



# **The Cab Rank Rule:**

## **Its Meaning and Purpose in the New Legal Services Market**

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## Abstract

The cab rank rule has been a defining feature of the English Bar for several hundred years. Its original purpose was to ensure that parties to a case would obtain representation regardless of the predilection of the barrister to take the person as a client. There were periods, such as during the IRA bombing of mainland Britain in the 1970s, when defence counsel were difficult to come by. The cab rank rule was invoked by the Bar to ensure defendants had counsel in court. Since that time the issues underlying the cab rank rule have shifted from the nature of the client to the nature of the payment by the client, as exemplified by the introduction of conditional fee arrangements and graduated fee schemes. This has become particularly stark in connection with publicly-funded cases where key questions concerning *cracked* trials and hybrid cases can influence decisions on whether or not to take a client and therefore whether or not the cab rank rule applies.

The question now that needs asking is whether or not the cab rank rule still serves any purpose? The Bar strongly subscribes to it. Yet the rule has not been the basis of any disciplinary finding by the Bar's regulator. It is virtually unenforceable because all but the most egregious detraction from the rule will be unnoticed. It applies only in specific and limited circumstances and not to direct access clients, nor does it apply to solicitor-advocates.

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.

## Introduction

The cab rank rule is a simple concept, which can be expressed both positively and negatively. The negative aspect is expressed in Paragraph 601 of the Bar Standards Board's (BSB) Code of Conduct (Bar Standards Board 2012):

601. A barrister who supplies advocacy services **must not** withhold those services:

(a) on the ground that the nature of the case is objectionable to him or to any section of the public;

(b) on the ground that the conduct opinions or beliefs of the prospective client are unacceptable to him or to any section of the public;

(c) on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available as part of the Community Legal Service or Criminal Defence Service). (emphasis added)

The positive aspect is presented in Paragraph 602 of the Code:

602. A self-employed barrister **must comply** with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs 603 604 605 and 606 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is publicly funded:

(a) accept any brief to appear before a Court in which he professes to practise;

(b) accept any instructions;

(c) act for any person on whose behalf he is instructed;

and do so irrespective of (i) the party on whose behalf he is instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person. (emphasis added)

The cab rank rule is claimed to insure that the availability of justice will be guaranteed. Indeed, the Bar Standards Board deems the rule to be a bulwark of the rule of law (Deech 2012). If the rule is so simple and well regarded, what is the point of examining it? It is because since the cab rank rule made its appearance with the representation of Charles I, the rule has modified and mutated to such an extent that its justification needs enquiry to detect whether or not it is distorting the legal services market. In other words, is it a rule for the protection of the Bar or does it still offer protection for clients against whimsical behaviour by the Bar?

One of the peculiar attributes of the cab rank rule is that it applies to a relatively small group of lawyers, namely, self-employed barristers who are instructed by solicitors. As Sir Igor Judge said in *R v. Ulcay*,

Counsel cannot choose his clients, or more accurately, cannot refuse to accept the instructions of a solicitor to act on behalf of an individual because of the nature of the charge he faces, or because of his character and reputation.<sup>1</sup>

According to the Bar Council (n.d.) statistics, in 2010, there were 12,420 self-employed barristers out of a total of 15,387. At the same time there were 150,128 solicitors on the Roll (in 2011 the number had grown to 159,524) (Fletcher & Muratova 2010; Fletcher 2012). Furthermore, the Office of National Statistics estimates that the legal services market has 252,000 people working in it (ONS 2012).<sup>2</sup> In all we are talking about a small segment of the market that is covered by the rule. Even if we applied the rule to advocacy it excludes segments of potential advocates. Solicitor-advocates—of whom there are 5,200<sup>3</sup>—fall without as do self-employed barristers who take instructions on Public Access or Licensed Access routes (i.e. direct access without an intervening solicitor). It is possible therefore that at any one time the number of self-employed barristers covered by the cab rank rule may fall below the 12,000 mentioned above.

Despite the apparent simplicity of the cab rank rule it is underpinned by a number of exemptions and exceptions that muddy the framework for understanding the mechanics of the rule, or even its philosophy. Paragraphs 601 and 602 set out the rule as above. Paragraphs 603 (a)-(h), 604 (a)-(i), 605, 606.1, 606.2, 606.3, 606.4, and 607 speak to the exemptions and exceptions. Paragraphs 608 to 610 deal with the return of brief and withdrawal from cases. We set these out in this particular fashion to illustrate how extensive the exemptions and exceptions are compared to the statement of the rule. It raises the question of the value and working of the rule if the means of escaping it appear to take more space in the Code of Conduct than those that commit the practitioner to the rule.

While the present Code of Conduct is a rule-based document, the proposed new BSB Handbook (2012a) is principles-based (see Black 2008). The handbook also examines the role of entities in the delivery of legal services. The draft Handbook appears to reduce the distinction, but not abolish it, between clients and professional clients and in terms of entities only refers to barristers in BSB regulated entities<sup>4</sup>, not the general range of

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<sup>1</sup> [2007] EWCA Crim 2379, para 39.

<sup>2</sup> The ONS uses two categories in legal services: legal professionals and legal associate professionals, but they also have the category of legal secretary, which, if included, would bring the total to 298,000. Other relevant categories have been excluded including, for example, information technology and human resources personnel who are essential to the functioning of the legal services market.

<sup>3</sup> Law Society, Press release on dedicated service for solicitor advocates, 27 January 2012, <http://www.lawsocietymedia.org.uk/Press.aspx?ID=1572>.

<sup>4</sup> The New BSB Handbook Consultation Papers specifically exclude BSB regulated entities from the class of multi-disciplinary practices (Bar Standards Board 2012b: 44).

Alternative Business Structures. The cab rank rule is present as before with a generous list of exemptions and exceptions and with the addition of BSB regulated entities.<sup>5</sup>

One aspect of the cab rank rule, which we mention at the start, was its relationship with advocates' immunity from suit; the proximity of the two can give cause for aligning them. Should counsel be penalized because they happen to be next in line to take a case? The courts discussed the cab rank rule in this context in, for example, *Rondel v. Worsley*<sup>6</sup>, *Saif Ali v. Sydney Mitchell & Co (a firm)*<sup>7</sup> and *Arthur JS Hall v. Simons*<sup>8</sup>. These cases demonstrate that barriers to immunity are collapsing and lawyers are discovering they can be as culpable as surgeons who leave behind scalpels in patients (Brookes 1999).<sup>9</sup> How does this affect the cab rank rule? Likewise, if the rule were to be abolished, how would that affect advocates' immunity? Would there be appropriate sanctions for poor performance on the part of advocates? We return to this topic in the review of the economic literature below.

The report is structured as follows. First, we present the history and meaning of the cab rank rule. Second, we examine the literature—economic and analytical-sociolegal—on the rule. Third, we present our data based on our interviews. And finally, we present our conclusions on the cab rank rule.

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<sup>5</sup> It is worth distinguishing between two types of clients here: professional and lay clients. The former are on the whole solicitors while the latter mainly non-lawyers who in part are referred to as direct access clients.

<sup>6</sup> [1967] 3 All E.R. 993.

<sup>7</sup> [1980] AC 198.

<sup>8</sup> [2002] AC 615; [2002] 2 All E.R. 673. *Hall v Simons* was one of three test cases (the others being *Barratt v Woolf Seddon (a Firm)* and *Harris v Scholfield Roberts & Hill (a Firm)*) where the claimants sought to sue their solicitors for negligence.

<sup>9</sup> In the test cases (*id.*) the law lords were unanimous in ruling there was no justification for retaining immunity in civil cases. The majority, four to three, also ruled there was no justification for its retention in criminal cases.

## History

In one way the cab rank rule has no history: it has always been or somehow emerged into the light in such a way that no one noticed its arrival but everyone is concerned about its absence or departure. What do we mean by this?

Douzinas et al (1993) relate it to the Book of Judges wherein the Israelites are abandoned by God and so must find a champion for their cause. This concerns the search for justice which “is achieved by providing access to the courts; and the Bar is concerned to defend to the death the right of people to be brought or to bring themselves—via the Bar—to the court” (1993: 188). The cab rank rule therefore invokes equivalence between access to the Bar and access to justice and therefore guarantees the latter. The Bar embodies justice. So has the cab rank rule always existed?

Mark Humphries (2009) mentions an early statement of the rule issuing from the Scottish Court of Session in 1532, “No advocate without very good cause shall refuse to act for any person tendering a reasonable fee, under pain of deprivation of his office of advocate”. For Geoffrey Robertson QC (2005) it seems to have appeared in the Bar’s consciousness in the 17<sup>th</sup> century, perhaps not in quite the way the rule is envisaged now. John Cook as Solicitor General was commanded to prosecute Charles I for war crimes (Robertson 2005: 25). All other lawyers left town in order not to be asked. On the return of the monarchy in 1660, Cook, now a judge, was himself prosecuted for having indicted the king (regicide). Despite arguing that he was under a duty to accept any brief accompanied by an appropriate fee, Cook was hung, drawn and quartered—not the most auspicious start for the basic duty of the Bar. Robertson (2005: 26) also refers to Lord Erskine defending Tom Paine and Lord Brougham defending Queen Caroline (in divorce proceedings) as articulating the premises of the cab rank rule. It is worth recollecting Thomas Erskine’s defence of Paine:

From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgement.<sup>10</sup>

By 1967 Lord Pearce in *Rondel v. Worsley*<sup>11</sup> 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 that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full hearing to be in the right. And it is a judge’s (or jury’s) solemn duty

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<sup>10</sup> *R v. Paine* (1792) 22 State Trials 357, 412.

<sup>11</sup> [1967] 3 All E.R. 993 at 1029 (H.L.).

to find that out by a careful and unbiased investigation. This they simply cannot do if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits.

*Rondel v. Worsley* has come to epitomize the ideal of the cab rank rule, the selfless, professional barrister ensuring “unpopular individuals and issues are properly represented” (Quinlivan 1998: 115). And the Code of Conduct enshrines it.

The cab rank rule never applied to solicitors until the Courts and Legal Services Bill, under the Thatcher government. The Bar lobbied the House of Lords to amend the bill to introduce a cab rank rule for solicitor advocates, and later the House of Commons added exceptions for them, which effectively nullified the rule (Thurman 1993: 5-6).

In the case of *Hall v. Simons* in 2002 the House of Lords brought many of the matters of immunity and the cab rank rule to a head.<sup>12</sup> Lord Steyn’s judgment, although disliked by the Bar, has not been overridden. The case was one against solicitors (and solicitor advocates) rather than barristers yet the law lords also had to consider the role of barristerial immunity. While they took different routes they came to the same destination, which was that it was a valuable professional rule but one of little significance in daily practice.

The rule is further complicated in *Medcalf v. Weatherill and Another* where the House of Lords considered the effects of wasted costs orders made against barristers.<sup>13</sup> The case concerned paragraph 606 of the Code of Conduct and Lord Hobhouse of Woodborough reviewed the advocate’s duty thus:

The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed.<sup>14</sup>

This duty is underwritten by the cab rank rule, although not explicitly mentioned, and means that the advocate must be protected from harassment by the judiciary or executive. Moreover, the duty is not owed to opponents and if representing a client brings the advocate into conflict with the court, and he is acting in good faith, then the advocate should not be sanctioned for so doing. Wasted costs orders could adversely affect the advocate’s and, by extension, the client’s interests.

Yet for its inclusiveness and its explicit stance, the Code contains many exemptions and exceptions to the cab rank rule which we examine in some detail because they are so diverse. The starting point is professional embarrassment which is a term of art in this context. Professional embarrassment, though not explicitly defined, is a key concept in limiting barristers’ activities. For example, they are advised if they investigate or collect

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<sup>12</sup> See notes 7 and 8.

