Bar Council response to “The Cab Rank Rule: Standard contractual terms and the list of defaulting solicitors” consultation paper

1. This is the response of the General Council of the Bar of England and Wales (“the Bar Council”) to the Bar Standards Board (“the BSB”) consultation paper entitled “The Cab Rank Rule: Standard contractual terms and the list of defaulting solicitors”.¹

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. As the Bar Council has made clear in the past, it believes in and supports the cab rank rule as one of the foundations of access to justice in the UK. It endorses the BSB’s view (as expressed in the BSB’s (2014) Review of the Standard Contractual Terms & the Cab Rank Rule) that it is “clearly in the interests of consumers of barristers’ services, and an essential safeguard of access to justice, the public interest, and the rule of law (hence in the interests of the regulatory objectives)”.

¹ Bar Standards Board, 2015, “The Cab Rank Rule: Standard contractual terms and the list of defaulting solicitors”.
5. The Bar Council also entirely supports the BSB’s position that:

5.1. It is not reasonable that barristers should be obliged to act without a contractual right to be paid for their services, or without clarity around when and how they are to be paid and,
5.2. It is not right to require barristers to have to rely for payment on solicitors who are in default in paying other fees and are therefore a possible credit risk.

6. Taking those issues into account, together with the regulatory objectives as set out in the Legal Services Act 2007 s.1, the Bar Council considers that the current issue before the BSB (i.e. whether the cab rank rule should continue to refer to the standard contractual terms) should be determined by reference to the issues of:

6.1. Protecting and promoting the interests of consumers, including both access to justice and commercial fairness
6.2. Commercial fairness for barristers and,
6.3. Reasonable practicality.

7. In particular, even if a rule change would in theory meet the objectives of both access to justice and commercial fairness, if it is in reality impractical or so uncertain as to result in impracticality then it should be rejected.

**Question 1 - What are your views on how these options would work in practice and what their impact on the effectiveness of the cab rank rule would be?**

**Question 2 - Do you have a preference and why?**

8. The Consultation provides 4 options:

8.1. Maintaining the status quo: “[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 as published on the Bar Council’s website; or (B) if you publish standard terms of work, on those standard terms of work”

8.2. Alternative 1 - keep the standard contractual terms, but add case specific barrister proposed terms. “[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 as published on the Bar Council’s website; or (B) if you publish standard terms of work, on those standard terms of work; or (C) such other terms as you may reasonably propose for the given instructions.”

8.3. Alternative 2 - remove the standard contractual terms, and include case specific barrister proposed terms. “[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) if you publish standard terms of work, on those standard terms of work; or (B) such other terms as you may reasonably propose for the given instructions”

8.4. Alternative 3 - remove the standard contractual terms, and include both case specific barrister and client/solicitor proposed terms. “[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) if you publish standard
terms of work, on those standard terms of work; or (B) such other terms as you may reasonably propose for the given instructions and which the professional client is willing to accept; or (C) such alternative terms as the professional client may reasonably propose for the given instructions if unwilling to accept (A) or (B)"

9. Of these maintaining the status quo is clearly the best option. As a general point, it is clear from the BSB’s 2014 Review of the standard contractual terms that they are working in practice. Whilst the Bar Council accepts that it is appropriate periodically to review the degree and form of regulatory intervention, it should be recognised that the current provision works, and thereby fulfils the regulatory objectives. Furthermore, an analysis of the alternatives shows that the status quo is clearly preferable.

10. Alternative 3 is entirely unworkable and unacceptable for barristers. The Bar Council agrees very strongly with all of the reservations about this alternative which are already set out in paragraphs 52 to 55 of the consultation paper, and proposes to expand on them only briefly.

