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<p>Q1: What are your views on how these options would work in practice and what their impact on the effectiveness of the cab rank rule would be?</p>	<p>Q2: Do you have a preference and why?</p>	<p>Q3: If the generic standard terms were retained, are there any elements that are unnecessary or unreasonable?</p>	<p>Q4: Do you agree that there should be an exception to the cab rank rule if the barrister has formed the reasonable opinion that the professional client is an unacceptable credit risk and that there should be no reference in the rule to the List of Defaulting Solicitors?</p>	<p>Q5: If there was an exception for unacceptable credit risk, do you have any views as to whether this would risk undermining the cab rank rule by adding to the grounds on which instructions could be refused?</p>	<p>Q6: Do you have any views on how the BSB could present the cab rank rule in a more principles-based way and whether this would negatively impact the effectiveness of the cab rank rule / principle?</p>
<p>Barrister</p>					
<p>No answer provided.</p>	<p>No answer provided.</p>	<p>No answer provided.</p>	<p>Does not think reference to the List should be removed from the Cab Rank Rule as it is a useful, objective guide to credit risk. It may be that the rule should deal with credit risk generally, as suggested. In that case (1) the rule should state that inclusion on the List indicates unacceptable credit risk and (2) the BSB should think carefully about what other evidence of credit risk could form the basis for a “reasonable opinion”, eg would it suffice if someone else in</p>	<p>Thinks that credit risk must be an exception to the Cab Rank Rule, as barristers should not be forced to work for nothing or at a discount.</p>	<p>No answer provided.</p>

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			Chambers had not been paid after six months?		
LAW SOCIETY					
When we consulted members of our committees in December 2014, we found that although most of the respondents used the current standard terms, a minority did seek to alter the terms on payment. Some barristers were also reported as wishing to use non-standard terms. If two parties agree commercial terms, we do not see why they should not be able to use them. Under the current arrangements, although arguably protected by the standard terms, in reality, barristers and solicitors are very unlikely to enforce those terms as they are in a mutually dependent relationship for work. In relation to	The Law Society is most amenable to alternative version 3. In the consultation document, the BSB directly refers to the Society's view expressed in answer to the December call for evidence, that solicitors should be able to suggest reasonable terms. The Society suggested that the Handbook should allow barristers to decline work if it is non-contractual, imposes inappropriate or unreasonable obligations on the barrister, or provides unusual or wholly unreasonable	The Law Society does not support the standard terms seeking to place the liability for the payment of barristers' fees entirely on solicitors. In any commercial arrangement, there is often a level of risk to manage and any reasonable terms relating to that arrangement, should seek to ensure that any such risk is shared fairly. The liability of solicitors to pay barristers' fees was removed as a regulatory obligation from the SRA Code in recognition of that fact and the relevant obligations that exist in the current code should be proportionate. If a	The Law Society agrees that if a barrister has reasonably formed the view that that the professional client is an unacceptable credit risk, then this could be a permissible exception to the application of the Cab Rank Rule. As the consultation paper itself says, the List of Defaulting Solicitors is only one source of intelligence about credit risk; it is reasonable that if a barrister has other intelligence about a professional client, then he/she should not be constrained in acting on it. However, the key word here is 'reasonable': This potential change to the Code should not enable the barrister to use it as a device to evade the obligations that are in place for proper public interest reasons. Any such	See answer to Q4.	We agree that framing the cab rank rule as a principle rather than a requirement could be a useful way of moving towards a more outcomes focussed approach to regulation. From the perspective of our members, under the current market conditions, the cab rank as a rule is rarely utilised and we forecast little in the way of consumer detriment. It is not, however, within our remit to advise the BSB on how to frame such principles.

