



REGULATING BARRISTERS

REVIEW OF THE CODE OF CONDUCT

SECOND CONSULTATION PAPER

CONDUCT RULES: A CORE DUTY APPROACH TO REGULATION AT THE BAR

March 2009

BAR STANDARDS BOARD
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PART I: INTRODUCTION

1. In its strategic plan for 2006 – 2008, the Bar Standards Board (“the Board”) committed to reviewing the Code of Conduct of the Bar of England and Wales (“the Code”). The Code sets out the regulatory and ethical rules which bind barristers. The aim of the review is to ensure that the Code is fit for purpose in setting out the standards required of barristers to meet the needs of the public and to ensure the proper administration of justice. The review is a major undertaking and is being carried out in stages. The review is led by the Board’s Standards Committee.
2. In June 2007 the Board issued its first consultation paper on the review of the Code. This paper sought to set the agenda and to determine the priorities for the review. It also raised fundamental questions in respect of the format and structure of the Code and in particular whether core duties should be introduced. A copy of the consultation paper along with a summary of the responses can be found on the Board’s website at www.barstandardsboard.org.uk.
3. It was evident from the responses to the first consultation paper that the majority of respondents supported the development of core duties for barristers which set out the overriding principles of professional conduct and standards. The Board decided therefore that the Code should be revised to incorporate core duties complemented by secondary rules and guidance which amplify and illustrate the scope and purpose of each duty. The Standards Committee established a working group (“the Group”), chaired by Sir Donald Irvine, former President of the General Medical Council, and comprising barristers and lay members with relevant experience to take this work forward and to draft a revised set of professional rules. The terms of reference of the Group are:

To revise the Code of Conduct for the Bar in a way which sets out the qualities, values, characteristics and duties of a barrister. That part of the Code will embody the standards of barristers’ professionalism and form the basis for the regulation of the profession.

4. The purpose of this paper is to seek views on the draft Conduct Rules (attached at **Appendix 1**) developed by the Group and to highlight, and invite comment upon, the key issues that have arisen during that process.
5. It should be noted that the Conduct Rules produced by the Group set out the proposed ethical and professional standards with which a barrister must comply. The draft Conduct Rules do not cover the business and practice standards and requirements contained within the existing Code.¹ These latter rules will be the subject of separate Practising Rules and a separate consultation paper due to be published in the latter half of 2009.

¹ Principally Parts II,IV,V and VIII of the existing Code

Purpose of the revision

6. Whilst, in many cases, the draft Conduct Rules adopt or adapt rules from the existing Code, as the new regulator for the Bar it is appropriate that the Board sets and defines its own rules and standards. Accordingly, some changes have been made. The new Code in particular takes into account the changed legal landscape in the light of the Legal Services Act 2007.
7. Further, there has been some criticism that the existing Code is drafted in such a way that it is not sufficiently accessible to non-lawyers and, in parts, not absolutely clear in its application to lawyers.
8. The draft Conduct Rules seek to address these criticisms and aim to produce a clear and user friendly set of professional rules. To assist in ensuring that the Conduct Rules are accessible to all, they will be reviewed by the Plain English Campaign before being published.

Related BSB work

9. The Board is undertaking a number of other projects which relate to the development of the Conduct Rules. In particular:
 - (1) The draft Conduct Rules include amendments to the conduct rules on the acceptance and return of instructions which arose from two recent consultation papers by the Standards Committee.
 - (2) Similarly, the November 2008 consultation paper on the implications of the Legal Services Act 2007 (in particular the ability of barristers to become managers of legal disciplinary practices regulated by an approved body other than the Board) has been taken into account. Any amendments that arise from that consultation exercise will be reflected in the final version of the Conduct Rules. Further information on both the acceptance of instructions and the Legal Services Act consultations can be found on the Board's website (www.barstandardsboard.org.uk).
 - (3) As noted above, draft Practising Rules will be the subject of a separate consultation paper due to be published in the latter half of 2009.

Responses to this Consultation Paper

10. A list of those to whom this consultation paper is being sent is attached at **Appendix 2**. This list is not meant to be exclusive. Responses are welcomed from anyone who has evidence or views about the questions raised in this paper.
11. It would be helpful if responses could be as full as possible with detailed reasons given for your comments. This is particularly the case where you disagree with any aspect of the draft Conduct Rules.
12. The Board will summarise the responses received and will publish responses on its website. If you do not wish your response to be published, please make that clear when you reply to us.

13. Responses should arrive no later than 5 June 2009 and should be sent to:

Oliver Hanmer
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289-293 High Holborn
London WC1V 7HZ
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PART II: FORMAT OF THE CONDUCT RULES

Format of the new Conduct Rules

14. The existing Code has been revised a number of times, but the basic structure has not changed since 1981, when the first edition of the Code of Conduct was introduced.
15. An increasing number of regulators, including the Solicitors Regulation Authority and the Financial Services Authority, have adopted a core duties approach to their professional rules. This approach sees the development of core duties which define the overriding principles of standards and conduct, supported by secondary rules which amplify each duty and further explained by guidance.
16. This approach has a number of benefits:
 - (1) It creates an accessible Code to consumers and barristers alike;
 - (2) It provides a greater degree of clarity on the standards that barristers are expected to meet;
 - (3) It avoids an unduly legalistic approach to the interpretation of the Code.
17. In the light of these benefits and because the majority of respondents to the first consultation paper endorsed the approach, the Board has decided that it should be adopted for the Conduct Rules for barristers.

Introduction to the Conduct Rules

18. As a preface to the Conduct Rules a new introduction has been drafted which seeks to define the role of the barrister and to explain the format and application of the Conduct Rules in language accessible to both consumers and barristers. The previous Code did not contain such an introduction. The Group believes that it is an important tool to set the scope and purpose of the Conduct Rules and to explain in simple terms the function of a barrister within the legal system and the fundamental standards and conduct expected of them.

Application of the Conduct Rules

19. The remit of the Group was to develop Conduct Rules which are applicable to all barristers; practising or not practising, employed or self-employed.
20. The profession can be broken down into a number of categories. At present, these consist of:
 - (1) Self-employed barristers.
 - (2) Employed barristers who provide legal services to their employers only.
 - (3) Employed barristers who provide legal services to clients of their employers: this category currently consists of barristers employed by solicitors' firms.
 - (4) Non-practising barristers who do not practise as barristers, i.e. persons who have qualified as a barrister but who either (i) do not provide any legal services (e.g. legal academics, employees providing non-legal services or retired practising barristers), or (ii) do not hold themselves out as barristers when providing legal services.
 - (5) Non-practising barristers who provide legal services while holding themselves out as barristers: this category only applies to certain barristers called before July 2000. Paragraph 206 of the current Code exempts such

barristers from complying with the rules applying to practising barristers, subject to certain conditions.

21. Developments in relation to Legal Disciplinary Practices or Alternative Business Structures may give rise to further categories.
22. The Group has discussed whether the Conduct Rules should apply to all barristers at all times or whether some or all of them should apply only to certain categories of barrister or only in relation to specified activities. It considers that the Conduct Rules should apply to all practising barristers in relation to all their professional activities, subject only to exceptions where the rules are irrelevant to the activities the barrister undertakes or where the barrister is subject to equivalent rules imposed by another regulator. The more difficult questions are the extent to which the Conduct Rules should apply in relation to a practising barrister's other activities, and to the business and other activities of non-practising barristers. On the one hand, it can be argued that the Conduct Rules should normally be concerned only with a barrister's professional practice as a barrister; on the other hand, it can be argued that misconduct by a person known to be a barrister can cause damage to the standing of the profession and to the confidence the public has in it, irrespective of the capacity in which the barrister is acting at the time.
23. The provisional view which the Group has reached, as set out in the introduction to the draft Conduct Rules, is as follows:
 - (1) Certain fundamental core duties and rules should apply to all barristers at all times, namely the core duties relating to duty to the court in the administration of justice and acting with integrity and honesty (CD 1 and 2) and the rule which prohibits a barrister from acting in a way which is likely to diminish the trust and confidence which the public places in the barrister or the profession (Rule 2.10R). This broadly continues the present position under paragraph 301(a) of the current Code. However, the Group would welcome comments as to whether any other rules (e.g. those in section 5 of the draft Conduct Rules concerning discrimination) should apply to barristers' conduct outside the scope of their professional dealings.
 - (2) All other core duties and rules should apply to all practising barristers, subject to any exemptions specified in the Practising Rules, in relation to their professional dealings. The definition of "practising barristers" will be a matter for those rules.
 - (3) It will be for the Practising Rules to disapply those of the Conduct Rules which are inappropriate for particular categories of barrister. It will be open, therefore, for the Practising Rules to provide (as at present) that the certain rules (eg the cab-rank rule) apply only to self-employed barristers but not to employed barristers. If, as proposed in the separate consultation document published in December 2008, barristers are in future allowed to practise as managers as well as employees of Legal Disciplinary Practices, the Practising Rules will be able to disapply certain of the rules in relation to those managers and employees where they are already subject to equivalent rules imposed by another authorised regulator.
 - (4) In drawing up the Practising Rules and determining the definition of 'practising barrister', the Board will review the position of barristers who provide legal services but who are not currently required to have a practising certificate (ie those in categories paragraph 20 (4) (ii) and (5) above) and

consider the extent to which the core duties and rules should apply to such barristers.

