

Bar Standards Board Handbook 2014

Summary of Main Code Changes affecting Chancery Barristers

Introduction

1. With effect from 6 January 2014, the existing Bar Code of Conduct is replaced by the new BSB Handbook, which includes a new Code of Conduct in Part 2. This can be found online at <http://handbook.barstandardsboard.org.uk/handbook/>. It is very different in appearance and layout, and in some respects different in substance from the existing 8th edition of the Code of Conduct, though many of the rules remain essentially the same.
2. Finding your way around the new Code is a challenge: the system for numbering parts of the Code is very difficult to grasp. Rules are not just found in Part 2 but in Parts 1-5.
3. The most important changes from the previous Code, as they affect Chancery barristers, are set out in the main section of this Note, below.

Transitional provision

4. The new Code does not apply in relation to matters occurring before 6 January 2014. The existing Code applies until that date.
5. So far as enforcement is concerned, the new enforcement machinery in the Handbook applies with effect from 6 January 2014 (see Part 5 of the Handbook), but the old conduct rules and sanctions continue to apply in relation to events that occurred before that date (Handbook, Part I, section C, r114).

Enforcement regime

6. The new monitoring, supervision and enforcement regime of the BSB comes into full force at the same time as the new Code. This is a new approach to regulating barristers, required by the Legal Services Board, which focuses on achieving regulatory “outcomes” and uses risk assessment as the primary tool for applying the new monitoring and supervision regime, to try to ensure that outcomes are achieved.
7. To a degree, the BSB has already started to apply the risk assessment approach in its monitoring. Chambers have previously had to complete an annual questionnaire return

for the purpose of enabling the BSB to assess the level of risk posed by the activities of each set. But the approach will apply to a greater extent from January 2014 and will be underpinned by new enforcement rules.

8. The good news is that under the new regime there is more emphasis on helping barristers and sets of chambers to address and minimise risks; and enforcement powers are used only when it is necessary or appropriate to do so, given the seriousness or frequency of the breach.
9. As a result of the new monitoring and risk assessment regime, chambers will receive an Impact Audit Survey in the Spring, the purpose of which is to assess how serious the impact of any breach of the rules will be. At about the same time, a 2014 supervision return will enable the BSB to assess how the risk of breaches of the Code is being managed. The matters of concern are, principally, the maintenance of updated records with the BSB; prompt replies to correspondence, including completion of the impact audit and supervision return; openness in identifying and dealing with risks, and taking appropriate measures to prevent risks materialising.
10. The survey and return will lead to a risk rating being applied to each set of chambers, which in turn will affect how the monitoring and supervision regime is applied to it in future. In short, the fewer and the better managed the risks, the less often chambers will have to respond to any BSB inquiries or fill in returns. There will however remain a degree of random supervision of all barristers and sets.

Main changes in the Code

11. The main changes, as they are likely to affect Chancery barristers, are the following:
 - a. Format and content of the Code
 - b. Public access rules apply to international work
 - c. Changes to cab rank rule
 - d. Acceptance of instructions
 - e. Responsibility of all barristers for compliance by chambers
 - f. Duty to report serious misconduct of self or other barristers
 - g. Non-discrimination
 - h. Pupils, devils and outsourcing
 - i. Right to conduct litigation
 - j. Administrative sanctions for breaches of Code

