

DISCLAIMER

This Accompanying Guidance has been prepared by the BMA to be used by self-employed Forensic Physicians (FPs). When using this Accompanying Guidance members should also refer to the Model Contract available on the BMA website www.bma.org.uk

This documentation is for information purposes only. FPs using this document should seek their own independent professional advice and/or contact your medical defence organisation.

ACCOMPANYING GUIDANCE TO MODEL CONTRACT FOR FORENSIC PHYSICIANS

This model contract and the accompanying notes are intended to be a guide only to assist the FP in considering the most relevant matters in terms of their services contract and their obligations to the Police and private companies contracted by the Police. Prior to accepting any instruction the FP must ensure that the services required of them and all terms and conditions are clearly identified in writing. FPs using this document are advised to seek their own independent advice.

READ AND CAREFULLY REVIEW CONTRACT

Read and review each and every clause in the contract including any service level agreements in the schedule. The content is not set in stone until you sign. You should look out for any unfair or harsh terms and consider the following:

- **Structure**

Most Police Forces or Private Companies will prefer to use their own terms or may try and change yours in correspondence. However, please note that you are not required to adopt their standard terms and conditions or fee rates and can negotiate the terms on which you agree to provide your services. Please ensure you review any proposed terms thoroughly and make notes of any discussions entered into. Before entering into a contract you should also seek independent legal advice and, if the contract is with a Private Company you may also wish to conduct due diligence checks on the company e.g. consider obtaining a report from a credit-rating agency which may disclose any county court judgments, risk warnings and the financial position of the company.

- **Negotiate fair terms**

Is the contract too one-sided in favour of the other party? It is important to remember that you are free to negotiate new terms and amendments to the clauses. Terms that are excessively unfair or unreasonable to you have the potential to be deleted and replaced with terms that are fairer and more balanced.

As an example, you may be asked to agree to indemnify the Private Company for any claims made against them as a result of your actions. Indemnity clauses such as these remove the need for the Private Company to prove the claim resulted from the FP's actions i.e. FP simply have to reimburse the Private Company costs resulting from the claims. This is onerous on the FP so ideally you should not be agreeing to such indemnities.

- **Clear obligations of both parties**

The contract should clearly state the agreed obligations of both parties. Avoid clauses that make your obligations too onerous. For instance, make sure any obligations or conditions are reasonable, achievable and not too restrictive or exclusive etc, and consider whether they will continue to be applicable in the future.

- **Entire Agreement and Oral Representations**

The contract is likely to contain a clause about the written document constituting the 'entire agreement' between the parties. It is essential that the FP ensures that any verbal representations favourable to the FP and made by the Private Company or Police are recorded in the written document. In the event of a future dispute this will assist the FP in proving what was agreed between the parties.

- **Financial gain and other benefits i.e. fees**

The financial and other benefits due to you through the terms of the contract should be stated clearly. It is sensible to manage the expectations of the parties – an estimate of fees can be inserted in the Schedule, attached to the main Agreement. There are fees nationally agreed by the BMA with the

Employers' Organisation for Local Government through the Joint Negotiating Committee for Forensic Physicians. These are available on the BMA website Fees Schedule 8 – police work <http://www.bma.org.uk/employmentandcontracts/fees/policework.jsp>

FPs are often subject to a 'gagging' clause in their contracts where they are not able to discuss fees.

It is ultimately up to the FP and Private Company to negotiate the appropriate fee individually.

The preference is to be paid on a retainer basis (including any fees for Items of Service), rather than per session. Items of Service can include examining a detainee, writing a report or attending Court.

However some police forces/private companies will require you to work on a sessional basis only. Sessions can vary e.g. six, eight or 12 hours. The session level matched the average item of service payment. This is usually based on an hourly rate. The retainer is paid upfront and then the sessional fees are paid retrospectively at the end of the month or per quarter.

The parties could insert the relevant fees agreed as a Schedule at the back of the FP contract.

- **Gagging Clauses and Whistle-blowing**

You may be asked to agree to gagging clauses which may continue beyond the termination of your contract. You should not agree to any gagging clauses. Gagging about operating practices is now specifically prohibited by the GMC. For further information on raising ethical concerns see the latest GMC guidance at the following link:

http://www.gmc-uk.org/guidance/ethical_guidance/raising_concerns.asp

The BMA has guidance on whistle-blowing found at the following link:

<http://bma.org.uk/practical-support-at-work/whistleblowing/what-is-whistleblowing>

- **Confidentiality**

The contract may contain a confidentiality clause requiring you to treat all information, facts, matters, documents and all other materials of a confidential nature which you receive or create as a result of this Agreement as confidential, (except insofar as you have to refer to them when setting out the substance of your instructions in your report or as required by law). You should ensure that such a clause does not put you in risk of breaching any other professional contracts or obligations, such as other employment or services contracts, or GMC stipulations e.g. as to probity and honesty. For instance, would the confidentiality clause prevent you from disclosing a conflict of interest etc? If you are unhappy, you should consider negotiating the removal of the clause.

