the Rules and Guidance section of the Bar Council’s website.

No formal permission is required from the Bar Council in order to set up as a sole practitioner. It is, usual, however, for the Bar Council to ask a representative of the Circuit on which the Chambers is based to visit the Chambers to look at the arrangements.

**Q22. May I set up Chambers with colleagues?**

A22. Similar rules apply to those for sole practitioners. There must be one qualified person in Chambers (i.e. a barrister who has been in practice for 6 years out of the last 8 and who has held full rights of audience for at least 2 years) for every three barristers who have been in practice for less than 3 years.

It would be prudent to look at the Practice Management Guidelines and to have a full constitution and arrangements for dealing with the requirements of those standards before setting up a new set.

**Q23. Can I set up Chambers abroad?**

A23. Yes, the same rules apply as for Chambers in England and Wales.

**Q24. Can I advertise to let people know about my new Chambers?**

A24. Yes. The rules are set out in paragraph 710 of the Code of Conduct. Essentially, you may advertise by any means permitted by law here. You may not, however, make direct comparisons with individuals, state success rates or advertise in such a way that it is so frequent or obtrusive as to cause offence.

If you are abroad, you should make sure that any advertising is permitted by local rules.

**Q25. Yesterday, my client instructed me that he wished to plead guilty to an offence. We went carefully through all the defences available to him and he signed instructions saying he wished to plead guilty. Today he has written to the Judge indicating that he wishes to change his plea because he was under pressure from others to plead guilty. Am I in difficulties?**

A25. Probably. Your duty is to ensure that the court is not knowingly or recklessly misled. In this situation, it would be appropriate to ask the client (a) why this was not raised with you originally and (b) why he chose to write to the judge about it. It may be that he can provide an explanation for the sudden change which satisfies you that you will be able to represent him without being concerned about misleading the court. If he does not provide a satisfactory explanation then you should withdraw.

If the explanation is satisfactory then it would be sensible to explore why he thought it right to approach the judge rather than deal with this through his advisers. The action suggests a lack of confidence in you which, of itself, might be reason either for withdrawal or for him to seek to instruct new counsel.

**Q26. One of the clerks in Chambers is having an affair with a member of Chambers. Does this cause any professional conduct problems?**

A26. While it is unlikely that the individual member is committing any misconduct, this can have serious ramifications for the remainder of chambers, particularly if the clerk concerned is involved in the allocation of work. Heads of Chambers have a duty to ensure that Chambers are administered fairly and properly. This must include ensuring that work is distributed fairly and that no member is seen or perceived to be obtaining more favourable treatment than others. It is easy to see how such a perception could arise. If serious concerns arise within Chambers about this then it may be appropriate that one or other should leave but, in any case, a Head of Chambers will need to ensure that there is sufficient monitoring of the allocation of work to ensure that any perceptions are unfounded.
Q27. An opposing solicitor has indicated that she would like to have a sexual relationship with me. Are there any problems with me starting a relationship with her?

A27. It would be very unwise to start such a relationship while any case in which you are both involved is ongoing. Both clients might perceive that there was a danger of breach of confidence or other conspiracy between you. It would also be likely to be a breach of paragraph 603(d) of the Code of the Conduct which prohibits you from acting where by reason of any connection with the client, the court, or otherwise, your professional independence might be compromised or there might be prejudice or the appearance of prejudice to the administration of justice.

While there cannot be any objection to a relationship being commenced once there is no longer any professional connection between you, the connection ought at least to be disclosed to clients in cases in which you are both instructed and, so far as possible, involvement in the same case should be avoided.

Q28. I have been invited to join a set of Chambers. On looking at the constitution, I see that the notice period for leaving Chambers is substantially greater than the normal three months. Is this proper?

A28. The Code of Conduct does not specify any notice periods. It does, however, make it clear that Chambers should be administered “fairly and equitably”. The Bar Council takes the view that it is for Chambers to decide how to run itself, subject to that general duty.