12. **(a) *Format and content of the Code.*** The Code, in Part 2 of the Handbook, now contains: 10 Core Duties; Outcomes; Conduct Rules and Guidance. The Core Duties are set out in Section B of Part 2. These must be complied with, though some have priority over others, as explained in the Guidance (gC1) and in relevant Rules (rC3.5, rC4 and rC16). Breach of a Core Duty can lead to disciplinary proceedings (I6.1) but breach of an Outcome cannot (I6.2). Outcomes may however be relevant to the assessment of whether or not a Core Duty or Rule has been complied with.
13. Core duties 1-8 are unsurprising and reflect the fundamental principles of the existing Code. Core duties 9 and 10 are new. These are: (9) you must be open and co-operative with your regulators, and (10) 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. Core Duty 10 includes an obligation to take reasonable steps to mitigate the effects of any breach of legal or regulatory obligations once the barrister is aware of the breach (gC2).
14. The Conduct Rules are found in Section C of Part 2, arranged thematically at C1 to C5, together with relevant Guidance. The rules are stated not to be exhaustive of the content of the core duties (I6.3.a). Not all relevant Guidance is found in the Handbook: some is found elsewhere, e.g. in the Equality and Diversity Code Good Practice Guidelines and in the Pupillage Handbook.
15. **(b) *Public access rules apply to international work.*** Under the old Code, Appendix A: The International Practice Rules, a barrister is permitted to take instructions from a lay client where the instructions relate to “international work”, as defined. This worked by disapplying to “international work” rule 401(a) of the old Code. That meant that such work did not have to be treated as public access work under the public access rules.
16. Under the Handbook, there is no longer an exception from the requirement for a professional, licensed access or public access client for international work. A barrister providing legal services must be instructed either by the court or by a professional client or licensed access client, or by a lay client giving public access instructions in accordance with the public access rules: Handbook, Part 3, rS24. A foreign lawyer is a professional client for these purposes, and some professionals resident abroad (e.g. accountants, insolvency practitioners) may be qualified to instruct a barrister under the licensed access scheme.
17. From 6 January 2014, subject to the period of grace identified below, it is no longer permissible for a barrister to take instructions directly from a lay client in relation to

foreign work unless the barrister does so under the public access rules. You may not accept public access instructions unless you are qualified to do so (by completing the requisite course), you have notified the BSB that you are willing to do so, and you comply with the public access rules at rC119 to rC130 (rS24.3.a).

18. Foreign work has its own definition in the Code (proceedings taking place outside England and Wales and work not subject to the law of England and Wales), but this appears to be relevant only to the cab rank rule (which does not apply) and the requirement to comply with local practice rules in the foreign jurisdiction.
19. The BSB indicated informally on 20 December 2013 that a period of grace of 6 months will be allowed to enable barristers to obtain the necessary qualification and become registered for public access work.
20. Details of public access courses (1.5 days) run by the Bar Council are available at <http://www.barcouncil.org.uk/for-the-bar/member-services-training-courses/public-access-training-for-barristers/>. The next available course is 18, 19 December 2013 in London, then 13, 14 January 2014 in Birmingham. Top up courses for those who have previously taken a public access course are also available: see <http://www.barcouncil.org.uk/for-the-bar/member-services-training-courses/public-access-top-up-training/>. The next available course is 17 December 2013, in London, then 17 January 2014 in London and 24 January 2014 in Birmingham.
21. **(c) Changes to cab rank rule.** The cab rank rule is at rC29. It applies only when you are instructed by a professional client. The cab rank rule does not apply in relation to foreign work, nor if you are instructed by a foreign lawyer except if that lawyer is a European Lawyer, as defined, a lawyer from a country that is a member of EFTA, a solicitor or barrister of Northern Ireland or a solicitor or advocate of Scotland.
22. Under the new Code, there is no longer any deeming provision in relation to the reasonableness of fees for publicly funded work. In every case, it is therefore a matter for the individual barrister to decide whether or not the fee offered is a reasonable fee, given his experience and seniority, the nature of the work to which the instructions relate and the terms and timing of the instructions. But the inadequacy of the fee cannot be relied upon if there has not been a reasonable attempt to agree a fee within a reasonable time of receipt of the instructions: rC30.9.a. There is still an entitlement to require fees to be paid in advance of acceptance of the instructions: rC30.9.b.

