Bar Standards Board
289-298 High Holborn
London
WC1V 7HZ

Chris Kenny
Chief Executive
Legal Services Board
7th Floor
Victoria House
Southampton Row
London
WC1B 4AD

11th May 2012

Dear Chris,

Re: Advice from consultees: proposed changes to the operation of the Bar Standard's Board Code of Practice – the cab-rank rule

(1) introduction

1. Thank you for your letter dated 2 April 2012, and for asking us to make written representations about the advice you have received from your consultees. Our detailed comments on the consultees' responses are in the Appendix which is attached to this letter.

2. In this letter, I would like to provide a context for those detailed comments by reiterating and expanding upon the reasons why the Bar Standards Board ("the BSB") has applied for this rule change; as it appears from some of the consultees' comments, from your reasons for issuing a warning notice, and from the advice from Hogan Lovells which you have helpfully shared with us, that these may not have been understood. We apologise if we have not explained our reasoning sufficiently clearly in our dialogue with you so far.

3. I do not wish, however, to create the impression that the BSB is in any way digging its heels in. We have carefully considered all the comments, which we have found very useful in developing our own thinking. I would also like to take the opportunity in this letter to indicate the area in which, having regard to some of the consultees' comments, the BSB has decided to revise its initial position.

4. You say in your letter dated 25 January 2012, which invited the advice of consultees, that you are not seeking the advice of consultees on the desirability or otherwise of the cab-rank rule, just on the proposed changes to its operation. We welcome and fully support your acknowledgement that the cab-rank rule is not "up for grabs" but must be taken as the context for this decision. However, we must make clear that, in our view, the need for the proposed changes to the operation of the cab-rank rule cannot be separated from the rationale for that rule: the two issues are inextricably linked. The reason for this is that the proposed changes are seen by the BSB, as this profession's regulator, as a reasonable and proportionate mechanism for ensuring both that the cab-rank rule continues to work in practice, and is up-dated to reflect the role of barristers as providers of legal services in the current market.

5. The importance of, and need for, the proposed changes, is therefore directly related to the importance of, and need for, the cab-rank rule itself. This means that despite the indication in your letter of 25 January 2012 that you are not seeking advice on the desirability of the cab-rank rule, the BSB considers that it is necessary to say something about the importance of the cab-rank rule in this response.

6. At the heart of this debate, in our view, are two propositions which ought, we would suggest, to be common ground between us. The first is that there is a continuing need, in the interests of access to justice and the rule of law, for the cab-rank rule to apply to work referred to barristers by professional clients. The second is that, in the twenty-first century, and in circumstances where solicitors no longer have a professional conduct obligation to meet a barrister's fees, it is time to move on from a situation where professional clients instruct barristers on the basis of non-contractual terms of work and that the relationship should instead be put on a contractual basis; to which end we have proposed some model contractual terms (albeit the parties are always free to agree other terms if they wish). However, those two propositions then necessarily give rise to a third, that we must define in what circumstances a barrister is and is not obliged to accept any given terms and conditions, so as to be obliged under the cab-rank rule to act, as otherwise there will be uncertainty about whether and how the cab-rank applies and the effectiveness of the cab- rank rule will be undermined.

7. The particular solution we have proposed to that third issue is the one which, after careful and indeed anxious consideration, we judge to be best suited to supporting the cab-rank rule, whilst reconciling this with the parties' freedom of contract. We acknowledge that this is a difficult balance and we explain in more detail below how we approached it.

8. Given the terms of some of the consultation responses it is worth pointing out that the issue does not arise in the same way in respect of barristers who are acting on a direct access basis for lay clients, because the cab-rank rule has never applied to that work. Barristers can choose whether or not to act on a direct access, having regard to the fact that they are not permitted to take money on account of fees. As the cab-rank rule does not apply in a direct access context, it follows that there is not the same need to define terms and conditions on which, as long as the other party is prepared to accept them, a barrister is obliged to act. It is the need to cater for the interaction with the cab-rank rule which explains this difference in approach.

9. We further explain, below, the need for the cab-rank rule to be linked to terms of work, and the need for changes to the existing terms of work to bring the Bar's practices in line

with the practices of other regulated professions. The existing non-contractual terms of work, in our view, are anachronistic and cannot now be supported. The proposed contractual terms of work much better serve the demands of providing legal services in modern conditions. Our proposed solution for how the introduction of contractual terms is to be reconciled with the operation of the cab-rank rule preserves access to justice without unduly hampering freedom of contract (and hence competition) and promotes the regulatory objectives.