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<p>any given set of instructions, a barrister is unlikely to try to enforce unacceptable contractual terms as s/he wishes to obtain the instructions. A solicitor is unlikely to try to enforce unacceptable terms as it may result in the solicitor losing their barrister of choice. Admittedly, this may be less the case in a scenario in relation to standard commoditised work in which the solicitor has a range of barristers to instruct; however, in that scenario, it would be inappropriate for the economic balance of power to be artificially imbalanced by regulatory enforceable terms.</p>	<p>commercial provisions. The BSB explains that this could lead to a conflict if both the solicitor and the barrister feel that the terms they have put forward are reasonable. This may be the case; however, we take the view that the solicitor and barrister should be able to work this out between themselves, just as any other professionals would be expected to in any other similar scenario. It is possible that the BSB could find itself adjudicating on whether terms provided by solicitors were or were not reasonable. This could be a complicated and potentially expensive process</p>	<p>client does not pay a barrister, it is likely that they have also not paid the solicitor; the Law Society can see no reason why solicitors should solely bear the risk of non-payment by the client when the professional fees of both the solicitor and barrister are at risk.</p>	<p>amendment or related guidance would therefore have to make it quite clear that refusal on this basis for unreasonable reasons could result in a complaint to the BSB and subsequent disciplinary action if refusal was subsequently found to be unfounded.</p>		
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	<p>if a regulatory one; alternatively, one solution that may be worth exploring is whether the Joint Tribunal Service could be extended to cover disputes over the reasonableness of terms.</p>				
<p>COMBAR</p>					
<p>The alternative options have the following undesirable features: <u>Alternative 1</u>: This appears to add little to the status quo, under which the contracting parties are free to agree alternative terms. However, barristers' professional obligations should not be defined by reference to whether any proposed contract terms are "<i>reasonable</i>"; <u>Alternative 2</u>: This is subject to the same criticism as Alternative 1. In addition, however,</p>	<p>For the reasons that we have discussed above the only suitable option proposed by the BSB is maintenance of the status quo.</p>	<p>No. The criticism of the Bar Council terms as being too detailed is misguided for the reasons explored at paragraph Error! Reference source not found. above.</p>	<p>Barristers should obviously not be compelled to accept instructions in circumstances where there is an unacceptable risk that the barrister will not be paid. Appearance of a solicitor on the List of Defaulting Solicitors is one indicator that the professional client presents an unacceptable credit risk. Indeed, there may be few other indicators to the barrister of the credit risk that accompanies any given instructions.</p>	<p>Accordingly, there is good reason for expanding the concept of unacceptable credit risk beyond that illustrated by the List of Defaulting Solicitors. We are not persuaded that doing this will, as the Bar Council suggests, lead to barristers avoiding the Cab Rank Rule by claiming that the solicitor/client was an unacceptable credit risk (especially if this can only be done in circumstances where reasonable grounds exist for taking such a view). However, if such an</p>	<p>As we have noted, the Cab Rank Rule is of the highest importance and (because of its effect in compelling barristers to work) needs to be expressed in clear and unambiguous terms. In our view, it is already expressed in a principles-based way, in that it sets out a clear principle, with some clear exceptions, each of which would be capable of being tested in the context of professional misconduct proceedings. We are concerned at the prospect that attempts to reformulate it might give rise to uncertainty and negatively</p>

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<p>it is essential for the certainty of its operation that the Cab Rank Rule is underpinned by some standard terms. No good basis has been provided for removing reference to the Bar Council terms. Removal of reference to the Bar Council terms will give rise to a period of unnecessary and undesirable administrative instability; <u>Alternative 3:</u> This is subject to the same criticism as Alternatives 1 and 2. Moreover, it would give an unfair negotiating advantage to professional clients and is likely in practice to lead to the adoption of unfair and inappropriate terms in certain cases.</p>			<p>However, the List of Defaulting Solicitors is an incomplete guide to credit risk. Indeed, the frequent adoption of Basis B where the COMBAR/CLLS terms means that professional clients are frequently seeking to transfer to the barrister the credit risk in respect of the lay client.</p>	<p>exception is to be added to the Cab Rank Rule, the BSB should publish guidance as to what a barrister might fairly regard as suggesting an unacceptable credit risk.</p>	<p>affect its application. We also do not accept that any case has been made for the rule to be reformulated. However, without greater description of the proposed changes, we are unable to comment on this suggestion any further.</p>
<p>BAR COUNCIL</p>					
<p>Alternative 1: Acceptable, but</p>	<p>Of these maintaining the <i>status quo</i> is</p>	<p>The Bar Council does not consider that there are any</p>	<p>This question has given rise to some debate.</p>		<p>The Bar Council considers that the cab rank rule is, in its present form, sufficiently</p>