Our understanding is that a three month notice period to Chambers is the norm but there is nothing to prevent Chambers having notice periods which are significantly greater than that. The Bar Council might become concerned if the notice period were so great that it amounted to an unreasonable fetter on an individual’s ability to leave Chambers. Each case will depend on its own facts.

In the meantime, barristers should consider carefully, before accepting an offer of tenancy, whether the prospects of the tenancy justify committing themselves to any unusual or onerous terms.

Q29. I have given notice to Chambers and wish to have my outstanding fees collected by my new Chambers. May I do so?

A29. Again, this will depend on the constitution of your old Chambers. The Code imposes a duty on Heads of Chambers, in the absence of any agreement to the contrary, to ensure that outstanding fees owed to former members are collected. There is nothing in principle, however, to prevent a barrister from having the fees collected by his or her new Chambers.

It is important to note that, again subject to the provisions of the constitution, you are still likely to be liable to your former Chambers or clerks for commission on work completed before you left Chambers. You may wish to negotiate with your former Chambers some agreed amount in settlement or some other way for accounting for the commission.

Q30. I recently left my Chambers because the clerking was very poor. The Chambers is now asking me to pay sums in respect of notice. I do not think I should pay. What is my position?

A30. Your position here is, in essence, one of contract with your former Chambers. They can sue you for the outstanding amount and you should seek legal advice about any defence that you may have.

The Bar Council offers an arbitration and conciliation service to barristers who are in dispute with their Chambers. Both sides must agree to be bound by the findings or to assist the conciliation. The service is free and is administered by Mark Hatcher at the Bar Council.

Q31. I acted for the wife in a family matter. During counsel to counsel discussions, I told opposing counsel that I had advised against a particular application being made. My instructing solicitors have now received a letter from the husband’s solicitors making a claim for wasted costs in respect of the application on the basis that it was against my advice. It is clear that opposing counsel has revealed matters which I discussed with him in confidence. Is there anything I can do about it?

A31. As the Code of Conduct does not recognise counsel to counsel confidentiality, there is nothing that can be done about it. Moreover, counsel is bound by his duty to act in his client’s best interests and if he learns something during the course of discussions with his opposite number which would aid his client’s case or which it is in the client’s best interests to know, then he is duty bound to reveal it. Barristers should bear this in mind when entering into counsel to counsel discussions.
Q32. My partner is also a barrister and we are instructed on opposite sides of a case. Are we able to appear against each other?

A32. Paragraph 603 of the Code of Conduct provides that a barrister must not accept instructions if to do so would cause him to be professionally embarrassed and sets out circumstances in which a barrister may be professionally embarrassed. In particular, paragraph 603(d) provides that a barrister will be professionally embarrassed inter alia if the matter is one in which he has reason to believe that whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced.

Paragraph (e) provides if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions).

The Court of Appeal in the case of R v Batte (TLR 30 May 1996) said that a relationship between husband and wife on opposing sides might give rise to an apprehension that the proper conduct of the case had been in some way affected by that personal relationship.

Before accepting instructions in any case in which there is any relationship between himself and other counsel or any other party in the case or connected with the case, a barrister should consider whether that relationship might give rise to such apprehensions, and to bear in mind that there will be some cases where the risk of such an apprehension cannot be averted by obtaining the consent of all parties in the case.

In a criminal case a barrister should also consider the comments of the Court of Appeal in R v Batte.

Q33. I have represented a client in a matter. He is now taking the matter further as a litigant-in-person and has asked to see my notebooks, citing the provisions of the Data Protection Act. Am I required to let him see them?

A33. The PCC has considered this matter recently and has taken the view that Counsel should provide a client with copies of any notes taken as part of the conduct of the hearing. This would cover the notes taken in court of the proceedings and any notes of the judge’s ruling or comments. The PCC was of the view that Counsel is not obliged by the Code to provide copies of his or her preparation for the case including any notes made that were other than a record of the proceedings.