<sup>13</sup> [2002] UKHL 27.

<sup>14</sup> *Id.* at para. 51.



evidence and that evidence becomes an issue in court, they are prevented from acting as counsel in the case, otherwise they would be professionally embarrassed.<sup>15</sup>

Under paragraph 603 of the Code, the BSB clearly registers professional embarrassment as a key reason for refusing or rejecting a client's instructions. There are eight clauses providing reasons for withdrawal including lack of experience or competence; other work leaving him short of time to prepare; the client limiting the authority or discretion of the barrister in some way; if the barrister fails to maintain independence; where there is a conflict of interest; if a client's confidential information is likely to be used for the benefit of another; if the solicitor is blacklisted by the Bar and if a direct access client is deemed to need a solicitor. While most appear reasonable grounds on their face, others seem to be the result of mismanagement in chambers, e.g. competence, too little time, blacklisted solicitors, and direct access clients. There are grey areas where professional embarrassment might cause a barrister to consider very carefully whether withdrawal was the appropriate form of conduct. For example, professional embarrassment might be asserted if a client admits guilt during a trial, having pleaded not guilty. This could prompt the barrister to withdraw from the case if the client refuses to change his plea or alternatively refuse to mount an active defence. A further example would be where a client indicates that he will perjure himself during a trial.<sup>16</sup> There are questions what damage could occur if the advocate were to withdraw. An extreme example is David Harris, a barrister, who, while representing Newzbin for copyright infringement, was discovered to own all the shares of Newzbin but had failed to disclose the fact. Moreover, Harris tweeted under the pseudonym "Geeklawyer" where he referred to the claimants as "slimebags" (Out-Law.com 2012). The BSB disbarred and fined Harris for, amongst other things, engaging "in conduct which was likely to diminish public confidence in the administration of justice or otherwise bring the legal profession into disrepute" (id.), and professional embarrassment.

Paragraph 604 is mostly concerned with not accepting instructions unless proper fees are paid, the manner in which they are to be paid falls within certain parameters (e.g. conditional fee arrangements are excluded), and the ways in which they are funded is acceptable, but does make a cursory nod to paragraph 601 where it is stated there is no refusal to accept instructions on grounds of financial support. To what extent a barrister is subject to 601 or how the two are balanced is not spelled out in 604. How fees are negotiated under the Bar's "contractual terms" means some aspects of public funding can give rise to negative obligations (i.e. the deeming and non-deeming of proper professional fees).<sup>17</sup> Why these exclusions exist is not explained.

The last set of exceptions relate to the barrister's working conditions as to whether solicitors are needed or extra counsel. Paragraph 605, which enables a Queen's Counsel to

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<sup>15</sup> Guidance on Self-Employed Practice, March 2010, Bar Standards Board, <https://www.barstandardsboard.org.uk/code-guidance/guidance-on-self-employed-practice-march-2010/>.

<sup>16</sup> *Myers v. Elman* [1940] AC 282.

<sup>17</sup> See notes 1 and 2 to Part VI of the Code of Conduct which indicate what are appropriately deemed fees.

determine whether he should appear alone or with a junior, is the most peculiar in that it harkens back to an earlier time when Queen’s Counsel typically appeared with junior barristers. A considerable amount of litigation—for example, in the Commercial Court—is conducted now with a single barrister, but the cab rank rule enables QCs to insist on double manning cases if they so insist.

Paragraphs 607 to 610 stipulate the conditions under which counsel must return instructions. And paragraph 610 deals with the tricky problem of overbooking and the over-running of cases and returned briefs. Essentially, paragraph 610 mandates the barrister to explain why the brief is being returned to the client.<sup>18</sup>

The concept of “professional” is a central and recurring feature among barristers. The fundamental principles of barristers’ behaviour revolve around professionalism as expressed in Part III of the Code. Yet professionalism, perhaps ineffable, is nowhere defined. The next section examines professionalism from a sociological perspective so we can understand what the concept embraces.

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<sup>18</sup> It is worth noting that the client receives no compensation for losing the services of counsel. The risk of non-appearance is borne solely by the client. See text accompanying footnote 24 below.

## Professionalism

The common theme that runs through the code is the professionalism of the barrister and the Bar. A wide-ranging body of literature (Freidson 1970, 2001; Johnson 1972; Larson 1977; Macdonald 1995) has established the sociological distinctiveness of professionalism as a work organization method. Thus as famously put by Terry Johnson, professionalism is a “peculiar type of occupational control rather than an expression of the inherent nature of particular occupations” (1972: 45). Crucial here is the control that professionals themselves, usually through their associations, exercise on their work, including its definition, organization, execution and evaluation. This, despite the empirical difficulties that such ideal-types pose, analytically distinguishes professionalism from alternative occupational principles such as managerialism or entrepreneurship where “consumers in an open market or functionaries of a centrally planned and administered firm or state” (Freidson 1994: 32), exercise such control.

Self-regulation is traditionally a key component of occupational control and a core objective for professional projects (Larson 1977) as professions collectively seek to achieve and exercise a high level of “institutional autonomy” (Evetts 2002) in managing their own affairs. This includes regulating the production of producers, i.e. controlling who can practise as a professional and how one qualifies into a profession, and regulating the production by producers, i.e. that ensemble of rules and regulations which establish how qualified professionals practise and organize themselves and how professional services are “produced, distributed and consumed” (Abel 1988: 176). The regulation of the production by producers, the second pillar of professional self-regulation, is particularly important here as it provides that nexus of restrictive arrangements, regulations and deontological obligations that frame professional life.

Overall professional self-regulation has been seen as part of a broader regulative bargain where the state has granted professions a high degree of autonomy in organizing their own affairs in exchange for the professions’ pledge to guarantee quality and put public interest before their own. This for years this form of social trusteeship has provided a stable template for professional governance. However, from the 1980s onwards, professional monopolies and regulatory arrangements came under increasing scrutiny from neoliberal administrations throughout the world (Ackroyd & Muzio 2005). In the UK, in particular, two parallel processes have been at play. Anti-monopoly sentiment had been growing putting professions in the firing line. Their restrictive practices when subject to economic analysis by the competition authorities failed to stand up for lack of convincing evidence (OFT 2001; Terry 2009), lending some credibility to long-standing charges of “conspiracy against laity.” In addition, the rise in consumerism, fostered by government policies and emboldened by some high profile cases of professional malpractice, gave voice to a massive number of complaints against lawyers and other professionals (Abel 2003; Flood 2008). In this context professional monopolies and restrictive arrangements were targeted in processes of liberalization and de-regulation while professionals themselves came under increasing public demand for more auditing and accountability (see Evetts 2011).

Julia Evetts (2011: 407) has argued that the conceptualization of professionalism is similar to that of light as particle and wave. Professionalism can be both seen as an occupational value and/or a discourse. This latter mode speaks to a shift in the organization of

professionalism away from the traditional ideal of autonomous control towards a new form of organizational professionalism. Organizational professionalism is based more on managerialism, bureaucracy and assessment. From the perspective of the Bar this might seem otiose, but we claim otherwise. The relevance of organizational professionalism is increasing for the Bar.

We see this new professionalism arising in the Bar in two ways—internally and externally. Despite being classified as self-employed and therefore sole practitioners, the vast majority of barristers work within sets of chambers. Out of 12, 674 self-employed barristers, only 427 (3.4%) were sole practitioners; the remainder were members of 768 chambers.<sup>19</sup> While on the surface they are cost-sharing arrangements with no sharing of profits, beneath the surface chambers are more ambitious in their goals and therefore reconstitute professionalism along the lines we suggest. The Bar Barometer states “securing a ‘tenancy’ means being accepted as a permanent member of a set of chambers.” Moreover, “Sets of chambers typically specialize in certain areas of law.” The LECG report for the OFT also notes this when discussing the potential effects of partnerships among the Bar (OFT 2001: 81). LECG states “Even under existing rules it is unclear to what extent barristers compete as individuals” (id.). The indications for this typification are found first in the growth of the size of chambers over the years. Some examples will illustrate: Brick Court<sup>20</sup>, one of the most successful commercial sets has 78 barristers; 3 Paper Buildings<sup>21</sup>, a general set contains 150 members; and No 5 Chambers in Birmingham is one of the largest sets with 235 barristers<sup>22</sup>. These are equivalent in size to law firms and perhaps in structure.

Chambers have adopted more sophisticated management structures in respect of chief executives, practice managers, marketing personnel as well as the clerks (cf. Flood 1985). Their hiring and retention policies have become more corporate over the years. Chambers are required to remunerate pupils, for example. Moreover, particular chambers have sought to specialize and attempted to do so by hiring teams of barristers from other chambers and conversely releasing barristers who no longer fit the new profile, just as law firms do (Beloff 2010).<sup>23</sup> This is not to suggest that chambers are fully corporatized but they are no longer merely collections of individuals: they have a quasi-corporate entity. One QC remarked that chambers were like law firms with the QCs as senior partners and juniors as junior partners and associates. Michael Beloff (2010) quotes Sir Gavin Lightman, “The dominant philosophy today amongst many chambers is to place the highest premium on keeping all available work for clients in house. Indeed chambers have increasingly become, in all but name, partnerships between members committed to the pursuance of the

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<sup>19</sup> Bar Barometer: Trends in the Profile of the Bar, Bar Council, November 2012, [http://www.barcouncil.org.uk/media/177918/bar\\_barometer\\_nov\\_2012.pdf](http://www.barcouncil.org.uk/media/177918/bar_barometer_nov_2012.pdf).

<sup>20</sup> <http://www.brickcourt.co.uk/>

<sup>21</sup> <http://www.3pb.co.uk/>

<sup>22</sup> <http://www.no5.com/>

<sup>23</sup> For example, two big civil sets of chambers in London—39 Essex Street and 4-5 Gray’s Inn—have effectively merged with a new set of 124 members focused on public, commercial and planning law. Katy Dowell, *The Lawyer*, <http://www.thelawyer.com/39-essex-street-confirms-addition-of-24-strong-4-5-grays-inn-team/1015770.article>.

best interests of members.”<sup>24</sup>

There are, in effect, two sets of changes in the conception of professionalism in play as it applies to the Bar. The first is the introduction of new rules by the state and professional associations, e.g. ProcureCo, BARCO, and ABS, whereby opportunities are granted for new organizations and institutions to be formed. Furthermore, the Bar’s ability to remain a set of autonomous beings has diminished further with alterations in time-honoured practices. Appointments to Queen’s Counsel are now carried out by an independent commission as are judicial appointments, which themselves have been opened up to other lawyers. Perhaps the most invasive incursion into the Bar’s autonomy has been the creation of the “Quality Assurance Scheme for Advocates” (QASA).<sup>25</sup> Initially it is to apply only to criminal advocates but the intent is to extend it across the Bar. QASA was developed because the Carter review of legal aid procurement criticized the inability of the Bar, and other parts of the legal profession, to deal with under-performing advocates in the criminal courts.<sup>26</sup> The second is where the profession extends its work jurisdiction by pushing boundaries, e.g. the dramatic rise of judicial review<sup>27</sup> as well as economic regulation and general competition law.<sup>28</sup> Both of these have contributed to the growth in practice areas in barristers’ chambers.