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<p>adds nothing to status quo.</p> <p>Alternative 2: Unacceptable, as it defeats the cab rank rule for the consumers.</p> <p>Alternative 3: Unacceptable, as it removes commercial fairness and certainty for the Bar.</p>	<p>clearly the best option. As a general point, it is clear from the BSB's 2014 Review of the standard contractual terms that they are working in practice. Whilst the Bar Council accepts that it is appropriate periodically to review the degree and form of regulatory intervention, it should be recognised that the current provision works, and thereby fulfils the regulatory objectives. Furthermore, an analysis of the alternatives shows that the <i>status quo</i> is clearly preferable.</p>	<p>elements of the standard contractual terms which are unnecessary or unreasonable.¹ As paragraph 11 of our response to the BSB's 2014 Review of the standard contractual terms states, our surveys have shown that they are widely used without any problems. We will, of course, keep this under review. It may be that detailed drafting issues are unearthed in due course. At present, however, the evidence is clearly in support of the current terms.</p>	<p>1. All barristers and clerks who expressed a view considered that the List of Defaulting Solicitors is a very useful service for the Bar, highlighting credit risks in an efficient, economical and fair manner. However, it is clearly limited in that in order to be placed on the List a solicitor will have to have failed to pay a judgment or a Voluntary Joint Tribunal's award in full within 30 days, and this could be seen as too high a test of being an 'unacceptable credit risk'. Accordingly, there was some support for expanding the exception to the cab rank rule to include a more general 'unacceptable credit risk' test.</p> <p>2. However, on consideration it was thought that such a change was:</p>		<p>principles based. That is to say, it is difficult to set out the principle in any more general a form whilst maintaining clarity of meaning and application. At best it might be possible to insert a pre-amble to the rule describing the principle it is applying, ie reasonable access to proper representation regardless of personal characteristics or the opinion of the public or the barrister, the only exceptions being circumstances in which or terms on which it would be unethical for the barrister to act, or unfair or unreasonable to require a barrister to act. However, the risk of doing so is that it could in fact make less clear (or at least less certain) that which it is intended to elucidate.</p> <p>6. The Bar Council also considers that the exceptions to the cab rank rule, by their very nature and the impact they have on the cab rank rule, need to be tightly drawn. As such they are one area of the Code of Conduct in which the</p>
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			<p>2.1. Unnecessary, as the Code of Conduct rC30.9.b allows barristers to demand payment in advance in cases where they feel there is a credit risk and the solicitors is not on the List of Defaulting Solicitors, and</p> <p>2.2. Undesirable, as it could be used to avoid the cab rank rule by means of barristers simply claiming that a solicitor was an 'unacceptable credit risk'.</p> <p>3. In particular, it would be difficult to regulate any such exception because what is "unacceptable" is uncertain and might change from case to case, and even from barrister to barrister.</p> <p>4. It may be important to note that the ability to require payment in</p>		<p>certainty of clear rules is particularly important. There are several exceptions, but they are specific and targeted: they do not detract, and should not be seen as detracting, from what is otherwise a very broad rule in rC29. It would be possible to frame the rule and exceptions in a more general way, but that would inevitably need to be supplemented by Guidance of the same degree of clarity as the current rules, and such an approach would carry with it a clear suggestion that other, less well defined circumstances would justify refusing instructions, which would risk widening the opportunity for arguing that the cab rank rule does not apply. That represents an unnecessary and undesirable risk, which would not appear to work in the public interest.</p> <p>7. The Bar Council has noted with surprise a view in some quarters that the underlying principles are not clear. If this is still the case, then the underlying principles might be set out in Guidance. It is not clear to the Bar</p>
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			<p>advance does not mean that barristers will not agree other arrangements where there is a heightened credit risk: it merely means that they cannot be required to accept that risk. Alternative payment arrangements can always be made; but the current formulation allows for this.</p> <p>5. In conclusion, the Bar Council does not agree with expanding the current exception to the cab rank rule.</p>		<p>Council what this would add which would serve a useful regulatory purpose, but perhaps a brief explanation might draw attention to the benefits for the public and the public interest, pursuant to the regulatory objectives.</p>
FAMILY LAW BAR ASSOCIATION					
<p>Superficially Alternative 1 looks to be the most attractive insofar as it would provide to the barrister the option of putting forward different terms on a case by case basis. However, this carries the risk of undermining the cab rank rule by affording the opportunity to put forward alternative</p>	<p>The status quo is the best option as it provides sufficient flexibility and has been shown to be working satisfactorily. Barristers have the protection of the Standard.</p> <p>Terms which they are free but not</p>	<p>We see no reason not to retain the current standard contractual terms and there are no unnecessary or unreasonable elements.</p>	<p>Again, superficially this proposal looks attractive as far as the Bar is concerned because the test for placing a solicitor on the List is high and beyond what might be considered an “unacceptable credit risk”.</p> <p>However, the importation of the words “reasonable” and “unacceptable” carry</p>	<p>We do not consider that such a rule would undermine the cab rank rule. It is deeply embedded in barristers from early on in their training that the rule of law requires access to justice for all. Also, the market is highly competitive and barristers want work; they are not looking for</p>	<p>Our view is that the rule is presented in a simple and straightforward manner in rC29. The exceptions to it in Cr30 are also clear and straightforward. Readers of the Conduct Rules can be in no doubt what the cab rank rule means and the limited circumstances in which a barrister may decline to act. Adding principles or further grounds would run the risk of</p>