24. In addition to the Conduct Rules' application to all types of barrister it is important that the Rules apply to all fields of practice. The Group was conscious that practice and procedures vary between areas of law and sought to ensure that the Conduct Rules were sufficiently general to apply across the profession. Comments are welcomed on whether this has been achieved.

Status of guidance

25. The introduction to the draft Conduct Rules makes it clear that both the guidance contained in the Conduct Rules and the guidance issued by the Board from time to time will be taken into account in the event of any allegation of breach of a Core Duty or a Rule. Thus, following such guidance will provide barristers with some protection and mitigation should disciplinary proceedings arise, but each case will fall to be determined on its individual facts and circumstances.

Questions for consultation

- Q1 Is the introduction appropriate and/or necessary? Do you have any suggested amendments?**
- Q2 Do you agree with the proposals above as to the application of the Conduct Rules? If not, why not?**
- Q3 Do you think the Conduct Rules as drafted apply across all areas of practice? Does it sufficiently take into account the differences in practice and procedures across the various areas of law?**
- Q4 Do you agree with the approach adopted to guidance in the draft Conduct Rules? If not, why not?**

PART III: CORE DUTIES

Core duties

26. Seven core duties are proposed in the Conduct Rules. They are:

CD1 You must observe your duty to the court in the administration of justice

CD2 You must act with integrity and honesty

CD3 You must maintain your professional independence

CD4 You must keep the affairs of each client confidential

CD5 You must act in the best interests of each client

CD6 You must provide a good quality of service to each client

CD7 You must not discriminate improperly in relation to any person

27. There was debate on the Working Group as to what the Core Duties should be. Regard was given to the regulatory objectives set out in Part 1 of the Legal Services Act 2007 ("the Act") of:

- (1) Protecting and promoting the public interest
- (2) Supporting the constitutional principle of the rule of law
- (3) Improving access to justice
- (4) Protecting and promoting the interests of consumers
- (5) Promoting competition in the provision of [reserved legal activities]²
- (6) Encouraging an independent, strong, diverse and effective legal profession
- (7) Increasing public understanding of the citizen's legal rights and duties
- (8) Promoting and maintaining adherence to the professional principles³

28. The SRA's Core Duties were also considered. They are:

- (1) You must uphold the rule of law and the proper administration of justice
- (2) You must act with integrity
- (3) You must not allow your independence to be compromised
- (4) You must act in the best interests of each client
- (5) You must provide a good standard of service to your clients
- (6) You must not behave in a way that is likely to diminish the trust the public places in you or the profession

29. Whilst the Board recognises the distinct and particular characteristics of a barrister, there is clear benefit in the duties for solicitors and barristers being as similar as possible, particularly in the changing legal landscape of the provision and regulation of legal services. Similarly, the Legal Services Board will need to be satisfied that the

² Reserved legal activities are defined in Part 3, paragraph 12(1) of the Legal Services Act 2007 as (a) the exercise of a right of audience (b) the conduct of litigation (c) reserved instrument activities (d) probate activities (e) notarial activities (f) the administration of oaths

³ Professional principles are defined in Part 1, paragraph 3 of the Legal Services Act 2007 as including acting with independence and integrity, maintaining proper standards of work, acting in the best interests of the client, confidentiality and complying with the duty to the court and the interests of justice.

professional rules of each legal regulator are fit for purpose and consistent with the aims of the Act. The core duties for barristers have therefore been drafted with this in mind.

30. Any suggested amendments to the list of core duties would be welcome, in particular in relation to two possible core duties which have been debated, i.e.

- (1) A duty not to behave in a way which is likely to diminish the trust and confidence which the public places in the barrister or the profession. This is currently Rule 2.10R in the draft Conduct Rules, but the Solicitors Regulation Authority treat their equivalent rule as a core duty.
- (2) A duty to keep one's professional knowledge and skills up to date. This is currently Rule 4.5R in the draft Conduct Rules, but some members of the Group considered it so fundamental as to merit the status of a core duty. Other members were of the view that the existing core duties in section 4 sufficiently reflected the importance of professional competence within the need to act in the client's best interests and to provide a good quality of work and service to each client.

Order of precedence of the core duties

31. The draft Conduct Rules indicate where one core duty should take precedence over another.⁴ In particular, the duty to act in the client's interests is subject to the duties to the Court and to act with integrity, honesty and independence. The duty to the Court is in turn subject to the duty to keep the affairs of each client confidential.

Questions for consultation

Q5 Are the core duties appropriate? Should any be omitted or added?

Q6 Do you agree with the proposed order of precedence of the core duties? If not, what order should they take and why?

⁴ See rules 1.2R, 1.3G, 2.4G and 4.8R.

PART IV: CONTENT OF THE CONDUCT RULES

32. Respondents to the first consultation did not express concern about the substance of the existing Code, which has worked well for many years. A large part of the substance of existing Code is therefore replicated in the revised version. However, the layout and structure is very different and regular users of the Code may initially find it difficult to navigate around the new Conduct Rules and to find where existing provisions are now located. To assist, and for reference purposes, at **Appendix 3** is a destination table which explains where the provisions in the existing Code⁵ can now be found in the revised version (or whether the subject of those provisions is to be dealt with the new Practising Rules).
33. The sections of the Conduct Rules do not entirely correspond with the core duties; there are seven core duties but only five sections. There would otherwise be an undesirable overlap.
34. The five sections are:
- 1) Duty to the Court and the administration of justice
 - 2) Integrity, honesty and independence
 - 3) Confidentiality
 - 4) Client relations
 - 5) Discrimination
35. Looking at each section of the Conduct Rules in turn:

Section 1: Duty to the Court and the administration of justice.

36. The existing Code recognises the importance of a barrister's duty to the Court but does little to explain what is meant by the duty. This section of the draft Conduct Rules seeks to provide a fuller explanation of the barrister's duty to the Court. The contents of this section of the new Conduct Rules contain provisions from the existing Code, but also additional guidance (e.g. in paragraphs 1.10G and 1.11G) intended to spell out what a barrister's duty to the Court entails.
37. The Group recognised that there is scope for different views as to how section 1 might be arranged. For example:
- (1) Rule 1.1R lists 4 aspects of the duty to the Court. The Group would welcome comments on this list, especially whether the individual items could be better phrased (e.g. paragraph 1.1R(3): "*You must take reasonable steps to avoid wasting the Court's time*") and whether items should be added to or omitted from this list.
 - (2) A number of matters which are currently the subject of specific rules in the existing Code are included in paragraphs 1.4G to 1.11G of the draft Conduct Rules as guidance to the application of the core duty to observe the barrister's duty to the Court. The Group would welcome comments on this approach.
 - (3) The Group would also welcome comments on the individual items in paragraphs 1.4G to 1.11G of the draft Conduct Rules. For example:

⁵ Appendix 3 assumes that the existing Code will be amended in accordance with current proposals in relation to acceptance and return of instructions.