(2) the reasons for the BSB's application

(a) the importance of the cab-rank rule

10. The BSB's belief in the continuing importance of the cab-rank rule is a central plank of the application. The cab-rank rule is an unusual, perhaps unique, feature of the Bar's professional code of conduct. Its broad effect is that it is professional misconduct for a barrister to refuse to represent a lay client because the barrister, for example, does not want to appear to be associated with a particular client, or would prefer for commercial reasons to act for a different party. A rule of this kind is, in our view, clearly in the interests of consumers of barristers' services, and an essential adjunct of access to justice. These are both regulatory objectives. It also, plainly, protects and promotes the public interest, and supports the rule of law. Those, too, are regulatory objectives.

11. If there were no cab-rank rule, there would be a risk that certain lay clients might find that they could not get represented, either by any, or by a full range of, professional advocates. It is not difficult to imagine lay clients who, if there were no cab-rank rule, many barristers would be reluctant, or would refuse, to represent; for example those accused of repugnant crimes, those with revolting political views, those of questionable morals, or those with an arguable, but wholly unattractive, case. The effect of the cab-rank rule, however, is that barristers cannot choose their clients. On the contrary, all lay clients have equal access to the bar; each lay client has a full range of choice of advocate, whatever the nature of his or her case.

12. We therefore believe that the cab-rank rule is fundamental to the provision of legal services by the independent bar. We also believe that such a rule must be in the code of conduct and that breach of such a rule must constitute professional misconduct. This promotes three desirable outcomes. First, it ensures that sanctions are available to punish those who break the rule. Second, the existence of this rule of conduct, and of sanctions for its breach, reinforce the importance, for the profession as a whole, of adherence to this essential and basic rule. Third, the public, who may wish to become lay clients of an independent barrister, know exactly where they stand, and can be confident that, whoever they are, and whatever the nature of their case, they have full access to the bar, and thus, access to justice. In this way the rule is consistent with, and, indeed, actively promotes, four of the regulatory objectives: the interests of consumers, access to justice, the rule of law, and the public interest.

(b) necessary limits to the absolute nature of the cab-rank rule

13. It follows that it is essential, in our view, that the cab-rank rule continues to be a rule of conduct so as to ensure equal access to the independent bar for all lay clients, whatever their characteristics, and whatever proper arguments they wish to advance in court.

14. However, it is now no longer the case that solicitors have a professional conduct obligation to meet barristers' fees and it is high time that the services that solicitors (and other professional clients) procure from the Bar were put on a clear contractual footing. We imagine that you would readily agree that, while the cab-rank rule remains an essential rule of conduct for barristers, it is not reasonable to expect barristers in independent practice to be obliged to act with no contractual right to be paid for their services or definition of when they are entitled to be paid. As it is, non-payment of fees ranks high among the reasons given for leaving the self–employed Bar and we know that disproportionate numbers of those who do leave are women. We are sure that you would accept that it would not be reasonable for the code of conduct to require that all barristers accept instructions from professional clients to represent lay clients, even if the professional client (who has the ability to get money from the lay client on account of fees) accepts no obligation to meet the fees or otherwise proposes unreasonable terms. If there were such an absolute cab-rank rule, those who would most be likely to suffer, and as a consequence leave the profession, would be those practitioners from least advantaged backgrounds who could not afford such credit risks. That, we are sure you would be the first to agree, would not support a diverse and meritocratic profession, would not be in the interests of consumers, and would not promote access to justice.

15. It is therefore both reasonable, and consistent with the regulatory objectives, for the cab-rank rule to be subject to some restrictions. One such existing restriction is that the client should agree to pay a proper fee for the work. We are sure it will not be suggested that such a limitation on the absolute nature of the cab-rank rule could be contentious. No other regulated professionals are expected, under their rules of conduct, to work for clients for no remuneration or for whatever figure the other party may choose to name. However, it is equally fundamental that the barrister should have some means of recovering the agreed fee, should it not be paid.

(c) the function of contractual terms of work

16. Once it is accepted that it is reasonable and in accordance with the regulatory objectives for there to be some limitations such as these on the absolute nature of the cab-rank rule, the question becomes what limits are necessary, reasonable, and in accordance with the regulatory objectives. That brings us to the second aspect of the BSB's application, which relates to the contractual terms of work.