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<sup>24</sup> According to Beloff (2010) this problem is growing as the perception of the independence of barristers within chambers is questioned. When an International Center for Settlement of Investment Disputes tribunal was asked to rule on whether a QC in the same set as one of the tribunal members could continue to act, Beloff notes, “Accepting that de jure barristers in the set of chambers were independent of each other, the tribunal ruled that they would be seen de facto as having a collective connotation.” In its review of the Code of Conduct, the BSB begins to indicate there should be some collective responsibility for the administration of chambers, but it falls short of suggesting chambers is an entity. See BSB, Review of the Code of Conduct, January 2011, para. 99, [http://www.barstandardsboard.org.uk/media/938853/code\\_of\\_conduct\\_consultation\\_paper\\_final\\_26-01-11\\_b.pdf](http://www.barstandardsboard.org.uk/media/938853/code_of_conduct_consultation_paper_final_26-01-11_b.pdf). The Bar Council goes to considerable lengths to negate this view of chambers as a collective. See a talk advertised on its website about cartels and the Bar, <http://www.barcouncil.org.uk/media/10151/remclk1.pdf>.

<sup>25</sup> <http://www.qasa.org.uk/about-qasa.html>.

<sup>26</sup> Kite marks are increasingly used to denote specialization, e.g. APIL for personal injury lawyers (<http://www.apil.org.uk/benefits-of-accreditation>), and ALEP for leasehold lawyers (<http://www.newsontheblock.com/news-and-opinion/34022/barristers-now-eligible-for-membership-of-alep.thtml>).

<sup>27</sup> See the research page of The Public Law Project for completed and current projects on public law and judicial review (<http://www.publiclawproject.org.uk/research.html>). See especially “Judicial Review in Perspective: Investigation of the Trends in the Use and Operation of the Judicial Review Procedure in England and Wales” (1993). The Ministry of Justice “Judicial and Court Statistics, 2011” show there were 18,811 judicial review applications in 2011 (see p. 65) and according to the BBC there were 160 in 1975 (<http://www.bbc.co.uk/news/uk-politics-20389297>).

<sup>28</sup> See, for example, Majone, Giandomenico. 1994. The Rise of the Regulatory State in Europe, *West European Politics*, vol. 17: 77-101.

Moreover, changes in state policy over areas such as legal aid have reinforced the divisions within the Bar as never before. Abel (1988) showed how much of the junior Bar relied on legal aid as a means of funding their early years of practice. It provided the gateway to acquiring expertise in courts and in litigation. As government curtailed access to legal aid, the Bar had to seek alternatives. Despite the growth in numbers of barristers, there was a shift from self-employed status into either in-house counsel, into law firms or exit.<sup>29</sup> These changes have raised the spectre of the Bar as two hemispheres: corporate/elite and individual/non-elite (cf. Heinz & Laumann 1982), creating class divisions within the Bar. For example, to demonstrate how this works we have found in interviews that very few barristers' clerks cross the divide between criminal and civil work or between publicly funded or privately funded work. The Bar is no longer homogeneous.

The Bar is balanced between competing paradigms of professionalism. On the one hand, there is the autonomous Bar which has considerable powers of control over the way it works and organizes itself (e.g. elite civil sets). On the other is the Bar which is increasingly subject to institutional control with limited powers of discretion (e.g. criminal and family law sets dependent on legal aid) (cf. Flood 2011). This is a radical shift. A small elite of the Bar will be hardly affected but the greater part will be subject to increasing external control.

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<sup>29</sup> From 2006 when there were 14,890 barristers in practice the numbers rose to 15,387 in 2010. However, the numbers of all self-employed barristers rose slowly: 2006—12,034 to 2010—12,420

(<http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/statistics/>).

## Literature Review

The academic literature on the cab rank rule is limited. It broadly falls into two categories: economic and analytical and sociolegal. The distinction we make here is more for heuristic purposes as shared features are found across both fields.

### 1. Economic Literature

The first thing to point out is that the pure economics literature on the cab rank rule is scant while the Law and Economics literature on it 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 basic theories of incentives in economics to speculate on the effect of the cab rank rule. However, before doing so, it is worth speculating on the dearth of literature with a more economics approach. Empirically, this approach needs the right data, and as argued in this report, appropriate data are not generally available. Theoretically, one would need to be able to simplify the real world in such a way that the insights from the simple models have some practical relevance. This involves making assumptions about what motivates the different actors. Finally, for someone to invest the necessary time to carry out such work, the effects from the cab rank rule should at least a priori be interesting and important. The difficulty with the latter is well illustrated by two quotations about the cab rank rule from the decision by the House of Lords in *Arthur J Hall v Simons* [2002]. The first is from Lord Steyn: “It is a valuable professional rule. But its impact on the administration of justice in England is not great.”<sup>30</sup> The second is from Lord Hope: “Its value as a rule of professional conduct should not be underestimated, but its significance in daily practice is not great ...”<sup>31</sup> The cab rank rule, it appears, is important but not very significant. Evidence elsewhere in this report supports this contention. Why study something which has little impact and is not very significant? For the purposes of this study, can economics offer an explanation of why anyone would fight to retain such a rule?

The Office of Fair Trading commissioned a report from LECG,<sup>32</sup> which it included in its report, *Competition in Professions* (OFT 2001). The LECG report examined restrictive practices among professions from the perspective of market failure and the consequences on competition and prices in the market. It provides an interesting comparison of professional restrictions shown in Table 6 (OFT 2001: 27). Across a range of professions, including law, dentistry, optometry, pharmacy, and architecture, there was a “detrimental impact on competition from restrictions on the provision of professional services” (id: 28). LECG does, however, focus on the cab rank rule, which they study with respect to two aspects of the Bar: how it organizes itself (chambers, partnerships, incorporation) and how it denotes specialization (QCs).

The Bar’s prohibition on partnerships is, according to LECG, designed to foster competition and choice which is reinforced by the cab rank rule. The reason is that barristers compete as individuals rather than firms. LECG argued that contrary to popular

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<sup>30</sup> [2002] 3 All E.R. 673 at 680e.

<sup>31</sup> Id. At 714b.

<sup>32</sup> LECG. 2000. *Restrictions on Competition in the Provision of Professional Services*. A Report for the Office of Fair Trading, in OFT (2001).

opinion competition took place at the chambers level rather than individual because of the role of clerks and the nature of specialisms. It identified specialisms that had particularly low numbers of chambers, e.g. competition and EU law, patents, tax, and pensions law (id: 70). LECG saw two consequences to enforcing the cab rank rule in these circumstances. One was that the rule created a barrier to entry that prevented the formation of alternative business structures and hindering the spread of financial risk among members and potential entrants to the Bar. The second was that LECG doubted that partnerships would affect competition because, as it had already determined, competition occurred at the level of chambers rather than between individuals (id: 81).<sup>33</sup>

With respect to Queen's Counsel LECG found their exclusion from the cab rank rule by virtue of paragraph 605 (see above) unsustainable because the QC system failed to function as a reliable kite mark and was in itself anti-competitive since the market did not determine their numbers (id: 78).

The more economics approach to the cab rank rule of barristers in the UK has, perhaps unsurprisingly, focused on various links with remuneration. The few contributions discussed below either explicitly or implicitly assume that at least up to a point barristers are motivated by financial considerations. This assumption is far from obvious. This is articulated very clearly in Hanlon and Jackson (1999: 556) "the Bar's function has been to administer justice in an independent non-pecuniary fashion."

Recall that as regards the merit of the cab rank rule the issue is whether a defendant or the public might struggle to find representation. Broadly speaking this market failure could arise for two reasons, either the fee is viewed as inadequate or the case is so unsavoury that no amount of compensation would bring forth a champion. The latter type one might expect to be high profile with considerable media attention where the defendant stands accused of doing something truly horrific.

Before moving swiftly on to focus on the financially motivated barrister, consider the obvious alternative that barristers are acting out of a concern for justice and the rule of law. In this scenario, the cab rank rule may be a way to avoid free riding. Even if all barristers hold the view that everyone should be represented, they might rather prefer it if someone else dealt with the unsavoury cases. One might wonder, to what extent, it would become obvious to the profession if someone chose to avoid what was seen as a collective responsibility. In that case, the consequent loss of reputation might be just as effective as the cab rank rule.

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<sup>33</sup> The OFT (2009) carried out an analogous study of legal services in Scotland, which is instructive. The OFT said it "questions whether the 'cab rank' rule does in fact ensure the right of representation as claimed since advocates may already decline a brief on the grounds of work load and have some scope therefore to balance their workload and types of cases. We query the suggestion that removal of the existing rule would cause some clients to be significantly hampered in securing Counsel of the appropriate skill and experience" (id: 18).



Hanlon and Jackson (1999) identify two important consequences of the cab rank rule: barristers cannot choose on the basis of the profitability of a brief and clients can choose any barrister they wish. This actually immediately implies that the cab rank metaphor is limited since at most cab ranks, we are expected to choose the first cab on the line. Note that the cab rank rule only requires that the barrister has to accept the brief, it says very little about the level of effort the barrister will put in once the brief has been accepted. Any problem of ensuring adequate effort may be solved by the second consequence identified above, namely that poor current effort may be punished by future potential clients. Before considering the evidence of the latter, let us focus on possible adverse effects on performance arising from the cab rank rule in theory forcing barristers to take cases independent of remuneration.

A group of papers by Tague (1999, 2000a, 2007), comparing the US and UK position on the representation of indigents in criminal cases, discuss the incentives created for UK barristers by a particular remuneration system. It is also one of the few sets of studies that focus on the cab rank rule in an evidenced manner. The analysis in those papers are based on an empirical dataset extracted from “files that had been or were being reviewed at the Central Criminal Court (the Old Bailey) in London, for the purpose of calculating the fees paid to the defending barristers and solicitors in very serious criminal cases” (Tague 1999: 173). In total 63 files were read. For the purpose of this review, these studies suffer from three important shortcomings. Firstly, the cab rank rule was not the primary subject of the analysis but rather one of the institutional features analysed. Secondly, the specific remuneration system studied was reformed in January 1997, shortly after the date of the last of the cases included in the data set. Finally, the data collected is biased in the sense that it focused on cases in which the defendant was charged with the most serious crimes. Together these reservations mean that it is very limited what we can learn from these three studies.

While Tague (1999) is focused on incentive effects, these are mostly hypothetical. In particular, the article never tests any of the hypotheses put forward. Given the subsequent reform of the remuneration system, we are not concerned with whether or not the old system had adverse incentive effects. The main thing we could potentially have learned from the article is whether barristers actually do respond to financial incentives. However, this is simply implicitly assumed. What we do learn is that adverse incentive effects can arise in a small number of ways. The first regards the incentive to return a brief, or to place oneself in a position where a brief will have to be returned. Barristers may have an incentive essentially to engage in strategic overbooking to ensure that they are continually employed. The second regards the incentive to prepare when there is the possibility that a brief may have to be returned. The third is that there may be too much or too little incentive to put the proper pressure on a defendant to plead guilty and the potential for biases as to the timing of such a pleading. Tague (2007) focuses entirely on this third point and rejects it as a problem given the fee scheme in place at the time. Tague (2000a) speculates on how the incentives of the barristers are likely to have been affected by the January 1999 change from an ex-post facto method to a “graduated fee scheme” but has not got the data to test whether the effects actually transpires and in common with Tague (1999) simply assumes that the barristers are motivated by financial considerations. In this

regard, Tague (2007: 313) does give a hint that this assumption may have some if not general support.

This study of barristers' incentives benefited from interviews with thirty-seven barristers over the last few years concerning their purposes in recommending a guilty plea or trial. Surprisingly, not all were aware of the monetary considerations discussed in this Part. Many were, with several revealing that they did calculate the fees depending on the plea. But others thought it was unseemly to do so, intent instead to counsel the defendant as they thought best for him, without regard to their personal (monetary) interests. Ignorant of the fees accorded depending on the course chosen, these barristers would not be tempted to think of themselves.