11. As the BSB notes, it will be impossible to determine what is or is not ‘reasonable’ with any degree of certainty, particularly (but not only) when instructions need to be accepted or declined in a short period of time (such as where a barrister is briefed in the afternoon to attend court the next morning). This would result in:

11.1. Uncertainty in the market place, increasing administration costs and reducing efficiency, and

11.2. The possibility of barristers being put under unreasonable pressure to accept terms which might well be ‘unreasonable’ rather than risk breaching their professional obligations.

12. This second point goes to the heart of how the cab rank rule exceptions should operate. They need to recognise that they are not dealing with a standard commercial negotiating situation. This is because one party (the barrister) is under a unique negotiating pressure - namely, if they fail to agree to terms they are at risk of a finding of professional misconduct. Barristers would run a clear risk of being under unfair, one-sided pressure to accept terms which may well be considered to be unreasonable, rather than risk breaching their obligations under the cab rank rule. Fairness dictates that, as the cab rank rule takes away barristers’ freedom of contract by taking away the ultimate freedom not to contract at all, it should not extend to situations in which the terms on which that freedom is removed are being dictated by solicitors or clients, under pain of a finding of professional misconduct. The large number of barristers available and eager for work already creates a general imbalance in market power between solicitors and barristers in favour of solicitors, and there is no justification for any regulatory requirement reinforcing that imbalance.

13. The reverse is not true for the clients/solicitors so long as there are standard terms which guarantee access to justice. So long as they can demand that a barrister accept instructions on a set of terms which are determined in advance to be reasonable - say, the standard contractual terms - then they cannot be pressured by barristers into accepting unreasonable terms simply because of, for example, pressure of time. If, however, there were
no standard terms guaranteeing access then the client/solicitor could be forced to accept terms which were not ‘reasonable’, simply due to the lack of available alternatives.

14. Alternative 2 is therefore unacceptable for the clients/solicitors. All that it would do (as the BSB recognises) would be to allow barristers to avoid being subject automatically to the cab rank rule on the basis of the standard contractual terms; but as there is no evidence that these are unfair to barristers, the Bar Council does not believe that it is unfair for barristers to be required to contract on those terms, if no others can be agreed.

15. In making those comments, the Bar Council has understood the BSB to read the Code (presumably, through rC29) in such a way that it would oblige barristers to offer standard terms or case-specific terms under Alternatives 2 and 3. If so, then the Bar Council suggests that this should be spelt out, even if only in Guidance: the use of the word “may”, in particular, could cause some uncertainty (particularly given that this word is used in Alternative 1 as well, in relation to which there does not seem to be any need or intention to impose any such obligation). Having clarity on this issue could be important. Otherwise, without a standard set of terms, and without the option for clients/solicitors of proposing their own reasonable terms, and being able to demand service, alternative 2 could defeat the cab rank rule entirely. All a barrister would need to do to avoid the rule applying would be to not publish or propose any terms. It would also important to be clear (assuming that this is intended) in the Code that there is no obligation to propose case-specific terms if a barrister publishes standard terms which would apply.

16. As regards both of Alternatives 2 and 3 (although this could also apply to Alternative 1), it would not be workable or desirable for either barristers or clients/solicitors for the question of the reasonableness of terms to be determined later, if and when a complaint is made against the barrister. Reasonableness needs to be something which can be ascertained with confidence at the time when instructions are offered. Clients needing to rely on the cab rank rule will wish and need to have their chosen barristers’ services at the time, not a right to complain about the offered terms later; and barristers should not be at unreasonable risk of complaints long after the event about the terms of business which they propose for a particular case (whether or not the solicitor/client accepts them or goes elsewhere). It is also difficult to see how practical or desirable – if not invidious - it would be for the BSB or a Disciplinary Tribunal to determine, as a core allegation of professional misconduct, the reasonableness of particular contractual terms offered in particular situations, rather than (as present) identifying a basic set of terms on which it would be reasonable to require barristers to work. Although Guidance might be issued on what is and is not reasonable, that is not likely to cure the undesirable and unacceptable uncertainty and pressures identified above. It is also far from clear that there would be any countervailing benefits when compared with the current arrangement: indeed, if there is no reasonable objection to the current standard contractual terms, then it is difficult to see this making any practical difference to the terms that are likely in practice to be proposed by barristers for the purposes of rC30, unless they seek to impose terms which are less favourable to clients. The only other consequence would appear to be to generate a potential need for expensive and unnecessary regulatory intervention long after the event on a case by case and fact-sensitive basis which could be avoided by the straightforward and proportionate step of identifying a single set of ‘baseline’ reasonable terms in advance, particularly if those affected – barristers themselves –
are content with those terms. The Bar Council believes that they are. The potential costs of those alternative approaches for the regulator, barristers, solicitors and clients are unnecessary and disproportionate and should be avoided.

