



## **BAR STANDARDS BOARD REVIEW OF THE CODE OF CONDUCT SECOND CONSULTATION PAPER**

### **CONDUCT RULES: A CORE DUTY APPROACH TO REGULATION AT THE BAR**

#### **Introduction**

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed barristers practising outside chambers.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members and pressing for appropriate change. BACFI actively supports the objective of an independent and high quality bar, accessible to all.

#### **Questions 1- 6**

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

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

**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?**

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

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

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

BACFI represents four of the five categories of employed and non practising barristers set out in paragraph 20 of the Paper and also has some self-employed members. BACFI has always urged that a modern Code should consist of easily understood core duties, with separate “practising” sections for particular categories of barrister or work.

**Q1** - The Introduction would be a good deal clearer to members of the public if the 5 categories of barrister were included. Sadly, the BSB’s survey “perceptions of Barristers” did not address the possibility of public confusion as to the various types of Barrister, but it exists. The lengthy and frankly embarrassing “disclaimer” that is required to be given under the existing Code par 206.1(b) would be unnecessary if the important differences between practising, employed and non practising were clearly spelled out in all publicly available documents. This would only serve to highlight the fact that where core duties and responsibilities are concerned – including the all-important matter of independence - all Barristers are the same.

Thus we suggest adding a short paragraph after the second in the Introduction, to read:

“There are several different types of Barrister:  
(Add I – V from paragraph 20)

All Barristers undergo the same academic training and are subject to the exactly same core professional duties; but some act only for their employers or do not work as advocates in the courts.”

To reinforce the message, we would suggest adding the word “all” and “whether employed, self employed or non practising” in the indented paragraph describing the Core Duties, set out in italics below:

“These Conduct Rules consist of:

- Core Duties (designated CD1 etc). The Core Duties are the fundamental duties owed by *all* barristers, *whether employed, self employed or non practising*. Failure to comply...”

We trust this whole issue will be considered carefully when deciding whether to replicate *all* the sections relating to the Employed Bar in the existing Code.

Given that the general public will be well aware that advocacy takes many forms, it might be considered that the first sentence of the (current) fourth paragraph of the Introduction is perhaps a little misleading. Barristers present or represent their clients’ cases in Tribunals, public enquiries, settlements negotiations and other forms of dispute resolution. The duty to present a client’s case fairly and fearlessly applies in all circumstances. This paragraph could usefully made more general in scope, whilst retaining the central caveat that the barrister’s duty not to mislead the Court is paramount.

What is important, however, is that lay clients should be aware that they can rely on self employed barristers practising in chambers to provide them with fearless representation however distasteful, unpleasant or morally repugnant their offence or their views may be. Something to this effect in the introduction to focus on this fundamental principle underlying the cab rank rule would be welcome.

## **Qs 2&4**

Subject to comments below on the duty not to discriminate (which we consider unnecessary), we agree with Qs 2 and 4.

**Qs 3 & 5** - Subject as above, we agree that the core duties are general enough and appropriate to cover all forms of practice.

**Q6** Subject as above, we agree the proposed order of precedence.

## **Q 7 Do you have any comments on or suggested amendments to section 1?**

No, apart from the obvious query that if there are to be seven core duties, then the provision of only 5 sections of the conduct rules will surely be bound to confuse any member of the public seeking examples or elucidation of any particular core duty.

## **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?**

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

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

Rolling up independence with integrity and honesty risks underplaying the former, yet it is of considerable importance to both employed and self employed barristers. We believe that “Independence”, to include illustrations of conflicts of interest, should be contained in a separate section.

For the benefit of employed barristers we suggest that 2.9R “handling client money” is modified to add “save by way of receiving payment for instructions *or where this is one of the duties of an employed barrister.*”

Q8(1) - We believe the Code should concentrate on describing conduct likely to diminish public confidence widely (as in the preamble to 2.11G) and in making clear what is NOT covered (as in 2.12G).

- We would like to see “Serious criminal conduct” reflecting as far as possible definitions contained in the ordinary criminal law, e.g. “arrestable offence” or “any offence involving dishonesty”
- We consider that “offensive conduct” is too imprecise to feature in a disciplinary code. Racial taunts and various forms of criminally offensive conduct are covered in “arrestable offence”, as is unlawful victimisation and harassment.
- We suggest that all forms of unlawful discrimination should be included in this section.

Barristers should not be subject to higher duties of personal conduct than ordinary citizens, though our professional association may subject us to more condign

punishment for any offence. The important element, from a public protection point of view, is surely the barrister's professional conduct when doing his or her job.

Q8(2) We have no comment on these rules.

Q8(3) We agree the prohibition on media comment is still valuable and it is sufficiently narrow to allow employed barristers, for example, to make media statements on behalf of their employers, provided they are not also acting as advocates in the particular case.

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

"BACFI has no comments on this section, other than to note that this duty appears to have no exceptions. The old Code contained two useful exceptions which we would suggest should be retained: see below Q17"..

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

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

We agree that something about the fundamental essence of the Cab Rank rule needs to be visible to members of the public, which is why we suggest, as above, that it be referred to in the Introduction and only 4.26R be retained, with the explanatory words "If you are a self employed Barrister practising in chambers" added at the beginning of the Rule.

The details of the rules (i.e. Rules 4.28R – 39R) belong in a section in the Practising Rules applicable only to the self employed, and can only serve to confuse members of the public looking for important information in the Core section. Those involved in the day to day instruction barristers in chambers will be well aware of the "rules" and can check these lengthy details in the Practising rules if they need to.

We also have some concerns about what a "good" quality of work and service might be. Bearing in mind that these are disciplinary rules, we need to be sure that a professional yardstick will be applied and that the client's personal and subjective perception of what is "good" will not be substituted. CR6 should emphasise the duty to act with professional competence and in the best interests of each client. This would be more understandable to lay clients as it concentrates on the Barrister's obligation to act only within his or her competence – a fairly objective test..

Apart from these, the first part of section 4 reads well. We applaud the emphasis on personal responsibility – though repeating the statement in both 4.1R and 4.1G, we suggest, may be too much of a good thing.

**Q12 Do you have any comments on or suggested amendments to section 5?**

**Q13 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?**

The inclusion of a positive duty to take reasonable steps to prevent discrimination by others is unrealistic as a core duty. The general law contains anti discrimination provisions, applicable to all individuals, and the addition of a non discrimination obligation (differently worded to the legal provisions) is, we consider, otiose. A Head of chambers, General Counsel in industry or a legal office manager would be conducting himself or behaving in a way likely to diminish the trust and confidence of the public, or committing a criminal offence, if he *unlawfully* discriminated against anyone. What does “*improperly* discriminate” mean, or add to the existing provisions of the law ? The Bar equality code, when drafted, should recite the very important statement contained in Section 5.3G and a cross reference to it might usefully be added somewhere in the Integrity and Honesty section.

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

BACFI has no comments to make on the definitions.

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

We agree.

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

No. If misconduct is clear and it is appropriate to report it, members of the Bar will do so without prompting.

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

Yes. The two exceptions to the duty of confidentiality should be retained to permit a barrister to pass on confidential information to another barrister who requires it for the performance of his/her duties; and to permit disclosure which is either obliged or permitted by law.