

**ENTERTAINMENT OF SOLICITORS AND OTHERS BY THE
BAR
GIFTS TO SOLICITORS**

**Consultation Paper
Issued by the Standards Committee of the Bar Standards Board**

Deadline for responses: 1st March 2007

1. The Standards Committee (“the Committee”) of the Bar Standards Board invites views and supporting evidence on the issue of barristers offering hospitality and entertainment to their professional clients, principally solicitors, but also other professional clients, both as part of formalised marketing strategies and otherwise; and whether or not it is in the public interest to restrict such hospitality and entertainment; and if it is to be restricted, how it is to be restricted.
2. Views are also sought on the related question of the giving of presents by members of the Bar to solicitors, which is currently expressly forbidden by paragraph 307(d) of the Code of Conduct, and whether the Code should be relaxed in this regard.

The Concern

3. In recent years there has been a large expansion in the use of entertainment by barristers to further their interests. Usually, the client of the barrister is the solicitor. In general, the lay client will instruct a

solicitor, and, where necessary, the solicitor will instruct a barrister. This will usually be the case if the matter is litigious, whether civil or criminal, and the solicitor instructs the barrister with a view to the barrister appearing as advocate in court proceedings, and advising on the evidence and tactics to be adopted. Barristers are also instructed by solicitors for specialist advice, such as tax advice, where barristers hold themselves out as having expertise in a particular specialised area of law. It follows that in the vast majority of cases, the barrister's client will be the solicitor. It follows, therefore, that any rules restricting entertainment by barristers will principally, but not exclusively, affect entertainment of solicitors.

4. Entertainment is carried out by individual barristers, or more commonly sets of chambers, with a view to marketing to solicitors or firms of solicitors. Many sets of chambers now have large marketing budgets which involve a substantial amount of entertainment. Some hospitality and entertainment is provided in the context of, and subordinate to seminars and lectures and similar events, but some is not. It is becoming increasingly common for sets of chambers to entertain solicitors and provide hospitality at dinners and with invitations to social and sporting events that have no connection with any specific case, or any general continuing education. Some examples involve the expenditure of considerable amounts of money on individual solicitors.
5. Although, as explained above, the client of the barrister is usually a solicitor or firm of solicitors, there are occasions where barristers compete with solicitors for work. Solicitors are now permitted to carry out advocacy, and to carry out work over which the Bar once had a monopoly. The most common area where they compete is in direct access work. Some direct access work comes from fellow professionals such as where tax

advisers, accountants or surveyors instruct barristers directly. There are occasions under the Bar's direct access rules where members of the public may instruct barristers directly. Barristers also compete with solicitors to some extent, such as where instructed by in-house lawyers. Thus there will be circumstances where an in-house lawyer can either instruct a solicitor or instruct a barrister directly. Many large organisations have legal departments which will instruct barristers sometimes indirectly through a solicitor and sometimes directly.

6. The question arises, therefore, as to what limits if any should apply to the entertainment and hospitality that can properly be offered to solicitors and others who instruct chambers, and the circumstances in which it can be provided
7. Although entertainment is often provided by sets of chambers through marketing budgets, the same issues arise where barristers entertain individually.

The consultation

8. The question on which the Committee wishes to consult – and to receive evidence – is whether it is in the public interest to restrict hospitality and entertainment that can be provided by barristers and if so, how and to what extent. A subsidiary question is whether it is in the public interest to maintain the unequivocal prohibition on the giving of presents by barristers to solicitors; and if the prohibition is to be relaxed, the extent of any relaxation.

Who is being consulted?

9. A list of those to whom this consultation paper is being sent is attached at Appendix 1. This list is not meant to be exclusive and responses are welcomed from anyone who has evidence or views about the questions raised in this paper.

Responses

10. Responses should be sent to Oliver Hanmer, Bar Standards Board, 289-293 High Holborn, London WC1V 7HZ or by email to OHanmer@BarStandardsBoard.org.uk. The deadline by which responses must be received is 1st March 2007

Background on the Bar Standards Board

11. The Bar Standards Board came into existence on 1st January 2006 following a decision to separate the regulation of the Bar from the representative functions of the Bar Council. The Board has a lay Chair, Ruth Evans, and 7 of its 15 members are lay members. The barrister members of the Board are not and may not be members of the Bar Council. All members were appointed in accordance with Nolan principles.
12. The Bar Council has delegated to the Board all of its regulatory functions including, without limitation, responsibility for: (i) qualifications and conditions for entry to the profession; (ii) all aspects of training; (iii) the setting of standards for those practising at the Bar; (iv) the determination, amendment, monitoring and enforcement of rules of professional conduct; and (v) investigation and prosecution of complaints against barristers and students. The Board has established committees, of which the Standards Committee is one, to assist it in discharging these regulatory activities. The

Standards Committee, which is itself made up of a mix of barristers and lay members, deals with matters relating to the Bar Code of Conduct.

