



Bar Council response to the Press access to skeleton arguments in the Court of Appeal: proposal for amendment to CPR Practice Direction 52C consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Civil Procedure Rule Committee's (CPRC) May 2015 consultation paper entitled 'Press access to skeleton arguments in the Court of Appeal: proposal for amendment to CPR Practice Direction 52C'.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. The CPRC proposes the introduction of an additional provision to CPR Practice Direction 52C to give accredited court reporters an entitlement to obtain skeleton arguments from legally represented parties at final hearings in the Court of Appeal Civil Division. The Bar Council understands the potential difficulties faced by court reporters in following cases in the Court of Appeal where, as is normal practice, written skeleton arguments are relied upon and acknowledges the important work carried out by accredited reporters in the accurate reporting of appeal proceedings. It considers that, in many cases, providing a copy of a relevant skeleton argument to an accredited court reporter is not likely in principle to

¹ Civil Procedure Rule Committee (2015), Press access to skeleton arguments in the Court of Appeal: proposal for amendment to CPR Practice Direction 52C

present problems and notes that the practice of doing so when requested is widespread and the subject of an existing ethics document from the Bar Council.

5. However, the Bar Council considers it essential that such an addition to the rules is accompanied by safeguards to ensure that skeleton arguments are not made available where their release would breach confidentiality, anonymity or be contrary to the interests of justice or the public interest. It agrees with the CPRC that it is “very important” that a party has the right to apply to the court for a direction that a relevant skeleton argument be withheld or appropriately edited before release in any given case.

6. An amendment to the proposed new paragraph 33(1) would assist in ensuring that copies were not made available inadvertently before any such applications were made.

7. The Bar Council considers that a new provision, analogous to CPR 32.13, should be added to the Rules to give clarity on the circumstances in which the court might refuse production of a skeleton argument or order that it be modified before production to the press.

8. It is difficult to see how the CPRC’s proposals for the copying (whereby it would be for accredited court reporters to distribute to other accredited court reporters) of documents can be made to work in practice. There needs to be a more robust system than is set out in the proposals to ensure the limited circulation of documents to accredited court reporters for the purpose of facilitating informed contemporaneous reporting of a hearing in court only. We also have concerns about the costs of providing copies of skeleton arguments in some cases.

Question: Should CPR Practice Direction 52C be amended by the addition of a new paragraph 33, as follows:

“Documents to be provided to court reporters at the hearing of an appeal

33(1) Where a party is legally represented at the hearing of an appeal, the legal representative must bring to the hearing two additional copies of the party’s skeleton argument (including any supplementary skeleton argument) for provision to accredited law reporters and accredited media reporters in accordance with sub-paragraphs (2) and (3) below.

(2) The additional copies must be supplied before the commencement of the hearing to the usher or other court official present in court.

(3) The usher or other court official to whom the copies are supplied must provide one copy to an accredited law reporter (upon production of their Royal Courts of Justice security pass) and one copy to an accredited media reporter (upon production of their

press pass), if so requested by them. Those copies are to be provided on the basis that the recipients may remove them from the court and may make further copies of them for distribution to other accredited reporters in court.

(4) Any party may apply orally to the court at the commencement of the hearing for a direction lifting or varying the obligations imposed by sub-paragraphs (2) and (3). Where a party intends to make such an application or is notified by another party of the intention to make one, the operation of those sub-paragraphs is suspended pending the ruling of the court."

Response

9. The Bar Council acknowledges that court reporters sometimes face difficulties in following and understanding proceedings in appeals before the Court of Appeal Civil Division where there is little by way of oral introduction to a case and heavy reliance on written submissions. As a result, barristers are often requested to provide copies of documents to non-parties. Requests by non-parties for copies of skeleton arguments are particularly frequent.

10. The Bar Council's Ethics Committee has examined the issues raised by such requests and the barrister's professional obligations in such cases in a document entitled "Provision of documents to journalists, law reporters and other non-parties".² Its primary concern was one of confidentiality. The Bar Council document highlights that the court has inherent power to order disclosure under the principles enunciated in the Guardian case,³ and notes that a non-party may, in certain circumstances, obtain copies of documents pursuant to CPR 5.4C(1) and, with the court's permission, Rule 5.4C(2).

11. In many cases, complying with a request from the press for a copy of a skeleton argument which has been used in the current, or a past, hearing is not likely in principle to present a problem. We understand that the proposed access to skeleton arguments under the new paragraph 33 would be for the sole purpose of facilitating informed contemporaneous reporting of a hearing in court, as described at paragraph 10 of the consultation. We consider it essential that this objective informs and underlies every aspect of the proposed changes in the Rules.

12. Against this background, the proposal that CPR Practice Direction 52C be amended as proposed raises two concerns. The first is one of confidentiality, the second is of procedure and cost.

² Available at: <http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/provision-of-documents-to-journalists-law-reporters-and-other-non-parties/>

³ The Queen on the Application of Guardian News and Media Ltd v City of Westminster Magistrate's Court [2012] EWCA Civ 420

13. As is recognised by the CPRC, it is essential that any such scheme should protect confidentiality. It is also important that no disclosure should breach (or facilitate breach of) any order (for example, under the Children and Young Persons Act 1933) made in the case in question. For these reasons the Bar Council endorses the safeguards which it is proposed the new rule should contain, in particular the proposal that the rule should incorporate a right to make an oral application to the court at the beginning of a hearing for the lifting or varying of the obligation.

