



## Review of standard contractual terms and the cab rank rule

### Summary

1. At the beginning of 2013, the BSB introduced a change to its Code of Conduct, which altered the cab rank rule. The effect of the change was that barristers would only be obliged to accept instructions under the cab rank rule where the instructions were offered on the basis of the new standard contractual terms or the barrister's own terms.
2. Now that the new contractual terms have had time to bed in and the new Handbook has been launched, it is right for the BSB to look again at the appropriateness of the Handbook rules. The purpose of this call for evidence is to establish the contractual basis on which barristers are being instructed, and to gather information about the frequency with which the cab rank rule is being invoked. In the light of this, the Board will consider whether a different approach to its Handbook rules is necessary.
3. We are inviting comments from interested stakeholders and have written to the Bar Council, the specialist Bar Associations, the Institute of Barristers Clerks, the Legal Practice Managers Association, the Law Society, and consumer groups to start discussions with them, but we welcome input from all interested parties.

### Background

#### The cab rank rule

4. The BSB's belief in the continuing importance of the cab rank rule has been reaffirmed in the new Handbook. The cab rank rule is an unusual feature of the Bar's regulatory arrangements, given that it can be professional misconduct for a barrister to refuse to represent a lay client because the barrister, for example, does not want to appear to be associated with a particular client, or would prefer for commercial reasons to act for a different party. The Board has taken the view that this 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).
5. However, the Board would not think it reasonable to expect barristers to be obliged to act with no contractual right to be paid for their services or clarity around when and how they are to be paid (non-payment or uncertainty as to fees is likely to affect the regulatory objective of encouraging an independent, strong, diverse and effective legal profession and may undermine competition in the provision of legal services).
6. Prior to the rule change implemented in January 2013, the cab rank rule did not apply to any instructions from a solicitor to a barrister that purported to be on a contractual basis. The default position was that barristers were instructed on the non-contractual basis provided for by the old Annex G1 to the 8<sup>th</sup> Edition of the Code of Conduct ("The Terms of Work on which barristers offer their services to solicitors and the withdrawal of credit scheme"). The BSB felt that those arrangements were outdated and no longer appropriate in the modern

legal services market. The previous, non-contractual, honorarium basis of payment failed to provide for solicitors, barristers and the client, an effective method of enforcement of rights and obligations.

7. Clearly, contractual relationships between solicitors and barristers are not ordinarily a matter for the regulator. The BSB only takes an interest in so far as relevant to the application of the cab rank rule. The rule change meant that instructions would fall within the scope of the cab rank rule if they were made either on the standard contractual terms (which were originally inserted as Annexe T of the old Code) or any standard terms that were published by the barrister. It also provided that barristers were not obliged to act under the cab rank rule if solicitors appeared on the list of defaulting solicitors, which is maintained by the Bar Council.
8. Since the rule change decision, the LSB has approved the new BSB Handbook. The standard terms are no longer included in the Code of Conduct section of the Handbook, but there continues to be a reference to them in **rC30.9.c**.

#### Stakeholder feedback to date

9. Feedback from stakeholders in the profession so far has suggested that many chambers have not routinely been entering into contracts when accepting instructions from solicitors. Whilst nothing obliges barristers (other than in the context of the cab rank rule) to accept instructions on a contractual basis, there is a risk that in failing to do so they may also be failing in their obligations under rC22 to confirm in writing the acceptance of instructions and the terms and/or basis on which they will be acting, including the basis of charging. Our current round of supervision activity is exploring the extent to which barristers are meeting these obligations.
10. It is also the case that solicitors may be seeking to impose their own terms on barristers or adopt alternative standard terms. This is not ordinarily a matter for the regulator – barristers and solicitors are free to agree the terms of instructions between themselves. However, we are concerned to ensure that barristers are not accepting terms that may be contrary to their regulatory obligations.
11. We have not so far received any direct feedback about the impact on the operation of the cab rank rule of the new terms; nor have we had any specific consumer concerns raised directly with us.

#### **Call for evidence**

12. The key questions for the BSB are:
  - a. What are the contractual terms actually being used by the Bar since the rule change was introduced?
  - b. Are there “reasonable terms” being offered within the market other than the Standard terms?
  - c. How regularly is the Cab Rank Rule being invoked in practice and are barristers using the Standard Terms or their own when responding to such requests?
  - d. In the light of the above questions, what would the impact be of taking a different approach on Standard Terms?

13. In addition to this publication, we will be contacting a range of stakeholders to arrange meetings to discuss this matter in more detail. We are particularly interested to hear from the Bar Council, the specialist Bar Associations, the Institute of Barristers Clerks, the Legal Practice Managers Association, the Law Society and consumer groups, but we welcome input from anyone who has an interest.

### **Next steps**

14. This call for evidence will be open until **4 January 2015**. If the Board decides that changes to its regulatory arrangements are necessary it will consult further on the new rules. Our objective is to challenge the assumptions made previously and investigate whether alternative approaches might be feasible without undermining the principle and effectiveness of the cab rank rule and the regulatory objectives.
15. If you would like to respond, please contact us via [bsbcontactus@barstandardsboard.org.uk](mailto:bsbcontactus@barstandardsboard.org.uk).