17. In this context, as what is at issue is a proposed rule change, the BSB has been very alive to the principles of better regulation. The proposed changes are a package, each aspect of which is related to the other. The BSB believes that this rule change, one effect of which is to sweep away the withdrawal of credit scheme (a cumbersome and outdated process for reporting, and 'blacklisting' defaulting solicitors) is consistent with, and very much supports, the aim of better regulation. One of the aims of the rule change is to replace this mechanism with a considerably more proportionate, and 'light-touch', advisory list of defaulting solicitors, which will mean that it is no longer a breach of the code of conduct for a barrister to work on credit for a defaulting solicitor. Instead, the individual barrister will have the choice to accept instructions on credit from such a solicitor, or not, as he or she sees fit. There has been no disagreement with this proposed change in the responses to the LSB's consultation.

18. May I, at this stage, also refer to an apparent misunderstanding which may underlie some of the comments in Annex A to your letter of 12 January, and some of the analysis

in the advice from Hogan Lovells. Both of these suggest that you and Hogan Lovells consider that the contractual terms of work will be imposed on all barristers as a matter of conduct, and thus, indirectly, on all solicitors. This is not the position. It is crucial that this aspect of the rule change is understood.

19. Under the proposed change, the new contractual terms of work are not imposed by the code of conduct. Barristers and solicitors are free, under the general law, and will be free, under the proposed changes to the code of conduct, to agree whatever terms they like. The changes to the code of conduct do not purport to usurp the parties' freedom of contract. The BSB of course accepts that that would be a disproportionate and unnecessary interference with the parties' freedom of contract to impose terms on solicitors and barristers. But this is not the effect of the proposed change. At an earlier stage, the BSB did consider whether, in the absence of agreed alternative terms of business, the proposed terms should then act as default terms. But, in the light of responses to the consultation, it decided that this would not be appropriate and, as our application made clear, this proposal is not being pursued.

20. The position, rather, is that the change seeks to establish baseline model contractual terms, which the BSB considers are a reasonable corollary of the cab-rank rule. In other words, the contractual terms of work are terms under which, in the BSB's considered view, it is reasonable to require barristers to be prepared to work and which will therefore, if accepted, place the barrister under the obligations of the cab-rank rule. The same will likewise apply to any other terms the barrister has published as standard terms on which he or she is willing to contract. Again, if the solicitor is willing to accept these, the barrister will be obliged under the cab-rank rule to act. The acceptance of one or other of these sets of terms is, in effect, quid pro quo for the cab-rank rule. If, however, a solicitor seeks to agree, as he is wholly free to do, different terms with the barrister, that barrister is not obliged by the cab-rank rule to accept the instructions.

21. If work is not offered on the new contractual terms, or on any other standard terms published by the barrister, the barrister is free to accept, or refuse the instructions, just as any other professional would be. If however, an agreement based on the new contractual terms, or on the barrister's own standard terms, is offered, the barrister will be obliged by the code of conduct (i.e. the cab-rank rule, which will apply to the contractual terms of work) to accept the instructions. The essence of the change, therefore, is simply to up-date the content of the cab-rank rule by attaching the obligations it imposes to what the BSB considers, in the modern world, is a reasonable, transparent, and simple, set of terms and conditions. In other words, the cab-rank rule is to be reformed, by attaching the obligations it imposes to a modern contract, which barristers can enforce. This will supersede the non-contractual terms of work, which are anomalous and old-fashioned, and no longer serve the regulatory objectives.

(d) the development of the current, non-contractual terms of work

22. The current structure of the cab-rank rule is a consequence of, and reflects, the quaint history of the Bar's relationship with their professional clients, solicitors. Historically, barristers could not make contracts with solicitors, and, it followed, were not able to sue for their fees. This exposed barristers to the risks that their fees would not be paid at all, or would be paid very late, or would not be paid in full. That anomalous rule of law was reversed by statute in 1991, when section 61 of the Courts and Legal Services Act 1990 came into force. There can be no real doubt that from then on barristers were permitted

to contract. Hogan Lovells appear, at times, to accept this in their advice, although they express themselves inconsistently at various points (compare paragraphs 4.20, 8.3 and 8.9 of that advice).

23. In practice, barristers typically have not sought to put their services on a contractual footing, despite the fact that since 2001, Annex G2 has provided contractual terms which it was open to a barrister and solicitor to agree in writing. The code of conduct (as it stands unless and until the proposed changes are approved) expressly provides that, if barristers do enter into any form of contract, the cab-rank rule does not apply (see rule 604(g)). There are broadly two reasons why despite their freedom to make contracts with solicitors, barristers did not and do not do so.

24. The first is that they were protected from the risks of non-payment, late payment and inadequate payment by the fact that for many years it was a breach of their own code of conduct for solicitors not to pay the fees of the barristers they instructed. That rule, however, was removed from the solicitors' code of conduct when the Solicitors' Code of Conduct replaced the Professional Conduct of Solicitors with effect from 1 July 2007.

