

**THE CHANCERY BAR ASSOCIATION**

**RESPONSE TO THE BAR STANDARDS BOARD'S CONSULTATION PAPER**

**ON**

**THE PROPOSED NEW CODE OF CONDUCT**

**Introduction**

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.
4. This response is the official response of the Association. It has been produced by Mark West, Ian Clarke, Catherine Addy and Georgia Bedworth, all of whom are members of the Committee.

## Consultation Response Form: Review of the Code of Conduct

**Q1: Do you agree with the approach adopted for guidance in the new Code?**

On balance, yes. However, the distinction drawn between Rules and Guidance and their categorisation is not always easy to appreciate. Why, for example is para 1.1 a rule, with paras 1.2 and 1.3 guidance?

**Q2: Do you agree with the approach to the application of the Rules?**

Yes.

**Q3: In particular, do you agree with the approach to the dis-application of Rules relating to barristers employed by or managers of a Recognised Body not regulated by the Bar Standards Board?**

Yes.

**Q4: Do you think that our approach to regulatory conflicts is sufficient?**

Yes.

**Q5: The Board does not believe that there are any regulatory conflicts. Do you agree or are there any conflicts that we have not identified?**

We have not identified any conflicts.

**Q6: Do you have any comments on the introduction?**

No.

**Q 7: Do you agree that there should be no rule prohibiting media comment, and that guidance should be provided instead?**

Yes.

**Q8: Do you have any comments on the revised drafting of the Conduct Rules?**

No.

**Q9: In particular, do you agree with the drafting of the rules in relation to:**

- a) A duty to report misconduct**
- b) A duty to co-operate with the regulator and the Legal Ombudsman**
- c) Equality and diversity**
- d) The application of the Conduct Rules to self employed and employed practising barristers**
- e) Applying CD2 to barristers without practising certificates ('unregistered barristers')**

a)Our view is that such a duty is undesirable opening up the further possibility of a 'litigation tactic' against an opponent by those inclined to engage in such tactics and because it may place a barrister in a position of conflict, the duty to report conflicting with the duty to the lay client. For example, the Conduct Rules state the core duties which include providing a competent standard of work and service to that client. Whilst the duty to report appears to extend only to "serious misconduct" (a phrase not apparently defined but, presumably, one which would include the breach of a core duty) it is possible (and not fanciful) to envisage that the representation of an opposing party in litigation to be so poorly and incompetently managed that that party's representative would be in serious breach of those core duties and thus demonstrating "serious misconduct". Nonetheless, this level of misconduct may be in the interests of the client of the barrister upon whom the duty to report would otherwise be placed.

Whilst it is recognised that the Code recognises that a barrister can have conflicting duties to the Court and his lay client, these provisions and their resolution are justified by stronger public-interest

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arguments and should not be extended. The proposed obligation should not be included.

If an obligation as suggested is to be imposed, the concern expressed above could be reduced if the rules make clear the timing of the requirement; the duty should only arise at the conclusion of a case either by judgment or settlement. (Analogies can be drawn with the wasted costs' jurisdiction and the obligation not to make any report prior to the conclusion of proceedings.) Such a refinement would address some, but not all, of the concerns set out above. Provision would have to be made for those cases which (from the barrister's perspective) simply 'fade away'.

- b) Yes.
- c) Yes.
- d) Yes.
- e) Yes.

**Q10: Do you agree with the proposed approach to the drafting of the Practising Rules?**

Yes.

**Q11: Do you have any specific drafting comments?**

No.

**Q12: Are there any omissions or unnecessary additions within the Practising Rules?**

No.

**Q13: Do you agree with the above proposal to link CPD requirements to the renewal of practising certificates?**

Yes – provided that the safeguards described in para 66 become and remain a feature of the regulatory system.

**Q14: Do you have any comments on the way in which the authorisation to practise arrangements have been reflected in the Code?**

Yes. Information as to any disciplinary findings etc. should be omitted; even more so, a finding of 'Inadequate Professional Service'. An interested party who wishes to consider an individual's disciplinary track record can do so through other means (e.g the Legal Ombudsman's website). To duplicate this facility is unnecessary and, in any event, that which is being shown in the register is the individual's current practising status and not his track-record. A detailed report of any disciplinary finding would unbalance the information in the register and assume a disproportionate prominence. Moreover, publication itself raises more complicated issues, on which the Legal Ombudsman has specifically consulted in September 2010. A summary prepared for the purposes of the register would be a waste of resources and (if it is to be done concisely and fairly) involve what are essentially specialist reporting skills.

**Q15: Do you agree with the new proposals in respect of unregistered barristers?**

Yes. Information in the 'model form' wording (para 85(c)) or substantially in that form should be made mandatory, otherwise the wording would become obscure and ineffectual to carry the full details of the implications of instructing an unregistered barrister.