We cannot advise on the provisions of the Data Protection Act 1998 (“DPA”) in relation to the request for disclosure of the notes in Counsel’s notebook. Counsel will have to take a view on those provisions himself. It may well be arguable that the information therein does not satisfy the definition of data in section 1 of the DPA.

Q34. A friend has asked me for some legal advice. Am I able to help?

A34. You are allowed to give free legal advice to friends and relations without instructions from a solicitor even if you have not completed the public access training. You should bear in mind that this is limited to advice and does not cover representation. If you wish to go further you would need to be instructed by a solicitor or undertake the training of public access. In particular, you should not correspond with the other side on your friend’s behalf (though you could draft letters for him to sign).

Barristers should consider paragraph 603(d) of the Code and whether their connection with the client is so close that they might find it difficult to maintain their own professional independence or the administration of justice might be or appear to be prejudiced. Clearly, the more serious the matter, the more likely it is that the barrister will find it difficult to advise as independently as someone not connected with the client.

Q35. I am in litigation and wish to represent myself. May I do so?

A35. You have the same right as every other citizen to act as a litigant in person. What you may not do is appear as a barrister in your own case.

Q36. I have been instructed in a case in which substantial amounts of material have been disclosed. I am now instructed in a matter against the same defendants in which some of the material disclosed is likely to assist my new clients. Should I accept the second instructions? Would it make any difference if I did not disclose the information to the new clients?
A36. The Code prohibits you from accepting instructions where you have information which is confidential to a former client and which would give an advantage to a new client without the former client’s consent. It is also obviously improper to reveal information which is privileged, whoever it belongs to.

If you did accept the instructions from the new clients, then you would be accepting a duty to act in their best interests. It is hard to see how you could comply with that duty without revealing such information and so be in breach of other duties.

Unless you are satisfied that you have the client’s permission and that none of the material is covered by privilege or any other protection then you should not accept the new instructions.

Q37. Our clerks have been asked by solicitors to issue proceedings in the High Court. All the papers have been prepared by the solicitor and they will provide the fee. It is simply more convenient for us to provide this service. Can we do so?

A37. No. This involves undertaking work which is prohibited by paragraph 401 of the Code - both the conduct of litigation and the handling of clients’ money. It is highly unlikely that you will be covered by the BMIF in respect of any negligence or loss arising out of this. You should therefore not undertake this work.

Q38. In order to monitor distribution of work and to ensure that members are informed about Chambers’ financial position and prospects, we propose to circulate details of members’ receipts to all members of Chambers. Are we able to do so?

A38. There is nothing in the Code to prevent you from doing so, provided that members of Chambers consent.

Q39. I have been instructed on behalf of a liquidator in a matter. I am now instructed in a separate matter against the same liquidator who is acting as a receiver. Am I permitted to take the second case?

A39. Yes, provided that the second case is not related in any way to the first and does not involve any criticism of liquidator’s personal conduct or allegation of negligence. It is akin to defending in a case against a prosecutor who also instructs you.

Q40. I am about to hold a conference with a client. The client has asked if they can bring along a friend. From the papers it appears that the friend has been advising the client and that the advice has not been helpful. Can I refuse to allow the friend to attend the conference?

A40. Yes. You should obviously consider the client’s best interests: there may well be occasions on which having a third party present may be helpful to both of you and you may wish to discuss the issue with the instructing solicitor, but you are certainly not required to agree that any third party should attend.

Q41. My client wishes to tape record a conference. Can I refuse this request?

A41. Yes. The request at least implies that the normal trust between counsel and client is lacking and you may wish to suggest that the client consider instructing somebody else.