25. The second is that the non-contractual terms of work, which apply once a barrister has accepted instructions, reflect what was thought, at the time they were drafted, to be the basic minimum terms on which it was reasonable for a barrister to accept instructions. Because they are expressly non-contractual, a barrister who did, or does, work on those terms expressly does not enter into a contract with a solicitor, and is not entitled to sue for any fee. In order to mitigate, but not wholly to overcome, the risks of non-payment, the current terms of work include a mechanism which enables a barrister who has not been paid to report the defaulting solicitor to the Bar Council. Solicitors who repeatedly default without a proper excuse will ultimately be put on a list of defaulting solicitors. A consequence of this is that it is a breach of the code of conduct for any member of the bar to agree to do work for those solicitors unless the fees for that work are paid in advance. The non-contractual terms of work, are, in effect, the terms on which most barristers work for solicitors, despite the fact that it has been open to barristers to make contracts with solicitors since 1991 and despite the existence of Annex G2.

26. As things stand then, under the code of conduct currently, the normal position is that non-contractual terms of work are the terms on which most barristers work for solicitors. But there are three linked defects with the current non-contractual terms.

27. The first is that they are non-contractual, with the consequence that barristers who undertake work on those terms are unable to sue for their fees. This, I am sure you will agree, is an indefensible anachronism in the twenty-first century, and is not a sensible basis for the instruction of one group of professionals by another. None of those consulted by the LSB has challenged the need for this to change.

28. The second, which flows from the first, is that, in the current code of conduct, the terms of work are linked to the withdrawal of credit scheme, a process of reporting non-paying solicitors, which can culminate in the 'blacklisting' of such solicitors. If a firm appears on the Bar Council's list of defaulting solicitors, it is a breach of the code of conduct for any member of the Bar to do work for that firm on credit. This process is cumbersome and time-consuming. It is a less effective mechanism for the recovery of fees properly due to an individual barrister than a court claim for debt would be. It is also less targeted. Moreover, the non-payment of the fees of a few barristers can have the consequence

that the bar as a whole is prevented by a rule of conduct from exercising the choice to do work on credit for a blacklisted firm, in circumstances where a barrister might wish, with full knowledge of the firm's poor payment history, to extend credit to that firm. That is arguably a disproportionate consequence of the operation of the rule, as the Law Society recognise in their letter of advice.

29. The third is that, ever since it ceased to be a breach of a solicitor's own code of conduct for him or her not to pay the fees owed to a barrister, the inadequacies of the Bar Council's system for reporting defaulting solicitors as a means of enabling barristers to recover their fees have become more and more glaring. This, in turn, means that barristers need to find a better mechanism for enforcing payment of fees which are due but unpaid. Non-payment and late payment of fees properly due to barristers for work done are major reasons why young barristers leave the Bar[1]. Women were disproportionately represented among those leaving the Bar in 2010. This, in turn, is likely to have an adverse impact on the diversity of the profession. The BSB, as regulator of the Bar, supports this rule change, as, in part, at least, an attempt to overcome this significant barrier to increasing the diversity of the profession. As you will be aware, encouraging a profession which, among other things, is diverse, is also a regulatory objective. It is one which the BSB, in this context, takes particularly seriously.

30. However, if these defects are to be remedied, as the BSB believes they should be, by a move to a contractual basis for barristers' services, it is necessary to address the relationship between the terms and the cab-rank rule. As noted above, the current code expressly states that the cab-rank rule does not oblige a barrister to do any work under the current contractual terms in Appendix G2 or on any other contractual terms. That approach treats whether to have any contractual terms, and if so what terms, as a matter to be left for untrammelled freedom of contract and the necessary corollary of that approach is that the cab-rank rule (which constrains a barrister's freedom to decide whether or not to accept instructions) is excluded altogether from operation in such cases. The solution the BSB has adopted in its proposed rule changes is one that, compared with the current position, extends the operation of the cab-rank rule by obliging barristers to act if the professional client agrees to accept the new contractual terms, or any other terms the barrister has published. The professional client remains free to put forward other proposed terms but the barrister is not then obliged by the cab-rank rule to accept those terms.

(e) is there a less intrusive method of achieving the regulatory aims?

31. An alternative, which the BSB considered and rejected, was a rule which simply stated that a barrister was obliged to accept instructions in a case if they were proffered "on reasonable terms".

