

THE CAB RANK RULE

A Response to the Report Commissioned by the Legal Services Board

In May 2012 the Legal Services Board commissioned Professor John Flood of the University of Westminster and Professor Morton Hvvid of the University of East Anglia to carry out “a literature review analysing the impact on the market of paragraphs 601-610 of the Bar Standards Board (BSB) code, otherwise known as the cab rank rule”.

Early in 2013 the two professors issued their Report, entitled “The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market”. Their Report runs to forty pages, followed by a five-page bibliography. In an “Abstract” at the beginning of the Report they sum up their conclusions in the following paragraph.

“This report examines the cab rank rule through an analysis of the economic, analytical-sociolegal literature as well as fieldwork involving interviewing key players in the field. The logic of our report argues that the rule serves no clear purpose. The

reasons for this view are that it is not really a rule but more a principle masquerading as one; it is unenforceable and there is no evidence to show that it has ever been the subject of enforcement proceedings; it applies only to a small, select group of lawyers, and finally the exclusion and exemptions from the rule virtually emasculate it. While it can be lauded as a professional principle enshrining virtuous values, as a rule it is redundant.”

Before considering the arguments which have led the professors to this far-reaching conclusion it is necessary to understand the nature and limits of their research. Professor Flood is a professor of law who has written extensively on aspects of the legal profession in England, the USA and elsewhere. Professor Hvvid is a professor of law who trained as an economist, but has specialized in competition law, and related topics. Neither of them appears to have practised in either branch of the legal profession. This is reflected in the method of their research.

The largest section of the Report (pages 14 to 29) is a “Literature Review” divided into two categories – “economic literature” and “analytical and

sociological literature”. As to the first category, the professors begin by saying (page 14) that

“the pure economics literature on the cab rank rule is scant while the law and economics literature is very sparse and ultimately not very illuminating for the questions posed in this report. We will briefly review the existing papers and then use the basic theories of incentives in economics to speculate on the cab rank rule”.

They conclude (page 18) -

“While nothing in the academic law and economics literature provides strong arguments which supports either the removal or retention of the cab rank rule, policy makers have offered economics based arguments in favour of removal”.

The example they give of such economics based arguments is the notorious 2001 OFT report on the professions.

Under the heading “Analytical and Sociological Literature” the authors devote much attention to a jurisprudential discussion distinguishing a rule from a principle.

The literature indicates that some commentators fully support the rule and others criticise both its theoretical basis and its efficacy, but it provides little support for any conclusion, as the Report seems to accept.

The more important section of the Report covers what the authors in their Abstract call their “fieldwork” i.e. interviewing “key players” in the field. This covers pages 30 to 37, under the heading “How the Cab Rank Rule Operates: From Principles to the Mundane”. It begins –

“Because there is little information on the actual working of the cab rank rule we undertook some interviews. Our interviewees included regulators, government officials, barristers, solicitors and barristers’ clerks”.

A “Methodological Note” (page 40) explains this further. After noting that the literature review “is rather scant” they state –

“We have added an empirical element to the literature by interviewing a number of stakeholders (sic). These include regulators, lawyers, clerks and executives. [Professor]

Flood has conducted 15 interviews some of which were recorded. We gave anonymity to our interviewees We have also used blogs and tweets as sources of information”.

The anonymity of those interviewed is understandable, but there is no indication of their standing in the profession, how many fall into each category, on what basis they were selected and what justifies their description as “key players”. If only 15 interviews were conducted how is one to interpret such expressions as “a number of clerks” (page 35) or “most clerks” (page 36)? We are not told what sort of information was derived from blogs and tweets, nor what weight the professors gave it.

The professors’ methodology and their own frank reservations about its limitations must be borne in mind in considering whether their arguments justify abandoning this long-standing rule of the Bar.