Q42. I am prosecuting a drugs case in magistrates’ court. During the course of the prosecution case I realise that there is a gap in continuity which might found a successful half time submission. My opponent does not take the point. Do I have a duty to bring the point to his attention or to the court’s? Does it make any difference if the defendant is unrepresented or if the trial takes place in the Crown Court?

A42. Where the defence is represented, there is no duty to draw this point to anyone’s attention - it is not your role to do the defence’s job for them. The case would be different where the defendant is unrepresented and it would be appropriate in those circumstances for the prosecutor to draw the matter to his or her attention. The answer does not differ according to the forum involved.

Q43. A solicitor for a defendant has spoken briefly to me about his client’s case. The prosecution subsequently sought to brief me and sent me the papers. I have not had the opportunity to read the papers. Now the defence solicitor is seeking to brief me. Which set of instructions should I take?
A43. This will depend on the nature of the discussion with the defence solicitor and, in particular whether counsel learned anything about the defence case which would give him an undue advantage in presenting the prosecution case. If he has such knowledge then he ought to return the prosecution brief unread. There would be nothing then to prevent him accepting the defence brief in those circumstances. If he has no such knowledge then, the prosecution brief having arrived first, he should take that.

Q44. I am instructed in a contested childcare case on behalf of the mother. At a hearing outside court, the father attacked my client’s ex-husband. I was present. The judge heard about this and has ordered a contempt hearing against the father. He has ordered that I supply a witness statement. Can I continue with the original case?

A44. Almost certainly. The contempt action and the childcare case are entirely different matters. Unless there is such a dispute over your evidence in the contempt matter, or some serious allegation about your impartiality to the extent that you consider that you are professionally embarrassed, you should carry on.

Q45. An instructing solicitor has told me that a clerk from a rival set has told him that the firm should cease to instruct me because I am slow in completing work. The clerk recommended that the solicitor should go instead to the rival set because they turn work around much more quickly. I do not believe that this is true. What can I do?

A45. Whether or not it is true, such a comparison contravenes paragraph 308 of the Code which prohibits direct comparisons with other barristers and should therefore not have been made. It may be difficult to prove that the clerk said this on authority as the solicitor may not wish to take this further. You might want to take it up informally with the Head of the Chambers concerned and suggest to him that he should ensure that his clerks comply with Code.

Q46. I have been instructed in an Employment Tribunal case. The solicitor has a contingency (not conditional) fee agreement with the client and would like me to take half of any eventual fee. Can I agree to this?

A46. Under review.

Q47. One of the rising stars of my set has been approached by a member of a larger set suggesting that she might be happier with them. Surely this is not permitted?

A47. It is. There is no rule in the Code which prevents "poaching" in this way. The other set should obviously ensure that their activities and recruitment procedures are consistent with the Equality Code but there is nothing to stop them encouraging other barristers to join them.

Q48. I have been instructed to appear in a part-heard case in which my lay client has previously been representing himself. May I do so?

A48. Yes - indeed, assuming that you are available and competent to do the case, you are required to do so by the "Cab-rank" rule. There may of course be difficulties in dealing with the case properly and you may wish to consider whether it is in your client's interests to apply for the case to be started afresh. However, such considerations would apply to any other member of the Bar.

Q49. My instructing solicitors have passed to me a document which they have received anonymously. It appears to belong to the other side and to be privileged.

a) What should I do?

b) What should I do if I have already read the document before realising that there was a problem and if it is very helpful to my client?

c) What if the case begins tomorrow and it will be impossible for anybody else to prepare in time.

A49.

(a) The guidance for this is in the Written Standards in Part 3 of the Code at paragraph 7. You should not read the document and return the document to the other side.

(b) Again you should return it and withdraw from the case.
Stay in the case and inform your opponent that you have the document and intend to use it. Let the other side decide whether to make any application to the court.

Q50. A solicitor who is a friend of mine sits on the board of a small company. He would like to use chambers for pro bono advice on contracts and other arrangements. We are a criminal set without much experience in this area. He thought that some of our pupils might be competent to do this.

