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**THE CRIMINAL BAR ASSOCIATION RESPONSE TO THE BSB'S LETTER IN  
RELATION TO RULE 3.1 OF THE PUBLIC ACCESS RULES**

**INTRODUCTION**

1. The Criminal Bar Association ("CBA") represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.
2. The CBA sets out its response in relation to criminal cases only and addresses, as requested, the four specific issues identified in the letter from Christopher Gibson Q.C, dated 20<sup>th</sup> July 2011.

## RESPONSE

### The nature of the current prohibition in relation to direct access and cases where a person maybe eligible for public funding

#### *The advice to date*

3. The confusion about the correct interpretation of Rule 3(1) of the Public Access Rules arises directly from the illogicality of the total prohibition.

4. The rule provides:

"A barrister may not accept direct instructions from or on behalf of a lay client:

(1) In or in connection with any matter or proceedings in which it is **likely** that the lay client would be eligible for public funding."

5. The BSB in March 2010 issued detailed guidance on the types of work that a barrister could accept under the public access scheme. At paragraph 54 it said: -

"The experience of licensed professional access has shown that a well-informed non-lawyer client can successfully instruct a barrister in such hearings as a planning inquiry or a hearing before tax commissioners. Public access will enable barristers to be instructed for advocacy services before inquiries and tribunals by informed clients outside the professions and bodies who can currently instruct the Bar direct. **But the greater the role which contested evidence of fact will play in any such hearing, the less likely it is that it will be suitable for a barrister to accept advocacy instructions on public access, even from a well resourced commercial client.**"

6. At paragraph 56 it went on to say:

"Barristers are unlikely to be able to conduct a means assessment to establish whether a client will qualify for public funding. Nor are barristers at present able to apply to the Legal Services Commission for public funding on behalf of a client. Therefore, when approached by a person whose circumstances are **not such as to make it obvious that he will not** be eligible for public funding, the barrister should advise the

client that he cannot investigate the possibility of public funding and should advise the client to approach a solicitor to investigate this possibility.”

### *Interpretation*

7. We suggest that taken together, the meaning of Rule 3(1) and the guidance appeared clear and amounted to the following:
  - a. If a potential client was obviously eligible for public funding [the case was serious or complex enough to warrant it], a barrister could not act under the public access scheme
  - b. If there was little or no role for contested evidence to play, and it was **obvious** that the client was not eligible for public funding [either the case was not serious enough or their means were too great to be eligible] a barrister could act under the public access scheme
  - c. If it was not obvious that client would not be eligible for public funding,  
  
“the barrister should advise the client that he cannot investigate the possibility of public funding and should advise the client to approach a solicitor to investigate this possibility.”
8. However the guidance and rule are far from complete when one considers the test of eligibility and a person’s own wishes.
9. The eligibility test is in two parts:
  - a. The **interests of justice test** consider the ‘merits’ of the case which can include the client’s previous convictions, nature of offence and risk of custody. This is a complex exercise involving the following:
    - i. It is likely that the client will lose their liberty
    - ii. The client has been given a sentence that is suspended or non-

custodial. If they break this, the court may be able to deal with them for the original offence

- iii. It is likely that the client will lose their livelihood
- iv. It is likely that the client will suffer serious damage to their reputation
- v. A substantial question of law may be involved
- vi. The client may not be able to understand the court proceedings or present their own case
- vii. The client may need witnesses to be traced or interviewed on their behalf
- viii. The proceedings may involve expert cross-examination of a prosecution witness
- ix. It is in the interests of another person that the client is represented
- x. Any other reasons.

b. the **means test** considers the client's financial position

10. Some of these criteria relate to the role of disputed evidence, and on that basis the case may not be suitable for public access, but the others involve a degree of judgment and a barrister may conclude that it is unlikely that the client would qualify for public funding, because the case is not serious or complex enough, and in those circumstances is apparently entitled to accept the case for public access under Rule 3(1) on the ground that the client's circumstances are such that it appears unlikely that he will be

eligible for public funding. It therefore appears that a barrister is entitled to form a judgment on eligibility under the first limb but not the second; it is only the second limb of the eligibility test that engages Rule 3(1). This is not stated explicitly in either the Rule or the Guidance.