At best the evidence on what motivates barristers is mixed. That may well, indeed likely, reflect reality. What would be interesting to explore, but not something which there is data to do, is to what extent any focus on financial considerations is determined by the specialization, types of cases generally argued and experience of the barrister.

The main lesson from the various articles by Tague is that it is possible that the cab rank rule, by making barristers take cases with potentially low remuneration, could leave the barristers with poor financial incentives to perform to an expected standard. If that were the case, and little else in the literature would support such a claim, the benefits to clients of getting some representation might be counter-balanced through an adverse effect on the quality of that representation.

Hanlon and Jackson (1999) remind us that the client does not have to take the next available cab. This is important because it puts into play the role of the expert purchaser of the barrister's services namely solicitors. Most non-corporate clients hope at most to have the need for a barrister once in their life and hence are not able to assess the quality and effort of the barrister. Solicitors, on the other hand, are expert enough to monitor at least some of the efforts of the barrister, and also engage with barristers on a recurrent basis so that punishment by not hiring in the future is a possibility. But does this matter? The one empirical contribution considering this possibility, Hanretty (2013) answers this positively. He (2013) demonstrates how "repeat players", that is, entities which litigate more than once do better, in the sense that they are more likely to succeed on appeal.<sup>34</sup> Part, but only part, of this is due to the repeat purchasers making better selections. Hanretty also demonstrates that it matters if the lead QC is experienced. Based on a statistically significant estimate, he finds that if an appellant has the choice between a barrister who has argued ten cases before the then House of Lords and one who has only argued one case, choosing the former increased the odds of winning by 24%. However, even where the repeat purchaser hires an inexperienced barrister, they are more likely to win. This research suggests to us that repeat purchasers may do better for a combination of two reasons. They select better barristers and they make better use of them. The latter could arise for a number of different reasons. It could be that the more experienced purchaser is better able

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<sup>34</sup> Hanlon and Jackson (1999: 563-564) also find that repeat purchasers are better informed.

to select an appropriately skilled barrister, better able to monitor the barrister or better able to provide the barrister with the relevant information and material.

So far we have simply focused on the cab rank rule as ensuring that everybody gets represented. Some might be more ambitious and think that for justice we needed the outcome not systematically determined by the ability, financial or otherwise, of one side to choose their barrister wisely. We might think that a pure cab rank rule can potentially counterbalance this inequality if it ensures that each party get a draw from the same distribution of talent.<sup>35</sup> The insights provided by Hanretty (2013) are important here as well because they suggest that it potentially matters both who is hired and who is doing the hiring. The former effect could in theory be nullified by the cab rank rule. The second, that more experienced purchasers of barrister services are on average able to “do better”, even with an inexperienced barrister, suggests that a totally level playing field where outcomes depend on the characteristics of the case rather than those involved may be impossible to achieve. An argument that the cab rank rule puts all on an equal footing may hence not be generally sustainable.

While nothing in the existing 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. In the 2001 report on the professions, OFT (2001), it was argued that the cab rank rule was an impediment to a change in the business structures of barristers and in particular would make partnerships impossible because ‘barristers would have to consider the impact on partners before accepting a case’ (paragraph 295). The arguments in the OFT report demonstrate the dangers of looking at one rule at a time and serves as a reminder of the intimate link between the sole trader and the cab rank rule. The report also offers a reason for the removal of the cab rank rule if the adoption of business structures that the current sole trader arrangements.

### **1.1. An Economic Approach**

The likelihood of the market essentially providing the necessary discipline is tempered by two features of the particular services in question. The first is the ability of the client to assess the quality of the barrister. This may be solved by the actual choice in this market being delegated to solicitors, who are professional, informed purchasers, who are moreover often repeat purchasers of these services. The second relate to whether the performance was adequate, as the services provided by both solicitor and barrister essentially have the characteristics of what economists refer to as a credence good (Decker & Yarrow 2010: 27; Dulleck et al 2011). The key characteristic of such a good or service is that the consumer, even after having “consumed” it, is unable to assess the quality of what was delivered.<sup>36</sup>

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<sup>35</sup> But to ensure this, we may have to remove the possibility of the client-solicitor choosing a barrister rather than accepting the next cab on the rank.

<sup>36</sup> Classic examples are dentists and car mechanics. Did you really need that filling or break fluid replacement? Did they actually do what they have claimed to have done? For more typical consumer products, vitamins provide an obvious example where even after years of consumption it may be impossible for the consumer to assess whether it is actually doing any good.

These twin problems of selection and monitoring then create problems in the hiring and remuneration of the legal team. In other areas, economists have made use of principal-agent models to gain insight into both the nature of the problems and possible solutions.

In a stylised example, the client hires a solicitor who instructs a barrister. Between them the solicitor and the barrister carry out the legal work. While in theory the tasks are clearly delineated, in reality the barrister could sometimes cover for inadequate effort by the solicitor and vice versa. Using the framework of Tirole (1986), this can be modelled as an extension of the basic principal-agent model to the principal (client)—supervisor (solicitor)—agent (barrister) model.

To use the model, we need to make a number of additional assumptions, particularly about what motivates the individuals. Firstly, assume that both solicitor and barrister are motivated by remuneration, either directly or through a concern over financial punishment or loss of future income. Secondly, assume that both solicitor and barrister prefer not to work hard, known as the disutility of effort assumption. These assumptions are obviously stark and likely in many cases to be violated. Further, assume that barristers vary in terms of skill set and experience so that some are capable of providing a higher quality service than others. This variation in quality may be known by all, but the client is assumed unable to observe this perfectly and the solicitor or barrister is assumed unable to reveal this fully in a credible manner. This difficulty of assessing all relevant aspects of quality is certainly not rejected by the empirical evidence cited above and seems a natural assumption to make.<sup>37</sup> Equally demonstrating just how good you are requires more than a mere statement to that effect and past performance may to a greater or lesser extent be down to luck. Finally assume that the client is not able to monitor<sup>38</sup> effort levels but can tell what the eventual outcome is.

As in all such principal-agent models, the primary concern for the modeller tends to be how principals can ensure that they get the optimal level of effort from the agent as well as from the supervisor (cf. Wilkins 2010). Assume that the client is able to assess the skill of the solicitor, either from experience or from advice from past clients but not necessarily the effort put forward. One of the activities the client would like the solicitor to engage in is both the selection and subsequent monitoring of the barrister. The fundamental problem is how to ensure that the supervisor does this. Contributing to the difficulty in ensuring this is that the supervisor and agent may “collude” against the principal, for example through the supervisor covering over any shortcomings of the agent, a point made in Tirole (1986).

While such a model can be solved to provide insights to how incentive contracts including possible contingency fees should be structured, for the present concern, the issue is how

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<sup>37</sup> Moorhead et al. (2003) provide a very full discussion about what clients can and cannot readily assess. In particular they highlight that there are aspects of legal competence which clients can assess. Important for the model, there are also areas where this is not so. A more challenging result of their research is that they find a divergence between client and professional views of quality.

<sup>38</sup> From Hanretty (2013) we know that this is violated when the client is experienced and we will comment further on the consequences below.

any of this is affected by a cab rank rule. Note that how the solicitor is incentivised to assess the proposed barrister and subsequently to carry out the monitoring clearly has nothing to do with any cab rank rule. Indeed, if the solicitor is given strong incentives to reach a positive result for the client, it is hardly credible that the solicitor would be prepared to take potluck on who the barrister is. At a first blush the principal-agent approach does not provide support for or against the cab rank rule.<sup>39</sup>

The cab rank rule is not about incentives to perform, but about incentives to participate. There is a second element to solving principal-agent models, namely the need to ensure that the agent, and in this case also the supervisor, is actually willing to work for the principal. The cab rank rule secures representation in cases where the fee is low, but high enough that the level of remuneration cannot be used as a justification for returning a brief. The implication of this, if we assume that the cab rank rule is fully enforced and enforceable, is that the procurer of barrister services, in our model the solicitor, can make a take-it-or-leave-it offer which has to be accepted unless an external body decides that the level of the fee is inadequate. This places a lot of bargaining power in the hands of the solicitor. This is to some extent tempered by the BSB, which has some influence over this in terms of what it deems and undeems in terms of fees at the level of the Bar.<sup>40</sup> However, it is clear from the model that the main *economic* impact of the cab rank rule is on the bargain over the barristers' fees. The importance of bargaining power is supported by comments by one clerk recorded below (see text accompanying footnote 76). The model then suggests that the cab rank rule harms at least some of the barristers some of the time by undermining their bargaining power with respect to fee setting.<sup>41</sup> The extent and significance of this problem is an empirical matter. The lowest fee which cannot trigger a refusal based on its inadequacy may still be substantial and the occasions on which such a fee is offered may also be infrequent. The bottom line is that we currently do not have this information.

How this effect on bargaining power may affect the market for barristers will depend on how this manifests itself. If it affects all barristers in roughly the same way, then this is simply a transfer of wealth away from barristers and although it may in turn affect the stock and flow of barristers, it will not distort the market. Indeed it will ensure that at least the agent market is reasonably competitive. However, if the effect falls on only specific

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<sup>39</sup> Cf. Hogan Lovells, Barristers' Ability to Contract and Recover Fees, Under Current and Proposed Arrangements, [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/hogan\\_lovellis\\_summary\\_of\\_legal\\_advice\\_bsb\\_terms\\_of\\_contract.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/hogan_lovellis_summary_of_legal_advice_bsb_terms_of_contract.pdf).

<sup>40</sup> Of course paragraph 604 of the Code of Conduct does grant the barrister the right to determine a proper fee subject to paragraph 601.

<sup>41</sup> Kunzlik (1999) points out a problem with having a cab-rank rule in the Principal-Agent model arising from having conditional fees. While one of the benefits of a conditional fee is that it provides an incentive for effort, another is that it provides an incentive for the barrister to evaluate the value of the case and only take the case if the probability of success is high enough. The cab rank rule takes away the second positive effect by removing the ability of the barrister to reject a case with low probability of success.

groups, it may distort the market. To illustrate this, imagine that the low fees only affect those at the beginning of their career. The resulting lower remuneration could potentially give rise to some entry deterrence as aspiring barristers may not be fully confident about their own ability to move up the ranks to more lucrative cases. This would harm the buyers and benefit the more successful and the more senior barristers. The nature and magnitude of the bargaining power reducing effects of the cab rank rule on fees and entry levels is an empirical matter, but would likely be hard to assess. The necessary data, for example on the characteristics of the barrister and the case where the cab rank does bind, is simply not available at present.

Finally from an economics perspective, there is a second point regarding the functioning of the market for barristers, related both to the increase in specialism mentioned on page 11 above and to the concern about how free barristers may be to represent both sides where there are only a few with the required specialism, discussed further on page 32. Where there is concentration on both sides of the market in the sense that only a few chambers or barristers can supply the services and a small number of users require a disproportionate amount of such services, the market could fail to provide both sides of an argument with adequate representation, which is why the Bar adheres to the view that its practitioners are individual sole practitioners, even in chambers, so conflicts do not exist. The powerful repeat-buyer of services may attempt to tie the most skilled barristers to them through their hiring decisions and through the fees they pay.<sup>42</sup> The cab rank rule is one way in which such a tie can be defeated by the barrister,<sup>43</sup> although when the rule does not actually bind, the barrister must also want to defeat such a tie. Interestingly, a major client may only be pacified by the cab rank rule argument if they believe it to be difficult for the barrister to extricate themselves from its consequences. Above we argued that the cab rank rule could weaken the bargaining power of some barristers. The cab rank rule may also strengthen the bargaining power of barristers by freeing them from implicit or informal ties with one powerful buyer of his or her services.