The authors’ arguments accept that the cab rank rule has been a defining feature of the English Bar for several hundred years, its purpose being to ensure that a prospective litigant could obtain representation in court, irrespective of the nature of his case or his desirability as a client. The question,

they say, is whether or not the rule still serves any purpose (page 2). Their negative reply to their own question is founded upon a number of arguments which may be summarised as follows –

- a) The rule is unimportant in that it very seldom affects the ordinary practice of a barrister. There is no evidence that its abolition would make any difference to the representation of clients.
- b) The rule is “virtually unenforceable” because it is easy to evade e.g. by requiring too high a fee, or asserting that other commitments make counsel unavailable. A breach of the rule would only be noticed in a flagrant and obvious case. There is no record of any disciplinary proceedings for its infringement.
- c) The numerous exceptions in the Code, “virtually emasculate” the rule.
- d) The rule only applies to a small group of lawyers, namely the self-employed Bar.
- e) The “collectivisation” of the chambers system and the emergence of new business structures undermines the rule or makes it unworkable.
- f) The real problems of representation arise from new fee structures, restriction of legal aid and

conditional fees. The barrier to representation is financial.

- g) The rule may distort the “market” for legal services by discouraging or preventing specialisation.

The final conclusion derived from these arguments is that the cab rank rule “as a rule” should be removed from the Code. The Bar could, however, espouse it as a “laudable principle” (page 39) – “enshrining virtuous values” (page 2).

Those arguments are now examined.

- a) Does the rule serve any clear purpose?

The authors give a brief history of the rule, going from a Scottish judgment of 1532 to Thomas Erskine’s statement on his defence of Thomas Paine and on to Lord Pearce’s resounding endorsement of the rule in *Rondel v. Worsley*¹, with his warning of the unhappy consequences were barristers allowed “to pick and choose their clients”. That judgment, they say, (not without sarcasm, one suspects) has come to epitomize the ideal of the cab rank rule, the “selfless professional barrister”

¹ [1969] 1 AC 191, 274F to 275D.

ensuring unpopular individuals and issues are properly represented. They go on to cite the case of *Arthur Hall v. Simons*², quoting Lord Steyn's statement that the cab rank rule was "a valuable professional rule but one of little significance in daily practice".

In both *Rondel* and *Arthur Hall* the point at issue was not the cab rank rule but whether barristers or other advocates should have immunity from claims for damages for negligence in the conduct of litigation. *Rondel* held there was immunity: *Arthur Hall* reversed that ruling. In both those cases the cab rank rule was raised as an argument for immunity, on the basis that it would be unfair if a barrister who had taken on an undesirable client only by reason of that rule should be subject to an action for damages by such client. It was in that context that Lord Steyn in rejecting that argument said³ that "its impact on the administration of justice in England is not great" and that it is "not likely that the rule often obliges barristers to undertake work which they would not otherwise accept".

² [2002] 1 AC 615.

³ At 678H.

It is indeed only rarely that a client appears so unappealing or his case so distasteful that the barrister accepts the brief only because of the cab rank rule. But what the Report ignores is that Lord Steyn nonetheless regarded it as a “valuable professional rule”. Similarly Lord Hope⁴ while agreeing that “its significance in daily practice was not great” said that its “value as a rule of professional conduct should not be underestimated”. He added –

“The independent Bars have a long and honourable tradition in the field of criminal justice that no accused person who wishes the services of an advocate will be left without representation. This is a public duty which advocates perform without regard to such private considerations as personal gain or personal inconvenience”.

Lord Hoffmann said⁵ –

“It is a valuable professional ethic of the English Bar that a barrister may not refuse to act for a client on the ground that he

⁴ At 714 EF.

⁵ At 686H.

disapproves of him or his case. Every barrister not otherwise engaged is available for hire by any client willing and able to pay the appropriate fee. This rule protects barristers against being criticised for giving their services to a client with a bad reputation and enables unpopular causes to obtain representation in court”.

