



Bar Standards Board
Review Of The Code Of Conduct
Second Consultation Paper
Conduct Rules: A Core Duty Approach To
Regulation At The Bar

Introduction

1. The Bar Standards Board has issued this Consultation Paper having already consulted on a review of the general format and structure of the Code of Conduct for barristers.
2. The BSB decided that the Code should incorporate core duties which set out the overriding principles of professional conduct and standards which would be complemented by secondary rules and guidance.
3. This Consultation Paper sets out the draft core duties and conduct rules governing ethical and professional standards. It does not address the business and practice standards which it is proposed should be the subject of separate Practising Rules.

Executive Summary

4. The paper runs to some 50 pages and is divided into five parts: -
 - Part I Introduction
 - Part II Format of the Conduct Rules
 - Part III Core Duties
 - Part IV Content of the Conduct Rules
 - Part V Other Issues

5. The paper poses 17 questions across Parts II to V. The first four questions are in Part II and are, in our view largely uncontroversial. They ask: -

Q1: Is the introduction appropriate and or necessary?

Q2: Should the Rules apply to all categories of barristers – employed and self-employed, practising and non-practising?

Q3: Should the rules apply across all areas of practice?

Q4: Is the approach adopted as to drafting guidance to assist in interpreting and complying with the Core Duties and Conduct Rules

Questions correct?

6. The answer to all these questions is broadly 'yes' [see paragraphs 33 to 36 below]

7. We see no reason to exempt either any particular category of barrister from complying with the Rules and we cannot identify any practice area for which the core duties or conduct rules are inappropriate. Finally, we consider that the approach adopted by the BSB, in drafting conduct rules which must be followed in order to comply with the core duties and the issuing of guidance to assist, provides clarity and flexibility.

8. There are two questions in Part III: -

Q5: Are the core duties appropriate and sufficient?

Q6: Is the proposed order of precedence correct?

9. We agree with the proposed core duties but consider that an additional one is required: that 'You must not act in a way that is likely to diminish the trust and respect the public places in barristers and the profession.'

10. We also think that it would be clearer and simpler if the number of core duties corresponded with the number of sections in the Conduct Rules, with each core duty having its own set of conduct rules.

11. We agree with the proposed order of precedence which establishes that in the event of a conflict between two core duties, a barrister is bound to apply the superior one and the less important one is thereby overridden [see paragraphs 37 to 47 below]

12. Part IV constitutes the bulk of the paper and contains the proposed Conduct Rules. They are divided into five sections which largely but not entirely correspond with the core duties. The BSB considered that were they to correspond exactly with the core duties there would be an undesirable overlap. The five sections are: -

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| Section 1 | Duty to the Court and the Administration of Justice |
| Section 2 | Integrity, honesty and independence |
| Section 3 | Client confidentiality |
| Section 4 | Client relations |
| Section 5 | Discrimination |

13. Only one question is asked in Section 1: Q7, do you have any comments on the proposed amendments?

14. Most are drawn from the current Code of Conduct and our proposed amendments are relatively minor, suggesting either small changes to the wording or the re-categorisation of certain rules as being more appropriate to other core duties.
15. One more significant amendment we propose is an explicit rule requiring adherence so far as is reasonably possible to time limits attached to orders of the court [see paragraphs 48 to 54 below]
16. There is one general question under Section 2 asking for comments on amendments, but there are three specific requests for comments on specific proposals.
17. Q8(1) asks whether the approach to 'conduct likely to diminish public confidence' issue is agreed?
18. We strongly believe there should be a core duty not to engage in any such behaviour. The BSB proposes a finite list of specific examples of behaviour which would breach this duty; we consider that this approach is fatally flawed.
19. Q8(2) asks whether the revised rules on advertising are sufficient?
20. The BSB proposes removing all limits on advertising apart from a prohibition on stating that which is untrue. We consider this to be an undesirable and retrograde step.
21. Q8(3) asks whether the prohibition on expressing personal views on an issue affected by a case in which one is currently instructed should remain?
22. We believe that it should [see paragraphs 55 to 60 below].
23. There is only one question in Section 3 governing client confidentiality; Q9 asks if there are any comments as the section reiterates the current requirements of the Code. As we believe they are sufficient we have no comments [see paragraph 61]