13. In regulating the Bar, the overriding aim of the Board and its committees is to act in the public interest and to protect the interests of the consumers of barristers' services.

Emergence of the Issue

14. Barristers are now expressly permitted to advertise by the code of conduct; sets of chambers have continued to grow, and many have become more commercial in operation to the extent that they have advertising budgets, and marketing budgets that extend to considerable sums of money every year. Sets of chambers see themselves as being in competition with each other, and firms of solicitors, and other organisations providing legal services.
15. Some sets of chambers have employees whose sole or main function is marketing the chambers to firms of solicitors; many others have employees expressly responsible for marketing matters. In some cases clerks have responsibility for marketing strategies. There will be many different arrangements and differing approaches. This is a period of change at the bar, and many barristers may be feeling that supplies of work are insecure, and there may be greater pressure than previously to embark on marketing strategies in order to create or maintain relationships with solicitors with work to provide.
16. It appears to the Committee that a situation has arisen in which some sets of chambers are spending large sums of money on the entertainment of solicitors in the belief that it is necessary and desirable to maintain as close

a relationship as possible to ensure the creation of or continuation of a valuable professional relationship. It appears that the view is becoming more widespread that it is both necessary, and desirable, to provide entertainment and hospitality for solicitors.

Approach of the Committee

17. The Committee considers that this is an important matter that involves the public interest and gives rise to significant matters of principle about the relationship between the Bar and those that purchase legal services, and the extent to which it should be permissible to seek to influence solicitors and others by hospitality that is unconnected with standards of professional performance.
18. The Committee considers that it needs to make its own independent, evidence-based decision on the question, as to how the public interest is affected, and where the public interest lies. It has therefore decided to undertake this consultation on whether such entertainment and hospitality should be subject to restriction and control and, if so, how.

Should permitted entertainment and hospitality be restricted?

19. The current provisions of the Bar Code of Conduct provide as follows.
Under Paragraph 301, a barrister must not:

(a) engage in conduct whether in pursuit of his profession or otherwise which is:

(i) dishonest or otherwise discreditable to a barrister;

(ii) prejudicial to the administration of justice; or

(iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

And under paragraph 307 a barrister must not

(d) give a commission or present or lend any money for any professional purpose to or (save as a remuneration in accordance with the provisions of this Code) accept any money by way of loan or otherwise from any client or any person entitled to instruct him as an intermediary;

(e) make any payment (other than a payment for advertising or publicity permitted by this Code or in the case of a self-employed barrister remuneration paid to any clerk or other employee or staff of his chambers) to any person for the purpose of procuring professional instructions;

20. There is an express prohibition on the giving of presents, but there is no express provision dealing with entertainment or hospitality.
21. It would be possible that the level of entertainment of a solicitor could be of such a lavish nature that it would be akin to providing the recipient with a significant personal gift. Whilst there is room for debate at what stage this level is reached, the Committee takes the view that there will come a stage where the level of entertainment is so lavish that there is a clear breach of Rule 301 and possibly Rule 307 also.
22. The Committee will consider in the light of the consultation exercise whether the existing rules require amendment or whether guidance should be issued. Respondents are invited to consider the issues raised in the consultation paper as a matter of principle, rather than to address the questions within the scope of the current rules.

23. Where the level of entertainment is such that the solicitor or other recipient will be perceived as instructing counsel because of the benefit he has received rather than on merit, there can be no doubt that the public interest is adversely affected and the Committee believes there can be no reasonable counter argument.
24. Where the issue arises, which gives rise to this consultation paper, is not whether there should be a boundary, but where the boundary should lie.

The case for a more restricted approach.

25. The arguments which have been put forward to justify a case for restriction are as follows.
26. In all cases the job of the solicitor in selecting and instructing a barrister is to consult his client's best interests. It is his client's money that he is spending and not his own, and he is in a position of trust in the way that he consults his client's interest and selects the barrister. Frequently the client (if an individual) will be under stress, and frequently will be relying entirely on the guidance of his solicitor.
27. If the barrister is allowed to do, or does, anything that might be intended to influence the solicitor, or might appear to be liable to influence the solicitor in his selection or recommendation of a barrister (or set of chambers) on anything other than a genuine professional appraisal of competence and expertise, this would be contrary to the public interest.
28. The public might take the view that the main (or possibly only) purpose of lavish entertainment or hospitality as part of a marketing strategy would be to influence the solicitors who received the hospitality in their choice of