**Q16: Do you think that the proposals provide adequate safeguards for clients and potential clients?**

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Yes, subject to the qualification set out to Q15.
<b>Q17: Do you think that rule 87 should apply to clients which are small businesses and other organisations as well as to clients who are individuals?</b> Yes. Small businesses and charities can be as unaware of the consequences of instructing an unregistered barrister as individuals.
<b>Q18: Do you have any comments on how these new proposals are reflected in the Practising Rules?</b> No.
<b>Q19: Do you think that the prohibition on dual qualification should continue?</b> Yes. (1) Dual qualification will only work if there is a clear procedure between the Approved Regulators to avoid regulatory conflicts; pending an acceptable formulation for resolution of those disputes, dual qualification should remain prohibited; (2) The restrictions and safeguards that are required will require consideration in light of the mechanism for resolving regulatory conflicts; and (3) The information that a dual qualified barrister is required to give if he wishes to call himself a barrister (even though not practising) should be clear, prescribed and analogous to that which must be provided to those dealing with unregistered barristers (consultation paper, para 85(c)). Individuals, small businesses and charities should be made clearly and explicitly aware of the regulatory and insurance framework governing the individual with whom they are dealing.
<b>Q20: If not, should there be any restrictions or safeguards introduced, and if so, what should they be?</b> See Q19.
<b>Q21: Do you agree that the information which a dual qualified barrister is required to give if he wishes to call himself as a barrister even though he is not practising as a barrister should be limited to explaining that he is not practising as a barrister?</b> See Q20.
<b>Q 22 Do you agree with how it is proposed to deal with legal aid fees for the purpose of the cab rank rule?</b> Some guidance should be given to Rule 75 in relation to the Cab-rank rule to the effect that barristers may take into account, when determining what is a proper fee, any guidance issued by the Bar Council. Otherwise it may be said that the Bar Council guidance in this regard is immaterial when considering any alleged breach of the cab-rank rule if a barrister declines to take a brief on a graduated fee on the basis that it is not 'proper' and it may also allow too much latitude generally in relation to publically-funded work and for individuals to broaden the range of cases in which a publically-funded fee is viewed as not (as far as they are concerned) a 'proper fee'.
<b>Q23: Do you agree that all members of Chambers should be collectively responsible for the administration of Chambers?</b> No. The obligation should remain with the Head of Chambers and those who have consented to and been elected/appointed to manage. Most modern chambers have moved away from government by all members in general meeting and, as such, many members have no management role or standing. Some will be too junior, some unwilling, some of not wanted by the body of chambers as a whole to

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<p>be involved in management. It would be wrong therefore to subject them to the obligations suggested.</p>
<p><b>Q24: If so, do you agree with the approach proposed?</b> No. See above.</p>
<p><b>Q 25 Do you agree that the existing requirement for barristers subject to the three year rule to have the same principal place of business as a qualified person should remain?</b> Yes.</p>
<p><b>Q26: Do you have any comments on the Practising Certificate Rules?</b> No.</p>
<p><b>Q27: Do you have any comments on the content and drafting of the Compliance Rules?</b> No.</p>
<p><b>Q28: Do you agree with the purposes of publication and disclosure? Do you consider that any other purposes are served by publication?</b> In relation to those matters already published or made available, the stated purposes are agreed. They do not apply however equally or at all in relation to the matters not currently published or made available. At present, the only matter which is (a) not published at all and (b) not publically available except on request is information about an Interim Suspension Order following a criminal conviction. We consider that this is the only additional item which, in order to achieve the purposes served by publication and disclosure, requires publication and disclosure.</p>
<p><b>Q29: Do you agree with the concerns identified? Can you identify any further concerns?</b> Yes.</p>
<p><b>Q30: Do you agree with the Board's proposal as to the publication of findings of professional misconduct? If not, why not?</b> Yes.</p>
<p><b>Q31: Do you agree with the Board's proposal as to the disclosure of findings of professional misconduct? If not, why not?</b> Yes.</p>
<p><b>Q32: Do you agree with the Board's proposal as to the publication and disclosure of findings of IPS? If not, why not?</b> Yes.</p>
<p><b>Q33: Do you agree with the Board's proposals as to the publication and disclosure of conditions imposed by Fitness to Practise panels? If not, why not?</b> Yes.</p>
<p><b>Q35: Do you agree with the Board's proposal neither to publish nor disclose findings under para 901.1. If not, why not?</b> Yes.</p>
<p><b>Q36: Do you agree with the Board's proposal as to the publication and disclosure of NFA determinations? If not, why not?</b> Yes.</p>
<p><b>Q37: Do you consider that there should be a residual power in the Complaints Committee, or in some other body, to publish or disclose findings where there is good reason to do so? If so, why?</b> No.</p>
<p><b>Q38: Do you have any further comments to make on the Board's proposed publication and disclosure policy?</b> Yes. An Interim Suspension Order following a criminal conviction should be disclosed indefinitely to</p>

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the Named Bodies.

**Q39: Do you agree that the Code should be principally web based?**

Yes, although it should be available such that historic versions of the Code at any particular date should be capable of re-creation. Charting its evolution may, in various circumstances, be appropriate or necessary.

**Q40: Do you think that the new Code of Conduct gives rise to any negative consequences for any group and, if so, how could they be mitigated?**

No.

**Q41: Does the Code provide opportunities to promote greater equality, and if so, how?**

No.

**Q42: Do you have any other comments on equality and diversity issues that may arise from the new Code of Conduct?**

No.

**Q43: Do you have any comments on the proposed timetable for publication?**

No.

Please return your responses by 21 April 2011 to  
[codeconsultation@barstandardsboard.org.uk](mailto:codeconsultation@barstandardsboard.org.uk)