11. On the second question, the BSB's own guidance appears less clear-cut than the present interpretation of the Rule. It states that in cases where the client's **circumstances are not such as to make it obvious that he will not** be eligible for public funding, the barrister should advise the client that he cannot investigate the possibility of public funding and should advise the client to approach a solicitor to investigate this possibility.
12. It is entirely silent about the client who follows that advice and then returns to the barrister to say that they are technically eligible, but do not wish to apply. If the Rule had meant to apply to clients who were likely to be eligible for public funding, why did the guidance not simply say 'Therefore, when approached by a person whose circumstances are **not such as to make it obvious that he will not** be eligible for public funding, the barrister should advise the client that he cannot investigate the possibility of public funding and should advise the client to approach a solicitor to investigate this possibility. In no circumstances would the barrister be able to act for such a client?
13. The guidance did not say that; it appeared to be drafted in a clear and commonsense way saying simply what advice should be given. This commonsense approach was, we all assumed, based upon the notion that it could not possibly be right or sensible for such a client to be turned away and told that if they chose to pay privately for their representation they could only do so by incurring the additional cost of instructing a solicitor to simply refer them back to the barrister? This is clearly an objectionable restriction on both the barrister's freedom of trade and the client's access to justice. It was this application of common sense that

created the confusion and led many to believe that in such circumstances a barrister obviously could act under the public access scheme.

### The four Gibson Questions

14. Answering each in turn:

Your perception of the regulatory risk referred to above and whether it justifies the existing rule

15. We assume that the regulatory risk referred to is the one in paragraph 7:

**“the possibility of clients subsequently complaining that they had not fully understood after a first meeting with their barrister the consequences and ramifications of not seeking legal aid”.**

16. The answer to this is threefold. Firstly, to ensure the client care letter sets out clearly what the consequences and ramifications are. Secondly, to ensure that at the first meeting these are spelled out and a record is made that this has been done, possibly signed by the client. Thirdly, it is already catered for in the guidance which requires a barrister in such circumstances to advise the client that he cannot investigate the possibility of public funding and should advise the client to approach a solicitor to investigate this possibility.

The frequency that a situation is likely to arise (identifying also how it would arise) where a potential client is likely to be eligible for public funding but would rationally choose to pay a barrister privately under the public access scheme.

17. It is already within the experience of many, if not most barristers that clients already exercise the choice, for a variety of reasons, to reject public funding, so it is a situation that frequently arises. Because such clients are presently only referred to a barrister after they have taken that decision with their solicitor we are not necessarily privy to the reasons and it seems impertinent to ask, but the reason often given is that the cost of the contributions will, or may well, exceed the cost of defending the case. In addition, some clients simply feel more comfortable paying privately.

How relaxing the prohibition might further the regulatory objectives set out above, in particular, measures that the BSB should consider in order to ensure that the interests of consumers are protected and promoted and how the BSB can ensure that consumers who are eligible for public funding, but choose to instruct a barrister privately, are in a position to make an informed choice.

18. It is clear that relaxing the prohibition does further some of the regulatory objectives, in particular:
  - a. improving access to justice;
  - b. protecting and promoting the interests of consumers;
  - c. promoting competition in the provision of services (by authorised persons).
  
19. It is difficult to see how or why consumers in this area need any special or further protection or information in making an informed choice. What information or protection do they get when choosing a solicitor?

Whether it is necessary to amend either the rules or the accompanying guidance to enable the client to have the discretion to use a public access barrister even if and once s/he has been made aware of their possible eligibility for public funding and in a way would be in their best interests
  
20. As we have said above, we can see no objection to the requirement that a direct access client be properly advised to consult a solicitor if they may be eligible for public funding and client care letters should be drafted in such a way as to explain how they could do that and what the advantages may be.
  
21. It should however be permissible for a barrister to act for a public access client even if they might be eligible but choose not to take such

advice. It would be undesirable to **force** a public access client to seek such advice before a barrister could act for them.

- a. Firstly, that would seem to be an inappropriate restriction on the right of the consumer to make up their own mind about what they wished to do.
  - b. Secondly, it is an unfair restriction on the trade of a self-employed barrister to be forced to refer a potential client to another authorised person who would then be free to effectively 'poach' that client by offering to act for them privately.
22. If the BSB were to take that course proper consideration needs to be given as to what litigators must advise potential private clients about consulting a public access advocate before retaining a solicitor.

## **CONCLUSION**

23. Needless to say the CBA believes that there is no need at all for rule 3.1 and that criminal barristers have undertaken expensive courses on direct access in good faith expecting to be able to conduct cases when appropriate.
24. The rule completely undermines the ability to do this and, without justifications which we have not seen, should be repealed.

PAUL KELEHER Q.C.

NATHANIEL RUDOLF

12<sup>th</sup> August 2011