- (a) It is arguable that the guidance in paragraph 1.10G (1) (“*You must not make any submission which you do not consider to be properly arguable.*”) would be more appropriately located in paragraph 1.9G, or perhaps paragraph 2.5R.
- (b) It is arguable that the guidance in paragraph 1.10G(2) (“*You should bring any procedural irregularity to the attention of the court during the hearing and not reserve such matter to be raised on appeal.*”) would be more appropriately located in paragraph 1.11G, or perhaps paragraph 2.5R.

Questions for consultation

Q7 Do you have any comments on or suggested amendments to section 1?

Section 2: Integrity, honesty and independence

38. This section of the draft Conduct Rules deals with integrity, honesty and independence. Although these attributes have been separated into two core duties, there is sufficient overlap between the rules and guidance that they have been put into a single section. Payments and gifts are also covered in this section.

Conduct likely to diminish public confidence in the profession

39. One issue which the Group debated at length was the prohibition on conduct likely to diminish public confidence in the barrister or the profession.⁶ Two inter-related aspects of this prohibition gave rise to debate:

- (1) Some members thought that the existing obligation (*fn: paragraph 301(a)*) not to engage in conduct which (inter alia) is discreditable to a barrister or likely to bring the legal profession into disrepute gave rise to uncertainty as to what fell within it and was therefore unsatisfactory. On the other hand, some flexibility was thought to be desirable, given the difficulty of defining with absolute precision every form of activity to which such a provision was intended to apply. It was noted that there was no evidence of the existing obligation having been misapplied in practice.
- (2) There was also debate as to whether, and if so to what extent, the obligation should be restricted to a barrister’s professional dealings, or should continue, as at present, to apply to a barrister’s conduct whether in pursuit of his profession or otherwise. On the one hand, it was thought that certain conduct (for example criminal conduct, and arguably some disreputable conduct which fell short of criminal conduct) should constitute misconduct even if it is not related to professional conduct. On the other hand, it is difficult to define this category of conduct with precision, and there was concern that too wide an obligation would have undesirable consequences. For example, a simple prohibition on dishonesty could have the result that that a barrister who had an extra-marital affair and in the course of so doing lied to their spouse would be guilty of professional misconduct, yet it was felt that the Conduct Rules should not extend to a barrister’s private or family life any more than was necessary. Drawing this line in individual cases may raise difficult questions: for example, should it be misconduct for a barrister to conduct sado-masochistic activities in private?

⁶ Rule 2.10R

40. In the light of this debate, the Group's proposed solution, on which comments are invited, was as follows;
- (1) to retain a rule which prohibits certain forms of conduct by any barrister; but
 - (2) to frame the rule in a way which identifies the underlying general principle; and;
 - (3) to reduce uncertainty by supporting the rule with guidance which identifies conduct which will or will not normally be regarded as contrary to the rule.
41. Paragraphs 2.10R to 2.12G illustrate this proposed approach. However, the drafting has not been easy. In particular:
- (1) Rule 2.10R prohibits conduct which diminishes trust and confidence placed by the public in "you or the profession", as it is considered that the public interest concern is whether a barrister's conduct has this effect. The Solicitors Regulation Authority has a similar rule, as do other regulatory bodies. However, the words "you or" (which are to be found in the SRA's rule) have given rise to some concern, as it may be thought too wide to prohibit conduct which is likely to diminish the trust and confidence which the public places in the individual. Possible alternatives include deleting the words "you or" or adding after "you" the words "as a barrister".
 - (2) Paragraphs 2.11G and 2.12G of the draft Conduct Rules set out a possible framework for the guidance. Views would be particularly welcome as to what conduct should be identified as likely to, or likely not to, amount to a breach of the rule.

Advertising

42. The existing Code contains detailed provisions relating to advertising and publicity of Chambers and barristers' services. The Group felt that many of these provisions were no longer necessary and has drafted more succinct rules in replacement which provide a general prohibition on publishing inaccurate or misleading advertising material.⁷

Media Comment

43. Another issue considered by the Group is the ban on expressing personal opinions to the press or other media (other than in an educational or academic context) on current proceedings in which the barrister is, or has been, instructed. This remains in the draft Conduct Rules.⁸ The Group does not propose any change to this rule. However, respondents may wish to comment on the question whether the rule should be amended, or even removed altogether:
- (1) It has been argued that a provision of this nature is unnecessary, and therefore ought not to be included in the Code. The solicitors' profession, for example, is not fettered in how it can communicate with the media. The existence of exceptions to the rule (see paragraph 2.14G of the draft Conduct Rules) is seen as evidence that the rule is unnecessary.

⁷ Rule 2.5R(5)

⁸ Rule 2.13R

- (2) On the other hand, the obligation has been generally accepted by the Bar. It can also be seen as a desirable adjunct to the cab rank rule. Public comment of this nature by barristers would reinforce the impression often misleadingly given by the press that the barrister was to be personally identified with the cause that they are arguing. On this basis, the rule could be seen, like the cab-rank rule, as serving the public interest in promoting access to justice for those with unpopular causes.

Questions for consultation

Q8 Do you have any comments on or suggested amendments to section 2? In particular:

- (1) Do you agree to the approach adopted in respect of the ‘conduct likely to diminish public confidence’ issue?**
- (2) Do you agree that the revised rules on advertising and publicity are sufficient?**
- (3) Do you agree that the prohibition on expressing personal comment to the media should remain?**

Section 3: Client confidentiality

44. This section is short and re-iterates the existing requirements in the Code to keep the affairs of the client confidential. The core duty is supported by brief guidance.

Questions for consultation

Q9 Do you have any comments on or suggested amendments to section 3?

Section 4: Client Relations

45. This section addresses two client facing obligations; the obligation to act in the best interests of each client and the obligation to provide a good quality of work and service to each client. “Each client” is used in order to reinforce the importance, where a barrister acts for more than one client, of servicing the interests of each client as if that client was the barrister’s only client. An inability by the barrister to do so means that there is a clear conflict of interest.
46. The obligation in the draft Conduct Rules to provide a good standard of work and service encompasses both the quality of work and the quality of service. The latter is wider and includes general principles of client care and the important role a barrister plays in explaining legal issues and trying to put the client at ease during legal proceedings.
47. Service to the client is not adequately provided for within the existing Code and is therefore given greater emphasis in the draft Conduct Rules. This reflects the Board’s commitment to the public interest and the provision of quality legal services to the consumer. Further, by placing importance on the principles of client care within the Conduct Rules, it encourages the Bar to take steps to meet the increasingly high expectations of their clients and, in turn, ensure a stronger position in a competitive legal market.
48. The provisions in this section are intended to be of general application to barristers whether employed or self-employed, subject to exemptions to be specified in the Practising Rules (e.g. in relation to the “cab-rank” rule and the prohibition on handling

clients' money): see paragraphs 19 to 24 above. The Group would particularly welcome comments as to whether and if so how the draft should be amended to fit with this objective.

Professional competence

49. This section of the draft Conduct Rules also emphasises the personal responsibility of the barrister and the need to recognise and work within the barrister's professional competence.

The cab rank rule and acceptance and return of instructions

50. The draft Conduct Rules include:

- (1) The cab rank rule.⁹ The cab rank rule contains elements of both professional and ethical standards and conduct and business regulation. It is open to debate therefore whether it belongs in the Conduct Rules or in the Practising Rules. The Group concluded that the cab rank rule was too important to appear merely as a rule concerning business regulation and it is therefore included in the draft Conduct Rules. However, it is proposed that detailed questions as to the scope of application of the cab rank rule (i.e. which barristers it should apply to,¹⁰ and the circumstances in which it does not apply¹¹) would be better dealt with in the Practising Rules, since they concern matters of practice rather than ethics.
- (2) The non-discrimination rule.¹² At present, this rule (which is required by statute) only applies to the provision of advocacy services.¹³ It is proposed that it should apply to all legal services provided by barristers, subject to any exceptions in the Practising Rules for particular categories of barrister.
- (3) Provisions requiring barristers not to accept instructions or to return instructions.¹⁴ These rules give practical effect to many of the other Conduct Rules.

51. These provisions of the draft Conduct Rules are largely taken from the existing Code, but include proposed amendments to the existing Code arising from the recent consultation on the acceptance and return of instructions.

Questions for consultation

Q10 Do you agree that the cab-rank rule should be included in the Conduct Rules rather than the Practising Rules?