In the same case Lord Hutton⁶ described the rule as being of “fundamental importance” and fully endorsed Lord Pearce’s dicta in *Rondel v. Worsley* referred to above. Lord Hobhouse under the heading “The duty to act for any client” says this⁷-

“This is a duty accepted by the independent bar. No one shall be left without representation. It is often taken for granted and derided and regrettably not all barristers observe it even though such failure involves a breach of their professional code. It is in fact a fundamental and essential part of a liberal legal system. Even the most unpopular and antisocial are entitled to legal representation and to the protection of proper legal procedures. The European Convention for

⁶ At 730 E-H.

⁷ At 739G – 740A.

the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) confirms such right. It is also vital to the independence of the advocate since it negates the identification of the advocate with the cause of his client and therefore assists to provide him with protection against governmental or popular victimisation.

The principle is important and should not be devalued”.

One may also refer to Lord Reid’s speech in *Rondel v. Worsley*⁸

“It has long been recognised that no counsel is entitled to refuse to act in a sphere in which he practises, and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is essential that the duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise. If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for

⁸ At 227 DE.

such a client and the client might have great difficulty in obtaining proper legal assistance”.

The professors would no doubt say (cf the Report page 38) that the judges, like the Bar, are “captivated by the rule and have promoted it as a shibboleth”. Others might think that the wealth and variety of professional experience of the judges who have emphasised the value and importance of the rule is a better guide to the profession.

The authors of the Report say (page 38) that they could find no evidence to suggest that the absence of the cab rank rule would make any difference to the representation of clients. It is difficult to understand what sort of evidence they would have expected. As long as the rule is in general observed by the Bar evidence of the effect of its abolition is necessarily absent. The burden is surely on those who assert that abolition of the rule would have no adverse effect. The Report points out that there are reasons other than the cab rank rule why a barrister will accept a brief to represent an unpopular or unattractive client. One is the financial incentive of a needed fee. That cannot be doubted, but it does not touch the case where the

prospect of a fee would not outweigh the distaste for the client or the cause.

Another, more bizarre, argument has attracted the authors of the Report and, it seems, the Legal Services Board. One of the unidentified “regulators” who was interviewed said that in a high-profile case the worse the client the more attractive and desirable the case, presumably because any publicity for the defending barrister would outweigh other factors. The authors of the Report while accepting (page 15) that there may be cases so unsavoury or horrific as to have no compensating factor seem to be impressed by that view. They say (page 31)

“Several respondents suggested that if Anders Breivik, the Norwegian bomber and shooter, had been on trial here in the UK ‘barristers would have queued round the block to represent him’. While this obviously remains hypothetical and is untestable, the idea is not far-fetched”. (Emphasis supplied.)

The professors despite their caveat seem to regard the remark of the “several respondents” as evidence of some weight. They also refer in this context to a plainly irrelevant recent case in New Delhi and to

the O.J. Simpson case in California, also entirely irrelevant, as confirming “the attraction of the undesirable client”. One is curious about the professors’ methodology. How did the “several respondents” all come to mention the Breivik case? Was it in response to a leading question? How many were barristers? Were the replies seriously intended? More surprising, however, is the response of the LSB itself. They state in their covering note summarizing the Report –

“It certainly (sic) would seem that, in England and Wales at least, clients who at one time may have been considered unattractive e.g. terrorists are now, through the wider publicity benefits they might offer, perhaps somewhat more attractive than many other types of client”.

“Perhaps” indeed. Even in relation to what the Report calls “high profile” cases it is not hard to recall examples where the publicity element would have been either negative or irrelevant, where the clients were unappealing, their causes unpopular and barristers took the cases as a matter of professional duty. One notable example was the trial for treason of William Joyce (Lord Haw Haw) at the end of the Second World War. There could

hardly have been a more despised, even hated, figure in this country. He was defended by G.O. Slade an eminent QC, who would not have been motivated by either financial need or hope of publicity. There were other such cases after the war.

