

To:	Board	
Date of Meeting:	Circulated out of committee on 13 January 2011	Item: Paper (12) 01

Title:	BSB amendments to Cab Rank Rule	
Workstream(s):	Rule approval	
Author / Introduced by:	Fran Gillon, Director of Regulatory Practice fran.gillon@legalservicesboard.org.uk / 020 7271 0087 Paul Greening, Regulatory Associate paul.greening@legalservicesboard.org.uk / 020 7271 0075	
Status:	Confidential and subject to FOIA restrictions	

Summary:
<p>The BSB has submitted a rule change application that seeks to make two substantive changes to the way the Cab Rank Rule operates (see paragraph 2). We have significant concerns about the proposed changes in terms of proportionality and regulatory conflict (see paragraph3) and are considering whether to refuse the application on the statutory grounds set out in Schedule 4 to the Act.</p> <p>Our deadline for making a decision on this application is 23 January. If we do not make a decision, the rule change comes into force. If we are considering rejecting the application we must issue a Warning Notice before 23 January. A Warning Notice has a particular meaning under the Act and allows the LSB to seek advice to help us further assess the application and extend the decision period by up to a maximum of a further 18 months, although we would aim to reach a decision much sooner than that.</p> <p>Although the LSB's Scheme of Delegations delegates decisions in relation to handling applications for rule changes to the Chief Executive, this is the first time that the LSB will have issued a Warning Notice. The Chief Executive welcomes input from the Board before reaching his decision.</p>

Recommendation(s):
<p>The Board is invited to:</p> <ul style="list-style-type: none"> comment on the Chief Executive's initial view that we should issue a Warning Notice to the BSB in respect of its application to make alterations to the Cab Rank Rule.

Risks and mitigations	
Financial:	N/A
Legal:	<p>We need to ensure that the Warning Notice is securely based on our assessment that it is reasonable to seek more time to <i>consider</i> refusing the application on the basis of the criteria listed in Schedule 4 paragraph 25(3) to the Act. It is important to note that at this stage we are <i>not</i> making a decision to refuse. Once we subsequently come to make a final decision, if we reject the proposed rule change then there is much greater potential for legal challenge if we do not put forward convincing reasons for the conclusions arising from our assessment.</p> <p>Colleagues should also note that it would not be relevant for those reasons to be informed by views on the desirability of the Cab Rank Rule as a whole and therefore both the analysis and the draft Warning Notice quite deliberately do not deal with the issue.</p>
Reputational:	<p>Potentially high profile. This will be the first time we have issued a Warning Notice in respect of a rule change application and it will signify our preparedness to do so when appropriate. In addition, the Cab Rank Rule is considered by the BSB to be ethically important and historically significant. While this rule change does not consider the Cab Rank Rule itself, the fact that it is linked to it may cause some publicity and controversy. We will develop appropriate approach to communications.</p>
Resource:	Relevant members of senior management team; Legal Counsel and one Regulatory Associate.

Consultation	Yes	No	Who / why?
Board Members:	✓		Chairman, Barbara Saunders and David Wolfe
Consumer Panel:		✓	Not at this stage but potentially will be a consultee in the decision period if we issue a Warning Notice
Others:			

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
All of paper	Exemption FoIA s36 – these issues need to be discussed by the Board in a free and frank way	None
Annex A	Exemption FoIA s22 – the Warning Notice is intended for publication	None

LEGAL SERVICES BOARD

To:	Board	
Date of Meeting:	Circulated out of committee on 13 January 2011	Item: Paper (12) 01