Q11 Do you have any comments on or suggested amendments to Section 4?

⁹ Rule 4.26R.

¹⁰ This question is currently the subject of consultation.

¹¹ i.e. detailed provisions of the kind found in paragraphs 604 and 605 of the existing Code.

¹² Rule 4.27R.

¹³ See paragraph 601 of the existing Code.

¹⁴ Rules 4.28R to 4.39R.

Section 5: Discrimination

52. Although the Bar's Equality and Diversity Code contains rules and guidance in relation to discrimination, the Group is of the view that it is of sufficient importance to feature as a core duty.
53. One issue which was the subject of considerable discussion was the extent to which (if at all) the Conduct Rules should go beyond the prohibition on discrimination in a barrister's professional dealings contained in Rule 5.1R:
- (1) Rule 5.2R of the draft Conduct Rules contains a positive duty to take reasonable steps to prevent discrimination by others in the barrister's professional dealings. This proposed new requirement goes beyond the law and beyond the professional obligations previously imposed on the barrister. The majority of the Group, however, felt that it was right and important that such a duty should be imposed on barristers. What constitutes "reasonable steps" in Rule 5.2R would naturally depend on all the circumstances. For example, the steps that are reasonable for a Head of Chambers may be different from the steps reasonable for a junior employed barrister who has little or no involvement in their employer's policy. The Bar Equality Code will require amendment to ensure that it provides practical guidance for the profession as to what this rule requires.
 - (2) Another suggestion considered by the Group was that the Conduct Rules should impose a positive obligation on barristers to take reasonable steps to promote equality and diversity in their professional dealings, with the Bar Equality Code being amended to give practical guidance as to what this rule would require. The draft Conduct Rules do not include such a duty, but the Group would welcome comments on the suggestion that such a duty should be imposed.
 - (3) An alternative approach to these matters would be to follow the example set by the SRA. Rule 6.03 of the Solicitors' Code requires a principal in a firm or a member or a director of a recognised body to "adopt and implement an appropriate policy for preventing discrimination and harassment and promoting equality and diversity within your firm" and "to take all reasonable steps to ensure that all employees, partners, members and directors are aware of and act in compliance with its provisions and that it is made available to clients, the [SRA] and other relevant parties where required." The guidance in relation to this rule sets out details as to what the policy must include including (para 22(b) (iii) (E) "a commitment to the principles of equality and diversity and to observing legislative requirements". The SRA's rule is thus more limited both in terms of the solicitors to whom it applies and the scope of the obligation it imposes.
 - (4) As noted in paragraph 23(a) above, views would be welcome on the question whether the rules in section 5 of the draft Conduct Rules should be limited to a barrister's professional dealings.
54. This is a subject on which different views are held, including within the Group itself. Accordingly, it is a subject on which the Group is particularly keen to receive as many responses from as wide a range of viewpoints as possible.

Questions for consultation

Q13 Do you have any comments on or suggested amendments to section 5?

Q12 Do you have any comments on the suggestion that there should be a positive duty on barristers to promote equality and diversity in their professional dealings?

Section 6: Interpretation

55. This section provides definitions of key phrases used in the Conduct Rules and provides some guidance as to their interpretation.

Question for consultation

Q14 Do you have any comments on or suggested amendments to section 6?

PART V: OTHER ISSUES

56. This part of the paper addresses some provisions which are not contained in the draft Conduct Rules.

Duty to report misconduct

57. A number of professional regulators place a requirement on their members to report to them if they are concerned about a fellow member of the profession's conduct or ability to practice competently. There is at present no similar arrangement for barristers. The Bar Council consulted on this issue in 2004 and the overwhelming majority of respondents were opposed to a reporting obligation. The main objections were:

- (1) The Bar is an adversarial profession, and reporting the opposing barrister might be used as a tactic in litigation;
- (2) The pastoral role of the Head of Chambers and other senior members of Chambers might be affected by the introduction of a duty to report;
- (3) Given the self-employed status of many barristers, the independent nature of practice and confidentiality and privilege issues, it is difficult for one barrister to assess the ability of another barrister to practise competently;
- (4) Considering whether to report involves a high degree of subjectivity and this places an unreasonable burden on barristers;
- (5) There is little or no evidence to suggest that there is a significant number of barristers who are not competent to practise but nonetheless continue to work at the Bar. There is therefore no regulatory need for such a duty.

58. In the light of the consultation responses above the Bar Council decided not to introduce a duty to report but instead issued guidance on the types of conduct that barristers are encouraged to report. This guidance can be found on the Board's website.

59. The Group considered whether such a duty should be introduced into the Conduct Rules and concluded, for many of the reasons set out above, that it was not appropriate or necessary to do so. However, comments are welcome on whether this is the right approach or whether there is an actual (or perceived) regulatory need now for an obligation to report misconduct to be established. It would also be useful to receive views on whether in the absence of any duty to report the rules should make it clear that barristers are free to bring to the attention of the Board any evidence of misconduct or inability to practise of a fellow member of the Bar. Such an approach would be distinct from a duty to report which carries with it the potential for misconduct charges being brought against a barrister who is aware of misconduct/inability to practise issues but does not comply with the duty and bring it to the attention of the regulator. A freedom to report rule would remove the positive duty but would encourage barristers who come in to contact with misconduct/inability to practise to report it to the Board.

Omitted sections

60. At **Appendix 4** is a list of provisions in the existing Code which have been omitted from the new version. This list is limited to those omitted rules that relate to

professional standards and conduct. It does not cover those rules that relate to practising or business requirements which will be located in the revised 'Practising Rules'.

61. Many of the omissions are uncontroversial and have been removed simply because they are adequately covered by other provisions of the Conduct Rules which have been included. However, of particular note are the following:

(1) Paragraph 301(a)(i) and (ii)

A barrister...must not 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

This has been excluded because the Group believes it is adequately covered by Rule 2.10R which requires you to not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession, coupled with the illustrative guidance at 2.11G and 2.12G.

(2) Paragraph 301(b)

A barrister must not engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice.

Again this has been excluded as it is adequately covered by Rule 2.10R.

Questions for consultation

Q15 Do you agree that the Conduct Rules should not include a duty to report misconduct?

Q16 Do you think that the Rules should include reference to a freedom to report misconduct as distinct from a duty to report?

Q16 Do you think any of the omitted provisions of the existing Code should be reinstated?

Equality and Diversity Impact Assessment

62. The Bar Standards Board is committed to promoting diversity and equality throughout the Bar and within our own organisation. We endeavour to ensure that our processes and procedures are fair, objective, transparent and free from discrimination. In addition to the questions we have asked you to respond to, please could you also let us know if any issues arise in the consultation paper which you consider might have implications for equality. This includes discrimination on the grounds of race, gender, disability, religion or belief, sexual orientation and age. We would particularly welcome feedback on whether there are likely to be any negative consequences for any group arising from the proposed changes and how these could be mitigated, or if there are opportunities to promote greater equality.

DRAFT**CODE OF CONDUCT FOR THE BAR OF ENGLAND AND WALES:
CONDUCT RULES****INTRODUCTION**

Justice and the rule of law are fundamental to our society. Therefore, the public must have confidence in the administration of justice.

Barristers play a central part in our legal system. The effective and efficient functioning of the system relies on barristers exercising independent judgment in relation to the advice they give, to the effective presentation of their clients' cases and to the observance of their duty to the court and their other professional duties. The trust and confidence which the public place in barristers, and the reputation of the Bar, depend on the behaviour and reputation of all barristers, not just those who are in practice.

This means that barristers must always act with integrity, honesty and independence. They must provide a competent and professional service. They must keep their knowledge fully up to date, be skilled advocates, give sound advice and maintain constructive relationships with their clients and colleagues.

As advocates, the barristers' role is to present their client's case before a court. Justice requires that litigants should have a fair hearing. This in turn requires that they should have the opportunity to have their cases presented by advocates who, subject only to their overriding duty to the Court and their duty not to cause unnecessary offence or distress to third parties, and regardless of their own personal views, are able to present their client's case fearlessly, to the best of their abilities and in a manner which is in the best interests of the client.

These Conduct Rules define the professional duties that barristers owe to the public, the court, their clients and colleagues. They set out the principles on which good professional practice is founded, and the standards that all barristers are expected to meet and against which their conduct is to be judged.