24. Section 4 on client relations contains two questions; the general one, Q11, asking for any comments and a specific one, Q10, asking whether the cab-rank rule should be a Conduct Rule or a Practising Rule.
25. We agree with the BSB that the cab-rank rule should be a Conduct Rule because of its fundamental importance.
26. In answer to Q11 asking for general comments we also strongly agree that service to the client is not adequately provided for within the existing Code. The existing Code was drafted before barristers could be employed by solicitors within their own firms and thus the solicitor acted as the guarantor of the quality of service to the lay client; if it were inadequate, instructions could be withdrawn or, more likely, never given in the first place. It is vitally important, in our opinion, that the rules governing service to the client by a barrister are expanded and given greater prominence in the changing landscape of the provision of legal services. [see paragraphs 63 to 66 below]
27. There are two questions in Section 5 which deals with discrimination; Q13, asking for general comments and Q12 asking for comments on the suggestion that there should be a positive duty on barristers to promote equality and diversity in their professional dealings?
28. We generally agree that there should be a positive duty of the kind described, but point out certain practical difficulties which seem to us to present themselves when imposing a duty on self-employed barristers to be responsible for the policies and actions of their chambers [see paragraphs 67 to 74 below]

29. Section 6 of Part IV deals with interpretation and Q14 invites general comments; we have none [see paragraph 75 below]
30. Part V deals with 'Other issues' and asks 3 questions:
- Q15 Do you agree that the Conduct Rules should not include a duty to report misconduct?
- Q16 Do you think that the Rules should include reference to a freedom to report misconduct as distinct from a duty to report
- Q16 [sic] Do you think any of the omitted provisions of the existing Code should be reinstated?
31. We conclude that, for the same reasons suggested by the BSB, there should be no duty on one barrister to report misconduct by another, and a reminder that one can seems to us otiose.
32. Finally, apart from matters already dealt with in the other sections we have no suggestions as the inclusion or exclusion of other rules [see paragraphs 76 to 78 below].

Responses to Questions

Q1 Is the introduction appropriate and/or necessary? Do you have any suggested amendments?

33. We can see no objection to the concept of an introduction written in accessible language and it seems positively desirable: -
- a) to spell out the independence of barristers;
 - b) their duty to the court;
 - c) that they have duties to several parties, not just to the person who pays them; and
 - d) why we therefore welcome a strict code of conduct.

Q2 Do you agree with the proposals above as to the application of the Conduct Rules? If not, why not?

34. We agree with the proposed application of the Code. It is in our view important that there should not be any exceptions to the application of the Code. It is undesirable to build in loopholes.

Q3 Do you think the Conduct Rules as drafted apply across all areas of practice?

Does it sufficiently take into account the differences in practice and procedures across the various areas of law?

35. We are unaware of any differences in practice that could affect the application of the Conduct Rules to all barristers. Again, we make the comment that it is unlikely that any conduct in any area of practice that could involve a breach of the Rules would be conduct that it would be appropriate for a barrister to engage in, given our view that it is desirable that these Rules should apply to all barristers for the reasons set out in the Introduction.

Q4 Do you agree with the approach adopted to guidance in the draft Conduct Rules? If not, why not?

36. Yes

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

(1) Should a duty not to behave in a way which is likely to diminish the trust and confidence which the public places in the barrister or the profession be included and

(2) Should a duty to keep one's professional knowledge and skills up to date be included

37. The core duties listed are

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

CD2 You must act with integrity and honesty

CD3 You must maintain your professional independence

CD4 You must keep the affairs of each client confidential

CD5 You must act in the best interests of each client

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

CD7 You must not discriminate improperly in relation to any person

38. We agree in general with the core duties as listed.

39. We also believe that there should be a core duty "*not to act in a way that is likely to diminish the trust and respect the public places in barristers and the profession*" and that this is an essential addition.