There have fortunately in more recent times been few cases in England which have evoked such strong public feeling against accused persons. The one example given in the Report (page 25) is the case of IRA members charged with bombing in 1974 who are said to have been unable to find counsel until the Bar Council (apparently invoking the cab rank rule) ensured that they were defended by Q.C.'s. If the London bombers of 2005 had been arrested and charged can the authors of the Report be sure that in the absence of the rule they would have obtained adequate representation by counsel? In present-day Northern Ireland the continuing value and application of the rule has been attested by Mark Mulholland Q.C. the Leader of the Northern Ireland Bar in a recent address in London.⁹

⁹ The Report (page 25) cites an Australian writer who thinks the rule of little value. I can say from my own experience that in political trials in South Africa in the apartheid years it was essential and invaluable.

Apart from causes with a political element one may consider cases where the facts are horrific and the accused persons are particularly unappetising, such as some recent cases concerning paedophilia or the trafficking of young women. The evidence and argument deployed in the Report do not convince one that the abolition of the rule would have no effect in those cases. Even in less extreme cases both criminal and civil there are clients whom a barrister would prefer not to have, but are represented because the barrister recognises his or her professional duty. Lord Pearce's statement in *Rondell*¹⁰ based on years of experience as barrister and judge has not been discredited or attenuated by any evidence produced in the Report. Lord Pearce said -

“It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And

¹⁰ [1969] 1 AC at 275 B-C

that would be the inevitable result of allowing barristers to pick and choose their clients.”¹¹

Is the rule enforceable?

The authors of the Report can find no record of any disciplinary proceedings for the infringement of the rule¹². Breaches of the rule, they say, are difficult to detect, and may be easily evaded, e.g. by demanding too high a fee or by pleading unavailability. That may be correct, but their conclusion is a non-sequitur.

Absence or paucity of prosecutions for an offence can have various explanations. One is that the law in question is generally observed. Thus there are

¹¹ For more recent endorsement of the rule see *R. v. Ulcay* [2008] 1 WLR 1209 (CA) where Sir Igor Judge said at paragraph 40 – “The cab-rank rule is essential to the proper administration of justice. It is not without its critics, although criticism is largely directed at the possible evasion of the principle rather than the principle itself. For example in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 Lord Steyn, while doubting whether much weight could be placed on the “cab-rank rule” in support of the immunity of the advocate from suit, nevertheless affirmed that it was a “valuable professional rule”; so did Lord Hoffmann who underlined that it was a “valuable professional ethic of the English Bar. ... We simply emphasise that if the cab-rank rule creates obligations on counsel in civil proceedings, it does so with yet greater emphasis in criminal proceedings, not least because to a far greater extent than civil proceedings, criminal proceedings involve defendants charged with offences which attract strong public aversion, with the possibility of lengthy prison sentences, when more than ever the administration of justice requires that the defendant should be properly represented, so allowing the proper exercise of his entitlement at common law and his Convention rights under article 6”.

In *Geveran Trading v. Skjevesland* [2003] 1 WLR 912 the Court of Appeal (Schiemann, Arden and Dyson LJJ) said (paragraph 43) – “We accept that the cab-rank rule is a salutary rule. It is an integral and long-established element in our adversarial system. Down the centuries the cab-rank rule has been the way in which unpopular causes have been represented in court.”

¹² They appear at a late stage to have identified two cases of such proceedings (Report, page 40).

few modern prosecutions for bigamy. That does not mean that the law is flouted or unnecessary.

The fact that the cab rank rule is regrettably not always observed was recognised by Lord Hobhouse in the passage quoted above. That does not alter the fact that it remains, in his words, “a fundamental and essential part of a liberal legal system”. No evidence has been adduced to suggest, still less prove, that evasion is widespread, and that “the rule is regularly breached” (Report page 38). The authors of the Report generally ignore the force of professional tradition and in particular that this element in it is inculcated into every Bar student.

The exceptions to the Rule in the Code

The professors cite some distinctions proposed by the late Professor Ronald Dworkin in his book “Taking Rights Seriously”. Professor Dworkin states that “rules are applicable in an “all-or-nothing fashion”, as contrasted with principles which are simply requirements of “justice or fairness or some other dimension of morality”. This leads the professors to assert that the numerous exceptions and exemptions “transform the cab rank rule into at best a principle and at worst a policy.”

