

Employed barristers' rights to conduct litigation

A report by the Director General
of Fair Trading to the Lord Chancellor
on the likely competition effects
of amendments to the Code of Conduct
of the Bar of England and Wales

February 2001

1 GENERAL SUMMARY

- 1.1 The advice below concerns alterations proposed by the General Council of the Bar to the 7th edition of the Code of Conduct of the Bar of England and Wales ('the Code of Conduct') and annexes supplied to the Director General by the Lord Chancellor's Department on 11 December 2000.
- 1.2 Under section 29 and Schedule 4 to the Courts and Legal Services Act ('the CLSA') (as amended), if a body authorised to grant rights of audience or rights to conduct litigation makes an alteration to its qualification regulations or rules of conduct, the alteration shall not have effect unless approved by the Lord Chancellor. The Lord Chancellor may seek the advice of the Director General who shall consider whether the proposed alterations would have, or be likely to have, any significant effect on competition.
- 1.3 I am authorised by the Director General, under paragraph 7 of Schedule 1 to the Fair Trading Act 1973, to carry out competition scrutiny of the proposed alterations as required by the provisions of the Courts and Legal Services Act 1990 (as amended) set out above.
- 1.4 Together, the Code of Conduct and the Consolidated Regulations of the Inns of Court ('the Consolidated Regulations') form the qualification regulations and rules of conduct for practice at the Bar of England and Wales. The proposed amendments to the Code of Conduct concern the introduction of rules that permit the Bar Council to grant employed barristers rights to conduct litigation.
- 1.5 For the reasons discussed in the following paragraphs, I believe that although the proposed amendments to the Code of Conduct reduce an existing restriction to a limited extent, they would not be likely to have a significant effect on competition.

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2 THE AMENDMENTS TO THE CODE OF CONDUCT AND THEIR LIKELY COMPETITION EFFECTS

Grant of rights to conduct litigation to employed barristers

Background

- 2.1 Section 28 of the CLSA (as amended by section 40 of the Access to Justice Act 1999) gave the Bar Council the power to grant all barristers rights to conduct litigation. Following the passing of the Access to Justice Act 1999 ('the AJA') the Bar Council set up a working party chaired by Mark Sheldon OBE to consider the appropriate scope and content of any grant to employed barristers of rights to conduct litigation. The Working Party was not asked to consider the grant of such rights to barristers in independent practice. It issued an interim report and consultation document in May 2000 and its final report and recommendations in July 2000.
- 2.2 In the present application, the Bar Council proposes the *Employed Barristers (conduct of litigation) Rules* ('the Rules') which will govern the exercise of rights to conduct litigation by employed, but notably not independent, barristers. In conjunction with Paragraph 504 of the 7th Edition of the Code of Conduct¹, the Rules will enable employed barristers to conduct litigation in limited circumstances.

The Rules

- 2.3 Under the Bar Council's approach, only employed barristers will be able to conduct litigation, and only on behalf of their employers and the limited categories of other persons specified in paragraphs 501 and 502 of the Code of Conduct. This will limit the effect that the grant of rights to conduct litigation will have on the wider market for litigation services. The changes are unlikely to increase significantly the pool of those who are able to supply litigation services direct to the public. Barristers will not, for example, be able to compete with a solicitor's practice in this respect. Rules that granted independent barristers rights to conduct litigation, and indeed employed barristers rights to conduct litigation on behalf of persons other than their employers, would be likely to have a greater effect on the market for litigation services. Nevertheless, the new rules will reduce to a limited extent an existing restriction on competition by allowing employed barristers to compete in most circumstances² with employed solicitors in the provision of litigation services to their employers.

¹ Paragraph 504 of the Code of Conduct, which by paragraph 101, *ibid.*, will come into force on a date to be determined, actually grants employed barristers the right to conduct litigation.

