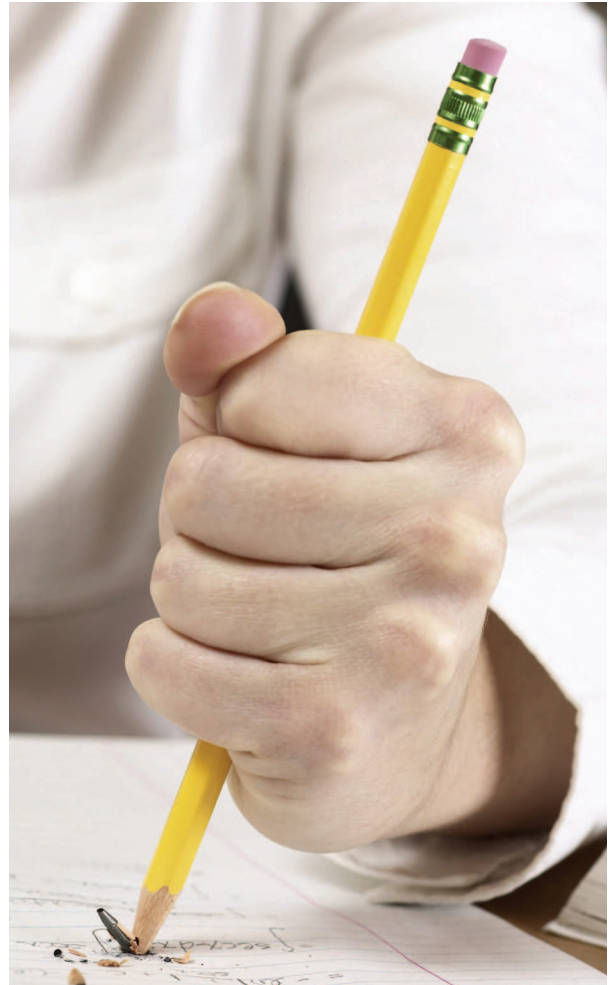


Public access barristers: MEN OF LETTERS?



The public access rules on correspondence are unworkable, anti-competitive and not in the interests of clients, writes [Marc Beaumont](#)



Beaumont:
restriction anti-
competitive

Wikipedia informs the surfer that the expression “man of letters” has been used in many cultures to describe contemporary intellectuals. The term implied a distinction between those “who knew their letters” and those who did not. The distinction had great weight when literacy was not widespread.

In Greece the expression “learn your letters” found widespread use in everyday life, especially by the surviving older generations. Its meaning was equivalent to “study hard” and “learn an intellectual trade”. Because of the agricultural background of Greece, the term “man of letters” also signified the opposite of the usual trades of builder and farmer. In this context, these hand-driven trades were often pointed out as examples to be avoided when parents suggested to a young person to “become a man of letters” in order to live an easier life.

However, when it comes to letter

writing, public access (PA) barristers do not live an easier life at all. This is because para 401 of the Bar Council’s Code of Conduct contains a prohibition against barristers engaging in correspondence. This is causing special difficulty in PA cases.

In all but name

Pre-action protocol letters before claim in PA cases are often self-evidently written by barristers. The author may even name himself in his draft. But he cannot use chambers’ notepaper or send the letter directly by post, fax or e-mail. He is compelled to be a ghost writer for the client. Feedback to last year’s Public Access Review Consultation shows clients frustrated that despite their payment for such services, they cannot enjoy the prestige or impact of a letter sent on the PA barrister’s own notepaper.

E-mail is an efficient, effective and self-recording method of delivery of communication. But by virtue of para 401, barristers are not permitted to send e-mails to

opponent barristers or to opponent solicitors. Such a restriction is so anachronistic that it runs the risk of bringing the Code of Conduct into disrepute. There is clear evidence that this restriction is being honoured more in the breach than the observance—and on a widespread scale. It is laughable. No-one seeks to defend it.

Case for change

The Public Access Review Working Group’s Consultation of clients and consumer groups supports the case for change. As the Bar Standards Board (BSB) states: “Good client care is a crucial feature of any profession providing services. The Bar should aspire to the highest standards of service and it needs to take notice of its consumers.”

The observations of the National Consumer Council in response to the BSB’s questionnaire are highly significant: they regard restrictions which lead to double-manning as not in the interests of consumers. The current rule compels a consumer who requires the use of a lawyer’s letterhead, to instruct: (i) a PA barrister to draft a complex letter, but then (ii) to use a solicitor merely to reproduce the barrister’s

work on professional notepaper. Relaxation of the current restriction will lead to greater efficiency and economy for the consumer.

