



Consultation

The Cab Rank Rule: Standard contractual terms and the list of defaulting solicitors

Purpose

1. This consultation identifies a number of options for amending the cab rank rule. In particular, the Bar Standards Board (BSB) is considering whether it is necessary to retain references to a set of standard contractual terms and to the list of defaulting solicitors within the list of exemptions to the rule¹.
2. This consultation will be of interest to the Bar, entities considering BSB authorisation, solicitors and other lawyers who instruct barristers, and consumers of legal services. We would particularly appreciate responses from those who represent consumer interests.

Executive summary

3. The cab rank rule is Rule C29 in the BSB Handbook. The rule states that if a self-employed barrister receives instructions from a professional client such as a solicitor, and the instructions are appropriate taking into account the experience, seniority and/or field of practice of the barrister, they must accept the instructions. This applies irrespective of:
 - The identity of the client;
 - The nature of the case to which the instructions relate;
 - Whether the client is paying privately or is publicly funded; and
 - Any belief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.
4. In order to ensure that barristers are not exposed to unfair or unreasonable commercial arrangements as a result of this obligation, the BSB Handbook provides that the rule applies only if instructions are on the basis of either standard terms published on the Bar Council's website or the barrister's own published terms. The

¹ The consultation is drafted as if applying only to individual self-employed barristers, as has been the case in the past. With the advent of entity regulation, the cab rank rule will also apply to authorised individuals (whether or not barristers) working in BSB authorised entities where the instructions name a specific authorised individual within that entity

barrister is also entitled (but not obliged) to refuse instructions where a solicitor appears on the list of defaulting solicitors, which is maintained by the Bar Council.

5. The BSB undertook a call for evidence to better understand what contractual terms were being used to instruct barristers and how frequently solicitors were instructing barristers in circumstances where the barrister was obliged to accept due to the cab rank rule.
6. In the light of this, the BSB has identified a number of options on which it seeks views. These include:
 - Retaining the status quo;
 - Retaining the standard terms as a backstop, but giving greater flexibility to the barrister to propose reasonable terms for the specific instructions in question;
 - Removing the standard terms, but requiring the barrister either to adopt their own standard terms or propose reasonable terms for the specific instructions in question;
 - Removing the standard terms, but requiring the barrister to accept any reasonable terms offered by a solicitor or other professional client.
7. The BSB also seeks views on whether the reference in its Handbook to the list of defaulting solicitors might be replaced by an exemption from the cab rank rule where it is reasonable to conclude that the professional client represents an unacceptable credit risk.

Background

The application of the cab rank rule

8. Examples of where the cab rank rule might apply include:
 - Where an individual has been accused of a serious criminal offence and the public perception is that his or her behavior was reprehensible and/or that the person was clearly guilty, with possible reputational consequences for a barrister who represents that individual, the cab rank rule will assist the individual in securing legal representation to ensure a fair trial and access to justice;
 - If it is in a commercial practitioner's interests not to act against a potential large client (such as a financial institution or multinational company) in the hope of receiving future instructions from that client (or where such a client seeks to apply pressure on the barrister to act for it exclusively) the cab rank rule protects the independence of the barrister and ensures that individuals or small companies who may have a claim against large commercial bodies can access proper representation and justice.
9. The cab rank rule is an unusual feature of the Bar's regulatory arrangements, given that it can be professional misconduct for a barrister to refuse to represent a lay client for personal reasons (which separates the Bar from other professionals). The

effect of the cab rank rule is that barristers cannot choose their clients. On the contrary, all clients have equal access to the Bar, each having a full range of choice of any advocate who is unconflicted and available for the work, whatever the nature of his or her case. In effect, the cab rank rule is a public interest restriction on barristers' normal freedom to contract (and hence to compete on an equal footing with other legal professionals in the marketplace).