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<p>terms to those which are advertised on the basis of reasonableness, a concept which although susceptible to objective assessment, this would be only after the fact and entirely at the behest of the barrister at the time.</p> <p>On considering the circumstances in which such a facility might be invoked by a barrister the only obvious example which comes to mind is if there is an issue about the payment of fees. That potential problem can be dealt with in other ways (see below).</p> <p>It is difficult to imagine how this would work in practice. Presumably barristers would be required to advertise that either (i) the Standard Contractual Terms may be departed from at the behest of the barrister in</p>	<p>obliged to depart from if the solicitor wishes to negotiate alternative terms, more favourable as far as the solicitor is concerned. In practice this happens regularly in financial remedy cases where, for example, counsel agrees to await payment until the conclusion of the case.</p>		<p>the potential for causing more difficulty than assistance. These words are wide open for interpretation and challenge, requiring barristers to provide evidence, which could be awkward. Presumably evidence produced to deal with a subsequent complaint would have to satisfy a third party assessor on a balance of probabilities? Again, that could cause great difficulty in practice.</p> <p>Such a change is unnecessary as rC30.9.b enables a barrister to require payment in advance without the need to provide a reason. Barristers use this provision when they have cause to believe that there is a risk that they will not be paid. The reality is that solicitors usually do not accept a personal liability for the payment of fees and agree only to pay when the client pays them. When barristers invoke</p>	<p>excuses to avoid accepting instructions.</p>	<p>providing more words which are open to interpretation and argument, thereby providing potential to undermine the rule itself.</p>
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<p>'reasonable' but unspecified circumstances or (ii) there are no standard terms and the barrister will propose reasonable terms on a case by case basis. Both options are unattractive for solicitor/client due to the lack of clarity. We believe that this lack of clarity could also expose barristers to pressure to accept terms put forward by solicitors who seek to take advantage of the apparent void. Alternatives 2 and 3 are unacceptable and unworkable for similar reasons.</p>			<p>rC30.9.b it is just as likely to be because they see a risk that the client will not pay the solicitor, and not necessarily a risk that the solicitor will not pay the barrister.</p>		
<p>Chancery Bar Association</p>					
<p>All three proposed options introduce a level of uncertainty into the cab rank rule, because it would be possible for different individuals to reach different views about</p>	<p>The introduction of contractual terms caused considerable disruption to the practice of many members of the Chancery Bar. This</p>	<p>Paragraphs 38 to 43 of the Consultation Paper indicate that this question is primarily aimed at solicitors' objections to the imposition of liability for barristers'</p>	<p>Any changes to the Code of Conduct which enable barristers to avoid credit risk are, of course, welcome. We note, however, that rule rC30.9.b already</p>	<p>See answer to Q4.</p>	<p>We are in favour of the BSB's less prescriptive and more outcomes focused approach. Nevertheless, we believe that the cab rank rule has real value in ensuring access to justice and that its existence as a rule, with certain clearly</p>

