Chancery Bar Association

Bar Standards Board Consultation Paper
on the International Practising Rules

Response of the Chancery Bar Association

Who we are

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,000 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Membership of the association is restricted to those barristers whose practice consists primarily of Chancery work.

2. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

3. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

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4. This response is the official response of the Association. It has been drafted by Malcolm Davis-White Q.C. and Stephen Schaw Miller.

Introduction

5. The principal and very serious concern of the ChBA is to the proposed extension of the cab rank rule to include instructions from foreign lawyers. There are cogent reasons why barristers should not be obliged to accept instructions from lawyers who operate under different systems of law, regulation and professional standards. These reasons are not outweighed by any benefit which this extension of the rule may provide. The ChBA's response on this aspect is set out under Question 4.

6. We also have concerns about the requirement for a barrister to come to a view as to the location of the client's centre of main interests and about certain other definitions, particularly the definition of "foreign lawyer".

Q1: Do you agree that it is no longer sensible to make distinctions in the IPR based on where the work is done or where instructions come from?

7. Distinctions based on these factors may be insufficiently precise for the purpose that they are used. They give rise to some anomalies, but that is likely to be so whatever definitions are used.

8. The location where legal services are supplied (which may be at least related to where the work is done) remains relevant

   (1) for the purpose of the proposed rule 14 (relating required levels of insurance);

   (2) in connection with the provision of advocacy services.

9. New rule 47 preserves reference to the place where work is performed but is under review.

Q2: Do you agree with removing the current definition of "international work" and replacing this with definitions of "foreign work", "foreign lawyers" and "foreign clients"?

Q3: If so do you think that the new definitions are adequate?

10. The following comments and suggestions are offered with respect to the proposed definitions.

Foreign client

11. It is understood that "foreign client" means a foreign lay client. It is suggested therefore that this be made clear and that the definition be that " "foreign client" means a client, other than a foreign lawyer, who has …"

Centre of main interests

12. The definition of "foreign client" employs the concept of centre of main interests in order to determine whether the client is foreign. The following comments are offered in this respect.

13. *First,* this concept originates in international instruments or EU legislation relating to insolvency. It may not be a familiar concept to lawyers practising in other fields.

14. *Secondly,* the concept is the subject of a reasonably extensive body of case law, including decisions of the European court. Although that jurisprudence may serve to make the concept more clearly defined, it means that the definition of "foreign client" in the code of conduct is not a concept which can be properly understood simply by reading the code of conduct. The second limb of the definition in the proposed rules mitigates the application of the concept but nevertheless takes the concept as the starting point.

15. *Thirdly,* trying to ascertain the centre of their main interests may be a difficult or even impossible factual exercise for a barrister to undertake. The reported litigation illustrates the extent to which a wide range of information is relevant to determining where the relevant centre is located. That raises the question, What steps is the barrister required to take to establish where the client's centre of main interests is located? It is suggested that there needs to be a simple route (e.g. certification by the client) on which the barrister can rely.

Foreign lawyer

16. The schedule of definitions attached to the consultation documents does not include reference to this definition but para 15 of the Consultation Document explains that the definition in the Courts and Legal Services Act 1990 will be used in the new Practising Rules.

17. Section 89(14) of that Act defines "foreign lawyer" as a person who is not a solicitor or barrister but who is a member, and entitled to practise as such, of a legal profession regulated within a jurisdiction outside England and Wales. The following comments are based on the assumption that this is the definition which is to be incorporated into the new rules. If that assumption is not right, then the comments may not arise.

18. *First,* the definition proposed does not take account of the case where the foreign lawyer has a dual qualification, both in the foreign jurisdiction and in England and Wales. For example many lawyers in off-shore jurisdictions hold English qualifications. It should be made clear that such persons are foreign lawyers for the purpose of the rules.

19. *Secondly,* the definition applies to individuals and does not deal with the position of firms very conveniently.

20. *Thirdly,* it may be appropriate to exclude from the definition of "foreign lawyer", Scottish and Northern Irish solicitors because they feature in their own right as another category of professional client in the definition of "professional client". If this suggestion were adopted, it would be necessary to consider the impact throughout the rules. For example it would be necessary to add a reference to Scottish and Northern Irish solicitors in new rule 31.10 so as to provide for the case where the employer was a Scottish or Northern Irish solicitor.

Q4: Do you agree with the way in which the cab rank rule will be applied in the proposed rules?

21. Emphatically "No". The cab rank rule should not apply to instructions for any category of work which are given by a foreign lawyer. Barristers should not be compelled to accept such instructions.

22. The purpose of the following points is to explain why objection is taken to the imposition of the cab rank rule to instructions to provide legal services other than advocacy services in and for the purpose of proceedings before a court in England and Wales. The purpose is not to justify the existing rules which include anomalies.

23. The background against which the rule arose was that of the barrister acting as a referral professional on instructions from a solicitor. The rule as set out in para 602 of the existing Code of Conduct for Barristers does not apply to solicitors. But a rule similar to para 601 does apply to solicitors in connection with instructions to act as an advocate.[1] But advocacy services are not the focus of the proposal under discussion.