10. However, the BSB has not thought it reasonable to expect barristers to be obliged to act without a contractual right to be paid for their services, or without clarity around when and how they are to be paid (non-payment or uncertainty as to fees is likely adversely to affect the regulatory objective of encouraging an independent, strong, diverse and effective legal profession, and may undermine competition in the provision of legal services in the longer term). It has also not thought it right to require barristers to have to rely for payment on solicitors who are in default in paying other fees and are therefore a possible credit risk.
11. The cab rank rule is therefore subject to Rule C30 in the BSB Handbook, which lists a number of detailed exemptions to the rule. These include exemptions when:
 - The professional client (i.e. the lawyer instructing the barrister, who is usually a solicitor) is not accepting liability for the barrister's fees and / or is named on the list of defaulting solicitors (see below for more information on the list of defaulting solicitors);
 - The instructions purport to be on terms other than either the standard contractual terms (for discussion of which see below) or the barrister's own standard terms.
12. The cab rank rule applies to referral work from a professional client and does not apply to direct access work, where the barrister is instructed directly by a lay client (nor does it apply where another lawyer instructs on their own behalf)².

Contractual terms and the cab rank rule

13. Prior to January 2013, the cab rank rule did not apply to any instructions from a solicitor to a barrister that purported to be on a contractual basis. The default position was that barristers were instructed on the non-contractual basis provided for by the old Annex G1 to the 8th Edition of the Code of Conduct ("The Terms of Work on which barristers offer their services to solicitors and the withdrawal of credit scheme"). The BSB considered that those arrangements were outdated and no longer appropriate in the modern legal services market. The previous, non-contractual, honorarium basis of payment failed to provide an effective method of enforcement of rights and obligations for solicitors, barristers or the lay client (there had previously been a solicitors' professional conduct obligation to pay barristers' fees, but this ceased to be the case in 2007).

² The BSB is planning to consult separately on whether the cab rank rule should apply to public and licensed access cases in due course

14. With the increasing use of contracts, the BSB had to decide whether and, if so, how to apply the cab rank rule to instructions offered on a contractual basis. It concluded that it should apply but only if the proposed contractual terms were reasonable. At that time, there was little or no experience amongst the Bar of contractual arrangements. Given the need for barristers to be able to decide quickly whether the rule required the acceptance of specific instructions, it decided that it should apply only to instructions on certain terms.
15. The rule change in January 2013 therefore extended the scope of the cab rank rule to instructions on a contractual basis but only if they were made either on the standard contractual terms which were originally inserted as Annex T of the old Code of Conduct (which had been prepared by the Bar Council following extensive consultation), or any standard terms that were published by the barrister. Instructions on any other basis could be accepted if the barrister so chose but there was no obligation under the rule to do so.
16. The new BSB Handbook then came into force in January 2014. The standard terms are no longer included in the Code of Conduct section of the BSB Handbook, but there continues to be a reference to them in the list of exemptions from the rule (as discussed above). The effect of this is that barristers are not obliged to accept work under the cab rank rule unless it is offered on either the standard terms or the barrister's own published terms. The BSB has already taken the view that the standard terms are primarily a matter for the Bar Council and may be published on its website, rather than within the BSB's regulatory guidance, but has not hitherto regarded them as a purely representational matter because of the link to the cab rank rule.
17. As discussed above, the regulatory rationale for this position is that the obligation on barristers to accept work must be balanced by a need to ensure that barristers' freedom to contract is limited no more than is necessary to ensure the public interest benefits of the cab rank rule.

The list of defaulting solicitors

18. The exemptions to the cab rank rule continue to provide that barristers are not obliged to act under the cab rank rule if the instructing solicitors appear on the list of defaulting solicitors. The list of defaulting solicitors is maintained by the Bar Council, which offers a number of fee advice and collection services to its members, including a joint tribunal with the Law Society to resolve disputes between solicitors and barristers. The BSB has no involvement in the administration of this list. The rationale for including it in the BSB's rules is as an indicator to a barrister that a particular solicitor may be an increased credit risk – the exemption to the cab rank rule simply removes the obligation to act for such solicitors, barristers are of course free to do so if they wish.