32. This version has the advantage of succinctness, and of not prescribing any content for such terms, other than that they be reasonable. However, there is problem with this apparently elegant solution, which led the BSB, after discussion and careful reflection, to reject it. The problem is that such a version of the rule does not establish a bright line in a situation where a bright line is essential. A barrister needs to be able to judge, in urgent cases as soon as he or she is offered work, whether the cab-rank rule applies to that

[1] http://www.barcouncil.org.uk/media/18145/15_12_general_council_of_the_bar_leavers_report.pdf

offer, because a barrister needs to know, there and then, whether it would be a breach of the code of conduct not to accept the instructions. While barristers are expected, in the context of the cab-rank rule, to make judgments about whether or not a reasonable fee has been offered, requiring them to make judgments about the reasonableness of terms offered raises problems of a wholly different order. The concept "reasonable terms" is inherently uncertain, and will, in some situations, lead to disagreements about whether the terms as a whole, or aspects of them, are reasonable or not. Two competing sets of terms could both be reasonable, but different from one another (in which case how would the cab-rank rule apply?) and instructions are sometimes received at short notice so there is little time to consider whether they are reasonable. It is inherently unsatisfactory for the content of a disciplinary rule to be as unclear as this, and for there thus to be doubt about when it will apply. For these reasons, the BSB decided that this apparently less intrusive change would not work in practice. In fact, there would be a significant risk that it would work to undermine the cab-rank rule because of the scope for differences of view as to whether terms offered were reasonable. The BSB's standards committee specifically revisited this issue in the light of your letter and attachments and reached the same conclusion, which I am told was particularly strongly supported by a number of the lay members.

33. In contrast, the solution which the BSB has proposed ensures clarity as to the scope of operation of the cab-rank rule and indeed extends its scope so as to oblige barristers to act if either the new contractual terms or their own published terms are accepted. It achieves this without affecting the freedom of professional clients to specify different terms if they prefer to do so. It is true to say that barristers are not then obliged by the cab-rank rule to accept any alternative terms the solicitor may propose, but to impose this on barristers would be too great an intrusion into their freedom and it is important to note that solicitors are no worse off, in that respect, than they are under the rule as it is currently worded (see previous section).

34. I say more about Hogan Lovells' advice below. I should deal here, however, with their suggestion in paragraph 8.8 that "A more proportionate alternative would be to produce guidance including tailored example terms that may be used in certain situations and also explaining the advantages of entering into contract". Far from being more proportionate, this would be more burdensome. The BSB does not consider that it is a sensible use of its limited resources for it to spend more time and effort in producing "tailored example terms" that may be use in "certain situations", with potentially infinite variations. The proposed terms are basic and general; anything beyond that is for the parties to agree. Nor do we consider that it is the regulator's function to explain to the regulated community, who are all qualified lawyers, "the advantages of entering into a contract".

35. For these reasons, the BSB does not consider that there is a less intrusive way of achieving the regulatory aims.

<u>(3) the BSB's revised position on the proposed change</u>

36. Some of the consultees have pointed out, correctly, that the proposed terms do not appear to apply to Alternative Business Structures ("ABSs") and Recognised Bodies / Legal Disciplinary Practices. These are covered by the term "authorised body" in the current code of conduct. This is an anomaly, and the BSB accepts that the new contractual terms should apply to both individuals and entities regulated by the SRA. We

have amended the terms to reflect this by providing an extended definition of "solicitor" which for the purposes of the standard terms will include any authorised person regulated by the SRA (whether an individual solicitor, or an entity regulated or licensed by the SRA) (see Appendix 2). The BSB is very grateful to all the consultees who made this helpful point. We are also considering whether Annexes T-2 –T4 need to be included in the code, or whether it might be more appropriate for them to be published somewhere else, for example on the Bar Council website.

37. In the light of the responses received, we have also been considering whether or not the proposed terms should be further extended to cover all authorised persons, as defined in S18 of the Legal Services Act 2007. We recognise that there is an argument that the terms ought in principle to apply to all authorised persons, by whichever regulator they are authorised or licensed, as long as they are in an equivalent position of instructing members of the bar on a referral basis. However, whether there might be any unforeseen consequences of, or amendments needed to allow, such an extension needs further thought, as does the question whether or not this would require a further mini-consultation with a wider group. We would welcome the LSB's views on these points and would be happy to meet up to discuss these points in further detail.

38. It is worth noting that in practice the vast majority of referral instructions to members of the bar come from those regulated or licensed by the SRA, and will therefore be covered by the current proposed wording (with the amendment we have already made). We therefore suggest that resolving the question of whether and how to extend the terms to other authorised persons, not regulated or licensed by the SRA, should certainly not hold up putting in place a solution to the issues we have identified above for the usual situation where instructions come from a solicitor or an entity licensed or regulated by the SRA.