A50. The Code prohibits barristers from undertaking work which is outside their competence. Pupils in chambers should not undertake work which cannot be adequately supervised by their pupil-master or mistress (by whose insurance they are covered). The fact that the work may be done pro-bono does not change this: barristers are under the same duty to act competently.

Q51. My chambers would like to give a gift of a food hamper to one of our regular instructing solicitors. Is this permissible?

A51. The Bar Standards Board is currently undertaking a consultation exercise on this issue. The Guidance below is current for the time being, but may well be amended in due course.

The Conduct Committee has considered the general issue of barristers giving gifts to solicitors and other intermediaries entitled to instruct them. The Committee’s opinion was that paragraph 307(d) of the Code of Conduct which states that; “a barrister must not give a commission or present or lend any money for any professional purpose to…any person entitled to instruct him as an intermediary” would prohibit a barrister (and effectively his clerk or his Chambers as a whole) from giving to a solicitor or intermediary a gift, however modest, of any kind.

The Conduct Committee has however deemed it to be acceptable for a barrister to take a solicitor or intermediary out for dinner at the conclusion of a case. The same would apply for Chambers offering hospitality to a firm of solicitors or other intermediary. For example, it would be permissible for Chambers who were sponsoring a cricket match to invite a firm of solicitors who routinely instruct members of chambers to watch the game.

Q52. A grateful client is offering me a present. Can I accept it?

A52. It will depend on the nature of the present and whether you are continuing to represent the client. The Conduct Committee has ruled that if the barrister’s involvement in a case has ended and that there is unlikely to be any appeal, Counsel may accept a gift from lay clients, provided that the gift is relatively modest and unlikely to bring Counsel's independence into question. Money, gift vouchers and so forth, should generally be avoided. Furthermore, any gift received should not be of excessive value or disproportionate to the work done by Counsel. If Counsel feels that accepting a particular gift will cause him or her embarrassment, it should be returned with a suitable note of thanks either to the client direct or through the instructing solicitor. If in doubt about individual gifts, Counsel should seek advice from the ethical help line.

Q53. My chambers undertake a considerable amount of Public Access work. A consequence has been increased workload for many of the clerks in terms of offering general guidance to lay clients on matters such as where to go to issue court documents. Would it be acceptable to include a note in the client care letter to the effect that a small charge will be made for administration?

A53. Charging for clerical work undertaken in chambers which is ancillary to a legal service, such as photocopying documents to be worked on by a barrister, is acceptable. However, barristers are strongly urged to ensure that such charging is expressly agreed between barrister and client in advance. Charging for ancillary administration, for example, attending listing officers to obtain fixed dates for hearings, is the sort of service which should be covered by the brief fee or time charges. It is not acceptable for a barrister to charge a fee for advice given by his clerk as clerks provide support to barristers and not the barristers’ clients. No legal advice of any description should be given by the clerk. The barrister should deal with all questions, no matter how straightforward they appear to be. Barristers may wish to provide a general information sheet to clients which deals with frequently asked questions.

Q54. My lay client has absconded prior to the PCMH and provided no instructions beyond comments in a police interview. My instructing solicitors have withdrawn and I believe that the Bar Council’s current guidance allows me to withdraw too. However, the trial judge has referred to the case of Jones 2002. UK HL 5 in which the Lord Chief Justice emphasised that whilst not obliged to continue to act in these circumstances, counsel might feel an obligation to remain if only to assist the court. In view of this, can I withdraw from the case?
A54. The normal course would be for counsel whose instructing solicitors have withdrawn to withdraw too as the solicitors’ instructions are no longer operative. However, there are situations in which counsel may feel able to continue. As a general rule, if the absconding occurs late in the proceedings, it is more likely that counsel could continue. It is entirely a matter for counsel’s discretion.