There is also a policy concern here is about the functioning of the market and the risk that for some specialisations, powerful firms or agencies could try to secure exclusive arrangements with key barristers. This could potentially affect those who may bring a case against these powerful firms or agencies, if they are unable to secure appropriate legal representation. Where the undertaking seeking to distort the market for barrister services through exclusivity arrangements is a dominant firm in the market relevant to the proposed

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<sup>42</sup> Flood (2009) has examined the effects of panel memberships and consequent potential conflict rules in the 2004 sale of Canary Wharf where all the major London law firms refused to participate in suing the Royal Bank of Scotland. The claimants used direct access to the Bar.

<sup>43</sup> Well-designed conflict of interest rules may be able to serve the same purpose. There is an apocryphal story about Joe Flom of Skadden who was reputed to take retainers from clients who feared a hostile takeover. The deal was the retainer was effective until whichever side came to him first to handle the takeover. The retainer, in effect, bought non-contentious work up to the point the matter went contentious. Flom never admitted to this saying the conflict of interest rules actually worked against him and cost him and the firm money when cases flared up (Marcus & Teitelman 2010).

legal action, competition law may possibly offer a remedy. However, much would depend on how markets are defined and potentially also on whether the entity seeking exclusivity is actually an undertaking.

## 2. Analytical and Sociolegal Literature

### 2.1 The Nature of a Rule?

The BSB Code of Conduct is quite specific in labelling the cab rank rule a rule as distinct from a principle or a policy. These distinctions have consequences. For Dworkin (1978: 24) “rules are applicable in an all-or-nothing fashion.” Principles, however, are standards to be observed because they are a requirement of “justice or fairness or some other dimension of morality... Thus the standard... that no man may profit by his own wrong [is] a principle” (id: 22). The distinction, according to Twining and Miers, is that a rule dictates a particular result while a principle merely points in a particular direction (2010: 83). On the basis that rules are prescriptive and may have some exemptions, we can validly question the status of the cab rank rule as expressed in the code.

If we accept Dworkin’s interpretation that rules have an all-or-nothing usage, then the manner in which the BSB has arranged the exemptions to the cab rank rule undermines its effect. Indeed, the result of the BSB’s combination of positive and negative “rules” and their exemptions is to transform the cab rank rule into at best a principle and at worst a policy (Dworkin 1978: 22). The meaning behind policy here, distinct from principle, is Dworkin’s (1967: 23) idea of a standard “that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community.” Here the principle in the rule is that no person should go unrepresented which advances the policy of improving access to justice. As a principle it is to be applauded, but as a rule it fails lamentably because there is no apparent application of enforcement procedures. These distinctions may appear needless perhaps but we maintain they help us see what kind of functions are being undertaken here, which we argue are in the realms of principle and policy not rule.

Moreover, as we show below in the section on how the rule operates and have discussed earlier in the introduction, the rule has different consequences according to whether it is imposed on individuals or collective entities. The rule is primarily drafted with the individual barrister in mind, but as we have demonstrated barristers practise within entities, chambers, which have a collective personality and have an organization that imposes responsibilities and duties on barristers. The cab rank rule fails to speak to the organizational aspects of a barrister’s practice, so, although barristers’ clerks’ actions could be imputed to the barrister, it is unlikely that under the rule any sanction could be imposed on chambers as a collective for a barrister’s or clerk’s actions in connection with it.

There is another aspect to the nature of this rule, namely, its institutional aspect, which concerns the deeming and undeeming of fees by the Bar Council and now the BSB. We discuss this below in “Problematic Fees”.

## 2.2 Discussions of the Cab Rank Rule?

There are few sustained analyses of the cab rank rule, although it crops up often in the literature as a footnote. Whether this is because it is taken as a given or because it is irrelevant, we leave open. Perhaps one way to start this discussion is to ask what is at issue here? Is it the simple construction of a rule or is it something larger. It is both but we need to preface our discussion with what we mean by the larger picture.

The larger picture—and this is often lost in the discussion of the cab rank rule—is to do with ethical lawyering and the ethical lawyer. Sharon Dolovich (2002: 1629) puts it very simply

What is involved in being an ethical lawyer? This, to my mind, is the central question for those interested in understanding the professional obligations of lawyers. But how to go about answering it? The obvious first step is to try to explain what it is that ethical lawyers do, how they respond to requests for assistance from current or prospective clients, how they understand their obligations and how they fulfill them.

For Dolovich (and Deborah Rhode [2003]) the concern is with what lawyers actually do compared to Fried (1976) who is concerned with the moral character of the lawyer (however cf. Leff and Dauer 1977). Much of their argument deals with zealous advocacy in the adversarial system and its results. For Rhode, if lawyers want to occupy the role of officers of the court, they must accept a greater responsibility to pursue justice. This means being a moral agent, not just an agent, who must act decisively. Lawyers must be aware of the moral consequences of their professional actions. One consequence of this is to be selective about choice of clients and to be aware of the effects of third parties.<sup>44</sup>

It may be argued that one of the reasons for the move away from sets of rules determining how lawyers should practice, or rather circumscribing some activities, to principles-based regulation is to force lawyers to think about what they do and the reasons for what they do. It is interesting to see some of the reactions to this form of regulating conduct, especially where there have been complaints about lack of precision of limits. To have one's whole professional behaviour held to account is quite different from whether one has infringed a rule. On the one hand it empowers lawyers—they account for their own actions—on the other it opens a chasm of indeterminacy—what exactly is no longer accepted?

If we want lawyers to act with integrity, then they must have a degree of control over their work. The theories of professionalism speak to collegial control as the professional resolving the tensions of the producer-client relationship. We know, too, that this ideal type of collegial control is scarce in the 21<sup>st</sup> century, even among the Bar. What is more common is the mediative kind of control where third parties intervene in various ways between the producer and client and affect the mode of decision-making (Johnson 1972: 77-86). It would seem that neither producer dominance nor client dominance is likely to

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<sup>44</sup> We are not going to discuss this in detail, but we note a concurrence of interests with the recent paper by Moorhead et al (2012) on designing ethics indicators, published by the Legal Services Board.



occur, either in their pure forms or in the way lawyers talk about them. There are too many institutions that interpose themselves—regulators, commissioners, professional associations, and more.

We have referred already to Robertson's portrayal of John Cook as the earliest (failed) advocate of the cab rank rule (see also Peacey 2001). Cook's approach was that he was acting as an advocate who had been hired by his client, which in this case was the government of the day. He was indifferent to the outcome. While Cook's view was not primarily altruistic, the cab rank rule is so interpreted today. Quinlivan (1998: 117) sees the rule reflecting concerns for "maintaining and sustaining justice and promoting good." The cab rank rule therefore idealizes the public interest and focuses on the service ethic. It nonetheless reflects loyalty to the client in an attempt to protect the client's autonomy. In doing so the lawyer's own autonomy is fettered and the lawyer's behaviour is therefore unaccountable.<sup>45</sup> The lawyer is denied choice and acts merely as agent. One advantage of this is that the choice of lawyer does not signal anything about the client's own view of the case. If there were choice, then by seeing who had or had not turned down the offer to work on a case might signal something, however unlikely, which would influence the court or even a jury.

In contrast, lawyers in the US view lawyer autonomy as crucial and something that should not be sublimated to that of the client. Wolfram (1984) gives the example of the lawyer asked to represent a self-confessed Nazi who wants to vindicate a right of free speech in order, in the future, to be able to spread legal but vicious Nazi propaganda about Jews and Blacks. Wolfram views this from two angles. From the client's perspective the threat of unwarranted criminal proceedings gives rise to a duty of representation. However, he does not accept there is a duty to assist in the vindication of the right to free speech. Wolfram (1984: 230) argues

Unlike the murder situation, here the abhorrent ideology of Nazism is central to the proposed course of conduct. With the lawyer's assistance the ideology can be broadcast, without it, it will be suppressed, even if against the legal right of the Nazi to free expression. [Furthermore] the Nazi proposes to engage in future elective behaviour. Moreover, it is behaviour that will impose harm upon the targets of speech, Jews and blacks, whereas an acquittal of an unjust murder charge will have no "victims".

A key element is the weight attributed to the interest in focus which will tip the scales and "will differ according to the values of the assessor" (Quinlivan 1998: 127). Other less extreme examples can be invoked to show the different interests at play. Freedman (1984) uses the case of the disinheriting parent who wants a will to exclude his son because the boy is opposed to the war in Vietnam. Wasserstrom (1984) suggests the lawyer ought to refuse because the client's reason is bad, while Freedman asks which is preferable, the immorality of refusal or the immorality of the cause? The English barrister would, it seems, be bound to act in all these situations regardless of the morality of the outcome.

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<sup>45</sup> Cf. Dare (2009) who adduces various arguments about the neutrality and non-accountability of lawyers.

But is the situation for the English barrister so clear-cut as suggested? Disney (1986) gives two examples in 1974. First, where the Bar Council had to appeal for assistance from QCs to defend IRA bombers because there were no original takers for the briefs. And, second, where barristers in Sydney asked the Bar Association to request members to accept briefs for prisoners involved in riots: the cases would mean making allegations against senior police, prison and public officials, with low remuneration. Avoidance, according to Disney (1986: 605), was common: he wrote, “the cab rank rule is not infrequently evaded. Such evasion is difficult to detect, and even more difficult to prove with sufficient certainty to justify disciplinary action.” We discuss this further below.

Although it is strictly true that the United States does not possess the cab rank rule it is obliquely referred to from time to time.<sup>46</sup> Charles Wolfram (1998) considered the effects of a ruling by the Massachusetts Commission Against Discrimination. The Commission effectively imposed a cab rank rule to prohibit lawyers from choosing clients on the basis of their gender.<sup>47</sup> Thus

a woman lawyer who says flatly to a man that she only represents women in contested divorce proceedings violates the Massachusetts law prohibiting gender discrimination in a “place” (the lawyer’s office) of “public accommodation” (the publicly advertised practice of law) (Wolfram 1998).

The United States has given constitutional protections to lawyers over representation so that only the courts and not the legislature or the executive can regulate their activities.<sup>48</sup> According to Wolfram the way the Commission had phrased its ruling left the respondent lawyer in an absurd position. Although attorneys have the right of refusal of clients, to say refusal is a matter of principle incurs the Commission’s wrath. However, if the lawyer had said that “the particular (male) prospective client is ‘not consistent with my speciality and area of interest’,” refusal would have been legitimate.

Wendel (2006: 999) argues for a convergence of views in that the United States is little different from the UK in its cab rank rule because the procedures and grounds for disengaging from clients are difficult but he characterizes it not as a rule but a principle, in Dworkin’s sense above, and so not binding in the same manner as a rule. The real

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<sup>46</sup> The exception to lawyer autonomy is if a court appoints a lawyer to represent a client. ABA Model Rules of Professional Conduct, Rule 6.2 (2002).

<sup>47</sup> *Stropnicky v. Nathanson*, No. 91-BPA-0061 (Mass. Comm’n Against Discrimination Feb. 25, 1997).