BSB amendment to the Cab Rank Rule

Background /context

1. The BSB has explained that the intention of the Cab Rank Rule is to require barristers to take instruction from a solicitor regardless of the nature of the case, or the conduct, opinions, beliefs of the prospective client or if the client is being financially supported in order to guarantee that lay clients will always be able to find an advocate willing to represent them, so maintaining access to justice. The current issue is about altering the operation of the rule.
2. The BSB submitted an application on 26 October 2011 to alter the Cab Rank Rule. In order to keep this paper to a manageable size we have not attached it (the combined documentation is fairly bulky. However, the application can be viewed on the LSB website via this [link](#) or we can email the PDFs or send hard copies to you should you prefer that. There are two principle proposed alterations which the BSB considers are necessary in order to ensure that barristers have a firm basis for pursuing payment from instructing solicitors:
 - The insertion of a new paragraph (604(h)) in the Code of Conduct to provide that the Cab Rank Rule is not to apply to any work other than work under proposed binding New Contractual Terms (NCT) or on terms on which the barrister holds himself out as willing to contract. At present, in default of other arrangements, barristers are instructed by solicitors on the non-contractual basis provided for in the “Terms of Work which Barristers Offer their Services to solicitors and the Withdrawal of Credit Scheme 1988”, as set out at Annex G1 to the Code of Conduct, (“the 1988 Terms of Work”). The NCT however is will be a new basic form of legally binding contract setting out the respective responsibilities of the barrister and solicitor and applicable to privately funded work. It will be included in an Annex to the Code of Conduct. Barristers will also be able to use the NCT or offer their own standard terms. Barristers will be able to opt out of the full NCT or of their own standard terms by way of a Conditional Fee Agreement or agree additional terms and amendments but, in either case, this will stop the barrister from being bound by the Cab Rank Rule unless the NCT are incorporated into the Conditional Fee Agreement; and
 - an amendment to paragraph 604(g) of the Code of Conduct regarding the obligations of barristers to take instructions (the Cab Rank Rule) which provides that the rule is not to apply when the solicitor is named in the proposed List of Defaulting Solicitors which would replace the existing Withdrawal of Credit Scheme. The main difference is that the current

scheme can mean that all barristers are prevented from accepting instructions from the solicitor, whereas the proposed list is merely advisory and barristers have the discretion whether to accept instructions from the solicitor.

3. The table at **Annex A** summarises thematically the main questions and concerns we have and the basis in the Act upon which we are making our assessment. We have a number of concerns:
 - in a number of aspects, the changes appear inconsistent with the regulatory objectives and better regulation principles;
 - there appears to be potential regulatory conflict arising from binding contract terms that both appear to favour barristers over solicitors, but also have the effect of excluding the clients of in-house barristers and other authorised persons from the benefits of the rule. The BSB appears not to have undertaken the appropriate and targeted consultation with interested stakeholders necessary to address this; and
 - throughout the application, there is insufficient argument and evidence to justify the stance the BSB is taking in the light of these substantive concerns.

External Legal Advice

4. The justification for regulatory backing for a contract has always depended on the perceived restriction on the ability of barristers to enter into normal commercial contracts. We have sought detailed external legal advice from Hogan Lovells. This is available on request. The Board members involved to date have also asked us to seek a second opinion from Leading Counsel on the Lovells advice.
5. In summary, it is been possible for barristers to contract (unless prohibited by Bar rules) since 1990 - although they appear to need to make an explicit decision to do so to overcome a “trade custom and practice” based presumption against the existence of a contract. It is also probable that they can enforce debts on this basis, although ambiguities as to the precise balance of obligation between barrister, solicitor and client add some degree of uncertainty.
6. The BSB’s proposed contract terms cannot improve on the entitlement to contract nor can they reduce the ambiguity of the debt enforcement position. The version of their terms does not assist on the contractual relationships point. Consequently it is hard to see that the mandatory imposition of these terms adds to what could be done freely by those parties without the regulatory imposition.
7. Even were such benefits discernible, it is far from clear that it would be appropriate to secure them via a change in regulatory arrangements agreed by one body only, rather than through general agreement and/or attempts to

change the practice of barristers to bring their contractual behaviour more into line with other commercial transactions.

Next Steps

8. The Chief Executive will reach a final decision by the statutory deadline in the light of the steer that emerges from the Board's input.
9. Should we proceed with a Warning Notice, the next steps are described in the attached flow chart at **Annex B**. In addition to the formal consultation, we suggest with the OFT and both regulatory and representative arms of ARs, we would anticipate sharing our legal advice with the BSB to obtain their comments before reverting to the Board for a final decision.
10. The Board should recall that the BSB are currently at a relatively advanced stage of reviewing their entire Code of Conduct. It is possible that they will choose to pursue the debate in that context rather than pursuing the matter separately.