If the absconding occurs before trial then the position is more difficult. The Court would appoint you to act, and it would have to say what it requires you to do. For example, you might be asked to test the evidence, put forward an assertive defence (perhaps from the interview record) or act simply to guard against legal errors or irregularities. “Act in the best interests of the lay client” would not be sufficient instructions. It would not be proper for you to use material given to you as part of your instructions by a professional client who has withdrawn. Since you will have probably seen that material it may be difficult for you to act without referring to it or without the appearance of having referred to it - a problem not shared by ‘fresh’ counsel.

In short, you are not bound to withdraw from the case but you retain an absolute discretion to do so. In considering that discretion, however, you should think carefully about accepting instructions from the Court to continue to act for an absent defendant. If your instructing solicitors took the view that they did not have sufficiently complete and final instructions to permit their continuing to act then your position is unlikely to be any better.

The Court of Appeal asked the professions to consider the position again and this is being done. However, until such time as the Rules Committee makes any change (if it does) the Code should be followed in its present form.

Q55. A friend has asked me to appear at an Employment Tribunal hearing on her behalf. May I do so without instructions from a professional client? I will not be charging a fee and do not want my friend to go to the trouble and expense of instructing a solicitor. If this is not possible may I appear as a McKenzie friend?

A55. The Code of Conduct permits you to offer advice free to a friend or relative and, as this is not deemed to be a legal service, you do not need instructions from a professional client in order to give such advice. Of course, were you to provide advice on an aspect of the law with which you were unfamiliar, you might run the risk of a complaint being made against you under paragraph 301(a) of the Code. On the other hand, representation is a legal service even if undertaken free. If you wish to appear on behalf of a friend or relative you must get instructions from a solicitor or, alternatively, accept instructions directly from the client if you have done the necessary training under the Public Access Rules and comply with all the necessary client care provisions.

The Code does not specifically prevent you appearing at a hearing as a McKenzie friend. However, you are advised to consider carefully whether you will be acting in the best interests of your friend by assisting in this fashion. There are many cases which will require preparation of the sort which can only be conducted by a solicitor. Furthermore, your ability to provide independent advice may be hampered by your friendship. Should your friend be dissatisfied with the result, not only may a friendship be lost but the litigant, in the absence of any professional indemnity insurance to pursue, may pursue a claim of professional misconduct against you. Paragraph 301 encompasses conduct "...whether in pursuit of his profession or otherwise..." These words are wide enough to include the role of a McKenzie friend.

You are advised to consider the Code as a whole and in particular paragraphs 303(a), 307(a) and 401(b) before agreeing to act as a McKenzie friend. It is unwise to undertake this role unless you believe that there is no risk to your professional practice.

Q56. Can a barrister act as a Notary Public in the same way that he can act as a Commissioner for Oaths?

A56. All barristers who hold a practising certificate are able to administer oaths. However, they are not automatically entitled to act as a Notary Public. To become a member of the notarial profession it is necessary to obtain a Diploma in Notarial Practice and then to acquire a Faculty from the Master of Faculties at the Faculty Office of the Archbishop of Canterbury.

Guidance has been published for those members of the Bar who are qualified to act as a Notary Public on the extent to which practice in the two professions can be combined. The work of notaries extends beyond the function of authenticating legal documents for use abroad into wider functions that are not normally permitted to practising barristers. This guidance is on the Bar Council’s website.

Q57. Does a barrister have a lien over papers in the event of non-payment of fees?
A57. The Bar Council is not aware of any authority by which barristers gain a general lien on documents belonging to the client until the fees are paid. While there seems to be nothing in the law to invalidate an express agreement made between a barrister and a client (especially in public access cases) permitting the barrister to exercise such a lien, it is doubtful whether in practice a lien would be of much assistance to a barrister as a client is already likely to have all the correspondence files and other documents.