40. If such a rule is considered a core duty for solicitors the Code for barristers could and should accommodate such a provision. We believe that the change in wording from the current rule at

paragraph 301 is appropriate and note that the current rule prohibits discreditable behaviour by a barrister *"in pursuit of his profession or otherwise"*. We believe that it is essential that the duty to behave well both when discharging one's functions and in one's personal life is retained for the reasons set out in the consultation paper. The risk of such a duty being unfairly relied upon by, for example, a disaffected spouse is unlikely to occur and, if it did, the good sense of the BSB could be relied upon to strike out frivolous or unreasonable complaints.

41. Indeed on a general note we believe that with the convergence of functions of solicitors and barristers it is highly desirable that their core duties are the same, insofar as they are relevant and that their Rules regarding duties relating to advocacy should be identical as solicitors now have higher rights of advocacy. We strongly believe that it is unreasonable that advocates appearing side by side in the higher courts should have different Codes of Conduct. If they are to remain different it is important in the public interest that this should be highlighted.
42. It appears to us that it is desirable to make the duty not to discriminate a Core Duty.
43. As to the duty to keep one's professional knowledge up to date, we agree that this is fundamental, and it that sense qualifies as a core duty. If one compares the Core Duties with the five sections of the Conduct Rules, a duty to keep one's knowledge up to date does not fit comfortably under 'Client Relations'¹. It might fit more comfortably under the heading 'Duty to the Court – Assisting the Court as to the law.'
44. One could also argue that Core Duty 5 is just an aspect of Core Duty 6; if one does not act in the best interests of a client one is not providing a good quality of service.
45. We have no strong views about this.
46. But overall, we think it would make more sense for the sections to

¹ Rule 4.6R, not 4.5R as stated at paragraph 30(2)

correspond to the Core Duties. To do so would make it easier to navigate the Code and would avoid this sort of debate as to where an aspect of conduct properly fits into the Conduct Rules.

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

47. Yes

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

48. We would suggest redrafting 1.1R(4) to say "*You must take reasonable steps to ensure that the court has before it all relevant legal materials*".

49. We can see little practical difference between matters being subject to specific rules as now, and the change to them being "Conduct Rules as to guidance to the application of the core duty". It does not appear to us that they have lost any importance or significance.

50. We consider that 1.10G(1) is appropriately located in paragraph 1.10. It does not seem to be a comfortable fit with the other matters in 1.9G and is not really an issue of integrity, as are most of the matters in 2.5, but of judgement.

51. On the other hand 1.10G(2) appears to us to fit more suitably into paragraph 1.11G as an issue relating to assisting the court as to the law.

52. Under paragraph 1.10G, has the BSB considered the pressing need to ensure the efficiency of the criminal courts by issuing Rules regarding the requirement to comply with court orders regarding the timetable for service of documents so as to avoid wasting the

court's time? For example: -

53. *'You must take reasonable steps to ensure that any order made by the court is complied with and proceedings are conducted reasonably expeditiously.'*
54. At present there are provisions for orders for wasted costs to be made but the time and expense to the criminal justice system of litigating such matters militates against courts pursuing them. It appears to us that such a Rule would complement the core duty to observe a barrister's duty to the administration of justice.

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

(1) Do you agree to the approach adopted in respect of the 'conduct likely to diminish public confidence' issue?

55. We strongly agree that there should be a both a core duty and rules prohibiting misconduct in general terms [see our answer to Question 5]. We note the uncertainty in the proposed wording of 2.11G and suggest that the absence of any proposed definition of 'serious criminal conduct' or any other examples in sub-paragraph (4) demonstrates the impossibility of providing either definitions or examples. We question why "*conduct likely to diminish public confidence*" has to be defined further. Surely such a issue can and should be determined on a case by case basis, with different levels of behaviour which all generally diminish public confidence being met with different levels of sanction?
56. Whilst we recognise the preference for providing guidance generally, the provision of specific examples simply shifts the problem without solving it; a tribunal would then have to decide whether any act of alleged misconduct that was not specified in the list of examples was analogous in terms of culpability and gravity with one of the

examples, leading, we imagine, to lengthy and sterile debate in comparing one act with another to decide which was more disreputable.

