

BSB New Handbook – Joint Seminar (Combar, ChBA and IBC)

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Bar Standards Board Handbook

Tim Fancourt QC
Chairman
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Bar Standards Board Handbook – effective 6 January 2014

Part 1 – Introduction

Part 2 – Code of Conduct

Part 3 – Scope of Practice and Authorisation and Licensing Rules

Part 4 – Qualification Rules

Part 5 – Enforcement Regulations

Part 6 – Definitions

Found online at

<http://handbook.barstandardsboard.org.uk/handbook/>

Transitional provisions (Part 1, Section C of Handbook, r113).

The main changes, as they are likely to affect Chancery and commercial barristers, are the following:

- Format and content of the Code
- Public access rules apply to international work
- Changes to cab rank rule
- Acceptance of instructions
- Responsibility of all barristers for compliance by chambers
- Duty to report serious misconduct of self or other barristers
- Pupils, devils and outsourcing
- Administrative sanctions for breaches of Code

Format and content

Part 2 of the Handbook

Section A – Application

Section B – The Core Duties

Section C – The Conduct Rules

Section D – Rules Applying to Specific Groups of Regulated Persons

Section B - Core Duties

CD9 -

You must be open and co-operative with your regulators

CD10 -

You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations

Section C - Conduct Rules

C1 – You and the Court

C2 – Behaving Ethically

C3 – You and Your Client

C4 – You and your Regulator

C5 – You and Your Practice

Example of Conduct Rule and Guidance

oC11 - *Clients'* best interests are protected and promoted by those acting for them.

rC17 - Your duty to act in the best interests of each client (CD2) includes a duty to consider whether the *client's* best interests are served by different legal representation, and if so, to advise the client to that effect.

Example of Conduct Rule and Guidance /cont...

gC49 - Your duty to comply with Rule C17 may require you to advise your *client* that in their best interests they should be represented by:

- 1 -a different advocate or legal representative, whether more senior or more junior than you, or with different experience from yours;
- 2 -more than one advocate or legal representative;
- 3 -fewer advocates or legal representatives than have been instructed; or
- 4 -in the case where you are acting through a professional client, different *solicitors*.

Example of Conduct Rule and Guidance /cont...

gC50 - Specific rules apply where you are acting on a public access basis, which oblige you to consider whether *solicitors* should also be instructed. As to these see the public access rules at Section 2.D2 and further in respect of BSB regulated bodies Rule S28 and the associated guidance.

gC51 -

Example of Conduct Rule and Guidance /cont...

gC50 - Specific rules apply where you are acting on a public access basis, which oblige you to consider whether solicitors should also be instructed. As to these see the public access rules at Section 2.D2 and further in respect of BSB regulated bodies Rule S28 and the associated guidance.

gC51 -

Part 3 - Scope of Practice and Authorisation and Licensing Rules

Section A – Application

Section B – Scope of Practice Rules

Section C - Practising Certificate Rules

.....

Section B

B1 – No Practice without Authorisation

B2 – Provision of Reserved Legal Activities

B3 – Scope of Practice as a Self-employed Barrister

.....

rS24 - You may only supply legal services if you are appointed or instructed by the court or instructed:

- 1 - by a professional client (who may be an employee of the client); or
- 2 - by a licensed access client , in which case you must comply with the licensed access rules ; or

rS24 /cont...

3 - by or on behalf of any other client, provided that:

a -the matter is public access instructions and:

i -you are entitled to provide public access work and the instructions are relevant to such entitlement; and

ii - you have notified the Bar Standards Board that you are willing to accept instructions from lay *clients*; and

iii - you comply with the *public access rules*; or

b - the matter relates to the conduct of litigation and

i - you have a litigation extension to your practising certificate ; and

ii - you have notified the Bar Standards Board that you are willing to accept instructions from lay *clients*.

Responsibility of all barristers for compliance by chambers

rC89 -

Taking into account the provisions of Rule C90, you must take reasonable steps to ensure that:

1 - your chambers is administered competently and efficiently;

2 - your chambers has appointed an individual or individuals to liaise with the Bar Standards Board in respect of any regulatory requirements and has notified the Bar Standards Board ;

.....

Responsibility of all barristers for compliance by chambers/cont...

4 - proper arrangements are made in your chambers for dealing with *pupils* and pupillage;

5 - proper arrangements are made in chambers for the management of conflicts of interest and for ensuring the confidentiality of *clients'* affairs;

.....

Responsibility of all barristers for compliance by chambers/cont...