This application of a semantic distinction no doubt useful in jurisprudential discussions is absurd in the present context. The general duty of the barrister under the cab rank rule is clearly stated in paragraphs 601 and 602 of the Code. Paragraph 603 is an overriding rule prohibiting a barrister in any case whatever from accepting a brief if to do so would cause him to be “professionally embarrassed”. Contrary to what the professors’ say (page 8) that expression is explicitly defined in the seven sub-paragraphs which follow. They cover such circumstances as conflicts of interest, relationships which might impair professional independence, a lack of adequate expertise or inadequate opportunity to prepare the case. Paragraphs 605 and 606 deal with situations in which, on various stated grounds it would not be in the interests of the client that the barrister should act or continue to act in the case.

Paragraph 604 provides in detail for the fee arrangements which the barrister is entitled to require before accepting a brief. It applies to any client and any case, whether or not the client or case would otherwise be unobjectionable. The cab rank rule does not require a barrister to work pro bono or at a reduced fee. It is not a form of legal

aid. The rule has always been subject to the tender of a proper professional fee. Legal aid fees are deemed in general to be proper fees under paragraph 604. Unfortunately the system of “graduated fees” applied now to many criminal and family cases often results in remuneration inadequate by any professional standard. Such fees are therefore no longer automatically deemed proper for the purposes of the rule. As Mr Michael Beloff QC said in his 2010 David Williams lecture, “it is no way dishonourable for a barrister to wish to receive a reasonable fee for demanding work”. The rules on fees generally may be a proper subject for debate. They do not warrant down-grading the cab rank rule to a vaguely desirable principle which may be ignored without sanction.¹³

¹³ It must be said that the whole approach of the two professors under this heading is suspect, based as it is on an unfortunate misreading of a not uncontroversial text. Professor Dworkin does say that rules “are applicable in an all-or-nothing fashion” (*Taking Rights Seriously* page 24). But a few lines later he adds – “Of course, a rule may have exceptions However, an accurate statement of the rule would take the exceptions into account, and any that did not would be incomplete”, and “the more exceptions there are, the more accurate in the statement of the rule”. (ibid. page 76). Dworkin also makes it clear that several other eminent legal philosophers disagree with his own distinction between rules and principles. See e.g. chapter 3 part 5 “Are Rules really different from Principles?” (ibid. Pages 71-80).

It should be plain that these philosophical and semantic discussions while interesting in their own sphere do not in the slightest support the opinions of Professors Flood and Hvvid that the cab rank rule is “at best a principle and at worst a policy” or that it is “not really a rule but more a principle masquerading as one”. It is unfortunate that the two professors should use a selective, incomplete and therefore misleading quotation to disparage a professional rule which eminent judges describe as valuable and of fundamental importance. But what is more disturbing is that the

The rule only applies to a small section of the legal profession

The Report correctly states that the cab rank rule governs only self-employed barristers who, in England and Wales members little more than 12,000. Solicitors, numbering about 160,000 including some 5,000 solicitor-advocates do not have such a professional rule. The Report (page 4) finds this “peculiar”.

The fact is that the Bar as a profession has, as part of its centuries-old history, developed a particular ethos of public duty. This duty includes duties to the court, and a duty to assist in procuring access to justice. The cab rank rule is an expression of such duty. It is a limited rule, does not in itself ensure access to justice, but it helps to do so.

The Bar alone has maintained this rule because it is the self-employed barrister who is ordinarily entrusted with representing clients in court. The solicitor’s branch of the profession has not adopted the rule. There are no doubt good reasons why

Legal Services Board, in its covering note, seems to have been impressed by the professors’ attempt to relegate the rule to an optional principle.

they have not done so. The partnership structure of firms would make it difficult to apply, and the much larger number of practising solicitors may go far to ensure that a prospective litigant will find a solicitor prepared to act for him. But whatever the reason the fact that a solicitor may pick and choose his or her clients can have no bearing on the desirability of the Bar's rule.