17. Alternative 1 is in principle acceptable, as it maintains the standard contractual terms as a guarantee to the client/solicitors, whilst also avoiding the barrister being put under unwarranted pressure or commercial uncertainty. However, it does not in practical terms add anything to the present formulation. This is because adding the fact that barristers must accept instructions on terms they propose (which is the effect of the proposed amendment to the Code of Conduct) seems to add nothing for the benefit of the solicitor/client in view of the following:

17.1. If there is no other reason for the cab rank rule not applying, then the barrister will be obliged to accept the instructions on the standard contractual terms or any published standard terms

17.2. If a barrister were to seek to tender reasonable terms which were less favourable to the solicitor/client than those terms, then the solicitor/client is unlikely to accept them

17.3. A barrister always has the freedom to propose terms in place of the two options currently available, and the proposal will not enhance that contractual freedom if the solicitor/client does not like the terms proposed, because Alternative 1 continues to allow the solicitor/client to invoke the cab rank rule on the basis of the standard contractual terms

17.4. If the barrister is willing to tender case-specific terms instead, then that indicates a readiness to accept instructions in any event, and

17.5. A barrister would almost certainly be bound contractually by the client/solicitor simply accepting the offer of terms anyway (if they chose to do so, rather than to opt for any other available terms).

18. As a result, it is difficult to see how a solicitor/client would ever need to rely on the cab rank rule if a barrister were to propose terms acceptable to the solicitor/client instead of the two options to which the rule is currently linked. If not, then there is no reason to change the existing rule.

19. Accordingly, maintaining the status quo is clearly the best option out of the alternatives given. In summary:

19.2. Alternative 1: Acceptable, but adds nothing to status quo.
19.3. Alternative 2: Unacceptable, as it defeats the cab rank rule for the consumers.
19.4. Alternative 3: Unacceptable, as it removes commercial fairness and certainty for the Bar.
Question 3 - If the generic standard terms were retained, are there any elements that are unnecessary or unreasonable?

20. The Bar Council does not consider that there are any elements of the standard contractual terms which are unnecessary or unreasonable. As paragraph 11 of our response to the BSB’s 2014 Review of the standard contractual terms states, our surveys have shown that they are widely used without any problems. We will, of course, keep this under review. It may be that detailed drafting issues are unearthed in due course. At present, however, the evidence is clearly in support of the current terms.

Question 4 - Do you agree that there should be an exception to the cab rank rule if the barrister has formed the reasonable opinion that the professional client is an unacceptable credit risk and that there should be no reference in the rule to the List of Defaulting Solicitors?

Question 5 - If there was an exception for unacceptable credit risk, do you have any views as to whether this would risk undermining the cab rank rule by adding to the grounds on which instructions could be refused?

21. This question has given rise to some debate.

22. All barristers and clerks who expressed a view considered that the List of Defaulting Solicitors is a very useful service for the Bar, highlighting credit risks in an efficient, economical and fair manner. However, it is clearly limited in that in order to be placed on the List a solicitor will have to have failed to pay a judgment or a Voluntary Joint Tribunal’s award in full within 30 days, and this could be seen as too high a test of being an ‘unacceptable credit risk’. Accordingly, there was some support for expanding the exception to the cab rank rule to include a more general ‘unacceptable credit risk’ test.

