**Review of standard contractual terms and the cab rank rule: summary of call for evidence**

How has the market changed since the standard terms were introduced?

1. 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 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, as the ChBA has pointed out, a number of the problems encountered have "settled down" now. The resulting change has arguably been beneficial for clients, with the impact that the majority of chambers now contract on a more transparent basis. It is clear, however, that the profession would find the introduction of new or substantially different terms to be problematic in the absence any overwhelming reason to do so.

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

    a. The Standard contractual terms (although some stated it was not unusual for specific terms to be varied, eg relating to payment);
    b. The terms negotiated by COMBAR and the City of London Law Society (the "COMBAR terms");
    c. Chambers' bespoke terms;
    d. Solicitors' own terms;
    e. In some CFA cases, terms agreed by the Association of Personal Injury Lawyers and the PIBA.

3. The Biennial Survey of Barristers Working Lives (published June 2014) to which the Bar Council referred in its response, indicated that the Standard contractual terms were the most often accepted (60% of respondents) with one in nine using COMBAR terms, one in five using non-contractual terms and 9% using others. Barristers working as sole practitioners or with dual roles were most likely to indicate other contractual terms. Barristers working in criminal[1] and family practice were most likely to use the standard terms and barristers working in commercial and chancery practice were most likely to use COMBAR or non-contractual terms.

4. The Bar Council conducted a further survey of the terms set out on 173 chambers websites, of which a very large majority offered the standard contractual terms and a minority offered either COMBAR terms or both. A small number offered other contractual terms or the old non-contractual terms (in the latter case the number seemed to be significantly lower than in the Biennial Survey).

Are there "reasonable" alternatives to the standard contractual terms?

5. There were differences of view as to whether some of the alternative terms available were 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

[1] Although in publicly funded criminal cases instructions are likely to be accepted on the terms used by the Community Legal Service, the Criminal Defence Service or the Crown Prosecution Service.

does not accept liability for the barrister's fees. COMBAR noted that if there was a risk of non-payment then it could be unreasonable to require a barrister to act on those terms. Some noted that the "COMBAR Basis B" terms were becoming by default the standard terms on which large city solicitors firms instruct the Bar. The IBC suggested that the "threat" not to instruct the Bar unless on those terms might be an "abuse" and that behaving in such a way might be a conflict of interest on the part of the law firms (the IBC did not specify why it was a conflict, but it is assumed that the conflict would be between the firm's commercial concerns and their clients' best interests). It should be noted of course that firms of solicitors regulated by the SRA are subject to their own regulatory obligations and could be subject to regulatory action if they were shown not to be acting in their clients' best interests.

6. The IBC raised further concerns about the nature of the terms that solicitors were seeking to impose on barristers:

   a. It was suggested that certain terms might be contrary to barristers' professional obligations, such as the duty to keep information confidential (examples being a requirement to disclose whether they have acted for any party in a litigation, or what cases they have been involved in that may be contrary to the position the client takes in the new instructions);
   b. There were concerns about lack of transparency to clients (for example if a barrister refused instructions due to unreasonable terms being imposed by the solicitor, the client would be unaware of the reason they had not received the relevant representation);
   c. There were also concerns (raised by others also) that solicitors' suggested terms were seeking to impose a level of contractual liability in excess of the level covered by BMIF (see below for more information).

7. PIBA also claimed that onerous terms were frequently encountered in solicitors' suggested contractual terms.

8. The Law Society noted that solicitors generally did not feel that they were being required to accept unreasonable terms, although they noted that solicitors would often seek to alter the standard terms (and indeed the Law Society has published guidance for solicitors suggesting some standard amendments to the terms, albeit as PIBA noted the organisations representing the Bar do not necessarily agree with those). In response to the suggestion that solicitors might impose unreasonable terms, the Law Society noted that solicitors themselves are subject to regulatory duties. Whilst a normal (and robust) level of negotiation is to be expected between barristers and solicitors, this was unlikely to be contrary to the solicitors' professional duties.

<u>The impact of the standard terms on the cab-rank rule</u>

9. 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 get 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:

   a. 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);
   b. 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;

c. 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.

10. It was suggested that the real value of the cab rank rule was as a general professional principle that guided the decisions of barristers. As COMBAR stated: "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 under the rule were rare, it was much more common for a barrister to accept cases they might not otherwise want to because of the existence of the cab rank rule. The Law Society disagreed – whilst acknowledging the "background cultural ethos" 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). The Bar Council suggested that cab rank rule issues were resolved voluntarily in the vast majority of cases (in the rare cases where a barrister did not want to accept a case from a particular client they would either self-enforce the cab rank rule or clerks would negotiate with the client and the client would voluntarily instruct another barrister).

11. The call for evidence highlighted a problem with the cab rank rule as drafted that was separate from the standard terms. There appears to be some confusion between rule rC30.7.a (the cab rank rule does not apply where the professional client does not accept responsibility for fees) and the requirement to apply the cab rank rule where requested on the barrister's own published terms (ie does the cab rank rule apply if the barrister's own published terms do not require the professional client to accept such a responsibility?). This might be a matter for additional guidance, although the response may depend on the options considered below.

<u>Other issues raised in the call for evidence</u>

12. One issue that arose in the responses to the call for evidence was the interaction between contractual liability between the barrister and professional client and professional indemnity insurance. The Standard Contractual Terms exclude contractual liability between the barrister and the professional client. COMBAR adopts a different approach that limits liability to claims in tort and if that gives rise to a liability to the professional client, liability is limited to £100,000. This was said to be important because the BMIF terms of cover only provide contractual cover up to £100,000 (this is separate from any liability to the lay client, which will be determined by the standard BMIF limit of cover of £0.5-2.5 million, plus any top up cover). For this reason it is suggested by PIBA that barristers should not deviate from the Standard terms or COMBAR terms without the approval of BMIF (whose terms of cover permits them to exclude contractual cover unless on contracts approved by them). It is suggested by respondents that this is not usually understood by those negotiating contracts (and solicitors may attempt to insert more onerous contractual liability clauses, although BMIF has published guidance for its members on this point). We will discuss these matters further with BMIF in the course of the consultation, but this is thought initially to be a matter for barristers to resolve with their insurers rather than a matter for the BSB's regulatory rules.

13. It was also 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).

14. The Law Society's suggested alternative approach is that rather than prescribing specific detailed terms, the Handbook should permit barristers to refuse work if the terms of work:

    a. Are non-contractual;
    b. Impose inappropriate or unreasonable obligations on the barrister; or
    c. Provide unusual or wholly unreasonable commercial provisions.

15. The Bar Council did not see how a different approach in principle could be adopted, whilst at the same time maintaining both the cab rank rule and the Bar's right to be instructed on reasonable terms. Both the Bar Council and Monkton Chambers suggested that it was premature to reach any conclusions on the impact that the standard terms had had, given their relatively recent introduction.