- individual barristers or chambers, on grounds other than a genuine professional appraisal of the most appropriate barrister for the job.
29. Whether or not any particular solicitor is in fact influenced in his choice of barrister in this way is not the point. If members of the public perceive or might reasonably perceive that solicitors were instructing barristers in part based on the solicitors' personal interests rather than on the basis of the client's interests, and did so because of the personal benefits the solicitor obtained from the barrister, public confidence in the Bar would be diminished
 30. Moreover, the public may perceive that the indirect use of legal fees for entertainment purposes tarnishes the image and reputation of the profession, particularly if the entertainment offered is on a scale beyond the means of many consumers.
 31. Whilst these concerns arise in all cases, in publicly funded cases there is a particular concern. It would not be appropriate for it to appear that decisions taken as to how to spend public money were in whole or in part taken because of entertainment of the solicitor instructed by the client. In addition, the public could view the entertainment budgets for those chambers whose publicly funded work is a significant proportion of its work as being funded ultimately by the tax payer. There must be, and must be seen to be, a free market in the expertise which the bar offers. It may be that those who put forward the argument for a more relaxed approach have not thought through the –issues of public perception.
 32. If there is no restriction, and if large sets of chambers grow bigger and competition increases, there may be further increases in the levels of hospitality and entertainment offered to solicitors under the guise of

- marketing. If there were such increases any possible compromise of the public interest might be more likely, and more obvious.
33. Those who support a restricted approach would outlaw marketing initiatives which involve barristers entertaining solicitors other than on a very limited scale and in a professional context. There would be no objections for example to offering drinks as part of a seminar presented by the barrister or by chambers, or to taking a solicitor out for lunch in the course of a case, but entertaining which went in any significant way beyond this, or where the entertainment rather than the professional context was the principal purpose of the invitation would fall on the wrong side of the line.
 34. The provision of hospitality and entertainment to solicitors must be effective or it would not be provided at considerable expense to the barristers who do provide it. If it is effective, then it can only be intended, it is argued, to influence the recipients; and any such influence must be contrary to the public interest.
 35. Whether or not there is any public perception (yet) of a problem is nothing to the point if the purpose, or effect, of this type of expenditure might be to influence solicitors in their choice of counsel otherwise than by reference to professional characteristics of competence and expertise. And it is improper for a barrister to seek to influence a solicitor in this way when the solicitor's inflexible duty is to consult the best interests of his client, and not to bear in mind which barrister provides the best hospitality.

The less restricted approach

36. The arguments which have been put forward to justify a case for a less restricted approach are as follows
37. Barristers compete with each other for work. At times they also compete with solicitors for work (as explained above), but generally solicitors are their clients. Barristers are permitted to advertise their services. No one suggests that moderate advertising brings the profession into disrepute even though it involves spending money for the purpose of influencing the mind of the reader of the advertisement in favour of instructing the barrister or chambers in question. It is perfectly normal for professionals to be permitted to entertain their clients. This is a normal means of making or cementing business contacts. There would need to be a public interest justification to restrict such entertaining.
38. Entertainment is to cement, and to forge, relationships between barrister and solicitor. In working together on a case, the barrister will need to work as a team with the solicitor. A team where the members get on together will often be a more successful team. A solicitor who takes into account in selecting counsel the fact that he or she gets on with counsel, and has confidence in being able to work with counsel in a harmonious relationship is taking a perfectly proper factor into account. Drinks parties, entertainment over dinner, or the like, help build a relationship which facilitates counsel and solicitor working together.
39. Solicitors, like other clients, will choose whom to instruct for a variety of reasons. They will want to have confidence in the counsel they instruct, and be confident that the lay client will also be able to repose confidence

in the barrister. The more they have an opportunity to get to know the barrister, the more they are likely to be happy that they and the lay client will be able to repose that confidence. Drinks parties and other chambers entertaining often enables a solicitor to “put a face” to counsel the solicitor has not previously instructed, and may be more willing in consequence, perhaps even after a mere short conversation at a drinks party, to instruct that counsel in future. This is particularly a way in which junior members of chambers may be introduced to solicitors.

40. An example might be the family law context. The type of work may make it particularly important for the barrister to develop a relationship with the lay client. The solicitor must be satisfied that the barrister not merely has the necessary legal and forensic skills but also the personal and communication skills to build a relationship with the lay client that inspires confidence.
41. There is widespread use of such marketing by solicitors towards their clients and potential clients, and it is artificial in the modern age to impose restrictions on barristers. As explained above, there are areas of work where barristers compete with solicitors for work, principally in direct access work. If entertaining were restricted, it would mean that barristers competed with solicitors at a disadvantage, which would be anti-competitive. The Solicitors’ Introduction and Referral Code 1990 (as amended) makes plain that, save as expressly permitted under the code, solicitors must not reward introducers of clients by payment of commission or otherwise but under s2 (3) is stated: “this does not prevent normal hospitality.” It may be unlawful as anti-competitive to put barristers at a disadvantage against solicitors in areas where they compete for work.