24. Where instructions are provided by an English or Welsh solicitor, a barrister receives the instructions from another professional lawyer working in the same system of law, who is subject to a known system of regulation and who will observe and be subject to known and high standards of probity. In such circumstances the application of an obligation to accept instructions is readily justifiable for the purpose of promoting access to legal advice and representation for the benefit of lay clients.

25. Foreign lawyers work, by definition, under different systems of law, regulation and professional standards. In many cases this will not give rise to problems and a barrister will be able to place appropriate reliance and trust on a foreign lawyer from whom instructions are provided. But it cannot be taken for granted that that will be so in all cases. This is the principal and most important reason why a barrister should not be subject to a professional obligation to accept instructions to provide any legal services to a foreign lawyer. A barrister should not be required to act on the instructions of a lawyer who may be operating under wholly different legal and professional standards.

[1] See the Solicitors' Code of Conduct 2007, rule 11.04(1).

26. Such differences are capable of raising severe obstacles to mutual understanding. For example, a barrister instructed by a foreign lawyer to draft or advise on an English trust may well encounter difficulties of communication where the foreign lawyer and his lay clients are unfamiliar with trusts. It is inappropriate to impose a duty on the barrister to accept instructions in such circumstances.

27. Foreign lay clients (or home lay clients in disguise) may come to see the fact that a barrister is obliged to act on instructions from a foreign lawyer, in circumstances where a solicitor is not, as an opportunity to obtain, via a foreign lawyer, English legal expertise (e.g. in drafting documents) for the purpose of money laundering or other nefarious activity. The protection which exists where the instructions come via an English or Welsh solicitor will not be present; and a barrister will not be entitled to restrict the instructions he is prepared to accept to instructions from those foreign lawyers whom he is willing to trust. Ensuring that the identity of the clients is properly ascertained and complying with other requirements of rules relating to the prevention of money laundering is likely to be difficult and time-consuming.

28. Difficulty may arise over the recovery of fees. It may not always be possible to quantify in advance what the appropriate fee is. So it may not always be possible to require payment to be made in advance. Payment on account is not permitted and the rule preventing that should not be changed. If the fee is not paid in advance, recovery afterwards may prove impossible.

29. A reason given for the proposed extension of the cab rank rule is that it should improve access to justice. At the core of the concept of access to justice is access to a court system which, under the rule of law, dispenses justice. The proposed change is not directed at all to improving access to English and Welsh courts. It is directed only towards enabling foreign lay clients to instruct barristers via foreign lawyers. It is concerned with access to lawyers, not access to the courts.

30. There does not appear to be any evidence that foreign lay clients are currently adversely impeded from obtaining advice from barristers or any evidence that

justifies imposing a duty on barristers to accept instructions from foreign lawyers to give such advice. Imposing such a duty is to impose on barristers a duty to act on the instructions of lawyers who work outside the system of law, regulation and standards in which barristers act and with which every barrister may be taken to be familiar. Strong and positive justification is required to impose such a duty. No such justification is alluded to in the Consultation Paper.

31. For these reasons it is suggested that in the proposed para 75.13 the words "to supply advocacy services in England and Wales" should be deleted and para 75.13 state "in a matter where you are instructed by a foreign lawyer".

Q5: Do you agree that these categories of work which were previously prohibited should become permissible under the new rules?

32. These categories are the three listed in paragraph 20 of the Consultation Paper.

33. It is agreed that the first category should be permitted.

34. The second category sits unhappily with the Public Access Rules. Permitting work in this category to be done other than under the Public Access Rules is likely to give rise to very fine distinctions being made between work permissible in this category and work which is subject to the Public Access Rules. It is reasonably easy for an individual to change the centre of his main interests: for example, a person may retire from working in England and settle at a new home in France. If he returns from time to time for the purpose of seeking legal advice, then as a foreign client and provided advocacy services are not provided a barrister will be permitted to accept instructions from him outside the Public Access Rules. This is a consequence of dropping the distinction based on where the instructions come from, currently contained in para 1(b)(i) of the International Practice Rules.

35. The proposed new rules do not expressly provide that a barrister is permitted to carry out work in the category. The fact that it is permitted follows from the provision in the introductory paragraph of the proposed new rule 24 which

excludes the operation of rule 24 from having application to foreign work. "Foreign work" is then defined in rule 25. Subject to the proposed new rules 26 to 28, a barrister may carry out foreign work for any type of client including, therefore, a lay client based in England and Wales. This results from the changes involved in dropping the current definition of "international work" and making the proposed definitional changes.

Q6: Do you agree with the proposed approach of incorporating the international practising rules into the body of the practising rules?

36. Yes.

Q7: Do you think guidance will be necessary to accompany the new rules?

37. Yes.

Q8: Do you agree with the content of the new rules?

38. For the reasons set out in response to Q4, the Chancery Bar Association strongly opposes the proposed extension of the cab rank rule and has concerns about the definitions employed.

Q9: Do you have any specific drafting comments?

39. Specific comments have been made above.

Q10: Do you think there is anything further that needs to be included in the rules?

40. No.

Q11: Are any of the proposals likely to have a greater positive or negative effect on some groups compared to others? If so, how could this be mitigated?

41. We have no comment to make in response to this question.