Q58. My lay client and his instructing solicitor have fallen out and my lay client is now instructing another firm. He has not paid his previous solicitors. I still possess a number of papers in the case forwarded to me by the first solicitors. The second solicitors wish to instruct me. Am I able to make use of the papers?

A58. You should ask the first solicitors whether they wish to claim a lien. If they do not, you may use the papers. If they do, you should return the papers to them and may not use them to assist you when instructed by the new solicitors. There is, however, nothing to prevent you using any notes that you may have taken for your own use when instructed by the previous solicitors to assist you at this later stage.

Q59. I am a witness in court and I have been asked a question, which, to answer, would breach my duty of confidentiality to my lay client. There has been no waiver. What should I do?

A59. You should put the court to the test. Raise the issue of privilege and ask the Judge to rule whether it applies in this case or not. If he rules that the evidence is not covered by legal professional privilege and requires you to answer the question, you should do so.

Q60. My clerk has accepted a brief for me to appear in court at a time when I am booked to be on holiday. Can I return the brief?

A60. Not without the consent of your instructing solicitor. Paragraph 506(c) of the Code of Conduct states that you must not return a brief which you have accepted and for which a fixed date has been obtained or break any other professional engagement so as to enable you to attend a social or non-professional engagement. You may, of course, discuss with your instructing solicitor the possibility of him instructing somebody else.

Q61. May I be a director of a company?

A61. Yes, provided that the company is not a device whereby you are offering legal services directly or indirectly to members of the public. As a director of the company, you may give the company the benefit of your legal knowledge in respect of general issues of law. You may not, however, be instructed to act on that company’s behalf or to advise it on individual questions of law.

Q62. A barrister has left chambers owing a substantial amount in rent and clerks’ fees. Can we hold back cheques that he has received in respect of fees until he pays chambers what he owes?

A62. Only if your chambers constitution or some other agreement among members of chambers expressly permits to you do so and this has been expressly agreed by the individual concerned. Even then, the Bar Council could not guarantee that chambers would be within its legal rights in doing so and
certainly would not recommend it as good practice. Generally, cheques are the property of the barrister and must be forwarded promptly. In these circumstances, chambers' remedies lie in the courts or with the Bar Council's arbitration service, if there is a dispute over the amount payable.

Q63. Is Counsel permitted to give an undertaking in the course of any court proceedings?
A63. There is nothing within the Code that prohibits counsel from giving an undertaking. However, self-employed barristers should be aware that BMIF does not insure a barrister for breach of an undertaking if the breach would constitute a criminal offence, for example, if it would result in a contempt of court. It is difficult to envisage any circumstances where the breach would not result in a contempt of court and, in the circumstances, barristers are advised to consider carefully the risk of a breach. Solicitors are insured and where possible counsel should ask the instructing solicitor to give the undertaking.

Q64. What does the expression “rights to conduct litigation” mean in practice?
A64. S.119 of the Courts and Legal Services Act 1990, as amended by the Access to Justice Act 1999, defines the “right to conduct litigation” as:
(a) the right to issue proceedings before any court; and
(b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)
The expression “ancillary functions” is not precise but it has been held to mean any “formal steps required in the conduct of litigation” by the Court of Appeal in the matter of Agassi v Robinson [2005] EWCA Civ 1507, The Times December 22nd, 2005. It follows that a barrister in private practice may not lawfully do the following:-

a. Issue a claim form or any other originating process on behalf of a client.
b. Provide his address as the clients address for service.
c. Issue an application to a court on behalf of a client.
d. Acknowledge service on behalf of a client.
e. Perform on behalf of a client any other formal step in litigation.

Q65. How can I check whether my client is a bankrupt or subject to an Insolvency Voluntary Arrangement?
A65. Details of bankruptcies that are either current or have ended in the last 3 months, current Individual Voluntary Arrangements, Fast Track Voluntary Arrangements, Debt Relief Orders and current bankruptcy restrictions orders and undertakings can easily be found on the Insolvency Service’s website.