<sup>48</sup> A few other areas of the world operate a cab rank rule. Parts of Australia where there is an independent Bar and South Africa; the same arguments for the rule are adduced (Katz & Osborne 2004). New Zealand is somewhat different because applicants to the legal profession qualify as both solicitors and barristers, and both are covered by the rule, but it is suggested it has no significant impact on the administration of justice (Webb 2000; Meehan 2005). See also Kimchi, Why the Cab Rank is Irrelevant if You Can’t Afford a Lawyer, [http://scannerclearly.org/blog/2008/06/28/why-the-cab-rank-is-irrelevant-if-you-cant-afford-a-taxi\\_13/](http://scannerclearly.org/blog/2008/06/28/why-the-cab-rank-is-irrelevant-if-you-cant-afford-a-taxi_13/).

distinction here is between individual and system level decisions. Whereas individuals may make decisions for all sorts of reasons creating something of an ad hoc approach to decision-making, the system ought to be capable of making more rational decisions.<sup>49</sup> Wendel gives the example of allocating health resources in favour of either pre-natal care or heart transplants: the former might help more people than the latter and thus be preferred (2006: 1030). But relying on system level justifications of the legal system sees normative conflict channelled into fair procedures and thus alleviating lawyers of difficult decisions and responsibility.

In this respect New York State is clear on the limits of lawyer refusal to represent clients. The Statement of Client's Rights promulgated by the New York State Bar Association and adopted by the Administrative Board of Courts states inter alia:

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
- .....
10. You may not be refused representation on the basis of race, creed, color, age, religion, sex, sexual orientation, national origin or disability.<sup>50</sup>

This last, number 10, is of interest because it states something so clearly obvious yet nonetheless it needs mention. What is interesting is that it has a resonance in the Client Care chapters (especially chapter 2) in the SRA code of conduct,<sup>51</sup> but is not found in the BSB code. It goes much further than the cab rank rule without compromise.

The essential difference between the US perspective of lawyer-client relationships and that of the UK is one of moral philosophy versus pragmatism. We have shown that American scholars are rightly concerned about access to justice, zealous advocacy, and due process.

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<sup>49</sup> Cf. Luhmann's (1985) analogous ideas of the stabilization of normative expectations, which can occur at the levels of persons, roles and programmes.

<sup>50</sup> <http://www.nysba.org/Content/NavigationMenu/PublicResources/ClientRightsandResponsibilitiesDeclaracinDeLosDerechosDeLosClientesyResponsabilidades/Rights.pdf>. See also 22NYCRR§1210.1 at <http://www.nycourts.gov/litigants/clientsrights.shtml>.

<sup>51</sup> <http://www.sra.org.uk/solicitors/handbook/code/content.page>.

For the English these issues are almost pushed into the background. Michael Beloff's (2010) view of the Bar is good example of this pragmatic type of thought. He even compares himself to the actor Michael Caine's character, Alfie,<sup>52</sup> when he asks, "What's it all about?" And not unlike the film character he approaches his answer as a "jobbing attorney." First, Beloff notes the changes in the Bar from a small craft industry into a full-scale business replete with regulation. Barristers are "case managers." Later, he invokes the cab rank rule as a central value of the Bar and justice. Yet he recognizes the truth of Lord Steyn's words when he said in *Arthur Hall*: "Its [the cab rank rule] impact on the administration of justice is not great. In real life a barrister has a clerk, whose enthusiasm for unwanted briefs may not be great, and he is free to raise the fee within limits."<sup>53</sup> As important as the rule is, Beloff understands the schizophrenic role of the barrister as one who must owe a duty to the court over and above the duty to the client. Or as Lord Hoffman put it, "a divided loyalty."<sup>54</sup>

Perhaps this is the essence of the English pragmatism which resembles President Clinton's "don't ask, don't tell" policy with respect to gays in the military (Thompson 2008). Beloff recalls Lord Gifford establishing a set of radical chambers in the 1970s that refused to act for landlords or the police.<sup>55</sup> The Bar Council objected to this, but the chambers declared they were expressing their preference rather than issuing a prohibition. This approach has been reiterated through the intervening years, as we shall show. Interestingly, Beloff comments on two further ambiguous situations—prosecuting barristers and politician-barristers—both of which embody divided loyalties.

Finally, in our literature review, we consider some of the responses that have been made to the Bar's consultations on partnerships and ABS that have involved discussion of the cab rank rule. Two responses are worth considering here for the insights they bring to the discussion. The first is by the Legal Services Institute of the College of Law (Mayson 2008) and the second is by the Chancery Bar Association.

Stephen Mayson (2008: 1) is critical of the Bar's formulation and justification of the cab rank rule. He wonders "whether it has now become an emotive 'article of faith' for the self-employed Bar rather than a rationally justifiable professional obligation." He indicates how it fails to meet the needs of disadvantaged clients in legally aided criminal and family work and that it is too easily evaded. Because the rule is subject to what Mayson terms

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<sup>52</sup> *Alfie* (1966), <http://www.imdb.com/title/tt0060086/>.

<sup>53</sup> [2002] 3 All E.R. 673 at 680.

<sup>54</sup> *Id.* At 687g.

<sup>55</sup> An analogous situation is that of Paul Diamond, a barrister who has made a specialty of defending conservative Christians with views antithetical to abortion and homosexuality (<http://www.pauldiamond.com/about-paul-diamond/>). We can guess his response to a request to act against such views. It would be difficult to see how he could abide by the cab rank rule, yet he is defending "undesirable" clients in the view of many. See also "Barrister defends Christians in courts", Christians Together in the Highlands and Islands, [http://www.christianstogether.net/Articles/262168/Christians\\_Together\\_in/Christian\\_Life/Barrister\\_defends\\_Christians.aspx](http://www.christianstogether.net/Articles/262168/Christians_Together_in/Christian_Life/Barrister_defends_Christians.aspx).

“professional relaxation”<sup>56</sup> and therefore can be suspended for economic reasons, it is difficult to justify in the public interest.

Looked at in these ways, the rule loses much of its consequence: the Bar runs the risk that the rule can so frequently be avoided for apparently self-serving reasons that it ceases to form a meaningful ideology of practice, and can nearly always effectively be overridden in the pursuit of economic interests (Id: 2).

The Chancery Bar Association’s paper (ChBA 2008) strongly advocates the status quo ante with regard to the cab rank rule. Its justification for the rule is different to most in that it emphasizes economic more than philosophical arguments. For example,

The ChBA is firmly of the view that the cab rank rule plays a vital part in making the services of specialist barristers widely available to the public. This conclusion has been arrived at by hard commercial analysis and it does not reflect a misty-eyed desire to retain the rule for its own sake (ChBA 2008: 5).

Although this argument is couched as economic—yet the Chancery Bar Association adduces no evidence of its hard commercial analysis—it is not couched in the usual terms of public interest the ChBA declares, “consumer choice is virtually certain to become severely limited by anti-competitive forces” (ChBA 2008: 6). Unfortunately no evidence is adduced to support the ChBA claims within its paper but it alludes to what it means by anti-competitive forces. The ChBA has in mind the difficulty, for example, of clients who want to sue a bank obtaining legal advice because law firms are either on a bank’s panel or have decided on principle not take action against banks in order to preserve future opportunities of work (see Flood 2009 and note 42 above). The client’s alternative is direct access to the Bar. But even here it is virtually impossible to say that it is the cab rank rule that is the core value that ensures the client is represented: rather it could be the conflicts of interest rules.

Two further aspects are worth considering here. One is a YouGov (2010) survey of barristers commissioned by the Bar Standards Board on new business structures. It covered the cab rank rule. There were responses from 1,913 barristers and 141 barristers’ clerks. When asked about important factors in business structures barristers placed the cab rank rule seventh out of eleven factors with 63% of respondents citing its importance (Id: Fig. 2). However, barristers interested in new business structures were less likely than those not interested in maintaining the rule and it obtained a negative score (Id: para. 8.2.3 and Fig. 16).

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<sup>56</sup> This in connection with how the Bar “deems” and undeems fees as proper professional fees in respect of paragraph 604(b) of the Code. See “Acceptance of Instructions in Criminal Cases”, <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/acceptance-of-instructions-in-criminal-cases/>. The effect is that a barrister is not obliged to accept any instructions but once accepted one must continue.

The second aspect concerns international practice and the cab rank rule. In response to a BSB consultation on international practice rules a number of groups rejected the rule because it would give foreign lawyers an unfair advantage if they could compel barristers to abide by the rule. The reason for this negative view seems to be based on the perceived difficulty of obtaining an effective remedy for the payment of fees.<sup>57</sup> The cab rank rule does not apply outside the UK in any case.

Perhaps this last point is one of the most telling in this analysis of the cab rank rule: the paucity of data. We are unable to find any commentator who can say that clients have suffered as a result of the misapplication of the rule or how many might be injured if the rule were no longer to exist. With this in mind we turn to the present operation of the cab rank rule.

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<sup>57</sup> See Response on international practising rules, 4 Pump Court; and Response of BSB Education and Training Committee to Consultation Paper on International Practice Rules.

## How the Cab Rank Rule Operates: From Principles to the Mundane

Because there is little information on the actual working of the cab rank rule we undertook some interviews.<sup>58</sup> Our interviewees included regulators, government officials, barristers, solicitors, and barristers' clerks.<sup>59</sup> The range of views was diverse from devotion to the status quo ante to some scepticism to complete puzzlement. For example, one clerk said of the rule, "I haven't thought about that for twenty years until you mentioned it." Another clerk commented, "It is difficult to get a man to understand something, when his salary depends on his not understanding it," which we found highly revealing.<sup>60</sup>

The general tenor of our interview responses followed Lord Steyn's statements in *Arthur Hall*, i.e. the rule had little effect. Yet on the part of some, barristers and Bar officials, there was an absolute conviction that without the cab rank rule, the rule of law would collapse. Clearly, we are, in Bagehotian terms, dealing with the "Dignified" and "Efficient" versions of the application of the rule.

The polarity of views can be represented, however, in a simple fashion: whether the topic is people or money. The origin of the cab rank rule is to ensure that the unwanted client receives representation, but what is apparent today is that such a client hardly wants for representation. The client who may be undesirable is one who might cause a "cracked"<sup>61</sup> trial resulting in a lower fee for counsel.

The profession's view is that over hundreds of years what was a matter of honour—that the Bar would defend clients against the state—mutated into a professional obligation written into the code of ethics. One solicitor, for example, argued that it enabled country solicitors to battle equally against the likes of Linklaters as each had access to the same barristers. This is clearly a naïve view, as we know there are monitoring difficulties in the principal-supervisor-agent model as discussed earlier. The cab rank rule does not protect against, for example, the supervisor and agent conspiring against the principal.<sup>62</sup> A substantial amount of mythology has been built around the cab rank rule in these ways.

Another divergent view that emerged from the interviews was over the nature of the cab rank rule. This view was that the rule was a nice principle, and might be important as such—as Wendel couched it above—but it was not a real working rule. However, one

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<sup>58</sup> See Methodological Note below at p. 39.

<sup>59</sup> All interviewees were assured of anonymity unless agreed otherwise. See also Methodological Note below.

<sup>60</sup> Quotation attributed to Upton Sinclair, *I, Candidate for Governor: And How I Got Licked*.

<sup>61</sup> According to the Legal Services Commission (LSC 2008-11), "A 'cracked' trial is a case that is terminated between the [Plea and Case Management Hearing] and the first day of trial. A case where no PCMH took place, but the case was listed for trial and did not get to trial or Newton Hearing, is also deemed to be a cracked trial."

<sup>62</sup> See examples at p. 19.

commentator put the reasoning behind the rule in such a way as to invert it: “I think most barristers would actually identify as the main justification, for which read: benefit to the barrister, namely that, so they assert, the existence of the cab rank rule ensures that we are not associated with our clients, their conduct, or their views. Obviously, that is nonsense, and anyway not a justification. No other professionals assert that need or suffer that problem, why should we?”

We next examine the two main views of the cab rank rule: the undesirable clients and problematic fees.