Scope of review

19. This consultation seeks views on whether it is desirable for the cab rank rule to continue to refer specifically to certain standard contractual terms and the list of

defaulting solicitors, or whether the regulatory objectives would be better met by moving to more broadly defined exemptions for instructions on unreasonable terms or where there was an undue credit risk. It suggests a number of alternative approaches, each of which has a number of advantages and disadvantages.

20. It is not proposed that the cab rank rule itself be reviewed at this stage. The BSB will be launching a review of the Handbook in due course, at which point it will consider the impact of the cab rank rule, whether it continues to be effective and whether it could be drafted in a more outcomes focused way without the need for the current long list of exceptions. It will also then consider whether the cab rank rule should apply in public access cases.

Call for Evidence on the Standard Contractual Terms and the Cab Rank Rule

21. In October 2014 the BSB issued a call for evidence to any interested stakeholders. The purpose was to establish the contractual basis on which barristers are being instructed, and to gather information about the frequency with which the cab rank rule is being invoked. The call for evidence asked four questions:

- What are the contractual terms actually being used by the Bar since the rule change was introduced?
- Are there “reasonable terms” being offered within the market other than the standard terms?
- How regularly is the cab rank rule being invoked in practice and are barristers using the standard terms or their own when responding to such requests?
- In the light of the above questions, what would be the impact of taking a different approach on standard terms?

22. The call for evidence ran for 12 weeks and the following responded:

- The Bar Council;
- The Chancery Bar Association (ChBA);
- The Commercial Bar Association (COMBAR);
- The Institute of Barristers Clerks (IBC);
- The Law Society;
- The Planning and Environment Bar Association (PEBA);
- The Personal Injuries Bar Association (PIBA);
- Four barristers’ chambers; and
- Two individual barristers.

23. At the same time as the call for evidence, the BSB issued a survey. The key issues that arose are highlighted below.

Changes in the Market since the Introduction of the Standard Contractual Terms

24. When the original decision was made, the profession had no experience of contractual instruction. As evidenced by some of the responses from barristers’ representatives, the very introduction of standard contractual terms (and the

requirement to accept them for the purposes of the cab rank rule) drove a significant change in the practices of the profession, which led to a period of considerable logistical challenges for the profession and lengthy negotiations with solicitors. However, it is clear that the use of contracts is now becoming the norm.

25. Respondents to the call for evidence identified a number of different bases of contractual instruction (albeit that instructing on a non-contractual basis also remains common practice in some chambers). The key bases of instruction appear to be:

- The standard contractual terms (although it may not be unusual for specific terms to be varied, e.g. relating to payment);
- Terms negotiated by COMBAR and the City of London Law Society (the “COMBAR terms”);
- Chambers’ bespoke terms;
- Solicitors’ own terms; and
- In some CFA cases, terms agreed by the Association of Personal Injury Lawyers and the PIBA.

Are there “reasonable” alternatives to the standard contractual terms being offered in the market?

26. There are differences of view as to whether some of the alternative terms available are reasonable. The COMBAR terms in particular attracted significant comment. COMBAR itself notes that these terms were intended for commercial cases and may not be reasonable in all situations. The “COMBAR basis B” terms, which are the most commonly used, are controversial (although not universally so) because they provide that the solicitor does not accept liability for the barrister’s fees. Whether or not that is reasonable will depend on the barristers’ own circumstances and whether there is a risk of non-payment.

27. Some concerns were expressed in the call for evidence that solicitors firms may be exerting undue pressure on the Bar or were seeking to enforce terms that were contrary to the barristers’ regulatory duties. For example, it was suggested that it would be a breach of the barrister’s regulatory duties for a barrister to agree to contractual terms in which barristers assumed a contractual liability to solicitors in excess of that permitted by the Bar Mutual Indemnity Fund’s insurance terms. That is in fact a misconception, as further explained below. The BSB will continue to monitor the impact that contractual terms have on the market for legal services and will liaise with the SRA as appropriate, if solicitors are behaving in ways that are anti-competitive, pose a risk to the regulatory objectives or breach their own conduct rules, but for the purposes of this consultation the BSB is only concerned with the impact that negotiation of business terms between barristers and solicitors may have on the cab rank rule.