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<p>whether the terms proposed for the instructions were “reasonable” in any given case. Such uncertainty is unwelcome where it could result in a barrister who genuinely considers he is acting in accordance with the Code of Conduct subsequently being held to have breached it.</p> <p>2. In relation to the first and second options, however, the choice whether to propose “<i>other terms</i>” is the barrister’s. As we understand it, neither of the first two options positively obliges the barrister to propose such terms. A barrister can, therefore, avoid the risk of being in breach of the Code of Conduct by publishing standard terms of work and, in any case where there is a doubt, insisting on being instructed on those</p>	<p>is not to say that the change was not desirable, but we are not convinced that there is any need to make further changes and risk yet further disruption. We therefore favour the status quo.</p> <p>13. If further change is considered desirable, we consider either of the first or second options to be acceptable, as presently drafted. We do not believe they are likely to have much impact, in practice, on the current position.</p> <p>14. The third option, however, would be unworkable, for the reasons explained above, and we are strongly opposed to it.</p>	<p>fees and the exclusion of the barristers’ liability to solicitors. We strongly agree with the views expressed in the Consultation Paper to the effect that these conditions strike a proper balance between the client’s right to insist on the cab rank rule “trump” card and the barrister’s freedom of contract.</p> <p>16. We do not consider that any other elements.</p>	<p>provides an exception to the cab rank rule if (except where fees are to be paid by the Legal Aid Agency or by the Crown Prosecution Service) “<i>having required your fees to be paid before you accept the instructions, those fees have not been paid</i>”.</p> <p>19. This exception currently provides very important and (we believe) frequently used protection to barristers if they consider there to be a material credit risk. This protection has taken on particular significance now that many solicitors are unwilling to accept liability for barristers’ fees. Although barristers are not obliged by the cab rank rule to accept instructions on this basis, market forces have dictated that, certainly in substantial commercial matters, terms (such as COMBAR Basis B) which do not involve the solicitor accepting liability for fees are</p>		<p>defined exceptions, causes little difficulty in practice. We are not, at present, persuaded that there are sufficient reasons for changing the presentation of so important a principle.</p>
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<p>terms. In relation to the first option, even barristers who have not published standard terms have the protection of being able to insist on the Standard Contractual Terms. Thus, whilst we consider that the addition of the suggested new wording in the first and second options (“<i>such other terms as you may reasonably propose...</i>”) would be acceptable to members of the Chancery Bar, we question whether they would be likely to rely on this exception to the cab rank rule in practice.</p> <p>The disadvantage of the second option, as compared with the first, is that there do not appear to be any checks and balances applicable to the barrister’s published standard terms. At</p>			<p>frequently agreed. Insisting on payment in advance is one way of mitigating the effect of such terms.</p> <p>20. It seems to us that this exception can equally be relied upon where a solicitor is prepared to accept liability for the barrister’s fees, but where the solicitor is an unacceptable credit risk. An exception to the cab rank rule which enables barristers to refuse instructions altogether in such circumstances may be thought unfair on the lay client, and unnecessary for barristers, if the lay client (or the solicitor) is willing and able to pay fees in advance. The proposed exception to the cab rank rule may, therefore, require revision to take account of this possibility.</p> <p>21. So far as the List of Defaulting Solicitors is concerned, it is arguable</p>		