### 1. Undesirable or Difficult Clients

One of the regulators referred to a case we have mentioned before (see Disney 1986), the Birmingham Six IRA bombers in the 1970s.<sup>63</sup> With defence counsel reluctant to appear, the Bar Council had to appeal for QCs to take on the case. No other case since then seems to have attracted such opprobrium that no counsel could be found. Indeed, the very opposite has occurred; the “worse” the client, the more attractive and desirable. Several respondents suggested that if Anders Breivik,<sup>64</sup> the Norwegian bomber and shooter, had been on trial here in the UK, “barristers would have queued around the block to represent him.”<sup>65</sup> While this obviously remains hypothetical and is untestable, the idea is not far fetched.<sup>66</sup> For example, during the O.J. Simpson murder trial a change of defence counsel

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<sup>63</sup> See “The Birmingham Framework” by Fr. Denis Faul and Fr. Raymond Murray (1976), CAIN Web Service—Conflict and Politics in Northern Ireland, <http://cain.ulster.ac.uk/events/other/1974/faul76.htm>.

<sup>64</sup> Anders Behring Breivik: Norway Court Finds Him Sane, <http://www.bbc.co.uk/news/world-europe-19365616>.

<sup>65</sup> A blogger pointed out how the allure of the unattractive client did not work in family law because many proceedings are held in private, Pink Tape, Bat the Rat, July 14 2012, <http://pinktape.co.uk/rants/bat-the-rat/#more-3572>.

<sup>66</sup> We see the problem arising in India as lawyers expressed their repugnance at the alleged perpetrators of the hideous gang rape and murder of a 23-year-old woman in New Delhi in December 2012. India has no cab rank rule. Initially the Saket Bar Association, which covers the trial court, “urged its members not to represent the five men [charged] because of the heinous nature of the crime”. It was thought that the court would have to appoint representatives but as of January 13, 2013 all five men had obtained legal representation through the efforts of their relatives. Without representation the accused would have had strong grounds for appeal. Convictions in similar cases have been overturned. See Lawyers Snipe in Delhi Rape Case, <http://online.wsj.com/article/SB10001424127887323596204578239640237155754.html>. See also Devil’s Advocate in India Gang Rape Draws Scorn from Public, <http://www.thenational.ae/news/world/south-asia/devils-advocate-in-india-gang-rape-draws-scorn-from-public>. It is difficult to see if a cab rank rule were in play in India, how it would be enforced. The longstop is for the court to appoint counsel for the accused. As is coming clear, the lawyers are already making capital out of their representation. The results have not been so different from what happens in the west.



was anticipated.<sup>67</sup> One particular defence lawyer offered an unusual reverse contingency fee: he would be paid only if he *lost* the case. If he won the resultant publicity would far outweigh any monetary reward, which confirms the attraction of the “undesirable” client.<sup>68</sup>

The manner in which the cab rank rule is presented makes it appear simple until all the exemptions are taken into account, but they do not account for all the possibilities. For example, they do not mention specialization although they refer to “a Court in which he professes to practise.” So it would be far fetched for a Chancery barrister to represent a client in a family court and so the cab rank rule is unlikely to be invoked. But where specialization is more narrowly specified then problems arise. We referred to Lord Gifford’s chambers earlier and since that time specialization at the Bar has intensified, without the cab rank rule being changed. Two examples will suffice: criminal prosecution and defence; and family law.

Although there is no prescribed way of specializing in criminal prosecution or defence it nonetheless occurs. Within the constraints of the cab rank rule barristers in either chambers ought to be available for any kind of criminal work. Formally they are, but informally solicitors, the Crown Prosecution Service and others know which chambers do which kinds of work and so would be unlikely to send a prosecution brief to a dogmatic defence set of chambers and vice versa. This information is available to the “club” but not the general public: it operates through networks. A similar situation is arising in family law where particular barristers act exclusively for Local Authorities in care proceedings while other act only for parents or children. Again these distinctions are informal and not publicized in ways that would incur the BSB’s wrath.<sup>69</sup>

The converse to this should be mentioned which is where clients want a particular barrister who is known for working in distinct areas. Having worked for both sides might deter some clients who would prefer a more “zealous advocate”. 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 sanction 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.<sup>70</sup> This brings us back to Hanretty’s (2013)

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<sup>67</sup> Famous American Trials: the O.J. Simpson Trial 1995. <http://law2.umkc.edu/faculty/projects/ftrials/simpson/simpson.htm>.

<sup>68</sup> Although high-profile clients, however distasteful, would be represented, would low-profile undesirable clients? Pink Tape at footnote 65 has referred to this point saying that the rule ensures she will represent these clients.

<sup>69</sup> The BSB draft handbook (Bar Standards Board 2012a) at rule 31 says you must accept a brief ...irrespective of the...identity of the client. Some barristers believe that this extension of the rule to include identity will put them in breach. Whether this expansion will in fact have any real effect is debatable since it is already breached regularly as we have shown.

<sup>70</sup> There is another aspect to this situation, which is blogging and tweeting by members of the Bar. For example, 1 Crown Office Row runs the UK Human Rights Blog (<http://ukhumanrightsblog.com/>). John Cooper QC ([twitter.com/John\\_Cooper\\_QC](https://twitter.com/John_Cooper_QC)),

analysis of how repeat players have the advantage in selecting the best counsel for the case as they have inside information not generally available.

One barrister noted that he worked in the very small field of pension fund law which meant that he and the other several barristers would act for either side as necessary and that clients understood this. In this respect it was the small number of counsel made any specialization by client virtually impossible. One area where he said there was some curtailment on outside representation was where counsel acted for HMRC. A regulator said that if a barrister was doing high-level work for the Revenue, it would say, “We expect you not to act for the other side.” This point is also raised in the economic model on page 21 above. The argument here being that this is covered more appropriately by a conflicts rule or possibly even competition law rather than the cab rank rule.

One area that is supposed to be non-exclusive, but, again, we have no data on, is the operation of panels by organizations such as local authorities.<sup>71</sup> By comparison we notice that the Attorney General’s Panel of Counsel specifically includes a “Myth Buster” as follows:

**Myth 4 When You Are Appointed As Panel Counsel You Can No Longer Act Against Government**

This is not true. We fully encourage counsel to maintain both a public and private practice, this includes acting against Government. It is beneficial to Government if counsel have had experience of acting against Government as we believe it makes them a better advocate as they have seen Governments arguments from the other side. Panel membership is also not infinite; we would therefore want to ensure that should your panel membership cease you would have a private practice to return to ([http://www.tsol.gov.uk/PanelCounsel/myth\\_busting.htm](http://www.tsol.gov.uk/PanelCounsel/myth_busting.htm)).

## 2. Problematic Fees

Fixed fees are now the area that causes the most difficulty. The two main areas where the cab rank rule is at best ambiguous are in criminal defence work and community legal service work.<sup>72</sup> Among our respondents this topic aroused much emotion and annoyance

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Francis Fitzgibbon QC ([twitter.com/ffgqc](https://twitter.com/ffgqc)), and Felicity Gerry ([twitter.com/felicitygerry](https://twitter.com/felicitygerry)) are all active on Twitter. All these social media outlets become forms of advertising of specialties and perspectives on the law, whether implicit or explicit, which could potentially fall afoul of the cab rank rule yet increase information for consumers in the market.

<sup>71</sup> One regulator argued that “theoretically” panels could restrict the working of barristers.

<sup>72</sup> See, for example, Undeeming of Criminal Graduated Fees, Bar Standards Board, <http://www.barstandardsboard.org.uk/code-guidance/undeeming-of-criminal-graduated-fees/>. There are even software packages that automate the billing depending on what the trial type is in Criminal Graduated Fee cases, e.g. Lex bar squared, <http://www.barsquared.com/files/products/lex-chambers-management/lex-criminal-graduated-fees.html>. For details of the fees see The Criminal Defence Service (Funding) (Amendment) Order 2011, No. 2065.

directed both at funders and the BSB. Without going into great detail on this topic, we indicate the main features that impact on the cab rank rule. The first part to take into account follows from our discussion of the nature of a rule above. In addition to the individual and entity aspects of the rule there is a third, the institutional. This is articulated in the rule in connection with the deeming and undeeming of fees.<sup>73</sup> In relation to publicly funded cases in criminal and family law, the Bar Standards Board has explicitly excluded such cases from the cab rank rule because of the level of fees granted in such cases. For a barrister to accept a case and have the rule apply, the fee must be a “proper” one. In the case of criminal defence until 2003 legally aided work “was deemed by the Code to be at a proper fee,” and for family law work graduated fees were undeemed in 2001 by the Bar Council.<sup>74</sup> To these we can add the BSB’s new Standard Contractual Terms (SCT) due to take effect in January 2013. The cab rank rule will not apply unless all parties agree to the SCT or the barrister’s own terms, which can be interpreted as a restriction on competition that might be disproportionate.<sup>75</sup>

For the ultimate consumer of legal services the “Swiss cheese” approach to the deeming and undeeming of fees overly complicates the matter. The public access client being excluded from the cab rank rule in any case further reinforces this and it could potentially leave a client stranded without representation since there is no enforcement mechanism. The institutional layer—that imposed by the BSB on behalf of the Bar—on the cab rank rule adds complexity to a melange of exclusions and exemptions that appear to make the rule not only unenforceable but rather meaningless. It also strengthens the case for characterizing the cab rank rule as a principle rather than a “rule”. The rule aspect appears to serve the Bar more than it does consumers.

For an example of a type of key case we take either way offences,<sup>76</sup> e.g. benefits fraud. This is where the potential problem for the barrister and the clerk occurs. In “either-way” cases there is under the graduated fee scheme a particular fee for each court that covers a number of activities. However, if the defendant elects for the Crown Court and then pleads or in some other way the case cracks, then counsel receives a fee less than would have

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<sup>73</sup> See, for example, Bruce Holder, To Deem or Not to Deem, That is the Question? Criminal Bar Association, 9 May 2003.

<sup>74</sup> Guidance to the Members of the Criminal Bar in Relation to Refusing Work, <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/guidance-to-the-members-of-the-criminal-bar-in-relation-to-refusing-work/>. Criminal prosecution work, however, is not “undeemed.” See also, Brendan Malkin, Bar Talk, *The Lawyer*, 24 June 2002, <http://www.thelawyer.com/bar-talk/79964.article>. See Review of the Code of Conduct, BSB, January 2011, para. 95, [http://www.barstandardsboard.org.uk/media/938853/code\\_of\\_conduct\\_consultation\\_paper\\_final\\_26-01-11\\_b.pdf](http://www.barstandardsboard.org.uk/media/938853/code_of_conduct_consultation_paper_final_26-01-11_b.pdf).

<sup>75</sup> New Standard Contractual Terms to take effect in January 2013, <http://www.barstandardsboard.org.uk/media-centre/latest-news/new-standard-contractual-terms-to-take-effect-in-january-2013/>.

<sup>76</sup> Cases which are non-indictable yet the defendant can elect to be tried either in the Magistrates’ Court or before a jury at Crown Court.

been awarded if the case had remained in the magistrates' court or not cracked. Peter Wright (2012), a barrister's fees clerk, gets quite emotional when he says,

The biggest bugbear at the moment is the regulation over "Defendant Elect Cases".

It is the Defendants right to elect for a Crown Court Trial (in either way offences) but this is not the problem. The issue revolves around the fees paid to DEFENCE advocates under the Advocates Graduated Fee Scheme.

Currently it stands that if the Defendants pleads at any point before or on the first day of trial the Defence Advocate is paid £203 plus vat, this fee covers everything that has happened on the case, by everything I mean everything;

- Prelim Hearing
- PCMH
- Mentions
- Conference
- Bail Apps

If alternative counsel has covered these hearings then the divvying up of the pot gets ridiculous.