These Conduct Rules consist of:

- Core Duties (designated "CD1" etc.). The Core Duties are the fundamental duties owed by barristers. Failure to comply with a Core Duty may make a barrister liable to disciplinary action.
- Rules (designated "1.1R" etc.). The Rules give effect to, and are to be read in the light of, the Core Duties. Failure to comply with a Rule may make a barrister liable to disciplinary action.
- Guidance (designated "1.3G" etc.). Guidance helps to interpret the Core Duties and the Rules and will be taken into account in the event of any allegation of breach of a Core Duty or a Rule. Further guidance will be issued by the Bar Standards Board from time to time and will also be taken into account in the event of any allegation of breach of a Core Duty or a Rule.

- Definitions (in section 6 below) of terms used in the Core Duties, Rules and Guidance.

These Conduct Rules apply to all barristers, as follows:

- These Conduct Rules apply to all practising barristers in relation to anything that they do in their professional life. 'Practising as a barrister' is defined in the Practising Rules. In addition, CD1, CD2 and Rule 2.10R apply to all barristers at all times.
- The Practising Rules disapply certain of these Conduct Rules in the case of barristers who supply legal services in certain of the manners specified in the Practising Rules.

CORE DUTIES

- CD1 You must observe your duty to the court in the administration of justice.**
- CD2 You must act with integrity and honesty.**
- CD3 You must maintain your professional independence.**
- CD4 You must keep the affairs of each client confidential.**
- CD5 You must act in the best interests of each client.**
- CD6 You must provide a good quality of work and service to each client.**
- CD7 You must not discriminate improperly in relation to any person.**

SECTION 1: THE DUTY TO THE COURT IN THE ADMINISTRATION OF JUSTICE

CD1 You must observe your duty to the court in the administration of justice

1.1R Your duty to the court involves the following:

- (1) You must not mislead the court or knowingly permit the court to be misled.
- (2) You must not abuse your role as an advocate.
- (3) You must take reasonable steps to avoid wasting the court's time.
- (4) You must ensure that the court has before it all relevant legal materials.

1.2R Your duty to the court does not override your duty to keep the affairs of each client confidential.

1.3G *It is fundamental to public confidence in the justice system that advocates assist the court in the administration of justice. Thus your duty to act in the best interests of each client is subject to your duty to the court.*

Not misleading the court

1.4G *Your duty not to mislead the court, or knowingly permit the court to be misled, means that you must not:*

- (1) *make submissions, representations or any other statement;*
- (2) *call witnesses to give evidence; or*
- (3) *ask questions which suggest facts to witnesses;*

which you know to be untrue or misleading.

1.5G *Your duty to act in the best interests of your client is subject to your duty to the court. Thus, for example, you must not make any submission on behalf of your client which you know, as a result of what your client has told you or as a result of documents which you have seen, to be untrue. However, your duty to the court does not prevent you from advancing your client's case merely because you yourself do not believe that the facts are as your client (or you, on your client's behalf) contends them to be. Your role as an advocate is to present your client's case, and it is not for you to decide whether your client's case is to be believed.*

Conflict between duty of confidence and duty not to mislead the court

1.6G *Your duty to the court does not require you to disclose confidential information which you have obtained in the course of your instructions and which your client has not authorised you to disclose to the court. However, you must not mislead the court or knowingly permit the court to be misled. For example, if your client were to tell you that he had committed the crime with which he was charged:*

- (1) *You must not disclose that information to the court without your client's consent.*

- (2) *You would not be misleading the court if, your client having entered a not guilty plea, you were to probe the crown evidence in cross-examination and to address the jury to the effect that the crown had not made them sure of your client's guilt.*
- (3) *However, you would be misleading the court if you were:*
 - (a) *to suggest to prosecution witnesses,*
 - (b) *to call witnesses to show that, or*
 - (c) *to submit to the jury that,*

your client did not commit the crime.

1.7G *Where the court will be misled in a material respect unless you disclose confidential information which you have learned in the course of your instructions, you should ask the client for permission to make disclosure to the court. If the client refuses to permit you to make the disclosure, you are professionally embarrassed and you must tell the court you can no longer act: see rule 4.34R (2) below. In such circumstances you must not reveal the information to the court.*

1.8G *Similarly, if you become aware that your client is in possession of a document which should be disclosed but has not been disclosed, you cannot continue to act unless your client agrees to the disclosure of the document: see rule 4.27R(3) below. In such circumstances you must not reveal the existence or contents of the document to the court.*

Not abusing the advocate's role

1.9G *Your duty not to abuse your role as an advocate includes the following:*

- (1) *You must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person.*
- (2) *You must if possible avoid the naming in open court of third parties whose character would thereby be impugned.*
- (3) *You must not make any submission which impugns a witness whom you have had an opportunity to cross-examine unless in cross-examination you have given the witness an opportunity to answer the allegation.*
- (4) *You must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the crime or conduct of which your client is charged unless such allegations go to a matter in issue (including the credibility of the witness) which is material to your client's case and appear to you to be supported by reasonable grounds.*

Taking reasonable steps to avoid wasting the court's time

1.10G *Your duty to take reasonable steps to avoid wasting the court's time includes the following:*

- (1) *You must not make any submission which you do not consider to be properly arguable.*
- (2) *You should bring any procedural irregularity to the attention of the court during the hearing and not reserve such matter to be raised on appeal.*

Assisting the court as to the law

1.11G It is your duty to ensure that the court has before it all relevant legal materials. This includes drawing the attention of the court to any relevant legal materials notwithstanding that this may not be in the interests of your client. This duty applies in all cases, but is particularly significant in cases where you are appearing against a litigant who is not legally represented.

SECTION 2: INTEGRITY, HONESTY AND INDEPENDENCE

CD2 You must act with integrity and honesty.

CD3 Your must maintain your professional independence.

2.1G Integrity, honesty and professional independence of barristers are fundamental.

2.2R You must not compromise your independence, integrity or freedom from external pressures.

2.3R You must not do anything which would reasonably lead others to think that your independence had been compromised.

2.4G The duty not to compromise your independence, integrity or freedom from external pressures will cover conduct designed to please the client, the court or a third party. Thus your duty to act in the best interests of each client is subject to your duty to act with integrity, honesty and independence.

Integrity

2.5R In your professional dealings, your duty to act with integrity includes the following:

- (1) In addition to not misleading the court (see Section 1 above), you must not knowingly or recklessly mislead any party to proceedings or their representatives, any mediator or any other person.
- (2) You must not draft any statement of case, witness statement, affidavit or other document containing:
 - (a) any statement of fact or contention which is not supported by your client or your instructions;
 - (b) any contentions which you do not consider to be properly arguable;
 - (c) any allegation of fraud in respect of which you do not have before you reasonably credible material which as it stands establishes a prima facie case of fraud; or
 - (d) in the case of a witness statement or affidavit any statement of fact other than the evidence which in substance according to your instructions you reasonably believe the witness would give if the witness were giving evidence orally,

provided that you may draft a document containing specific factual statements or contention included by you subject to confirmation of their accuracy by the client or witness.

- (3) You must not encourage a witness to give evidence which is untruthful or which is not the whole truth.
- (4) You must not rehearse, practise or coach a witness in relation to his evidence.

- (5) You must not publish any advertising material which is inaccurate or likely to mislead.

Payments and gifts

2.6R You must not:

- (1) give a commission or present or lend money for any professional purpose;
- (2) accept any money (whether as a loan or otherwise) from any client, professional client or other intermediary, save as remuneration; or
- (3) make a payment to any person for the purpose of procuring professional instructions, save as:
 - (a) a payment for advertising or publicity;
 - (b) remuneration paid to any clerk or other employee or staff; or
 - (c) a reasonable fee required by an alternative dispute resolution body that appoints or recommends persons to provide mediation, arbitration or adjudication services or entering into a reasonable fee-sharing agreement required by such a body

2.7G *Making payments or receiving gifts in connection with professional services potentially compromise your independence. If you are offered a gift by a current, prospective or former client, professional client or other intermediary, you should consider carefully whether the circumstances and size of the gift are such as would reasonably lead others to think that your independence had been compromised. You may provide entertainment to current, prospective or former clients, professional clients or other intermediaries, but:*

- (1) *what is appropriate, as opposed to excessive, will depend on all the circumstances; and*
- (2) *such entertainment must not be intended or likely to cause the recipient to choose or recommend a barrister or anyone else having regard to anything other than the client's best interest, nor be of such a manner or of such value as to appear in all the circumstances to be intended or likely to do so.*

2.8G *The prohibition on making payments for the purpose of procuring professional instructions excludes fees required by alternative dispute resolution bodies and reasonable fee-sharing arrangements required by such bodies. What is a reasonable fee-sharing arrangement is likely to depend on whether it is of a kind similar to that made by other persons who provide such services through the body.*

Handling client money

2.9R You must not receive or handle client money, securities or other assets, save by way of receiving payment for instructions.