The operation of the cab rank rule in practice

28. It is clear from responses to the call for evidence and survey that it is rare for solicitors to have to avail themselves of the cab rank rule in order to obtain

representation for their clients (however, there was no evidence that the standard terms themselves were acting as a disincentive to do so). Suggested reasons why specific reliance on the rule is rare included:

- Barristers are voluntarily applying the cab rank rule (the rule itself would only ever need to be relied on by solicitors if there was a dispute about whether a barrister would agree to act);
- Market forces (both that there is a good supply of barristers and that they will have a commercial self-interest in accepting work) are likely to be a significant factor in barristers' willingness to accept instructions; and
- Solicitors would not consider it to be helpful for their client to force a barrister to accept a case they did not want to undertake.

29. It was suggested that the real value of the cab rank rule was as a general professional principle that guided the decisions of barristers. One respondent noted: "the rule does not need to be "invoked" to be effective: it underpins the basis on which every barrister should decide whether or not to accept a case". This was supported by the quantitative data in the survey, which showed that although the instances where barristers had been required to accept instructions because of the rule were rare, it was much more common for a barrister to accept cases they might not otherwise want because of the existence of the cab rank rule. The Law Society disagreed – whilst acknowledging the "background cultural ethos" that it engendered, it felt it would make a difference only in a very small number of cases (noting that there are no examples of people with properly arguable, funded cases being unable to access a solicitor).

Other Issues Raised

30. It was noted by a number of respondents that the current protections for barristers, outlined via exceptions to the cab rank rule, should be maintained in order to avoid exposing the profession to unreasonable risks. The Law Society agreed that the cab rank rule cannot be unlimited in its effect and that barristers should not be forced to accept work for inadequate fees, if they are too busy or if the terms of the contract are unfair. However, it states that just as the BSB does not set detailed fee levels or detailed criteria about what amounts to being too busy, so it should not prescribe in detail the contractual terms on which the cab rank rule should depend (such as, for example, the length of time in which the barrister should be paid).
31. The BSB is not proposing, at present, to review rule C30.7.a, which provides an exemption from the cab rank rule where the professional client does not accept liability for the barrister's fees. This exemption applies independently of any other and whatever terms of work a barrister routinely offers, the cab rank rule will not apply unless the professional client accepts responsibility for the barrister's fees.

Standard terms: Options considered by the BSB

32. The BSB remains of the view that it would not be proportionate to require barristers to accept instructions under the cab rank rule irrespective of the terms on which they

are offered. It has considered whether developments in the market and the general adoption of contractual terms across the profession mean that there is no longer a regulatory need for the exception to the cab rank rule to be based, in part, on standard terms specified by the BSB. Instead the exception could be for instructions whose terms were not reasonable. Standard terms could still be published by the Bar Council, Specialist Bar Associations, individual chambers or others, as has happened in any event, and would be relevant to consideration of whether proposed terms were reasonable; however, the decision about what are reasonable terms would depend on the circumstances and a “one size fits all” approach would no longer apply.

33. In any case, the BSB considers that certain protections must remain, such as entitling a barrister to refuse instructions where their perception of the creditworthiness of the client means they would be exposing themselves to an unacceptable business risk by accepting the case.
34. The BSB has identified a number of options for consideration in relation to the terms on which instructions are offered. These would involve amending the exemption to the cab rank rule at rC30.9.c. These are presented as a number of options, each with a number of advantages and disadvantages. The BSB at present has no preferred option and welcomes views on the practical implications of each. In relation to alternative version 3 below, the BSB’s provisional view is that it would be disproportionate to restrict barristers’ freedom to contract in addition to the cab rank rule itself to the extent that this would entail if there are other less onerous ways of achieving the required regulatory outcome (and that the other variants appear to provide such alternatives). We welcome views on the feasibility of this option nevertheless.