8 - appropriate risk management procedures are in place and are being complied with; and

9 - there are systems in place to check that:

a - all persons practising from your chambers whether they are members of the chambers or not have insurance in place in accordance with Rules C75 to C77 above (other than any pupil who is covered under his pupil *supervisor's* insurance); and

b - every BSB authorised individual practising from your chambers has a current practising certificate

rC90 - For the purposes of Rule C89 the steps which it is reasonable for you to take will depend on all the circumstances, which include, but are not limited to:

1 - the arrangements in place in your chambers for the management of chambers;

2 - any role which you play in those arrangements; and

3 - the independence of individual members of chambers from one another.

gC127 -

Members of chambers are not in partnership but are independent of one another and are not responsible for the conduct of other members. However, each individual member of chambers is responsible for his own conduct and the constitution of chambers enables, or should enable, each individual member of chambers to take steps to terminate another person's membership in specified circumstances. Rule [C78] does not require you to sever connection with a member of *chambers* solely because to your knowledge he or she is found to breach this Handbook, provided that he or she is not disbarred and complies with such sanctions as may be imposed for such breach; however, your chambers constitution should be drafted so as to allow you to exclude from chambers a member whose conduct is reasonably considered such as to diminish the trust the public places in you and your profession and you should take such steps as are reasonably available to you under your constitution to exclude any such member.

CD5 –

You must not behave in away which is likely to diminish the trust and confidence which the public places in you or in the profession

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Vice-Chair of the Bar Standards
Board



Supervision

- New risk-based approach;
- Chambers/entities initially – then other areas of activity;
- Risk assessment framework;
- Priority to higher risk sets of chambers or higher risk areas through thematic reviews;
- Supervision v enforcement – a focus on early, constructive engagement rather than enforcement;
- Only persistent or very serious non-compliance referred for enforcement.

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Duties to Provide Information and to Report Misconduct – an overview

Andrew Walker QC
Maitland Chambers
Chairman, Bar Council
Professional Practice Committee



Two aspects:

- Providing information to the BSB
- Reporting serious misconduct by barristers

Providing information

CD9 -

You must be open and co-operative with your regulators

“Your regulators” will include the Bar Standards Board (rC64) and the Legal Ombudsman (rC71).

Outcome oC23 - The Bar Standards Board has the information that it needs in order to be able to assess risks and regulate effectively and in accordance with the regulatory objectives.

rC64 -

You must:

.1 - promptly provide all such information to the Bar Standards Board as it may, for the purpose of its regulatory functions, from time to time require of you, and notify it of any material changes to that information.

gC92 -

Your obligations under Rule C64 include, for example, responding promptly to any request from the Bar Standards Board for comments or information relating to any matter whether or not the matter relates to you, or to another BSB regulated person.

gC93 - The documents that you may be required to disclose pursuant to Rule C64 may include client information that is subject to legal privilege. It has been recognised in R v Special Commissioner and Another, Ex P Morgan Grenfell & Co Ltd ([2003] 1 A.C. 563) that the disclosure of a *client's* privileged information to a legal regulator does not infringe the *client's* right to privilege. This is because the information is not being sought for the purposes of making it public or to be used against the person entitled to the privilege. Note the difference where you are being required to report serious misconduct by others. In those circumstances, where legal professional privilege applies, this will override the requirement to report serious misconduct by another.

Reporting serious misconduct by barristers – the rationale

gC95

It is in the public interest that the Bar Standards Board, as an Approved Regulator, is made aware of, and is able to investigate, potential instances of serious misconduct. The purpose of Rules C65.7 to C69, therefore, is to assist the Bar Standards Board in undertaking this regulatory function.

Reporting serious misconduct - yourself

rC65 - You must report promptly to the Bar Standards Board if:

.7 - you have committed serious misconduct.

gC94 - In circumstances where you have committed serious misconduct you should take all reasonable steps to mitigate the effects of such serious misconduct.

Reporting serious misconduct - others

rC66 - Subject to your duty to keep the affairs of each client confidential and subject also to Rules C67 and C68, you must report to the Bar Standards Board if you have **reasonable grounds to believe** that there has been serious misconduct by a barrister or a registered European lawyer.

rC67 - You must never make, or threaten to make, a report under Rule C66 without a **genuine and reasonably held belief** that Rule C66 applies.

rC68 - You are not under a duty to report serious misconduct by others if:

.1 - you become aware of the facts giving rise to the belief that there has been serious misconduct from matters that are in the public domain and the circumstances are such that you reasonably consider it likely that the facts will have come to the attention of the Bar Standards Board ; or

.2 - you are aware that the relevant person that committed the serious misconduct has already reported the serious misconduct to the Bar Standards Board ; or

.3 - the events which led to you becoming aware of that other person's serious misconduct are subject to their legal professional privilege; or

.4 - you become aware of such serious misconduct **as a result of your work on a Bar Council advice line.**

rC69 - You must not victimise anyone for making in good faith a report under Rule C66.

gC97 - If you **believe (or suspect)** that there has been serious misconduct, then the first step is to carefully consider all of the circumstances. The circumstances include:

- .1 - whether that person's instructions or other confidential matters might have a bearing on the assessment of their conduct;
- .2 - whether that person has been offered an opportunity to explain their conduct, and if not, why not;
- .3 - any explanation which has been or could be offered for that person's conduct;
- .4 - whether the matter has been raised, or will be raised, in the litigation in which it occurred, and if not, why not.