The “collectivisation” of the chambers system

The point made in the Report is that in recent times the numbers of self-employed barristers in certain sets of chambers has greatly increased, sometimes exceeding 100. These sets, it says, develop a quasi-corporate personality. They act in the collective interest of their members. Sir Gavin Lightman is quoted as saying that they have increasingly become partnerships in all but name. (Report pages 11-12.) This may affect the conduct of barristers' clerks who (as Lord Steyn remarked in the *Arthur Hall* case) may steer unwanted briefs away his chambers.¹⁴

¹⁴ The Report (page 11) cites Mr Michael Beloff QC in his 2010 David Williams lecture as authority for the statement that some chambers have attempted to specialise “by hiring teams of barristers from other chambers”. Mr Beloff said nothing of the kind. His lecture, which gives a wholly realistic account of the state of the modern bar, fully endorses the cab rank rule.

Sir Gavin Lightman presumably knew of chambers of which his statement is true, but it could hardly be said of chambers in general. Members of chambers remain individual practitioners, with individual responsibility to their clients. They do not share fees. If clerks, acting (or believing that they are acting) in the interests of their chambers, disregard or take steps to evade the cab rank rule the barristers whom they represent should be held responsible for their conduct. This comes back to the question of difficulty of enforcement. It may be that the Bar Council and the BSB need to consider effective means of enforcement in relation to sets of chambers, but “collectivisation” cannot be a ground for abolishing a valuable rule.

New business structures

Barristers do not form partnerships. Partnerships have been regarded as inconsistent with the independence required of a barrister. One (although not the only) reason for this is the potential for conflict between the individual barrister’s duty under the cab rank rule and the interests of the partnership. Under the provision now made by statute for new business structures this potential for conflict will be exacerbated. The new structures would permit the formation of entities

in which barristers will join with members of other professions and even outside investors. The application of the rule to barristers working in these structures will undoubtedly raise problems. Will the barristers continue to be regarded as self-employed? Can the new entity be compelled to accept the rule as it stands, alternatively in some modified form?

At present it is not possible to say how the new structures will operate, nor in what numbers barristers will join them. It is at least premature to invoke these untried structures as a reason for abolishing the rule.

The barriers to representation are financial

The rationale of the cab rank rule was to ensure that litigants were able to obtain counsel to represent them in court. The Report argues that at the present day the real obstacle to adequate representation is financial. Legal Aid has been restricted, and where it exists, graduated fee schemes have discouraged counsel from accepting briefs. In civil cases parties cannot always obtain conditional fee agreements.

This is undoubtedly true and is a matter of great concern to the Bar. The cab rank rule nonetheless remains of fundamental value in a society committed to the rule of law. Its abolition would do nothing to solve the financial problems of access to justice.

The rule may distort the legal market

A recurrent theme in the Report is that the cab rank rule is if observed a barrier to specialisation and is therefore anti-competitive. It is said (page 38) that “We do know that at an informal level [the rule] is regularly breached because the nature of chambers specialisation means that it is not invoked but rather side-lined or ignored”.

This large statement (“We do know”!) is not supported by anything in the Report which could be dignified as evidence. Nor do the authors make clear what they understand by specialisation. In fields such as intellectual property, aviation law, shipping law or banking the cab rank rule had not been a barrier to specialisation. On the other hand it has ensured that counsel in those fields will not refuse to act for “the small man” perhaps represented by a small firm of solicitors against large competitors represented by major firms of

solicitors. The professors (page 30) quote a solicitor as expressing just this view. They condescendingly say “This is clearly a naïve view”. Others, with more professional experience would say that solicitor is right.