23. As from 31 January 2013, the cab rank rule applied under the old Code to instructions proffered on the Bar Council's Standard Contractual Terms and on any terms that a barrister or set of chambers advertise themselves as willing to accept. That remains the position under the new Code, and there remains an exception to the cab rank rule where a professional client is not accepting liability for the barrister's fees (rC30.7.a). It is not yet clear whether this exception applies in a case where the barrister advertises acceptance of work on terms that do not impose such a liability on a professional client, e.g. Combar B, C and D.
24. It is recommended that sets of chambers do not *advertise* themselves as being generally willing to accept instructions on those terms, but that they accept instructions on those terms on a case by case basis, where it is considered appropriate or pragmatic to do so. For reasons given in my July 2013 note on Standard Contractual Terms (<http://www.chba.org.uk/for-members/library/professional-guidance/chba-guidance-on-the-combar-colls-terms>), there are many cases for which Combar B, C and D are unsuitable and should not be used.
25. **(d) Acceptance of instructions.** As from 6 January 2014, when you first accept instructions in relation to a matter you must confirm *in writing* (which includes e-mail) acceptance of the instructions and the terms and basis on which you will be acting, including the basis of charging (rC22.1). This should make clear the extent of the instructions that you are accepting on that basis.
26. This written confirmation must be sent to the professional client if the instructions come from a professional client. This must be done before you do the work, unless this is not reasonably practicable (rC24). It can be done by your clerk and, where appropriate, by reference to the terms on your website or on the Bar Council's website.
27. Where further work is done in response to further instructions on the same matter, the same terms are deemed to apply when you start the further work, unless you agree otherwise (rC23). You need to be careful here if you have accepted limited initial work on a basis of charging and payment that you would not consider acceptable for more extensive instructions.
28. Remember that you must inform your clients (lay and professional) at the time that you are instructed of the lay client's right to make a complaint and how the chambers complaints procedure operates (rC99, rC101).

29. ***(e) Responsibility of all barristers for compliance by chambers.*** Every barrister in a set of chambers has a responsibility to take reasonable steps to ensure that their chambers are well-administered, with proper arrangements and processes in place (including for pupils and pupillage and for protecting confidentiality), that all employees are competent, aware of the provisions of the Handbook that are relevant to their work and do nothing to cause or contribute substantially to a breach of the Code (rC89).
30. Further all barristers have a responsibility to see that all appropriate risk management procedures are in place, and systems to check that all barristers have requisite insurance and a practising certificate (rC89.8, rC89.9).
31. The steps that it is reasonable for an individual member of chambers to take depends on all the circumstances, but in particular:
- a. The arrangements in place for the management of chambers;
 - b. Any role that the barrister plays in those arrangements, and
 - c. The independence of individual members of chambers from each other. (rC90)

Thus a barrister who is a member of the management board of chambers may be expected to have greater responsibility than the junior tenant who is not involved in any way in the management of chambers. And one member of chambers cannot be responsible for the unforeseen misconduct of another member, only for inadequate systems or arrangements that give rise to such misconduct.

32. Every member of chambers has a responsibility to ensure that the chambers has appointed a BSB liaison person and notified the BSB of that person's identity (rC89.2).
33. Every member of chambers should ensure that chambers has a constitution that enables it, where appropriate, to terminate the memberships of other members who are not fit to practise (gC127). This Guidance sits rather oddly in the Code, since there is no rule to which it apparently relates, other than perhaps a general requirement not to associate with others in such a way as to bring the profession into disrepute: see Core Duty 5 and gC126.
34. ***(f) Misconduct: duty to report serious misconduct of self or other barristers.*** In addition to Core Duty 9, there is now a specific rule requiring barristers to provide the BSB promptly with all information that it requires for regulatory purposes. This includes information about other regulated persons. (rC64). As a matter of law, this is understood to include information that is privileged to a barrister's client: gC93.