57. We do agree that it is possible to list types of behaviour that would not normally be likely to diminish public trust, but again suggest that the examples should be very broadly drafted. We therefore agree with sub-paragraph (1) and sub-paragraph (2) (a) and (b), but are slightly puzzled by (2)(c) as it would appear to be an example of (2)(a). In any event, if it were not, it would surely not constitute 'serious criminal conduct'.

(2) Do you agree that the revised rules on advertising and publicity are sufficient?

58. We do not agree that the revised rules on advertising and publicity are sufficient. We see no good reason to remove the prohibitions currently in force. At the very least we consider that the BSB should give consideration to a specific consultation on the topics of advertising and publicity before the current rules are relaxed. We do not agree with the assertion in the consultation that the current prohibitions are "*no longer necessary*". No evidence is given for this sweeping statement and the abolition of the current rules would appear to explicitly sanction: -

- the making of direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be barristers or members of any other profession);
 - the inclusion of statements about the barrister's success rate;
 - advertising being so frequent or obtrusive as to cause annoyance to those to whom it is directed
- all of which are currently prohibited.

59. Advertising generally appears to us to be inimical to the dignity of a profession that operates on referral from another profession,

although we recognise that it is in the public interest that members of the public are given direct access to the limited information that is currently permitted. But given that barristers are now instructed in criminal work not by a process of referral but by solicitors directly employing barristers to represent their lay clients, any relaxation of the rules governing advertising is likely to result in solicitors' firms advertising their barrister employees to the general public in a way that is both unfair to self-employed and unattractive in general. This is not in the public interest.

(3) Do you agree that the prohibition on expressing personal comment to the media should remain?

60. We strongly agree that the prohibition on expressing personal comment to the media should remain and agree with the reasoning in Paragraph 43(2). We do not agree that the existence of the exception in 2.14G is any justification for the proposition that the rule is unnecessary. There is a world of difference between giving a lecture on the current or any proposed changes to, for example, the laws on money-laundering which would include comments upon their effectiveness and compatibility with rules of natural justice, and expressing an opinion on the guilt or innocence, or the fairness of an ongoing prosecution, of one's current client,

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

61. We have no comments on or suggested amendments to section 3 as it reiterates the current rules on client confidentiality with which we agree.

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

62. We agree with the BSB's expressed view that the cab-rank rule is too important to be in the Practising Rules and should be included in the Conduct Rules.

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

63. We agree that the non-discrimination rule should apply to all legal services provided by barristers, subject to any exceptions in the Practising Rules for particular categories of barrister.

64. We agree with the proposed rules concerning accepting and returning instructions.

65. We also strongly agree that service to the client is not adequately provided for within the existing Code.

66. The existing Code was drafted before barristers could provide advocacy services whilst employed whether by solicitors or the CPS. We consider that there are significant pressures in the conduct of criminal litigation on an employed advocate that do not apply to self-employed advocates; we consider that to ignore this is short-sighted and unrealistic. There are many professionals in other fields of work who are subject to ethical codes and who are not self-employed, but we believe that the pressures to act unethically that can apply to a criminal advocate are unique in their nature, the frequency with which they arise and the direct effect upon the potential earning capacity of the advocate. It is therefore vitally important in our opinion that everything possible should be done to

ensure that the Conduct Rules are robust enough and clear enough to prevent advocates succumbing to these pressures.

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

67. We applaud the BSB's approach to the issue of duties to prevent discrimination and agree that it is of sufficient importance to feature as a core duty. We accordingly agree that it is desirable that there should be a positive duty on barristers to promote equality and diversity. However, there are practical difficulties in drafting rules for guidance that would apply to individual barristers. See below in the answer to question 13.

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

68. The duty to take reasonable steps to prevent discrimination by others in the barrister's professional dealings may create practical difficulties. The BSB acknowledges that what constitutes "*reasonable steps*" in Rule 5.2R would naturally depend on all the circumstances. We quote:

"For example, the steps that are reasonable for a Head of Chambers may be different from the steps reasonable for a junior employed barrister who has little or no involvement in their employer's policy. The Bar Equality Code will require amendment to ensure that it provides practical guidance for the profession as to what this rule requires."