The confusion in the Report’s approach to specialisation is exemplified by a passage on page 32. After saying (reasonably) that some clients would prefer an advocate known to work on one side in a particular area, it continues –

“For example, victims of race discrimination or assaults by the police might not want to be represented by a barrister who previously was cross-examining someone like them on behalf of a racist or the police. As we have seen this cannot be done explicitly without incurring sanctions from the Bar for breaching the rule. Thus it has to be done covertly which reduces knowledge about the market and makes it harder for consumers”.

This passage is literally non-sense. The client is not subject to the cab rank rule: he may pick his barrister on whatever basis he pleases. Who then would be breaching the rule? What has to be done covertly? What sanctions could the Bar impose?

Whose knowledge of the market is reduced – barrister or client? And why?

If the authors include in “specialisation” (as they sometimes appear to do) specialisation by client e.g. acting only for insurance companies in personal injuries cases then the rule may be a barrier to such a choice¹⁵. If it is a barrier to such specialisation, that would be in accordance with the policy of the rule¹⁶.

General conclusion

If a long standing ethical rule supported by ancient tradition and valued by the profession and the judiciary is to be abrogated one would expect strong grounds to be put up to justify such step. The two professors consistently underrate the values on which the rule is based and what the judges have called its fundamental importance. They also wholly fail to point to any adverse effects which flow from the maintenance of the rule. Despite their vague references to the “modern legal market” and their statement (page 3) that “justification [of the rule] needs enquiry to detect whether or not it is

¹⁵ “May be”, because as the author themselves point out at page 33, the rule against conflicts of interest may apply.

¹⁶ The English Bar, unlike some or most American Bars, has not accepted the concept of a plaintiff’s bar and a defendant’s bar.

distorting the legal services market” they have not made any such enquiry. They have not even tried to explain theoretically how a rule the object of which is to assist, however incompletely, in providing services to persons who might otherwise not obtain them can “distort the market”. It is abolition not maintenance of the rule which requires justification.

The professors in their conclusion put forward an alternative to abolition of the present rule. They quote a Statement of Client Rights promulgated by the New York State Bar as follows:

“You may not be refused representation on the basis of race, creed, color, age, religion, sex, sexual orientation, national origin or disability.”

They say that such a provision could constitute a clear rule, needing no exceptions or exemptions. They add that it would be practicable, within the English context, “to augment the rule by including references to type of client, the nature of the case/crime or the defence required”. (Report page 39.)

Incorporating a clause on the New York lines into the rule may be worth considering. The professors, however, still maintain that there is no justification for the continuation of the rule “in the modern globalized legal services market”. Their final verdict on the cab rank rule is stark –

“By all means the Bar can espouse it as a laudable principle, but it should not pretend that the rule is significant or efficacious”.

The professors do not confront the consequences of their advice. Suppose a member of the Bar asking advice from the Bar’s Ethical Helpline were to say “I have been asked to defend a very unpleasant client in a nasty terrorism case. Must I accept the brief?” Or, “I have been asked to appear in a defamation case for a public figure whose views on immigration/race/religion I find abhorrent. Must I accept the brief?” In each case, absent the cab rank rule, the answer would have to be “no”. Nor would it help if the Bar had “espoused it as a laudable principle”. The answers would be “on principle we would like you to take the brief, but you are not obliged to, and there will be no sanctions if you do not”.

The professors would presumably regard that as acceptable, but the Bar would not. If the rule indeed, as they say, serves no purpose why should they espouse it as a “laudable principle” enshrining “virtuous values”?

The professors see only that breaches of the rule are difficult to detect and conclude that breaches must inevitably occur. They do not see the Bar as an honourable profession whose members generally obey the ethical rules of their profession, and who do not seek to evade them. Indeed, throughout the Report one finds not merely hostility to the rule but hostility to the Bar and sneers at its ethical pretensions. One finds also far-reaching conclusions based on selective quotation, flimsy evidence or no evidence at all – very far from what one would expect from senior academics doing serious research.

Sir Sydney Kentridge Q.C.
Brick Court Chambers
4 March 2013