Conduct likely to diminish public confidence

2.10R You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession.

2.11G *Such conduct may take many forms. It is not possible to define all forms of conduct which is likely to diminish the trust the public places in you or the profession.*

[However, it will normally include:

- (1) *Serious criminal conduct [to be defined].*
- (2) *Offensive or discreditable conduct towards third parties [in your professional dealings].*
- (3) *Unlawful victimisation or harassment.*
- (4) *[Other examples?]*

2.12G *Conduct which is likely to diminish the trust the public places in you or the profession will not normally include:*

- (1) *Your conduct in your private or family life, unless that involves serious criminal conduct.*
- (2) *Minor criminal offences. [To be defined, possibly including:*
 - (a) *An offence committed in the United Kingdom which is a fixed penalty offence for the purposes of the Road Traffic Offenders Act 1988 or any statutory modification or replacement thereof for the time being in force.*
 - (b) *An offence committed in the United Kingdom or abroad which is dealt with by a procedure substantially similar to that applicable to such a fixed penalty offence.*
 - (c) *An offence whose main ingredient is the unlawful parking of a motor vehicle.]*
- (3) *[Other examples?]*

2.13R You must not express a personal opinion to the press or other media or in any other public statement on the facts or issues arising from any current proceedings or mediation in which you are instructed, or expect to be instructed, to appear as an advocate.

2.14G *Rule 2.13R does not prevent you from expressing such an opinion on an issue in an educational or academic context.*

SECTION 3: CONFIDENTIALITY

CD4 You must keep the affairs of each client confidential.

- 3.1G *The barrister's duty of confidentiality is central to the administration of justice. The client who reposes confidence in his legal advisers must do so in the knowledge that the information which he imparts, or which is imparted on his behalf, will remain confidential. In normal circumstances, such information will be privileged from production.*
- 3.2G *There are circumstances in which there will be a conflict between your duty of confidentiality and your duty to the court. These are considered in the guidance to Section 1 above.*

SECTION 4: CLIENT RELATIONS

CD5 You must act in the best interests of each client.

CD6 You must provide a good quality of work and service to each client.

Personal responsibility

4.1R You are personally responsible for your own conduct and for your professional work. You must exercise your own judgment in all your professional activities and be prepared to justify your decisions and actions.

4.2G *It is axiomatic that a barrister is personally responsible for his own conduct and his own professional work. You must exercise your own professional judgment in relation to those matters on which you are instructed, regardless of the views of your client, your professional client or other intermediary, or any another advocate with whom you are instructed: see Sections 1 and 2 above.*

Professional Competence

4.3R You must recognise and work within the limits of your own competence.

4.4R You must not accept instructions to undertake any task which:

- (1) You are not competent to handle.
- (2) You do not have sufficient experience to handle.
- (3) You do not have adequate time to prepare.
- (4) You cannot discharge within the time requested or in any event within a reasonable time.

See also Rules 4.27R to 4.38R for specific provisions relating to the acceptance of instructions

4.5G *Rules 4.3R and 4.4R require you to consider before accepting instructions whether you have sufficient competence to handle your instructions. This involves consideration both whether you have the necessary experience and the necessary expertise. You must also satisfy yourself that you have sufficient time to handle the instructions and to prepare for any hearing you are instructed to attend (see also Rule 4.27R).*

4.6R You must keep your professional knowledge and skills up to date.

4.7G *In addition to complying with such requirements as to continuing professional development as may apply to you, you must identify and participate in such educational activities or opportunities for review as may be necessary and appropriate to keep your professional knowledge and skills up to date.*

Best interests of each client

4.8R Your duty to act in the best interests of each client is subject to your duties under Core Duties 1 to 4.

- 4.9R Your duty to act in the best interests of each client means that:
- (1) You must promote fearlessly and by all proper lawful means the client's best interests.
 - (2) You must do so without regard to your own interests or to any consequences to yourself.
 - (3) You must do so without regard to the consequences to any other person (whether to your professional client, or other intermediary or another barrister).
- 4.10R Your duty to act in the best interests of each client includes a duty to consider whether the client's best interests are served by different legal representation, and if so, to advise the client to that effect.
- 4.11R Your primary duty is to your client, not your professional client or other intermediary. You must not permit your professional client or intermediary to limit your discretion as to how the interests of the client can best be served.
- 4.12R When supplying legal services funded by the Legal Services Commission as part of the Community Legal Service or the Criminal Defence Service your primary duty is to the client, but you must comply with any duty imposed on you by or under the Access to Justice Act 1999 or any regulations or code in effect under that Act, including Annex E.
- 4.13G *Your duty to act in the best interests of each client is subject to:*
- (1) *Your duty to the court: see Section 1 above.*
 - (2) *Your duty to act with integrity, honesty and independence: see Section 2 above.*
 - (3) *Your duty to keep the affairs of each client confidential: see Section 3 above.*
- 4.14G *The rule makes clear that your primary obligation is to your client, not to your professional client.*
- 4.15G *A barrister must fearlessly promote the interests of the client. You must not be deflected from your duty to do so by any concern as to the personal consequences to yourself, to your solicitor, another barrister or any other person.*
- 4.16G *Where interests conflict, your duty is to act in the best interests of your client. The rule is expressed in terms of the interests of each client. This is because you may only accept instructions to act for more than one client if you are able to act in the best interests of each client as if that client were your only client.*
- 4.17G *You must not be deflected from your duty by any personal interest.*
- 4.18G *The duty to act in the best interests of the client includes a duty to advise the client if you consider that the client's interests are better served by different legal representation. Thus it may be necessary to advise the client that only one advocate or more or fewer advocates, should be instructed.*

4.19G *Similarly, if you consider that your solicitor, or another barrister or professional, may have been negligent, it is your obligation to ensure the client is so advised.*

Work and service

4.20R You must:

- (1) read all instructions delivered to you expeditiously;
- (2) fulfil your instructions promptly;
- (3) treat each client with courtesy and consideration; and
- (4) take all reasonable steps to avoid the incurring of unnecessary expense.

4.21G *You must read your instructions promptly. This may be important if there is a time limit or limitation period. If you fail to read your instructions promptly, it is possible that you will not be aware of the time limit until it is too late.*

4.22G *It is important that you provide not merely a good standard of work but also a good standard of service to your client.*

4.23G *It is important to remember that your client may not be familiar with legal proceedings and may find them to be a difficult and nerve-wracking experience. You should do what you reasonably can to ensure that the client understands the process and what to expect from it and from you. You should also try to avoid any unnecessary distress for your client.*

4.24G *You are responsible for the service provided by all those who represent you in your dealings with your client, including your clerks or any other employees.*

The “Cab-rank” rule

4.25R You must comply with the “Cab-rank” rule. This means that, subject to Rules 4.27R to 4.38R and to Rules [] of the Practising Rules, you must:

- (a) accept any brief to appear before a Court;
- (b) accept any other instructions; and
- (c) act for any client;

in any field and before any Court in which you profess to practise in relation to work appropriate to your experience and seniority and do so irrespective of:

- (i) the client;
- (ii) the nature of the case;
- (iii) whether the client is paying privately or is publicly funded; and
- (iv) any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

4.26R You must not withhold your services:

- (1) on the ground that the nature of the case is objectionable to you or to any section of the public;
- (2) on the ground that the conduct, opinions and or beliefs of the prospective client are unacceptable to you or to any section of the public;
- (3) 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).