35. There is now a general duty to report yourself if you have committed serious misconduct (rC65.7). There is also a duty to take reasonable steps to mitigate the effects of such misconduct (gC94).
36. You are also under a duty to report another barrister if he or she commits serious professional misconduct (rC66), but only if you have a genuine and reasonably held belief that there is a duty to make such a report (rC67). The duty is however subject to your duty to keep the affairs of your client confidential; and there is no duty to report if the events that led to your being aware of that barrister's serious misconduct are subject to their legal professional privilege (rC68.3).
37. So although client confidentiality is not a bar to self-reporting, confidentiality and privilege appear to exclude the duty to report others.
38. There are further exceptions to the duty to report others, such as where the barrister is known to have reported himself already, or where the misconduct is already in the public domain and you reasonably consider that it is likely to have come to the BSB's attention already (rC68.1, rC68.2).
39. Serious misconduct is not exhaustively defined but examples of it are given (gC96). These include: dishonesty, encouraging a witness to give evidence that is untruthful or misleading, harassment, knowingly or recklessly misleading or attempting to mislead the court or an opponent, and failure by a barrister to report himself or another barrister where a report should have been made. Further Guidance is available on how to approach the decision whether or not to make such a report (gC97, gC98).
40. There is no exception as such to the duty to report where a barrister discusses his possible misconduct with his head of chambers or with another experienced barrister in chambers who provides such advice. So if the advice given by such a person is that the barrister has committed serious misconduct and the barrister does not report himself, the head of chambers (or other barrister) is obliged to report the serious misconduct. However, the duty to report does not override privilege, so if the barrister genuinely instructs his head of chambers (or another barrister) to give him legal advice about possible misconduct (which he can do as a professional client), the head of chambers cannot report the barrister because this would breach the barrister's privilege. But if the advice is that there has been serious misconduct the barrister must report himself.
41. There is an exception to the duty to report for the Bar Council's ethical helpline. Matters disclosed by a barrister to other barristers or employees staffing the helpline do not give

rise to a duty to report; though again if the barrister is advised that he has committed serious misconduct he is under a duty to report himself.

42. There is no duty to report misconduct that does not amount to serious misconduct unless the misconduct leads to a charge on an indictable offence, a conviction for an offence other than a minor criminal offence (defined) (rC65) or a request for information about misconduct is made by the BSB.
43. **(g) *Non-discrimination.*** The new Code contains the same prohibition on discriminating unlawfully against, harassing or victimising any other person on account of specified protected characteristics (rC12). An Outcome in the same section of the Code is that a barrister will “take all appropriate steps to prevent discrimination occurring in their practices” (oC8); but the only other rules of this kind are the non-discrimination rule in relation to the acceptance of instructions (rC28, gC88) and the Equality and Diversity Code. An earlier proposal to impose a specific duty on a barrister to take reasonable steps to prevent unlawful discrimination generally has not been included in the Handbook.
44. **(h) *Pupils, devils and outsourcing.*** As under the old Code, a barrister is required to take personal responsibility for his or her work and to use his or her own professional judgement (rC20). This does not prevent outsourcing of support work or the use of pupils or devils, as long as the client is not misled about these matters (rC19.2; gC59).
45. If a barrister outsources to a third party support services that are critical to the delivery of legal services required by instructions, the barrister must ensure that the third party is subject to specific contractual obligations. These are that the third party owes a confidentiality obligation equivalent to the barrister’s, an obligation to comply with relevant Code duties and an obligation to process any personal data in accordance with the barrister’s instructions (rC86). These rules do not apply in the case of pupils or devils (gC130).
46. The new Code has a new definition of “pupil”: an individual who is undertaking the first non-practising six months of pupillage or the second practising six months of pupillage, or a part thereof, and who is registered with the BSB as a pupil. So mini-pupils, third six pupils and unregistered pupils are not “pupils” (though third six pupils may be “devils”), nor are lawyers on secondment or on placement schemes.
47. The provisions of the new Code give rise to difficulties in relation to confidentiality.