<u>(4) the advice provided by Hogan Lovells</u>

39. I do not propose to set out at length the points in the advice provided by Hogan Lovells with which the BSB disagrees. But with the greatest respect to Hogan Lovells, we consider that there is a significant confusion in their analysis of the legal position, on two issues in particular.

40. The first is their equivocation about the legal effect of section 61 of the 1990 Act, to which I referred above. We consider that there cannot be any serious doubt about the effect of that change. The parliamentary draftsman assumed, rightly in our view, that there was then a rule of law that barristers could not make contracts with solicitors. The draftsman stepped in to reverse that rule of law. Nor can it seriously be doubted that once Parliament had permitted barristers to make such contracts, it followed, as a necessary consequence, that barristers could then also sue for any unpaid fees. To suggest otherwise, on the basis that Parliament did not say so expressly in section 61, is, again, with the greatest respect to Hogan Lovells' undoubted expertise, fanciful.

41. Second, they say that the proposed change to the code of conduct is unnecessary in order to enable barristers to make contracts with solicitors, as section 61 of the 1990 Act already has this effect. But no-one suggests that the proposed change is necessary in order to give barristers the legal capacity to make contracts with solicitors. Rather, for the complex reasons which I set out above, the majority of barristers still do not, in practice, enter into contracts with solicitors, despite the fact that, in law, they are able to. Part of

what the proposed rule seeks to achieve, is a change to what happens in practice (something which Hogan Lovells appear to endorse).

42. While I am on the subject of this advice, I would like to mention five further points.

43. First, we do not consider that it is appropriate for Hogan Lovells to be advising the regulator on the very questions which the regulator has to decide, namely, whether the proposed changes meet the regulatory objectives. Those are issues of judgment for the LSB to make, and not for Hogan Lovells, and we would strongly encourage the LSB to reach its own conclusions on the regulatory objectives, by its own, independent, and transparent, process of reasoning.

44. Second, we are concerned that an appearance of unfairness has been created by your instructing a firm to advise you which has already expressed an opinion on the subject of the consultation, an opinion which is adverse to the proposed rule change. A reasonable and objective observer might well conclude that there was a risk that Hogan Lovells might come to the same view in their formal advice as they had expressed in the consultation.

45. Third, since the LSB has asked Hogan Lovells to advise on this issue, and the advice is adverse to the interests of the Bar Council, which represents barristers, a reasonable and objective observer might conclude first, that the advice might well influence the LSB's thinking significantly, and second, that it would be fair to disclose it in full, so that the Bar Council could comment properly on it. All that the Bar Council has seen, as is clear from their letter of advice, is a very condensed and (again with the greatest respect to Hogan Lovells) unilluminating summary of the advice. Not only would such a process have been fairer, but it is possible that the LSB's understanding might have been enhanced by having the Bar Council's comments on the advice.

46. Fourth, Hogan Lovells say, at paragraph 8.11 of the advice, that "...we understand that it is possible that the necessary procedures have not been complied with". This "possible breach" appears to be a further reason why, in Hogan Lovells' view, the rule change should not be approved. We would be grateful if you could tell us what "possible" breach of "necessary procedures" Hogan Lovells are referring to, and why is it described as a "possible" and not an actual, breach, so that we can, understand its relevance, if any, to the issues in hand, and if necessary, comment on it.

47. Fifth, Hogan Lovells make the point that the rule changes do not take the opportunity of clarifying the nature of the various legal relationships between counsel, solicitor, and client. This is a valid point but it is not one that can be addressed in the context of the current application and nor should the proposed rule changes be held up on that account.

48. For several reasons, some of which are set out in the Hogan Lovells advice itself, these are questions of some complexity, and are controversial. The contractual terms of work were the subject of years of negotiation between the Bar Council and the Law Society, and after all that time, were on the verge of being agreed, when the Law Society decided that it could not agree to them.

49. It seems to us that it would be desirable to discuss these issues and seek to reach an agreed position with the Solicitors' Regulation Authority, as on any view these are not

issues which the BSB could resolve unilaterally by way of the new contractual terms. However, that would be a major area of work, at a time when the BSB has limited resources, and must prioritise prudently. It is also, if previous experience is a reliable guide, likely to be time-consuming. In point of fact, although the legal nature of the solicitor/barrister/client relationship raises some complex legal issues, these appear rarely to generate practical difficulties. The undoubted difficulties of resolving these wider issues are certainly not a good reason for delaying the much more circumscribed changes that are proposed and which are, for the reasons explained above plainly desirable and consistent with the regulatory objectives. To delay on that ground would be disproportionate, and is not, in practical terms, necessary to make the terms work.