The status quo

“[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 as published on the Bar Council’s website; or (B) if you publish standard terms of work, on those standard terms of work”

35. The BSB does not consider that it should continue to endorse generic standard contractual terms unless it is demonstrably necessary to ensure the adequate functioning of the cab rank rule. However, the benefits of maintaining the status quo include certainty for the barrister and solicitor and the continuation of a policy that has worked well since the introduction of the standard terms. Whilst the certainty provided by this approach restricts the freedom to contract of the barrister, they have the safeguard that the terms have been developed as a result of negotiations involving the Bar Council as their representative body and have been the subject of consultation so can generally be considered reasonable terms for the Bar to be required to accept. As a result this approach means that a bright line exists – if a solicitor requires a barrister to accept work urgently then the barrister must do so immediately, without the need to consider whether the terms are reasonable (assuming no other exception to the cab rank rule applies).

36. The disadvantages are that solicitors (or other professional clients) may be obliged to accept terms that they would not have chosen in order to take advantage of the cab rank rule for their clients. It would also mean that other terms, although entirely reasonable and in general use, would not attract for clients the benefits of the cab rank rule (unless adopted by a barrister as their own published standard terms).
37. If it is considered valuable in principle to maintain the generic standard terms as a “trump” card to ensure the barrister will act under the cab rank rule (either in the context of the status quo or alternative 1, below) then the next question is whether there is evidence of any particular difficulties having arisen from the operation of the generic standard terms in their current form.
38. Objections to the generic standard terms from solicitors appear (judging from consultation responses and the survey) to have focused on two points. The first is that the generic standard terms commit solicitors to liability for the barrister’s fees (and for those to be paid within 3 months). Liability for the barrister’s fees is in any event currently one of the conditions before the cab rank rule will apply (rule C30.7.a). It therefore does not appear unreasonable that this should be included as a term in the generic standard terms which, if acceptable to the solicitor, would then trigger the application of the cab rank rule and oblige the barrister to act unless any other exemption applies. In relation to the period of time in which fees should be paid, the BSB has previously taken the view that it is reasonable for a barrister to expect reasonably prompt payment in circumstances where (a) the solicitor has in any event accepted liability for the barrister’s fees, and (b) the barrister is being obliged to act by virtue of the cab rank rule.
39. Secondly, as touched on above, it appears that in some cases solicitors would prefer barristers to agree to contractual terms in which barristers assumed a contractual liability to solicitors, which is specifically excluded by the standard terms.
40. It is necessary to be clear about what type of liability is under discussion here. We are not concerned with terms defining the barrister’s duty towards consumers or the liability they may incur towards consumers as a result of a breach of duty by the barrister in providing their services. Nor are we concerned with situations where a solicitor seeks contribution from a barrister in circumstances where they are both liable to the consumer for the same loss. Rather, we are concerned with terms put forward on behalf of solicitors to protect their own business interests by seeking to impose on the barrister contractual liability for losses the solicitor himself may suffer (for example, a consequential loss of profit if a client withdraws their work from the solicitor as a result of a lapse in competent service on the part of the barrister). The BMIF excludes such liability, save where incurred under a contract whose terms the BMIF have approved, one example of which is the COMBAR terms allowing for such liability up to a maximum of £100,000. It follows that this is a matter which is not in any way concerned with indemnifying consumers for loss they may suffer as a result of shortcomings in a barrister’s services. Rather, it is concerned with allocation of risk, as between barristers and solicitors, for losses that solicitors themselves may suffer.