² Solicitors employed by legal expense insurers are permitted to act directly for insured parties in relation to claims which do not exceed the 'no costs' limit in the county court - Employed solicitors Code 1990, Rule 4(b)

- 2.4 Rule 1(a) provides that rights to conduct litigation are exercisable only by those who are 'employed barristers' under the Code of Conduct. This rule continues to prevent barristers in independent practice from conducting litigation. However, it should ensure that employed barristers who conduct litigation will be subject to the full regulatory regime of the Bar Council and provide an appropriate degree of protection for consumers of their services.
- 2.5 Rules 1(b) to 1(d) go on to specify the additional training that must be undertaken by those who wish to exercise these limited rights to conduct litigation. Rule 1(b) proposes an initial twelve-week period of supervised training under a 'qualified person'. A qualified person is defined as a person having at least six years recent practice experience in the conduct of litigation, whether as a barrister or otherwise.³
- 2.6 Rule 1(c) provides that after the initial twelve weeks of training, there is a period of work under the oversight of an experienced litigator. Where barristers supply legal services to their employer only, the period is one year (unless they already have one year's experience in the conduct of litigation as a barrister or member of another authorised body). Where barristers may also supply legal services to the public⁴, the period is three years (unless they already have three years' experience in the conduct of litigation as a barrister or member of another authorised body).
- 2.7 Finally, Rule 1(d) requires barristers to take six hours of Continuing Professional Development ('CPD') on an approved litigation course in each of the first three years subsequent to the grant of rights to conduct litigation.
- 2.8 Collectively, these requirements seek to ensure that employed barristers who conduct litigation are competent to do so. The requirements of an initial twelve weeks of supervised training and the need to take CPD in the first three years appear to be proportionate means of achieving that aim. Also, the scope for exemptions from the basic requirements for those with sufficient relevant experience in the conduct of litigation provides a degree of flexibility in the application of the rules
- 2.9 By way of comparison, I would note that a fully qualified solicitor may conduct litigation as an employed solicitor without the need for further training, having gained litigation experience during a two-year training contract. Given the 12-week training period and CPD requirements that employed barristers must undertake, it is questionable whether the imposition on employed barristers of a longer period of oversight of three, rather than two, years is strictly necessary on grounds of public protection. Nevertheless, overall these training rules appear to strike an acceptable balance between public protection issues and the need to avoid unnecessary and unduly onerous restrictions.

³ See Rule 3

⁴ Paragraphs 501 and 502 of the Code of Conduct stipulate the persons to whom barristers may supply legal services. In most circumstances, employed barristers may provide legal services only to their employer. Where the employer is a solicitor or other authorised litigator, an incorporated solicitors' practice or a Legal Advice Centre, an employed barrister may supply legal services to 'clients' of their employer. Employed barristers may supply services to the general public only if the Legal Services Commission employs them or if they provide their services free of charge.

- 2.10 Rule 4 stipulates that breach of an undertaking given by an employed barrister in the conduct of litigation shall constitute professional misconduct. This is intended to ensure that the present disciplinary framework of the Code of Conduct⁵ applies to employed barristers who conduct litigation. To the extent that the mechanism for dealing with professional misconduct is able to take account of the nature and gravity of the undertaking given and of the breach, this criterion appears to be justified and is not likely to have an appreciable adverse effect on competition.

Further considerations

Prohibition on handling client money

- 2.11 Employed barristers with rights to conduct litigation will be subject to the general principles contained in the Code of Conduct applicable to all barristers. This will include the general prohibition, contained in paragraph 307(f) of the Code of Conduct, on barristers handling third party clients' money.⁶ The Sheldon Working Party concluded that although the prohibition might cause problems, the problems were not significant enough to justify a change in the rule.⁷ Nonetheless, there is a recommendation, which we welcome, in the Sheldon Report, that this prohibition be reviewed.⁸ The Bar Council accept the need for such a review, particularly in relation to employed barristers who conduct litigation in law centres. In conducting this review, the Bar Council should seek to ensure that the restrictions on employed barristers handling clients' money do not disadvantage employed barristers in the market for the conduct of litigation.

⁵ Contained in Annexes J to P of the Code of Conduct

⁶ Paragraph 307(f) of the Code of Conduct

⁷ Interim Report, paragraphs 5.4 and 5.5; Final Report, paragraph 16

⁸ Final Report, paragraph 16.

3 CONCLUSION

- 3.1 In summary, to the extent that the proposed changes increase the numbers of persons able to conduct litigation for their employers, they should in principle enhance competition. However, for the reasons highlighted above, the proposals are not likely to have a significant effect on the market for the conduct of litigation.
- 3.2 The Office has recently undertaken a review of restrictions on competition in the professions, including the legal profession. The above advice is given subject to any relevant issues relating to the legal profession that may arise from the review.

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