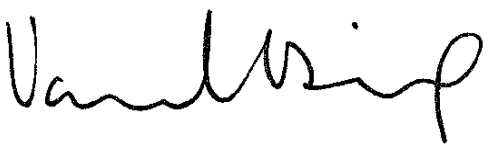
(5) conclusion

50. For these reasons, then, the BSB continues to seek approval of the proposed changes to the code of conduct but with the proposed new contractual terms being extended to all individuals and entities regulated by the SRA, including LDPs and ABSs. May I mention, finally two matters which are, in my view, very significant.

51. The first is that, as I have mentioned, in the internal discussions of this issue in the relevant committee, the lay members of the BSB expressed very strong support for the change. They understand, and support, the link between the terms of work and the cab-rank rule, and fully support the move to enforceable contracts for the Bar, so that barristers, like all other professionals, will be able to enforce the payment of fees due to them, if necessary by suing for them.

52. The second, and this cannot have escaped the notice of the LSB, is that there have been very few responses to its request for evidence and the SRA did not respond to the LSB as far as we aware. The majority of respondents understand the need for these changes, and are broadly supportive of them. The only respondent to oppose the new contractual terms (the Law Society) has misunderstood the proposals and suggested that what is proposed is the "prescription by the regulator of contractual terms of business". As I have sought to explain above, the BSB is not "prescribing" terms of business to anyone. Rather, the BSB is seeking to define the basic contractual terms which will attract the important obligations of the cab-rank rule. Even the Law Society accepts that "the present position is not satisfactory ....It is unusual today for work to be provided by one professional to another in the absence of contractual terms and protections". It also accepts that the withdrawal of credit scheme is not quick, is ineffective, and, in effect, penalises barristers rather than the defaulting solicitor (as it becomes a matter of misconduct for all barristers to accept instructions on a credit from a listed solicitor).

Yours Sincerely,



Dr Vanessa Davies

Director
Bar Standards Board
Appendix 1 – BSB Comments on the responses that the LSB received to the

Association of Costs Lawyers ("ACL")

1. The ACL note in their response that the Standard Contractual terms are limited to arrangements with Solicitors. As we mention above, we have amended the terms to cover arrangements with individuals and entities regulated by the SRA. We are also considering whether it might be appropriate to extend the terms to all authorised bodies as defined in S18 of the Legal Services Act 2007.

2. Our response to the detailed points that the ACL raised in their letter is set out below.

(a) The provisions as to sub-contracting work in sub-clause 8.3 without the consent of those instructing the barrister is too open-ended. The ACL considers that in such cases the barrister should be under an obligation to inform those instructing him or her in advance of any intention to sub-contract work.

The clause clearly stipulates that the barrister remains responsible for the acts, omissions, defaults or negligence of any person to whom he or she delegates. It will frequently be the situation that the delegation of part of the Services will occur where the barrister has a wholly unexpected clash of commitments where time is limited and it would not be practicable to inform the instructing solicitors of the intention to delegate/sub-contract.

(b) The provision that clients of barristers are prohibited from using advices etc. other than for the particular purpose for which they are prepared unless "express permission" is given is again too open-ended. It is obviously quite reasonable not to expect such documents to be distributed en masse but it frequently occurs that previous advices are of value to other barristers in other cases or proceedings which may involve similar points and it is unrealistic to require permission to be sought in such cases. This is especially so when the document concerned may be several years old.

The "product of the service" in question would be specific to the case in question or the instructions given. The principal danger of removing the requirement for obtaining the insistence of "express written permission of the barrister" from clause 9.1 is that the "product" could be used in situations which differ from the circumstances for which the service was given and that consequently there is a risk the "product" would be inappropriately used or relied upon. In addition, allowing unrestricted use of the "product" creates significant risk that there could be privilege and data protection issues. It is accordingly essential that the requirement for the express written permission of the barrister is retained, in order to protect against any possible misuse of the "product" to the detriment of any other person, whether the lay or professional client.

(c) The ACL applauds the flexibility with which it is proposed fees can be agreed both in terms of whether they can be retrospective or prospective and whether they be based upon an hourly rate or flat fee.

(d) The ACLl regrets that there is no provision for estimates to be made. Estimating (and in due course budgeting) is becoming a common feature of litigation and it is unrealistic for

barristers to be able to opt out of providing a realistic estimate when one is required. The ACL considers that this should be a positive provision within the New Contractual Terms.