41. The BSB's rules do not seek to regulate contractual liability towards solicitors, as distinct from ensuring consumer protection and adequate insurance cover for the liabilities which barristers may incur towards consumers. In either case, the enforceability of any limits on liability is a matter dealt with by the general law.
42. In regulatory terms, if one leaves to one side for the moment the issue of the cab rank rule, the question of whether the barrister is to assume any contractual liability towards the solicitor in order to protect the solicitor's own business interests, as distinct from the interests of the consumer, is in principle a matter to be left to the parties. Equally it is a matter for barristers whether to seek cover for any such liability that they might incur and a matter for insurers to decide whether to provide such cover. It is therefore mistaken to suggest (see discussion of the survey responses at paragraph 27 above) that it would be misconduct for a barrister to agree to incur liability towards a solicitor that went beyond the limit which the BMIF currently insure. It is open to them to agree to do so (whether it would be commercially wise is another matter). As between commercial parties contracting freely with one another, those judgments are for them to make.
43. However, when one instead comes to ask in what circumstances a barrister can be obliged to act by the operation of the cab rank rule, the regulatory question becomes whether it is unreasonable, in that context, for the generic standard terms to exclude liability, as between the two professional parties involved. In other words, in order for the "trump" card to be played in the interests of the client, thereby triggering the cab rank rule, the solicitor must be prepared to accept the absence of liability to the firm, as distinct from the client.
44. The BSB invites comments on this particular issue, on whether there are any other difficulties with the generic standard terms in their current form and, more generally, on whether it is in the public interest to retain the generic standard terms as a "trump" card which is always available to be resorted to in order to trigger the operation of the cab rank rule.

Alternative version 1

"[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 as published on the Bar Council's website; or (B) if you publish standard terms of work, on those standard terms of work; or (C) such other terms as you may reasonably propose for the given instructions"

45. This proposal addresses the fact that it might not be reasonable for barristers to publish standard terms that they will accept for all work, because they may expect some flexibility around what terms to propose for a given case – for example, they may be willing to accept COMBAR terms for a commercial case but would expect something different for a criminal or family matter. This addition would give clients three routes to benefit from the cab rank rule but would seek further to preserve barristers' freedom to contract. So the professional client could instruct on the basis of either the generic standard terms or the barrister's own terms (if either were

acceptable) or invite the barrister to propose alternative terms given the circumstances of the case in hand.

46. In this scenario where a barrister seeks to propose terms that are unreasonable or unacceptable to the solicitor and they do not publish their own standard terms they can still be required to work on the generic standard terms. In this case the generic standard terms could act as a safeguard against barristers using unreasonable terms to avoid the obligation, but with greater flexibility and freedom to contract than the status quo. As with the status quo, it ensures that the professional client can always trigger the cab rank obligation regardless of what terms the barrister may have proposed.
47. Neither this option nor the others outlined below would preclude a barrister from adopting the terms drafted by others (such as the specialist Bar associations) rather than drafting their own.
48. When the current rules were adopted it was felt to be desirable to supply a clear bright line enabling rapid decision-making as to whether there was an obligation to accept instructions, which was achieved by tying the operation of the cab rank rule to the generic standard terms and any standard terms published by the barrister. However, the evidence shows that circumstances where such a decision needs to be made quickly are in fact quite rare. Introducing as a third alternative, any terms reasonably proposed by the barrister adds flexibility as to the routes by which a client can benefit from the operation of the cab rank rule. However it also introduces an element of judgment as to whether what is proposed is reasonable and hence the potential for uncertainty about the operation of the rule. Judgments about whether terms are reasonable are potentially more complex than judgments as to the reasonableness of the fee. We welcome views on whether this addition would better protect the public interest in the operation of the cab rank rule or whether it would create practical difficulties.

Alternative version 2

“[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) if you publish standard terms of work, on those standard terms of work; or (B) such other terms as you may reasonably propose for the given instructions”

49. This version removes the generic standard terms from the Handbook rule and hence deprives the client of the ability to rely on those terms in the absence of agreement (a barrister would be free, but could not be obliged, to adopt those as standard terms in any event). However, it seeks to preserve the barrister’s freedom to contract because it would prevent solicitors from imposing, without the barrister’s agreement, terms that may differ from any terms that the barrister may reasonably propose. If the barrister does not publish standard terms then the safeguard would be the risk of regulatory action if the barrister did not propose reasonable terms to the solicitor (this could also be the case under alternative version 1 if the solicitor rejected the generic terms or the barrister’s own terms).