- **Official Secrets Act**

In their contract FPs may be asked to adhere to the Official Secrets Act 1989. Section 4 of the Act provides that it is an offence for Government contractors to disclose information without lawful authority if it is or is likely to:

- (i) result in the commission of an offence;
- (ii) facilitate an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or
- (iii) impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders.

An FP should query further, their obligations and ensure they carefully review any related documentation they may be asked to adhere to.

- **Conflicts of interest and exclusivity**

Clauses referring to conflicts of interest and exclusivity may restrict your practice, for instance your ability to practise in other areas or for other organisations, particularly if deemed to be competitors to the other party to the contract. If it is not possible to negotiate such clauses out of the contract, then it is important to establish a clear definition of what the other party would deem to be a 'conflict of interest' or what constitutes 'exclusivity'. If acceptable to you, this should then be made explicit in the contract that you sign.

- **References to other contracts or documents**

Be aware of any clauses in a written contract obliging you to accept the terms of a separate policy e.g. Health & Safety or other contractual document not available for review at the time of signing the contract. It is prudent to ensure you obtain a copy of such document and review it carefully. If there are any clauses unacceptable to you, consider removal of such clauses.

- **Term and termination**

The term of an FP agreement and any notice period for termination is a matter for individual negotiation. Some contracts may have a set term requiring FPs to actively request further renewal periods. Others may be rolling contracts i.e. they continue automatically unless the FP specifically elects to terminate it.

FPs generally prefer a contract term of 3 years with renewal for further 2 year periods thereafter i.e. 5 years, with notice required by either party of 3 months.

- **Waiver of rights**

You should exercise caution in cases where the contract requires you to give up, ie 'waive', your rights. For instance, you might be asked to give up the right to rescind the contract or to claim damages if the other party breaches the contract.

- **Notes and reports**

It is important during the negotiation stage to discuss ownership and control of any notes and reports that may be produced by the FP.

In relation to medical records, in some instances the FPs create and retain their own set of notes. FPs should consider whether they must register with the Information Commissioner as a data controller. In other instances, the FPs notes are handed over to the Police/Private Company once work is completed. These are legal documents and are promptly filed in police case records as evidence.

In relation to statements/reports, the police request them directly from the FP or via the Private Company. The FP must then submit them within an agreed timeframe e.g. 1-2 weeks. It is a matter for individual negotiation in the FP's contract whether they are paid extra for writing statements. Payments for this are generally received when the FP is paid for his/her shifts that month i.e. several weeks later.

You may wish to seek further specific advice from your medical defence body on this point. Further information may also be found at the following Information Commissioner's link http://www.ico.gov.uk/what_we_cover/register_of_data_controllers.aspx

- **Independence of FPs**

It is vital that FPs maintain professional independence i.e. as required under GMC Guidelines.

FPs should also maintain contractual independence. Some contracts with private Companies may place obligations on FPs to promote the interests of the private company. In such cases it is not clear precisely what interests are being referred to e.g. financial, ethical etc. This has the potential to conflict with FP's duty to remain independent. It would be prudent, in the circumstances, to delete such wording from the contract.

- **GMC Duties and registration requirements**

FPs must understand and be prepared to comply with the relevant GMC requirements. It is extremely important that you understand the nature of the duties which the Agreement would impose on you.

Self-employed doctors generally fund most of their own 'keeping up to date' costs (e.g. courses, exams etc). However, it is good practice for a company to have a study leave budget and to offer to reimburse some of these costs. FPs may wish to negotiate something to this effect in their contract.

- **Medical Indemnity Cover**

This is a standard requirement as per the GMC's *Good Medical Practice* for FPs to have medical indemnity cover and it is generally the case that this cover is provided by a Medical Defence Organisation (MDO) on of the FP's choice. You could confirm with the MDO whether the policy actually covers you for the work you do and what the exclusions or limits are (if any). Private Company's would also have indemnity cover and you may wish to discuss that further with the Private Company.

- **VAT**

The BMA is not permitted to give financial advice to members. Accordingly, you should seek your own independent financial/accounting advice.

To ascertain whether you are self employed a useful link is the

<http://www.hmrc.gov.uk/calcs/esi-01.htm>

If you are required to become registered for VAT you will need to consider legislative requirements regarding issuing VAT invoices and accounting to HMRC for VAT on fees, expense reimbursements and disbursements claimed. For more information on VAT refer to HM Revenue & Customs (HMRC) at <http://www.hmrc.gov.uk/index.htm> This would include medical reports subject to VAT e.g. expert witness reports and not professional witness statements.

- **Liquidation of Private Company**

Please note that should a Private Company go into liquidation, an FP will have no security over monies owed to him/her. Bankruptcy law is a specialist area. It is therefore advisable to seek professional advice about whether it would be appropriate to include a clause in the Agreement enabling the FP to be a 'secured creditor'.