Acceptance and return of instructions

4.27R You must not accept instructions, and (subject to rules 4.35R and 4.38R) you must cease to act and return any instructions which you have accepted, if:

- (1) By reason of any existing or previous instructions you are not able to fulfil your obligation to act in the best interests of each client.
- (2) You reasonably believe that there is or may be a conflict or risk of conflict of interest between:
 - (a) yourself and some other person; or
 - (b) one or more clients.

and informed consent has not been given to you acting.

- (3) There is a real risk that information confidential to another client might be disclosed to anyone other than that client or former client without their consent.
- (4) Your instructions seek to limit your authority or discretion in the conduct of proceedings in court.
- (5) Your instructions require you to act other than in accordance with law or of the provisions of this code.
- (6) Your instructions require you to act as an advocate in court in a matter in relation to which you are likely to be a witness.
- (7) You reasonably consider that you will be unable to maintain your professional independence whether by reason of your connection with the client, with the Court or a member of it, or otherwise.
- (8) You reasonably believe that the administration of justice may be prejudiced.
- (9) You are instructed by a client without a solicitor or other professional client, and you are satisfied that either the clients' interests or the interests of justice can only be served if the client instructs a solicitor or other intermediary.

4.28G *Rules 4.27R (1), (2) & (3) reflect the law on conflict of interests. In relation to rule 4.27(1), see also rule 4.35R (1) below.*

4.29G *Rules 4.27R (4) & (5) prevent you from accepting instructions where your instructions require you to act contrary to this code or contrary to law.*

4.30G *4.27R (6) prevents you acting as advocate where you are likely to be a witness. However, where you are instructed with another lawyer who will act as advocate, you may accept instructions notwithstanding that you are likely to be a witness if the matter on which you are likely to be a witness is peripheral or minor in the context of the litigation as a whole and you consider that it is in the interests of the client that you continue to act. In relation to rule 4.27(6), see also rule 4.35R (2) below.*

4.31G *Rules 4.27R(7) & (8) prevent you accepting instructions where you are likely either to be professionally embarrassed or where the administration of justice would be prejudiced if you accept instructions. It is not possible to identify all the circumstances in which this may arise.*

4.32G *Rule 4.27R(9) requires you to refuse to accept instructions where you are instructed without a solicitor or other professional client and you consider, perhaps by reason of the scale or nature of the work involved, that the client's interests require instruction of a solicitor or other intermediary.*

4.33R You must inform your professional client, or your client if instructed directly by a client:

- (1) if it becomes apparent to you that you will not be able to do the work within the time requested or within a reasonable time after receipt of instructions.
- (2) if there is an appreciable risk that you may not be able to undertake a brief or fulfil any other professional engagement which you have accepted.

4.34R Subject to rules 4.35R and 4.38R below, you must cease to act and return your instructions if:

- (1) In any case funded by the Legal Services Commission as part of the Community Legal Service or Criminal Defence Service it has become apparent to you that such funding has been wrongly obtained by false or inaccurate information and action to remedy the situation is not immediately taken by the client.
- (2) The client refuses to authorise you to make some disclosure to the court which your duty to the court requires you to make.
- (3) Having become aware during the course of a case of the existence of a document which should have been but has not been disclosed on discovery the client fails forthwith to disclose it.
- (4) Having come into possession of a document belonging to another party by some means other than the normal and proper channels and having read it before you realise that it ought to have been returned unread to the person entitled to possession of it you would thereby be embarrassed in the discharge of your duties by your knowledge of the contents of the document.
- (5) You are satisfied that the relevant instructions have been withdrawn.

4.35R You may only cease to act and return instructions:

- (1) under rule 4.27R (1) if you have acted with proper regard to any applicable guidance on the return of instructions in such circumstances issued by the Bar Standards Board from time to time.
- (2) under rule 4.27R (6) if you can do so without jeopardising the client's interests.
- (3) under rule 4.34R (4) if you can do so without jeopardising the client's interests.

4.36R You may cease to act and return any instructions where serious illness, injury, childbirth or a bereavement or a similar matter make you unfit or unable reasonably to perform the services required in the instructions, or where you are unavoidably required to attend on jury service.

4.37R Except where the circumstances are such that the client may be prejudiced because there is insufficient time to engage other adequate legal assistance, you may cease to act and return any instructions if:

- (1) Your professional conduct is being impugned.
- (2) The client consents.
- (3) Despite all reasonable efforts to prevent it, a hearing becomes fixed for a date which coincides with a bona fide holiday entered in your diary.
- (4) There is some other substantial reason for doing so.

4.38R You must not:

- (1) cease to act or return instructions without either:
 - (a) your client's consent; or
 - (b) having first clearly explained to your client or your professional client the reasons for doing so;
- (2) return instructions to another barrister without the consent of your client or your professional client; or
- (3) except as provided above, break any engagement to supply legal services in the course of practice to enable you to attend or fulfil a non-professional engagement of any kind.

SECTION 5: DISCRIMINATION

CD7 You must not discriminate improperly in relation to any person.

- 5.1R You must not in your professional dealings discriminate against, victimise or harass any other person, on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital or civil partnership status, disability, age, religion or belief, or political persuasion.
- 5.2R You have a duty to take such steps as are reasonable in the circumstances to prevent discrimination by any other person in your professional dealings with them.
- 5.3G *Improper discrimination, harassment or victimisation, whether in the selection of tenants or pupils, the provision of work to barristers, the promotion of barristers to senior positions, or in any other respect, is anathema to the Bar.*
- 5.4G *Rule 5.2R contains a positive obligation to prevent discrimination by others in your professional dealings . Thus, it is your obligation to take such steps as are reasonable in the circumstances to prevent discrimination by those you work with, including clerks (e.g. in the selection of barristers for particular cases), other members of chambers, other barristers, solicitors and any other third party you may encounter in your professional dealings. The Bar Equality Code [to be drafted] contains guidance as to the steps which would be reasonable in the circumstances to take in order to prevent discrimination. This guidance will be taken into account in the event of any allegation of breach of a Core Duty or a Rule.*

SECTION 6: INTERPRETATION

6.1R In this Code (including both the Core Duties and the Rules):

- (a) “client” means, in relation to any legal services provided or to be provided by you, the person to whom or on whose behalf you provide or are to provide those services;
- (b) “court” includes any court or tribunal or any other person or body before whom you appear or may appear as an advocate;
- (c) “instructions” means instructions or directions in whatever form (including a brief) to supply legal services;
- (d) “proceedings” includes proceedings before any court, as defined above; and
- (e) “professional client” means the solicitor or other professional who instructs you on behalf of the client.

6.2G *When you appear as an advocate, your client is the person whom you represent, rather than any intermediary. When you provide advice, your client is the person whom you advise, rather than any intermediary. When you provide other legal services (such as drafting) your client is the person to whom you provide those services, rather than any intermediary.*

6.3G *References to “court” and “proceedings” are not limited to proceedings before courts of law. Thus they include proceedings before tribunals such as disciplinary or statutory tribunals, public enquiries, arbitrations and other proceedings before any body exercising judicial or quasi-judicial functions.*

List of consultees

Bar Standards Board Committees/Panels

Consumer Panel and its constituent organisations
Complaints Committee
Education and Training Committee
Qualifications Committee
Quality Assurance Committee
Diversity Sub-group

Bar organisations

Chairman of the Bar
All members of the Bar Council
Access to the Bar Committee
Alternative Dispute Resolution Committee
Bar Human Rights Committee
Employed Barristers' Committee
Equality and Diversity Committee
European Committee
Fees Collection Committee
Information Technology Committee
International Relations Committee
Law Reform Committee
Legal Services Committee
Professional Practice Committee
Public Affairs Committee
Remuneration Committee
Training for the Bar Committee
Young Barristers' Committee

All Circuit Leaders
All Heads of Chambers
All Chairs of Specialist Bar Associations

Inns of Court

Association of Women Barristers

Other bodies

Advocacy Training Council
Association of District Judges
Association of Muslim Lawyers
Attorney General
Bar Council of Northern Ireland
Bar Mutual Indemnity Fund
Chancellor of the High Court
Council of HM Circuit Judges
Council of the Inns of Court

Council for Licensed Conveyancers
Citizens' Advice
Crown Prosecution Service
Department for Business, Enterprise and Regulatory Reform
Faculty of Advocates
Government Legal Service
Immigration Legal Practitioners Association
Institute of Barristers' Clerks
Institute of Chartered Accountants of England and Wales
Institute of Chartered Secretaries and Administrators
Institute of Legal Executives
Institute of Paralegals
Institute of Taxation
Institute of Trade Mark Attorneys
The Law Society
Legal Complaints Service
Legal Practice Management Association
Legal Services Board
Legal Services Consultative Panel
Legal Services Commission
Legal Services Ombudsman
Lord Chief Justice
Master of the Rolls
Ministry of Justice
National Consumer Council
Office of Fair Trading
Office of the Immigration Services Commissioner
President of the Family Division
President of the Queen's Bench Division
Queen's Counsel Appointments Panel
Society of Asian Lawyers
Society of Black Lawyers
Solicitor General
Solicitors Regulation Authority
Which?