50. The question of what would amount to reasonable terms would (as in version 1) depend on the circumstances (and would only be a matter for the regulator in the event of a complaint for breach of the cab rank rule). However, this version of the rule could be supplemented by additional guidance. Guidance could explain that “reasonable” in this context includes advertised terms or other terms on which the barrister has recently undertaken similar work. Those terms will necessarily have been regarded as reasonable at the time by both parties. If the barrister attempted to refuse the instructions on terms on which he or she had accepted other work, the onus would be on them to show that the circumstances were sufficiently different to justify a refusal.

Alternative version 3

“[The cab rank rule does not apply if] accepting the instructions would require you to act other than on (A) if you publish standard terms of work, on those standard terms of work; or (B) such other terms as you may reasonably propose for the given instructions and which the professional client is willing to accept; or (C) such alternative terms as the professional client may reasonably propose for the given instructions if unwilling to accept (A) or (B)”

51. This option introduces greater flexibility by enabling the solicitor to suggest reasonable terms and thereby trigger the operation of the cab rank rule. This approach has been considered by the BSB before. It has the advantage of simplicity, and of not prescribing any content for such terms, other than that they be reasonable.

52. However, this option imposes yet greater restrictions on the barrister’s freedom to contract, beyond those already involved in the cab rank rule. In practice, this would mean that a barrister who had adopted their own perfectly reasonable terms could find those trumped by a solicitor who had different, but also reasonable, terms. Reasonable parties may reasonably disagree with one another as to the terms on which they prefer to provide their services. The effect of this change to the rule would be that, in the event of such disagreement, the barrister would be obliged to accept the solicitor’s (reasonable) terms in preference to his or her own.

53. In the case of a dispute, the solicitor would have the option to complain to the BSB on the grounds that a barrister had refused their offer of reasonable terms. The BSB would find itself adjudicating on whether terms proposed by solicitors were or were not reasonable, which solicitors themselves may find objectionable. Barristers’ ability to operate in the marketplace on the basis of their own (reasonable) preferred terms would be undermined. As in the case of versions 1 and 2, introducing the concept of reasonableness into the equation means that there is no longer the bright line that the current arrangements were intended to establish.

54. The BSB notes the Law Society’s suggested alternative approach that rather than prescribing specific detailed terms, the BSB Handbook should permit barristers to refuse work if the terms of work:

- Are non-contractual;

- Impose inappropriate or unreasonable obligations on the barrister; or
- Provide unusual or wholly unreasonable commercial provisions.

55. Such a test would similarly require a barrister to make a judgment about whether the terms offered are reasonable and appropriate (and would in turn require the regulator to make that judgment in the event of a dispute). It is a variant of alternative 3, and raises the same issues, because a barrister could not prefer their own (reasonable) terms to any (reasonable) terms proposed by a solicitor, meeting the Law Society's criteria.

Question 1: What are your views on how these options would work in practice and what their impact on the effectiveness of the cab rank rule would be?

Question 2: Do you have a preference and why?

Question 3: If the generic standard terms were retained, are there any elements that are unnecessary or unreasonable?