- **Late payments**

Under clause 6 of the Agreement the Police Forces / Private Companies will be required to pay the FP on time. The statutory rate for late payments is determined in accordance with the Late Payment of Commercial Debts (Interest) Act 1988 as amended and supplemented by the Late Payment of Commercial Debts (Interest) Regulations 2002. It is set at 8% above the "reference rate" covering the sixth month period in which the debt becomes late.

The "reference rate" for 1st January to 30th June is the Bank of England's base rate on 31st December and, for 1st July to 31st December it is the base rate on 30th June. For the current base rate the following link may be useful <http://www.bankofengland.co.uk>

- **Additional duties**

We understand that in some areas FPs are being asked to work in two (2) separate areas i.e. doubling up with work. FPs may be paid double to do this work. While it is ultimately up to the FP whether they wish to take on the additional work, the BMA's view is that this is not appropriate as the service is being stretched and therefore potentially compromised.

- **Substitutes**

Private Companies may ask for the FP or else a 'substitute' to carry out the services. This could be problematic for FPs if they are then required to source a suitable substitute e.g. the Private Company may determine that the substitute has inadequate skills and qualifications. To avoid this eventuality it would be advisable to delete the reference to 'substitute' from the FPs contract.

- **Cancellation Charges**

In their contract FPs could request the right to recover costs owed to FPs where sessions have been cancelled within 48 hours.

- **Expenses/Disbursements**

Some clauses in contracts specify the FP must obtain pre-authorisation from Police/Private Company before incurring expenses or else the FP is made to pay for such expense. Some FPs may find this to be overly restrictive and possibly compromise their ability to perform their duties. One option is for FPs to include in the contract 'necessary' expenses not requiring pre-authorisation.

- **Travelling time**

FPs can charge a fee for travel outside an agreed district where the outward and return journey times exceed one hour in total.

- **Post termination/continuing obligations**

FPs may be asked by private companies to provide personal contact details in order to be contacted several years in connection with provision of the services.

Following termination of the contract, if you are asked to prepare a report or attend Court, you could include in your contract a clause entitling you to payment of an additional fee for this work.

- **Job planning**

Some Private Companies require FPs to give greater than two months notice of services to be provided while the private company only needs to give two weeks notice of the roster. Negotiate notice periods that suit you better, if necessary. Ideally, the notice period would be three (3) months.

Where a contract requires the FP to be available at all times (subject to reasonable notice) query the notice period and whether any of these times are likely to fall outside normal, acceptable contracted working hours.

- **'Business Opportunities'**

Some Private Company contracts will specify that the FP agree to offer to the Private Company any Business Opportunities. If this is onerous on the FP they could ask for removal of such clause from the contract.

- **Undertakings v Reasonable Endeavours**

FPs should note that any clause requiring FPs to 'undertake' to do (or not to do) something means they are agreeing to a much stronger obligation. In such circumstances it would be less restrictive if the FP replaced 'undertake' with 'use reasonable endeavours'. As mentioned previously FPs should consult their legal advisor where appropriate.

- **Leave entitlements and circumstances preventing work**

As self-employed individuals FPs are aware that they are unlikely to be entitled to benefits ordinarily afforded to employed individuals e.g. sick leave, annual leave etc. Some contracts go further and state that where FPs are unable to do the work for any reason whatsoever they are not entitled to be paid. If there are circumstances where FPs feel there are particular circumstances where payment should still be made to the FP (e.g. where events outside an FP's control prevent them performing the work and the FP incurred costs towards such efforts) this should be made clear in the agreement.

Safety in maternity– it is a woman's right to continue working as normal whilst pregnant and the police/ Private Company may take additional effort in protecting her e.g. providing a workplace assessment. The Police/Private Company may wish to have a right to instruct FPs disclosing they are pregnant are removed from custody suites. The FP may wish to refuse this and consent to assuming the possible risks to safety. There may be generic guidance or it may vary from police force to police force.

- **Anti-bribery**

FPs should consider the impact of the Bribery Act 2010 on their business. Section 7 of the Act makes it an offence for a person associated with any commercial organisation (which includes a company) to bribe another person, intending to obtain or retain business or a business advantage for the organisation. Note that it is a defence for the organisation to show that it has in place 'adequate procedures' designed to prevent bribery by its associated persons.

FPs may be asked to agree to a clause on anti-bribery in the agreement e.g. requiring them:

1. to comply with applicable anti-bribery and anti-corruption laws including the Bribery Act 2010 and any policies on Business Ethics, Anti-Bribery and Anti-corruption the Police have in force.
2. to have his/her own equivalent procedures are maintained for the term of the Agreement;
3. promptly report any request for undue financial or other advantage received in connection with the Agreement to the Police;
4. provide to the Police reasonable requests for evidence of compliance.