gC98 - Having considered all of the circumstances, the duty to report arises if you have reasonable grounds to believe there has been serious misconduct. This will be so where, having given due consideration to the circumstances, including the matters identified at Guidance C97, you have material before you which as it stands establishes a **reasonably credible case** of serious misconduct. Your duty under Rule C66 is then to report the potential instance of serious misconduct so that the Bar Standards Board can investigate whether or not there has in fact been misconduct.

gC99

Circumstances which may give rise to the exception from the general requirement to report serious misconduct set out in Rule C68.1 include for example where misconduct has been widely reported in the national media. In these circumstances it would not be in the public interest for every BSB regulated person to have an obligation to report such serious misconduct.

What is “serious misconduct”?

gC96 - Serious misconduct includes, without being limited to:

- .1 - dishonesty (CD3);
- .2 - assault or harassment (CD3 and/or CD5 and/or CD8);
- .3 - seeking to gain access without consent to instructions or other confidential information relating to the opposing party’s case (CD3 and/or CD5); or
- .4 - seeking to gain access without consent to confidential information relating to another member of chambers, member of staff or pupil (CD3 and/or CD5);
- .5 - encouraging a witness to give evidence which is untruthful or misleading (CD1 and/or CD3);

- .6 - knowingly or recklessly misleading, or attempting to mislead, the court or an opponent (CD1 and/or CD3); or
- .7 - being drunk or under the influence of drugs in court (CD2 and/or CD7); or
- .8 - failure by a barrister to report promptly to the Bar Standards Board pursuant to rC66 above; *[duty to report serious misconduct by others]***
- .9 - a breach by a barrister of rC70 below; *[duty to allow inspection of premises, documents and records]*
- .10 - conduct that poses a serious risk to the public.

Points to Note - discussions within chambers:

- No exception for serious misconduct disclosed during a barrister's discussions with Head of Chambers, or any other barrister in chambers.
- The individual barrister will have a duty to report.
- The Head/member of Chambers will also have a duty to report if the individual barrister has not already done so (rC68.2), unless the serious misconduct is disclosed in circumstances covered by the individual barrister's legal privilege (rC68.3; likely to be unusual).

- Query whether a Head of Chambers (or other member of chambers) can rely on the individual barrister reporting the matter.
- BSB previously suggested that it would be sufficient that the individual barrister is advised to report himself and then does so.
- The Head/member of Chambers must at least know that the individual barrister has done so?

Points to Note - Bar Council ethical advice

- Barristers providing advice through designated services operated by the Bar Council (e.g. the ethical enquiries service and the pupillage helpline) are not subject to the duty to report others; but are expected to encourage self-reporting of serious misconduct (rC68.4; gC100-101).
- Only excluded if they discover serious misconduct whilst working for that advice service.
- Barristers seeking advice cannot escape the duty to report themselves.

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The new Handbook

Ewen Macleod,
Head of Regulatory Policy,
BSB



The Code of Conduct

- 10 core duties (CD)
 - Core elements of professional conduct that apply to all barristers (and others)
- Outcomes (o)
 - Descriptive, rationale for rules and aid understanding of rules and guidance; not mandatory but will be taken into account when considering breaches of the rules
- Rules (r)
 - Supplementing core duties where specific rules necessary
- Guidance (g)
 - Assists in the interpretation of rules, examples of expected behaviour etc (not mandatory)

The Core Duties

- You must observe your duty to the court in the administration of justice [CD1]
- You must act in the best interests of each client [CD2]
- You must act with honesty and integrity [CD3]
- You must maintain your independence [CD4]
- You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession [CD5]
- **You must keep the affairs of each client confidential [CD6]**
- You must provide a competent standard of work and service to each client [CD7]
- You must not discriminate unlawfully against any person [CD8]
- You must be open and co-operative with your regulators [CD9]
- You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations [CD10]

The conduct rules

- You and your client
 - rC15: Your duty to act in the best interests of each client (CD2), to provide a competent standard of work and service to each client (CD7) and to keep the affairs of each client confidential (CD6) includes the following obligations...:
 - rC15.5: You must protect the confidentiality of each client's affairs, except for such disclosures as are required **or permitted** by law or to which your client gives informed consent

Enforcement changes

- Admin sanctions available for breaches where proportionate
 - Power to impose rests with PCC (can be delegated to staff)
 - Max fine increased to £1,000 for individuals
- Cases not appropriate for NFA or admin sanctions referred to a disciplinary tribunal
- New enforcement strategy

Enforcement changes

- Disqualification powers:
 - Where breach caused and in public interest to prevent them working for a BSB regulated person
 - Requirement to seek BSB approval before employment
 - Only DT (or interim panel) could impose
 - May apply to us to have it lifted
- Interim suspension and disqualification panels:
 - PCC's powers enhanced
 - Triggers for referral and powers available widened
 - Immediate interim suspension powers

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