List of Defaulting Solicitors

56. The call for evidence did not ask about the list of defaulting solicitors, and no respondents commented on whether it had any practical impact on the cab rank rule. Given the limited circumstances in which the cab rank rule is invoked by solicitors, it is unlikely that many barristers have relied on the list to refuse work under the rule. The rationale for including the list in the BSB's regulatory arrangements is that it is unfair to oblige a barrister to accept an unacceptable credit risk by the operation of the cab rank rule that they would otherwise have the commercial freedom to avoid. It is not suggested that this principle (that barristers should be protected from undue credit risks when obliged to act under the cab rank rule) should be altered, as it would undermine the Bar's freedom to compete in the marketplace (and those worst affected would likely be those practitioners from the least advantaged backgrounds, which might impact negatively on the regulatory objective to promote an independent, strong, diverse and effective profession).
57. The list of defaulting solicitors is one but only one source of evidence of potentially high credit risk. The BSB is considering amending the exceptions to the cab rank rule to allow barristers to refuse instructions if they have formed the reasonable opinion that that the solicitor or other professional client is an unacceptable credit risk. There would then be no need to refer to the list of defaulting solicitors in our regulatory arrangements. The list is maintained by the Bar Council and the BSB has no involvement. If reference to the list is removed from the BSB Handbook, the Bar Council could continue to offer the service, albeit for regulatory purposes the list would become just one possible indication of a possible credit risk – the barrister would have to make his or her own decision on a case by case basis.
58. For the avoidance of doubt, and as discussed above, we do not propose at the moment to remove the exemption from the cab rank rule where the professional client does not accept responsibility for the barrister's fee – so the credit worthiness of the solicitor (rather than the lay client) remains a key component of the decision.

Proposed alternative exemption

“[The cab rank rule does not apply if the professional client] represents, in your reasonable opinion, an unacceptable credit risk”

Question 4: Do you agree that there should be an exception to the cab rank rule if the barrister has formed the reasonable opinion that the professional client is an unacceptable credit risk and that there should be no reference in the rule to the List of Defaulting Solicitors?

Question 5: If there was an exception for unacceptable credit risk, do you have any views as to whether this would risk undermining the cab rank rule by adding to the grounds on which instructions could be refused?

The cab rank rule: the future

59. This review of just two of the exceptions to the cab rank rule has underlined how detailed and specific they are. The changes discussed above may lead to a less prescriptive approach in relation to the particular subject matter of this consultation but they also prompt the broader question whether such a prescriptive approach remains the most effective means to secure the objectives behind the rule. The proliferation of exemptions to the rule in its current form can seem to detract from the central importance of the cab rank principle itself. As already explained, the BSB will be looking at the cab rank rule as part of its review of the new Handbook. In that context, we will explore whether a new approach to the cab rank rule may be appropriate. Elsewhere in the Handbook, the BSB has sought to be increasingly less prescriptive and more outcomes focused. The BSB’s overriding objective is to promote access by clients to legal services. To that end barristers should be positively obliged to accept work for which they are available and unconflicted, and which is within their expertise, provided that this obligation is reconciled with their legitimate commercial interest in being paid for their work and being able to negotiate reasonable terms for that work. The rule might perhaps more closely reflect this objective and be drafted in a way that better reflects the reality, reflected in answers to the survey, of the practical operation of the cab rank rule today (i.e. as a core principle to be upheld rather than a rule with detailed, prescriptive exemptions). Such a new approach would need careful development but any initial views at this stage would be welcome.

Question 6: Do you have any views on how the BSB could present the cab rank rule in a more principles-based way and whether this would negatively impact the effectiveness of the cab rank rule / principle?

Summary of Questions

- Question 1: What are your views on how these options would work in practice and what their impact on the effectiveness of the cab rank rule would be?*
- Question 2: Do you have a preference and why?*
- Question 3: If the generic standard terms were retained, are there any elements that are unnecessary or unreasonable?*
- Question 4: Do you agree that there should be an exception to the cab rank rule if the barrister has formed the reasonable opinion that the professional client is an unacceptable credit risk and that there should be no reference in the rule to the List of Defaulting Solicitors?*
- Question 5: If there was an exception for unacceptable credit risk, do you have any views as to whether this would risk undermining the cab rank rule by adding to the grounds on which instructions could be refused?*
- Question 6: Do you have any views on how the BSB could present the cab rank rule in a more principles-based way and whether this would negatively impact the effectiveness of the cab rank rule / principle?*

Responding to This Consultation

60. Responses to this consultation should be sent to the Regulatory Policy Department at the BSB, at regulatorypolicy@barstandardsboard.org.uk
61. Responses should be received no later than **Friday 19 June 2015**.