Counsel however accept cases on this understanding (all be it begrudgingly), BUT in these cases where the CROWN decide not to proceed against the defendant is it fair to pay the defence advocate the same £203?

Surely if it is the Crowns decision to drop the case then defence counsel should expect to be paid a full Fee (please note at this point the CPS advocate (assuming self employed) receives a full fee regardless of when the case concludes).

The inherent flaw in the system means that defence counsel has fully prepared to defend this case, and in some cases may have affected the Crown's position to proceed, yet receives £203 for his/her trouble.

The response from a number of clerks was, if possible, to steer a course away from this type of work. For them the client had too much leeway to spoil a case. The cab rank rule had both formal and informal effects. One clerk put it this way:

In the old days when solicitors couldn't go to court, the fee to the barrister was a disbursement so it didn't matter who got it. The solicitor couldn't touch it and so he thought "I might as well buy the best barrister I can." In the new world the advocacy fee, the barrister's fee is a potential profit centre not a disbursement. So you look at that fee and say "Do I want it to leave my building?" Not if I can make a profit out of it. I look for the most profitable advocate not the best. If you're running a quality service then you look for the best advocate, but if you're running a bargain basement operation you look for the most profitable. So if you're dealing with cases in far away geographical places with uncertain fees, then you send a barrister. That puts the solicitors in the economically dominant position as they

control the workflow. And the Bar, because of the cab rank rule, are in an ethically weaker position.<sup>77</sup>

A solicitor reinforced this position when he said that he would authorize the work in stages such as pre-trial work, cracked trial stage, but he would never authorize full trial work. It was all based on risk analysis: as he further said, “Risk, risk, risk.” Or as the clerk put it, “The solicitor is driven by cash and we’re driven by ethics.” Another clerk went so far as to mention ‘brown envelope deals’ between solicitors and chambers where the work was done off the books in order to cement strong relationships between them.<sup>78</sup> He said, “The cab rank rule is a clean hands rule and business is currently very dirty. And those who are ethical are at a disadvantage.”<sup>79</sup>

The cash nexus between solicitors and barristers was picked up by a regulator who said,

It’s to do with the divvying up of legal aid between them. If too much money sticks in the hands of the solicitor then it’s a loss maker for the barrister. Now if the work is coming from a law factory the clerk doesn’t mind because plenty of work will follow even though the individual barrister suffers. The client is therefore irrelevant.

For most clerks, while they respected the barristers’ ethics, they had not heard a rational explanation of the cab rank rule; it was a fetter. One clerk suggested the question ought to be put, “Would you refuse to act if you didn’t have the rule?” Another clerk stated that, “The true ethos of the Bar is not the cab rank rule, it’s a collegiate ethos. It’s helping the judge, it’s pointing out to your opponent something he’s missed.”

The previous discussion brings to light what some perceive as an internal contradiction in the cab rank rule over collective versus individual. The rule is based on individual behaviour despite, as we remarked earlier, that chambers are now a more collective operation than before. Because of this formulation it is possible for certain parts of the collective to evade corporate responsibility.

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<sup>77</sup> And more to the point a weaker bargaining position. Walking away from the offer may be unattractive, especially to very junior barristers.

<sup>78</sup> This brings us close to the topic of referral fees. Legal Futures reported that “Solicitors are putting barristers under ‘increasing pressure’ to enter into referral fee agreements, to the detriment of clients, the public interest and the junior Bar, the Bar Council has claimed.” <http://www.legalfutures.co.uk/latest-news/solicitors-putting-barristers-increasing-pressure-pay-referral-fees-bar-council-warns>. See also Mark Stobbs, Bar needs to rethink on referral fees, [http://www.lawgazette.co.uk/blogs/blogs/news-blogs/bar-needs-rethink-referral-fees?utm\\_source=emailhosts&utm\\_medium=email&utm\\_campaign=GAZ+05%2F11%2F2012](http://www.lawgazette.co.uk/blogs/blogs/news-blogs/bar-needs-rethink-referral-fees?utm_source=emailhosts&utm_medium=email&utm_campaign=GAZ+05%2F11%2F2012).

<sup>79</sup> The introduction of best value tendering was, among clerks, expected to reinforce these changes in the balance of power between solicitors and barristers, as the mega-firms, like Tuckers, would own the work and the relationship.

For example, one instance came to light where a barrister had done a certain amount of work for a client and because of double-booking and over-running could not appear in court.<sup>80</sup> The clerk found another barrister in chambers but the only one available was convinced the client had no case. As a result the client lost a considerable amount of money. Who is culpable? In one sense no one because each part acted 'properly' but as a collective unit the chambers offered extremely poor service to a client and therefore barrister, clerk and chambers were at fault. The barrister should have ensured that he was able to provide the full service offered; the clerk could have gone outside chambers to find another barrister who would have followed the lines of the first if such were not available in house; and the chambers should have had better support and monitoring systems in place for such eventualities.

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<sup>80</sup> Double booking or double courting appears to be an eternal problem. The Bar Council offers advice and emphasizes the cab rank rule, however, the problem persists. See Conducting Two Cases in Court Simultaneously, Bar Council, 2007, <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/conducting-two-cases-in-court-simultaneously/>.

## Conclusion

A series of questions arise from our research. Is the cab rank rule worthwhile? What does it do? Does it have any relevance in the business of law? Is it a rule observed only in the breach? Or more fundamentally would the practice of law and the delivery of legal services be any different if it did not exist? The short answer is no. We are not convinced that it even is a proper rule. It seems at best a statement of principle masquerading as a rule in order to make it appear to have more teeth than it does.

While the Bar is captivated by the rule and has promoted it as a shibboleth, we have no evidence as to its efficacy nor that it is understood within the legal marketplace. The BSB has no disciplinary findings based on the rule. The Legal Ombudsman has received no complaints based on the rule. No one appears to know of any infractions of the rule. Indeed we have no means of knowing if it has been breached. How would one police such a rule? We are left with the question is the cab rank rule unenforceable?

We do know that at an informal level it is regularly breached because the nature of chambers specialization means that it is not invoked but rather side-lined or ignored. We know it is of limited applicability in that it currently applies to a small segment of the legal services market. We also know that it only applies to relationships between “professional” clients and barristers. It fails to apply between public access clients and barristers. This is justified on the grounds that the latter is such a small percentage of instructions that it is of no consequence. Its partial application raises the valid question about whether it is legitimate to ask if the cab rank rule distorts the legal services market.

We are left with three possibilities with respect to the cab rank rule. The first is to leave it as it is. The second would be to abolish it as an anachronism in the modern legal services market. And the third, which was suggested by a number of respondents, was that, as a principle and not a rule, it should apply to *all* providers of legal services, including alternative business structures.

We return to some of the issues we raised earlier. A code of conduct is an expression of professional idealism, one that embodies what we think best of professions. Codes are important and necessary but they are also expressions of self-regulation within the context of the regulatory bargain. We now have external regulation and therefore we can ask how many of the rules are still relevant. Apart from the idea that the cab rank rule underpins the rule of law and that it is an article of faith, neither of which need evidence for their assertions, we could find no evidence to suggest that an absence of the cab rank rule would make any difference to the representation of clients. Indeed, we have no evidence that its presence ensures representation. The fact that barristers are largely self-employed and therefore only individuals in practice, not collective, maybe technically true, but the Bar has been collectively organizing for many years now. Chambers are organization units with “personalities” that need to be recognized not only for their specialization but also for their ability to coordinate and plan the activities, careers, and business of their members. A principle of universal representation would be acceptable but a rule that undermines the collective responsibility of chambers and effectively absolves the barristers from

responsibility is less acceptable today. To this we add the institutional impact of derogation from the rule by the Bar Standards Board, which does much to undermine its universality.

Finally, the modern legal market is not one in which clients are unable to obtain representation for the character of their offences or the despicability of their personalities. The barrier to representation is one of finances and access to legal aid. These fall outside the purview of the cab rank rule. Indeed, as we have tried to show, the rule is about money—how it is negotiated,<sup>81</sup> how it is divided between solicitor and barrister, and the risk analysis of cases and who bears that risk. This is not the work the cab rank rule was meant to do. If a rule is necessary then one could be drawn up similar to the Statement of Client Rights number 10 promulgated by the New York State Bar

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

This rule is clear and unambiguous. It protects clients and it can apply to all lawyers, and we see an equivalent in the SRA Handbook. It has no need of exceptions and exemptions, which presently serve only to confound and confuse clients. For the purposes of the client and consumer representation will be supplied and access to justice and the upholding of the rule of law would be ensured by the profession. 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. These would deal with the original aspects—unpopularity of clients and heinous nature of crimes—of the cab rank rule that have since been overshadowed by arguments over funding.

Lawyers would not be unrealistically barred from choosing clients, but the decision would have to be reasoned, within the prescribed limits and ultimately testable. However, if there is a situation where the number of available barristers is small because of the specialty then it ought to be feasible for a regulator to monitor the market in order to ensure that there is no market abuse or failure as happens in other markets where there is limited supply (see Decker & Yarrow 2010: 36). Indeed its abandonment ought to make market signals clearer and more direct than they are presently. There would be clearer and more direct specialization and lawyers should be able to inform clients more thoroughly about the services they offer.

We can see no justification for the continuation of the cab rank rule as a rule in the modern, globalized legal services market. By all means the Bar can espouse it as a laudable principle, but it should not pretend that the rule is significant or efficacious.

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<sup>81</sup> The new standard terms of contracting by the Bar Standards Board is an attempt to impose constraints on bargaining by defining what would and would not be under the cab rank rule.



## Methodological Note

The data for our examination of the cab rank rule are drawn from a number of sources. We have undertaken a literature review, which is rather scant. There were a number of academic articles and analyses but the main body of work on the rule is found in reports, speeches, and consultations and responses thereto. Where we have been able to do comparative work we have done so. We found references to the rule in the USA, South Africa, Australia, and somewhat unexpectedly, Italy.

We have added an empirical element to the literature by interviewing a number of stakeholders. These include regulators, lawyers, clerks and executives. Flood has conducted 15 interviews some of which were recorded. We gave assurances of anonymity to our interviewees so they are referred to by title only. We have also used blogs and twitter as sources of information.

There were, however, data we could not obtain. The Bar Council had no statistics on the operation of the cab rank rule; for example, returned briefs numbers. Nor were we able to find out from the Crown Prosecution Service any data on returned briefs. We asked the Bar Standards Board how many disciplinary findings against barristers based on Paragraph 602 of the Bar Code of Conduct there were. The BSB reported zero findings. We were puzzled by this lacuna since the Bar places such importance on the rule that we thought that it might have some evidence to reinforce its position. But it is more in the nature of a belief than an evidence-based phenomenon. We then found a report in the *Daily Mail* of 2006 that Mark Mullins, a committed Christian and regional chairman of the Lawyers' Christian Fellowship turned down "the case of an illegal immigrant who wanted to use his homosexual relationship as grounds to stay in this country." The Bar Council ruled that he was in breach of the cab rank rule and was guilty of professional misconduct for which he was reprimanded and ordered to pay £1,000 towards the cost of the case.<sup>82</sup> We are thus perplexed as to what data might be available, in what form it is, and where it might be. It would be helpful to researchers if data were kept in a more systematic form, so we can improve our analysis.

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<sup>82</sup> James Mills, Barrister who refused to represent gay client reprimanded, *Daily Mail*, 26 July 2006, <http://www.dailymail.co.uk/news/article-397625/Barrister-refused-represent-gay-client-reprimanded.html>.

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