The terms in the NCT are designed to be basic terms and there is nothing to prevent the solicitor from asking for estimates in advance of the creation of the contract or to negotiate the terms to provide that estimates are required before work is carried out. A positive requirement to provide estimates was not inserted in the NCT as there may be instances, particularly in respect of urgent instructions, where it would be impracticable to give estimates.

(e) Equally there is no provision in the new terms for barristers to keep a record of the time they spend in preparation or otherwise engaged on their instructions. From the point of view of a client recovering costs of litigation there should, the ACL believes, be a duty on the part of barristers to provide as much assistance as possible in maximising or facilitating that recovery yet there is no such obligation. The New Contractual Terms should provide for barristers to keep proper time records and to give as much reasonable assistance as possible to enable the lay client to recover costs.

Paragraph 701(f) of the Bar Code of Conduct requires that adequate records are kept by the barrister to support the fees charged or claimed and this provision is restated in the Bar Council's Practice Management Guidelines.

Costs Lawyer Standards Board

3. The Costs Lawyer Standards Board had no issues to raise regarding the proposed changes. We regret that they were not specifically consulted, and will ensure that they are included on our consultation lists in the future.

General Council of the Bar

4. The BSB endorses the Bar Council's response to the issues mentioned in the LSB letter. In their response, the Bar Council note that the LSB received external legal advice on this issue from Hogan Lovells. The Bar Council has asked to be shown the full advice but to date the full advice has not been published on the LSB website. It would have been helpful if the full advice had been published on the LSB website at the same time the letter was sent out to consultees. This point is developed more fully in the text of the current letter.

The Institute of Chartered Accountants in England and Wales

5. We endorse the ICAEW response which broadly supports our proposals.

The Law Society

6. We are pleased that the Law Society accepts that the present position is unsatisfactory because barristers are instructed on a non-contractual basis and are unable to insist on the resolution of fee disputes directly with solicitors. The proposals in the application suggest that the cab rank rule should apply to the standard contractual terms and also to the individual barrister's own advertised terms, so barristers will be free to draft and publish their own standard terms.

7. However, it is important to note that the Law Society is incorrect in asserting that the effect of the proposal would be the imposition of prescribed contractual terms and in asserting that such a step does not square with regulatory objectives. In fact, as we explained in the original application, and in the text of the current letter, the proposed contractual terms are not prescriptive. Barristers and solicitors are intended to remain free to enter into arrangements for the provision of the barrister's services on any terms they may choose whether contractual or otherwise.

8. Furthermore, nothing which is proposed would prevent barristers from publishing their own terms of business and in fact, that is what is envisaged. As you will be aware it is intended that the cab-rank rule apply to the proposed contractual terms and the barrister's own terms of business.

9. In this regard, it would seem that the Law Society has also misunderstood the effect of the intended link between the cab-rank rule and the proposed contractual terms. There is no intention to undermine the cab-rank rule, quite the reverse. It is merely proposed that it apply to instructions delivered on the proposed contractual terms or the barrister's own published terms of business. To apply the cab-rank rule to any terms whatsoever or in effect none, which appears to be the gist of the Law Society's comments, would not only be disproportionately disadvantageous to barristers but would be unworkable.

10. Lastly, we should mention that the assertion that proposed contractual terms are balanced in favour of the barrister is not supported by any detailed reasoning. In our view, it is not accurate.

<u>The Legal Ombudsman</u>

11. The Legal Ombudsman questions why the standard contractual terms will not cover alternative business structures ("ABSs") and expresses concern that customers of ABSs will not be covered by the cab-rank rule. As explained above, it is now proposed to apply the same standard terms to all individuals and entities regulated by the SRA, including ABSs and LDPs. ABSs and LDPs are already covered by the cab-rank rule as they come within the Code definition of professional client. The extension of the new contractual terms to ABSs and LDPs regulated by the SRA will mean that the rule will apply to instructions offered either on those terms or on the barristers' own terms. For other authorised persons, individuals and entities, the BSB will, as explained above, consider whether the standard contractual terms should also apply to them. In the meantime, the amendment to the cab-rank rule will extend it to instructions from them on the barrister's own published terms.

12. It is unclear why LeO state in their response that "the proposed changes also remove the solicitor's liability for fees." The new standard terms are intended to have full contractual effect and will enable barristers to sue for unpaid fees on clear terms.

<u>The Office of Fair Trading</u>

13. The OFT has stated that it will defer its opinion on the questions outlined in the LSB letter until the LSB has commissioned research with a view to gathering evidence of the practical and economic effect of the cab-rank rule on the provision of legal services by barristers. We would be grateful if the LSB would confirm the timescales for this

research. We would welcome an opportunity to be involved in considering how this project should be structured.