23. However, on consideration it was thought that such a change was:

23.1. Unnecessary, as the Code of Conduct rC30.9.b allows barristers to demand payment in advance in cases where they feel there is a credit risk and the solicitors is not on the List of Defaulting Solicitors, and

23.2. Undesirable, as it could be used to avoid the cab rank rule by means of barristers simply claiming that a solicitor was an ‘unacceptable credit risk’.

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2 Paragraph 43 of the BSB consultation notes that the standard contractual terms “exclude liability, as between the two professional parties involved”. This is a novel form of liability, the existence of which is not supported by any legal precedent; but as its existence is sometimes asserted, irrespective of a specific contractual term which imposes it (as is done, in a very limited form, in the COMBAR/CoLLS terms), it is entirely appropriate to exclude it in the standard terms. If the standard terms were changed in that respect, it could expose barristers to greater liability than their required BMIF cover (rC77.2) and beyond any top up cover available, leaving barristers in breach of the BSB Handbook (rC76.1). See Q.17 of the Bar Council’s Frequently Asked Questions document on the contractual terms: [http://www.barcouncil.org.uk/media/201277/13_3_7_freq_asked_q_contractual_terms_final.pdf](http://www.barcouncil.org.uk/media/201277/13_3_7_freq_asked_q_contractual_terms_final.pdf)
24. In particular, it would be difficult to regulate any such exception because what is ‘unacceptable’ is uncertain and might change from case to case, and even from barrister to barrister.

25. It may be important to note that the ability to require payment in advance does not mean that barristers will not agree other arrangements where there is a heightened credit risk: it merely means that they cannot be required to accept that risk. Alternative payment arrangements can always be made; but the current formulation allows for this.

26. In conclusion, the Bar Council does not agree with expanding the current exception to the cab rank rule.

Question 6 - Do you have any views on how the BSB could present the cab rank rule in a more principles-based way and whether this would negatively impact the effectiveness of the cab rank rule / principle?

27. This is possibly the most difficult of all the questions asked. After careful consideration the Bar Council’s view is as follows.

28. The Bar Council considers that the cab rank rule is, in its present form, sufficiently principles based. That is to say, it is difficult to set out the principle in any more general a form whilst maintaining clarity of meaning and application. At best it might be possible to insert a pre-amble to the rule describing the principle it is applying, i.e. reasonable access to proper representation regardless of personal characteristics or the opinion of the public or the barrister, the only exceptions being circumstances in which or terms on which it would be unethical for the barrister to act, or unfair or unreasonable to require a barrister to act. However, the risk of doing so is that it could in fact make less clear (or at least less certain) that which it is intended to elucidate.

29. The Bar Council also considers that the exceptions to the cab rank rule, by their very nature and the impact they have on the cab rank rule, need to be tightly drawn. As such they are one area of the Code of Conduct in which the certainty of clear rules is particularly important. There are several exceptions, but they are specific and targeted: they do not detract, and should not be seen as deterring, from what is otherwise a very broad rule in rC29. It would be possible to frame the rule and exceptions in a more general way, but that would inevitably need to be supplemented by Guidance of the same degree of clarity as the current rules, and such an approach would carry with it a clear suggestion that other, less well defined circumstances would justify refusing instructions, which would risk widening the opportunity for arguing that the cab rank rule does not apply. That represents an unnecessary and undesirable risk, which would not appear to work in the public interest.

30. The Bar Council has noted with surprise a view in some quarters that the underlying principles are not clear. If this is still the case, then the underlying principles might be set out in Guidance. It is not clear to the Bar Council what this would add which would serve a useful regulatory purpose, but perhaps a brief explanation might draw attention to the benefits for the public and the public interest, pursuant to the regulatory objectives.
Bar Council
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