Destination Table

Showing the destination of provisions in the Code of Conduct of the Bar of England and Wales (8th Ed) (as proposed to be amended in relation to acceptance and return of instructions) in the new draft Conduct Rules and those provisions that are to be considered during the review of the Practising Rules

Paragraph	Existing Code		Draft Conduct Rules	Practising Rules
	Sub-paragraph	Sub-paragraph		
101-103				
104			Introduction	
105-107			-	
108				
201-206				
301	(a)	(i)	-	
		(ii)	-	
		(iii)	2.10R(2.11 and 12G)	
	(b)		-	
302			CD1	
To be considered				
To be considered				

Paragraph	Existing Code		Draft Conduct Rules	Practising Rules
	Sub-paragraph	Sub-paragraph		
			1.1R(1) 1.2R-1.5G	
303	(a)		CD5 4.8R	
	(b)		4.11R	
	(c)		4.12R	
304			4.12R	
305.1			CD7 5.1R	
305.2			2.11G(3)	
306			4.1R 4.2G	
307	(a)		CD2 CD3 2.2R	
	(b)		2.3R	

Existing Code		Draft Conduct Rules	Practising Rules
	(c)	2.4G	
	(d)	2.6R(1) 2.6R(2)	
	(e)	2.6R(3) 2.7G 2.8G	
	(f)	2.9R	
401-406			To be considered
501-504			To be considered
601		4.26R	
602		4.25R	Cab-rank rule to be considered in detail by the Practising Rules group.
603	(a)	4.4R(1) 4.4R(2)	
	(b)	4.4R(3) 4.4R(4)	

Paragraph	Existing Code		Draft Conduct Rules	Practising Rules
	Sub-paragraph	Sub-paragraph		
	(c)		4.27R(4)	
	(d)		4.27R(6) 4.27R(7) 4.27R(8)	
	(e)		4.27R(2)	
	(f)		4.27R(3)	
	(g)		-	
	(h)		4.27R(9)	
604				To be considered
605				To be considered
605.A				To be considered
606.1			4.18G	
606.2			4.18G	
606.3			4.18G	
606.4			4.18G	
606A.1				To be considered

Paragraph	Existing Code		Draft Conduct Rules	Practising Rules
	Sub-paragraph	Sub-paragraph		
606A.2				
607			4.18G	
608	(a)		4.27R	
	(b)		4.27R(2)	
	(c)		4.34R(1)	
	(d)		4.34R(2)	
	(e)		4.34R(3)	
	(f)		4.34R(4)	
	(g)		4.34R(5)	
609	(a)		4.35R(1)	
	(b)		4.35R(2)	
	(c)		4.25R(3)	
610	(b)		4.37R(1)	
	(c)		4.37R(4)	
	(d)		4.37R(2)	
	(e)		4.37R(3)	

Paragraph	Existing Code		Draft Conduct Rules	Practising Rules
	Sub-paragraph	Sub-paragraph		
	(f)		4.37R(4)	
611			4.36R	
612	(a)		4.38R(1)	
	(b)		4.38R(2)	
	(c)		4.38R(3)	
701	(a)		1.1R(3)	
			1.10G	
			CD6	
			4.20R to 4.24G	
	(b)	(i)	4.4R(1)	
		(ii)	4.4R(3)	
		(iii)	4.4R(4)	
	(c)		4.20R(1)	
(d) The application of the Written Standards for the Conduct of Professional Work to be considered as part of the Practising Rules review				

Existing Code		Draft Conduct Rules	Practising Rules
Paragraph	Sub-paragraph		
	(e)	4.33R(2)	
(f)			
702		CD4 3.1G 3.2G	
703		4.18G 4.19G	
704			
	(a)	2.5R(2)(a)	
	(b)	2.5R(2)(b)	
	(c)	2.5R(2)(c)	
	(d)	2.5R(2)(d)	
705	(a)	2.5R(4)	
	(b)	2.5R(3)	
	(c)	-	
706			
To be considered			

Paragraph	Existing Code		Draft Conduct Rules	Practising Rules
	Sub-paragraph	Sub-paragraph		
707				
708	(a)		4.1R 4.2G	
	(b)		-	
	(c)		1.1R(4) 1.11G	
	(d)		1.10G(2)	
	(e)		2.5R(2)	
	(f)		1.10G	
	(g)		1.8G(1)	
	(h)		1.8G(2)	
	(i)		1.8G(3)	
	(j)		1.8G(4)	
708.1			2.5R(1)	
709.1			2.13R	
709.2			2.14G	

Paragraph	Existing Code		Draft Conduct Rules	Practising Rules
	Sub-paragraph	Sub-paragraph		
710.1			-	
710.2	(a)		2.5R(5)	
	(b)		-	
	(c)		-	
	(d)		-	
	(e)		-	
	(f)		-	
801-809				To be considered
901-905				To be considered
1001				To be considered
1101-1106				To be considered
Annexes A-S				Format and content of Code Annexes to be considered as part of the review of the Practising Rules

TABLE OF OMITTED PROVISIONS

This table sets out the provisions in the current Code of Conduct relating to professional conduct and standards which have been omitted from the draft Conduct Rules.

Provision	Text	Reason
301(a)(i) and (ii)	<p>A barrister must have regard to paragraph 104 and must not:</p> <p>(b) engage in conduct whether in pursuit of his profession or otherwise which is:</p> <p>(i) dishonest or otherwise discreditable to a barrister;</p> <p>(ii) prejudicial to the administration of justice; or</p>	Adequately provided for in revised for in Rule 2.10R which requires you to not behave in a way which is likely to diminish trust and confidence in the profession.
301(b)	A barrister must not engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar or in the case of a practising barrister prejudice his ability to attend properly to his practice.	See reason above
708(f)	<p>A barrister when conducting proceedings in Court:</p> <p>(f) must not unless invited to do so by the Court or when appearing before a tribunal where it is his duty to do so assert a personal opinion of the facts or the law;</p>	Adequately covered by general independence core duty (CD 3) and accompanying rules (e.g. 2.2R) and the core duty to observe your duty to the court in the administration of justice (CD 1) and in particular 1.1R(2) regarding not abusing your role as an advocate.
710 (apart from 710.2(a))	<p>710.1 Subject to paragraph 710.2 a barrister may engage in any advertising or promotion in connection with his practice which conforms to the British Codes of Advertising and Sales Promotion and such advertising or promotion may include:</p> <p>(a) photographs or other illustrations of</p>	Adequately covered in 2.5R(5) which states that you must not publish any advertising material which is inaccurate or likely to mislead.

	<p>the barrister;</p> <ul style="list-style-type: none"> (b) statements of rates and methods of charging; (c) statements about the nature and extent of the barrister's services; (d) information about any case in which the barrister has appeared (including the name of any client for whom the barrister acted) where such information has already become publicly available or, where it has not already become publicly available, with the express prior written consent of the lay client. <p>710.2 Advertising or promotion must not:</p> <ul style="list-style-type: none"> (a) (b) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute; (c) make direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be barristers or members of any other profession); (d) include statements about the barrister's success rate; (e) indicate or imply any willingness to accept instructions or any intention to restrict the persons from whom instructions may be accepted otherwise than in accordance with this Code; (f) be so frequent or obtrusive as to cause annoyance to those to whom it is directed. 	
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