14. The CPRC acknowledges that a wide range of circumstances might justify the withholding of documents in whole or in part.⁴ It refers to the factors set out at CPR rule 32.13(3) which justify a court's refusal to allow a witness statement to be open to inspection. In context, the reference would seem to imply that similar circumstances might justify the lifting or varying of the obligation to provide a copy of a skeleton argument under the proposed paragraph 33(4). The Bar Council agrees that the Rule 32.13(3) factors serve as a useful starting point for limiting the obligation to provide copy skeleton arguments to the press. It believes the rule change should go further and that the CPR should be modified to make specific provision for the matters a court should take into account on any application under paragraph 33(4). These should include those set out at CPR 32.13 and in addition "where the court considers that the contents of the skeleton argument or the circumstances of the case as a whole are such that production of the document should be refused". The new rule should, as in CPR 32.13, also make specific provision for a skeleton argument to be amended – by excluding words or passages – prior to production. In family appeals involving minor children, the rules should provide that only skeletons anonymised in accordance with the rules could be given to the media, including skeletons provided by litigants in person (notwithstanding that they would be under no obligation to provide copies under the proposed rule change).

15. The Bar Council considers that the proposed paragraph 33 would achieve greater clarity and give greater protection against the unwitting release of documents pending an application under 33(4) if the draft were amended to incorporate the provisions of 33(4) directly into 33(1). This would result in a revision of the proposed wording to read:⁵

33(1) Where a party is legally represented at the hearing of an appeal, the legal representative must bring to the hearing two additional copies of the party's skeleton argument (including any supplementary skeleton argument) for provision to accredited law reporters and accredited media reporters **in accordance with subparagraphs (2), (3) and (4) below.**

16. Whilst the cost of producing further copies of skeletons may be incidental in a great many appeals that is not true in all cases. A requirement to provide skeletons for every appeal is potentially wasteful given that reporters will not want a copy of the skeleton in

⁴ See paragraph 13 of the consultation paper

⁵ Additional text in bold

every case; we question why counsel should have to bear the cost as a matter of course. Many members of the Bar who do publicly funded cases are unlikely to be able to recoup costs involved, requiring them to unfairly absorb this additional expense. The unfairness would be even greater for barristers who are acting pro bono. We would ask the CPRC to consider whether it should be the court that photocopies the skeleton (which it will already have), if necessary on the basis that it will be paid for by the recipients.

17. The Bar Council endorses the proposal that copies, where provided, should be obtained from the usher or other court official, and not provided to the court reporter direct. However we are unsure how the proposals for the provision of copies of documents to accredited reporters can be made to work satisfactorily in practice.

18. For the reasons set out above, the Bar Council endorses the intended curtailment of distribution presumed to have been intended by the provisions of the proposed paragraph 33(3). This is essential.

19. Under proposed paragraph 33(3) it is stated that the initial recipients of the document (“the accredited reporters”) be entitled to make further copies for distribution to “other accredited reporters in court”. It is not clear whether this means distribution solely to other reporters who were in court but did not get a copy. We believe there should be greater clarity as to what use can be made of the document and to precisely whom it can be distributed. The requirement also presupposes that the accredited reporters:

- Are in a position to make copies of the document at court
- Are willing to do so
- Are willing and able to check the accreditation of those to whom they give copies of the document
- Can be trusted to do so effectively, and
- Will only use the skeleton arguments for the intended purpose of court reporting.

20. For this proposal to work, we believe there would need to be photocopying facilities at court to which the accredited reporters can be given access and some mechanism by which the court itself can ensure that copies are given only to other accredited reporters and used for court reporting purposes. This may include the court stamping skeleton arguments with a notice that indicates the limited purpose they are provided for, namely the contemporaneous reporting of the case by an accredited reporter. It is likely to be asking too much to expect the accredited reporters to check the press passes of any reporter by whom they are asked or to whom they intend to give a copy and there is no obvious sanction if they fail to do so.

21. Moreover, enabling the accredited reporters (and those other accredited reporters for whom they have copied the document) to remove the document from court without imposing any further obligation on them to limit its circulation, or any sanction were they to allow copies to be distributed outside court more widely, would wholly undermine the

intended curtailment of distribution imposed by the proposed paragraph 33(3). The Bar Council considers that, if 33(3) is to have its intended effect, the removal of documents from court should be subject to the requirement that they cannot be copied for further distribution or used other than in the course of facilitating contemporaneous reporting of a hearing in court.

22. The Bar Council agrees that the distribution requirements imposed by the proposed new Rule should be limited to full appeals for the reasons given at paragraph 14 of the consultation paper.

23. The Bar Council agrees that there may be arguments for extending the scope of this proposed new rule, if it can practicably be made to work, to other jurisdictions. It would wish to see the arguments for and against such a move before any further changes were made. The Bar Council is particularly mindful that other jurisdictions may not have photocopying facilities and may not have court staff available to assist.

Other matters

24. The Bar Council agrees with the CPRC's rejection of the proposal relating to transcripts set out at paragraph 18 of the consultation.

25. The Bar Council also wholeheartedly endorses the CPRC's rejection of the suggestion that the parties be required to bring to the hearing of an appeal a note of the parties' names and geographical area(s) of residence,⁶ and agrees with the CPRC's reasoning in relation to it.

Bar Council
June 2015

For further information please contact
Sarah-Jane Bennett
Head of Policy, Legal Affairs, Practice and Ethics
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7611 1319
Email: SJBennett@barcouncil.org.uk

⁶ See paragraph 21 of the consultation paper