69. The BSB also say: -

"An alternative approach to these matters would be to follow the example set by the SRA. Rule 6.03 of the Solicitors' Code requires a principal in a firm or a member or a director of a recognised body to "adopt and implement an appropriate policy for preventing discrimination and harassment and promoting equality and diversity within your firm" and "to take all reasonable steps to ensure that all employees, partners, members and directors are aware of and act in compliance with its provisions and that it is made available to clients,"

70. Draft 5.4G as drafted states: -

"It is your obligation to take such steps as are reasonable in the circumstances to prevent discrimination by those you work with, including clerks (e.g. in the selection of barristers for particular cases), other members of chambers, other barristers, solicitors and any other third party you may encounter in your professional dealings. The Bar Equality Code [to be drafted] contains guidance as to the steps which would be reasonable in the circumstances to take in order to prevent discrimination. This guidance will be taken into account in the event of any allegation of breach of a Core Duty or a Rule."

71. The problem with this approach is that it may not fully take into account the unique nature of barristers' chambers. Chambers were traditionally run as benign dictatorships in which the Head of Chambers had absolute powers. Chambers now are run in a variety of ways. At one extreme, the Head of Chambers' position is much as it was. At the other, the Head of Chambers is elected and chambers is run by an appointed or elected management committee.

72. In any event, barristers are self-employed and are not employees of chambers, still less of the Head of Chambers. We agree that there should be a duty on all barristers to avoid discriminating unlawfully or improperly and we accept that all barristers who take a role in

managing chambers – whether as Head of Chambers or part of a management committee - should have a duty to prevent discrimination by those they employ or work with, including clerks, other members of chambers, other barristers, solicitors and any other third party. But no member of chambers, including the Head of Chambers, has the power that a principal in a firm has to dismiss an employee because barristers are all self-employed.

73. We would simply invite the BSB to take into account that any barrister is ultimately unable to supervise the conduct of any other barrister or force them to behave in any particular way. Nor can any barrister direct any clerk to behave in any particular way towards another member of chambers. The ultimate sanction any barrister has over a fellow member of chambers is to ask chambers as a whole to vote to withdraw a member of chambers' tenancy, but the outcome of that request would depend upon the membership of chambers as a whole. For example in some chambers a member can only be expelled on the vote of two thirds of the members.
74. We agree that it is reasonable however to expect all barristers' chambers to adopt measures to prevent discrimination by their employees or members, but that is subtly different to a positive duty to be placed upon every individual barrister.

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

75. We have no comments on Section 6.

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

76. We agree that the Conduct Rules should not include a duty to report misconduct. Some of the reasons why this is not desirable that are set out at paragraph 57 are more persuasive than others but in particular we draw attention to the comments concerning the pastoral role of other members of chambers, the confidentiality issues and the high degree of subjectivity. It is our view that any clear instances of misconduct or inability to practice would be apparent to either instructing solicitors, the judge or in the case of employed barristers, their employer. They would all have either a duty or power to report a barrister.

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

77. We consider that a reference to a freedom to report misconduct is otiose as any barrister is aware that the Code of Conduct exists and they could report another barrister if they saw fit.

Q17 Do you think any of the omitted provisions of the existing Code should be reinstated?

78. Only insofar as we have commented upon the proposed changes above.

Summary

The CBA welcomes the clear and thorough approach taken by the BSB to the complex task of reviewing the contents of the Code of Conduct for barristers. We cannot emphasise too strongly that from our perspective, the Code of ethics that makes up the rules governing our profession is of great and fundamental importance to: the public's trust in the profession; the efficient administration of the criminal justice system; and the crucial constitutional importance of a robust and fair system for the prosecution and conviction of the guilty and the acquittal of those who should be acquitted.

As set out above, we believe that members of the Criminal Bar face more frequent and greater pressures to act otherwise than in accordance with our duties to justice and the court than is commonly realised. It is a tribute to the integrity of members of the Bar that the courts place complete trust in our ability to conform at all times to the highest standards. The independence of the Criminal Bar and the freedom from external pressures that the provisions of the Code emphasise and reinforce are central to that trust. We therefore welcome any attempts to reform and strengthen the Code and would resist any attempts to weaken or dilute it.

Peter Lodder QC

Paul Mendelle QC

Paul Keleher QC

Adrian Chaplin

3 June 2009