48. The primary rule is that the affairs of each client must be kept confidential save to the extent that disclosure is required by law or made with the client's informed consent (rC15.5). Guidance (gC46) provides that "if you are a pupil or are devilling work for a self-employed barrister, Rule C15 applies to you as if the client of the self-employed barrister was your own client". Though only guidance, this is apt to impose a duty of confidentiality on the pupil or devil, but it may not (and cannot in law) exonerate the barrister from disclosing confidential material to the pupil or devil without the consent of the client. Nor does the guidance in relation to pupils apply to mini-pupils.
49. The problem is the same under the Combar/COLLS contractual terms, where only disclosure required by law or authorised expressly by the client is permitted. Under the general law, disclosure to a pupil could be a breach of an obligation of confidentiality.
50. The only safe course, therefore, is to ensure that a barrister provides services on terms that state that the barrister may disclose confidential material to his pupil or a mini-pupil or secondee, provided that such persons are subject to or assume a duty of confidentiality.
51. The BSB has been asked to clarify these rules in order to establish that there is at least no breach of the Code where a barrister shares confidential information with his or her pupil, mini-pupil or secondee provided that that person owes a parallel duty of confidentiality.
52. **(i) Right to conduct litigation.** Under the new Handbook, a self-employed barrister can be authorised by the BSB to conduct litigation. For obvious reasons, the vast majority of those in practice in chambers will not wish to do so.
53. To conduct litigation lawfully, you must be authorised to do so (by way of indorsement of your practising certificate) by the BSB. This means that you will first have to be authorised to accept public access instructions and then be authorised to conduct litigation. It is believed that the BSB will be accepting applications for authorisation from 22 January 2014.
54. These restrictions do not prevent a barrister from doing matters that are authorised by those rules or by the Code generally, such as conducting correspondence with other parties.
55. **(j) Administrative sanctions for breaches of Code.** Under the old Code, except for some minor (mainly administrative) transgressions in relation to which the penalty was a

warning or a fine, breaches of the Code were charged as professional misconduct and, if not admitted, had to be proved to the criminal standard either at a summary hearing or before a disciplinary tribunal.

56. Under the new Handbook, where the PCC concludes *on a balance of probabilities* that a breach of the Handbook occurred, it may take no further action (rE37.2) or deal with it by way of an administrative sanction (rE37.3). It may only do so if it considers that an administrative sanction is sufficient and proportionate in the public interest (rE50.2). It may not take that course in the case of an external complaint against a barrister unless the barrister has had a reasonable opportunity to respond to the allegations in writing (rE40). If the PCC considers that an administrative sanction would not in all the circumstances be appropriate, it must refer the complaint to a disciplinary tribunal.
57. The maximum fine that can be imposed by way of administrative sanction is £1000 (rE52.1). There is a right to appeal such a fine, which takes place in front of an appeal panel constituted as in the case of a 3-person disciplinary tribunal (rE84). The appeal is by way of review, not re-hearing. It takes place on paper unless a request for an oral hearing is made (rE85).
58. You will note that there is accordingly the possibility of a finding of breach of the Handbook being made on paper, without a hearing, and on a balance of probabilities only. The right to an oral hearing on appeal may be sufficient to make this procedure article 6 compliant, but there is a question as to the status of any finding of breach dealt with by way of administrative sanction.
59. The Handbook provides that any decision to issue a warning or to impose an administrative sanction will be recorded and used in connection with future supervision and monitoring, but will not be disclosed to third parties except in accordance with particular rules (rE53). These rules are contained in Part 5.A8 of the Handbook. They provide, inter alia, that disclosure may be made by the BSB in response to a request from Queen's Counsel Appointments and the Judicial Appointments Committee, or in relation to a request for a certificate of good standing or an application to become a pupil supervisor.
60. It is currently unclear whether, in future, a barrister applying for silk or for a judicial appointment will have to disclose in their application the fact of a finding of breach of the Handbook that was dealt with administratively (or where no further action was taken or a warning given). The Chancery Bar Association, in its response to the consultation on the new Handbook, opposed the proposal that findings could be made on paper on a balance of probabilities. When it became clear that the BSB was going to proceed with that

proposal, the Association urged the BSB to achieve clarity that any finding made on that basis and dealt with administratively was not a finding of misconduct that would have to be disclosed as such in any silk or judicial application. The BSB has been asked to clarify its position on this important point, and if clarity is not provided the Association will take the matter up with QCA and JAC.

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