The Public Access Bar Association supports the abrogation of para 401. The experience of its members, who specialise in PA work, is that the rules on corresponding are unworkable and inimical to the interests of PA clients.

A rule limiting freedom of expression in a PA case in the conduct of, for instance, settlement negotiations to the use of speech and which prevents the use of the written word, is predicated on an artificial distinction between sound waves and symbols—yet both are forms of human expression. The BSB and the Bar Council are public bodies. The legality of their actions is governed by the Human Rights Act 1998. The restriction on corresponding appears to be a breach of s 6 of the Act, as it is impossible to find any justification for it in Art 10 of the European Convention on Human Rights. Art 8 of the Convention, referring expressly to correspondence may also be engaged.

Moreover, the current restriction is anti-competitive. It places solicitors at an unfair commercial advantage against PA barristers. And it is an advantage without justification on public policy grounds.

Reform would be a natural extension of the BSB's self-avowed aim to increase access to justice for consumers. The BSB states that: "Clients and courts must be confident that barristers will provide excellent legal representation and advice at a price which represents value for money." There is evidence that barristers' fees in PA cases may be as much as ten times less than those of solicitors. Increasing the flexibility of the service that a PA barrister is able to offer can only assist the consumer to enjoy protection from exorbitant solicitors' fees. Within the alternative business structures soon to be created by the Legal Services Act 2007, the idea that all the professionals involved may write letters, except the barrister, paints an

absurd picture—and will be prima facie anti-competitive in any event.

Permission to correspond

It is submitted that correspondence should be permitted in PA cases between PA barristers and their opponents, where, but only where, it is adjunctive to recognised and permitted barrister functions in PA work, such as:

- **advocacy**—eg e-mails attaching skeleton arguments and/or copy authorities;
- **drafting**—eg letters before claim, which are technical documents now routinely drafted by counsel in PA cases;
- **negotiation and ADR**—eg without prejudice or open letters making offers to settle, e-mails exchanging travelling draft consent orders as attachments, or letters or e-mails suggesting arrangements for the setting up of a mediation;
- **discharging a duty (or courtesy) to the court**—eg a letter or e-mail to a judge explaining an absence from court, or providing dates to avoid, or a draft order for approval, or copy authorities.

By contrast, the service by a barrister of a pleading or witness statement under cover of a letter should not be permitted, as that would be the conduct of litigation and not merely adjunctive to a barrister function. It would be the assumption of a solicitor function and therefore prohibited.

There is some scope for barristers to be permitted to send correspondence in non-contentions matters, eg the exercise of an option. The BSB is considering whether some barristers should be permitted to engage in conveyancing work. They too will need to be free to correspond.

Impact

Would relaxation fuel the argument of those favouring fusion of the legal professions? It would not. The rules about correspondence can be relaxed without enabling barristers to conduct litigation. This is

because in *Andre Agassi v Robinson (HMIT) & (1) Bar Council (2) Law Society (Intervenors)* [2005] EWCA Civ 1507, the Court of Appeal held that correspondence is not part of the conduct of litigation. So relaxation should not per se lead to fusion of the professions. It is no more likely to have this effect than the advent of the PA scheme itself.

Whose offence?

The BSB is undertaking a review of the Code of Conduct as a whole. It may be some time before amendments can be made in this area. This being so, there is a compelling argument for the issue of a moratorium announcing that barristers in PA work who correspond in a way which is merely adjunctive to the exercise of permitted functions, will not be prosecuted for breach of the Code. The notice might cite the above examples of expressly permitted work. The moratorium would protect the Bar Council or the BSB from a challenge to the legality of the current restriction by anyone accused of breaching a rule which is probably unlawful.

These changes will require a small amendment to para 401 and amendments to the PA Rules and Guidance. The Access to the Bar Committee possesses the expertise to draft all of these changes. I have settled a first draft. And the PA Training Course run by the College of Law might usefully in future involve some training in letter writing.

Meanwhile, when you next send an e-mail to an opponent, ask yourself whether you are in danger of committing a professional offence. If the answer is yes, perhaps you will support my proposal. I venture to suggest that at some time or another most busy barristers have breached para 401. That is a condemnation of the rule and not the barrister. ❖

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