42. There is a legitimate public interest in maintaining a strong and independent bar. The bar operates in a highly competitive market, in which it faces direct competition from solicitors, including in the provision of advocacy services, and from others such as accountants, increasingly so with the development of direct access. Added to this, individual barristers operate within an atmosphere of competition, not only from other sets but also from within chambers themselves. It is open to question whether there is anything wrong in permitting barristers and chambers to market themselves in a way that does not compromise their independence, integrity and freedom from external pressure.

Examples

43. It may be helpful to focus on a number of concrete examples to assist respondents in expressing a view on where the borderline should lie as to what should be permissible:
- (1) A number of solicitors are flown to New York and put up at a five star hotel for the weekend which is spent with an equal number of barristers
 - (2) Solicitors are taken to a box at Wimbledon or Glyndebourne with an equal number of barristers as part of a "hospitality package" which involves, lunch or dinner and tickets for the tennis or opera.
 - (3) Solicitors are taken to Windsor races for similar hospitality. The difference from (2) is that (a) the races may be said to provide an enjoyable backcloth to a social occasion between barristers and solicitors, rather than in (2) where the prestige event may be said to play a more important role in the solicitor deciding whether to attend (b) the cost per head is likely to be significantly less in (3)

- (4) Solicitors are invited to a golf club to play or watch golf with members of chambers at a "golf day" where lunch and drinks are served
- (5) An individual barrister says to one or two solicitors "I have a couple of spare tickets to the test match on Tuesday. Would you like to come with me?"
- (6) Chambers hold a drinks party at which 100 solicitors are invited. Drinks and canapés are served
- (7) Chambers holds a quiz night at which a firm of solicitors are invited. Drinks and canapés are served. The quiz has no legal content.
- (8) Chambers holds a quiz night at which a firm of solicitors are invited. Drinks and canapés are served. The quiz involves very light-hearted questions on reinsurance law.
- (9) At the end of a case, the barrister invites the solicitors who worked on the case with him out for dinner.
- (10) Chambers holds a seminar on recent developments in family law and invites solicitors who instruct it regularly.
- (11) Chambers invite a firm of solicitors to (a) a dinner or (b) a wine tasting attended by members of chambers.

The Issue of Presents

There is currently an express prohibition in the Code against the giving of presents to solicitors. It is believed that this may be widely disregarded in respect of small promotional items, such as pens and pencils with chambers logos or addresses, pads, mouse mats, and perhaps umbrellas, and modest seasonal gifts. It is not known if the practise of giving more

lavish presents (other than in the form of hospitality) is developing. The Committee seeks evidence on the extent to which presents are given by barristers to solicitors, and the type of such presents. It also seeks evidence on the question as to whether the giving of such presents might be contrary to the public interest and/or as to whether the prohibition in the code should be relaxed.

Summary of Questions:

44. The Standards Committee would welcome responses by 1st March to the following questions:

- (1) Is it in the public interest to restrict the provision of entertainment or hospitality to solicitors by barristers; or is the public interest served by imposing no limit beyond the general obligations currently provided by the code?
- (2) If the answer to question (1) is yes, what restrictions or what level of restrictions, should be imposed. What levels of financial expenditure should be set as the maximum acceptable, and what sort of hospitality and entertainment, if any, should be forbidden?
- (3) Is it in the public interest to relax the current prohibition on the giving of presents to solicitors by barristers: And if so how should the prohibition be relaxed?

The Committee would also be assisted by evidence available to respondents relevant to the issues identified in this consultation paper.

December 2006

LIST OF CONSULTEES

BAR STANDARDS BOARD COMMITTEES/PANELS

Consumer Panel
Complaints Committee
Qualifications Committee
Quality Assurance Committee

BAR ORGANISATIONS

The Bar Council
Training for the Bar Committee
Professional Practice Committee
Employed Barristers Committee
Legal Services Committee
Remuneration Committee
Young Barristers Committee
International Committee
Equality and Diversity Committees

The Circuits
All Specialist Bar Associations
Heads of Chambers

The Inns of Court

OTHER BODIES

The Legal Services Ombudsman
The Law Society
The Institute of Legal Executives
The Institute of Paralegals
The Department for Constitutional Affairs
The Office of Fair Trading

Which?

National Consumer Council

National Association of Citizens Advice Bureaux