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<p>present, if a barrister publishes terms which are wholly unreasonable, the client can still insist on the barrister acting on the Standard Contractual Terms. Since those terms appear to be regarded as acceptable by the substantial majority of (if not all) members of the Chancery Bar (and probably the Bar as a whole), this ensures that the cab rank rule has teeth. Removing the requirement to act on anything other than the barrister's published standard terms, however, appears to deprive the cab rank rule of much of its content.</p> <p>5. The third option, however, swings the balance too far the other way. It takes choice away from the barrister in two respects.</p>			<p>that the existence of the List, and the ability to refuse instructions from a solicitor who is on it, has some (perhaps limited) deterrent effect. If the List is no longer the basis of an exception to the cab rank rule, it is possible that the List will lapse into abeyance. For that reason, we are not in favour of removing the reference to the List as an exception to the cab rank rule</p>		
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<p>6. First, it gives the professional client the choice whether to accept the barrister's published standard terms. The barrister's ability to fall back on his published standard terms is, in our view, a vital safeguard against the barrister later being held unwittingly to have breached the Code of Conduct. If there is a concern as to whether some barristers might publish standard terms which are unreasonable, this can be dealt with by allowing the client to insist upon the approved Standard Contractual Terms, as explained above.</p> <p>7. Secondly, this option gives the opportunity to propose alternative terms to the professional client. As explained above, different individuals can legitimately hold different views as to</p>					
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<p>what is reasonable. Thus, a professional client might propose terms which are within the range of possibilities that might later be held to be reasonable, but which the barrister himself would never have put forward.</p> <p>8. Experience to date of negotiating contractual terms suggests that professional clients are likely, in practice, to propose terms to which the majority of members of the Chancery Bar would be unwilling to agree. We note that paragraph 52 of the Consultation Paper states that the effect of the third option would be that, in the event of a disagreement, the barrister would be obliged to accept the solicitor's terms in preference to his own.</p> <p>9. We do not believe that such an approach</p>					
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<p>is desirable, or that it would be accepted in practice. The BSB would be likely to be inundated with requests for a ruling on whether particular terms are reasonable, in advance of those terms being agreed. The acceptance of instructions would be unnecessarily delayed. The publication of general guidance could not be expected to produce sufficient certainty in all (or even in most) cases. The third option is, in our view, bound to lead to intractable arguments about what is, or is not, reasonable in the circumstances of the particular case and to many unnecessary and unfounded complaints about barristers' conduct.</p> <p>10. Further, the barrister would be at risk of acting without insurance (and so in</p>					
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<p>breach of Handbook) if he accepted the solicitor's terms when they are not within the scope of BMIF approval.</p> <p>11. For these reasons, we consider that the third option would be unworkable in practice.</p>					
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Feedback/informal responses to the consultation

Citizens Advice

The operation of the cab rank rule isn't something that we get much evidence about from our local Citizens Advice so we are not in a position to comment in depth of this. We are supportive of the cab rank rule's intention to ensure that everyone is able to secure representation, this is a cornerstone of justice so we are pleased that you are giving due regard to the implications of any changes.

Beyond saying that any rule change needs to ensure that cracks do not open up denying some clients representation, we are not in a position to give an informed opinion about whether the proposed change will on balance be beneficial.

Advice UK

I believe that the reference to the standard terms should not be removed. I recognise and understand the arguments re greater flexibility but feel that the potential restriction of access to justice that may result if it is removed is more important.