



The Council of the Inns of Court

# **Disciplinary Pool members'**

## **Information and Guidance pack**

**January 2014**



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## 1. Introduction from the President of COIC

Dear Panel Member,

I am pleased to provide this Information and Guidance Pack for your use. It is intended to serve as both a training and reference resource and I hope you find it useful throughout your tenure.

Whilst we have strived to make this pack as comprehensive as possible, it is not an exhaustive guide and should not be taken as such. Furthermore, the pack will need updating from time to time. Indeed it is likely that substantial additions will be necessary if and when entity regulation becomes a reality. If you wish to supplement your knowledge, much useful information exists online on the Bar Tribunals and Adjudication Service website and the quarterly Newsletters which are emailed to you.

We would appreciate any feedback or comments about the pack. The appropriate forum to express this would be on the website at [info@tbtas.org.uk](mailto:info@tbtas.org.uk) Otherwise, please contact the BTAS Tribunals Administrator, Margaret Hilson at [Margaret.Hilson@tbtas.org.uk](mailto:Margaret.Hilson@tbtas.org.uk).

Finally, please accept my personal thanks for offering your valuable time to the service of COIC's Disciplinary Tribunals. Your contribution will ensure that both public and professional interests are properly served.

Yours sincerely,

**Sir Christopher Pitchford**  
**President of the Council of the Inns of Court**  
**January 2014**





## 2. Overview of the Council of the Inns of Court (COIC)

- 2.1 **History:** COIC was established in 1987 following a report by Lord Rawlinson of Ewell, who was asked to examine the constitution of the Senate of the Four Inns of Court (COIC's predecessor). As a result of the Rawlinson report, it was agreed that the Senate should be dissolved and replaced by (1) the General Council of the Bar and (2) COIC. In parallel with these changes, the Judges, with the agreement of the Inns, resolved that from 1 January 1987 the disciplinary powers over barristers, which had previously been delegated by the Judges to the Inns, were to be exercised in accordance with the Constitution of the COIC.
- 2.2 **Functions of COIC:** The functions of COIC are set out at paragraph 1 of the COIC's Constitution. In summary, the overarching purpose of the COIC is to be the representative body of the four Inns of Court and to formulate and co-ordinate the policies of the Inns. The Council also serves as a forum in which tripartite discussions can take place between the Inns, the Bar Council and the Bar Standards Board.
- 2.3 At the time of writing, COIC has recently become incorporated and is seeking charitable status. The Bar Tribunals and Adjudication Service and the Advocacy Training Council will become operational arms of COIC under the stewardship of the COIC Director, James Wakefield.
- 2.4 **COIC's Disciplinary Function (paragraph 1 (f) of the Constitution):** Most saliently for the purposes of this pack, COIC is responsible for recruiting, appointing and administering all Disciplinary Tribunal panels. It does not however, act as the professional regulator. This role falls upon the BSB, who, in the exercise of this, investigate and prosecute breaches of the Code of Conduct and the BSB Hadbook. COIC's involvement theoretically safeguards the independence of the panels within the disciplinary process.

2.5 In summary, COIC convenes and organises:

- Oral Directions Hearings for Disciplinary Tribunals;
- Disciplinary Tribunals; and,
- Panels under the Interim Suspension and Disqualification Regulations and Fitness to Practice Regulations.

2.6 The President of COIC nominates those who shall sit on a tribunal or panel by the signing of a convening order. The President also sees all the reports of Findings and Sentence produced by Chairmen of Disciplinary Tribunals. Section 6 of this Guidance Pack will provide more detail of the procedure involved in this.

2.7 Given COIC's responsibilities for disciplinary matters, it has a real interest in and input into implementation of the Bar Standards Board's policy and procedures in relation to the complaints and disciplinary processes. It is one of the bodies required to approve charges to the Disciplinary Tribunal Regulations.

2.8 **The Tribunals Appointments Body:** Through the Appointments Protocol 2012<sup>1</sup>, COIC and the President of COIC have delegated their powers to appoint Disciplinary Tribunal panel members to the Tribunals Appointments Body ("TAB"). The TAB is currently chaired by McFarlane LJ, a Court of Appeal judge, and should contain at least 2 silks, 2 practising barristers of at least 7 years standing and 2 lay members, as well as the Chairman.

The TAB is charged, amongst other things, with appointing and maintaining a pool of:

- (1) QC's, barristers and lay persons who are eligible to sit on Disciplinary Tribunal panels.<sup>2</sup>
- (2) Clerks to Disciplinary Tribunals and other hearing panels.

2.9 Under the Code of Conduct outlined in the Appointments Protocol, appointees to the COIC Disciplinary Pool ("the Pool") are expected to uphold the 7 Nolan Principles. If it is found that persons are not acting in accordance with these obligations, or they become ineligible to serve as a Disciplinary Tribunals panel member for some other

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<sup>1</sup> Due to be updated in February 2014

<sup>2</sup> Cumulatively known as the COIC Disciplinary Pool

reason, the TAB will refer to the President to consider their removal from the Pool.

- 2.10 **Training:** COIC also has responsibility for providing both pre and post appointment training to members of the Pool. Pre-appointment training is conducted in 3 stages: induction, equality and diversity and observation of a tribunal. Post-appointment, COIC will provide training to provide practical updates to our procedures or other necessary information to develop the core competencies demonstrated by appointees at interview. Our Performance and Appraisal scheme will assist in the identification of additional training and development needs of panel members.
- 2.11 **Consequences of the COIC Review of the Disciplinary Tribunal 2012:** Following the Report by the Review Group chaired by Desmond Browne QC, a number of changes to the Tribunals Service have been implemented. Perhaps the most notable aspects of these the decision to conduct tribunals in a newly refurbished, fit for purpose space in Gray's Inn [*the COIC Tribunal Suite at 9 Gray's Inn Square*] from February 2013 and second, the impending appointment of a specialist Registrar to oversee the smooth administration of the Tribunals Service. These are exciting developments which are necessary to ensure that COIC delivers a modern, efficient and transparent Tribunals Service for the profession it serves.







### 3. Overview of the Bar Standards Board

- 3.1 **About the Bar Standards Board:** The Bar Standards Board (“BSB”) was established by the Bar Council in January 2006 to regulate barristers called to the Bar in England and Wales. As part of this remit, the BSB investigates and prosecutes cases of alleged breach of the Code of Conduct and/or the BSB Handbook by barristers where necessary. It is in this capacity that the BSB has most relevance to COIC Disciplinary Tribunals panel members.
- 3.2 The BSB’s purpose is to provide specialist regulation of advocacy and expert legal advice in the public interest, and it is responsible for:
- Setting the education and training requirements for becoming a barrister;
  - Setting continuing training requirements to ensure that barristers’ skills are maintained throughout their careers;
  - Setting standards of conduct for barristers;
  - Monitoring the service provided by barristers to assure quality;
  - Handling complaints against barristers and taking disciplinary or other action where appropriate.
- 3.3 In accordance with the Legal Services Act 2007, the BSB is required to act in a way which is compatible with the regulatory objectives set out in that Act, which include:
- protecting and promoting the public interest;
  - supporting the constitutional principle of the rule of law;
  - improving access to justice;
  - protecting and promoting the interests of consumers;
  - promoting competition in the provision of legal services;
  - encouraging an independent, strong, diverse and effective legal profession;
  - increasing public understanding of the citizen’s legal rights and duties;
  - promoting and maintaining adherence to the professional principles.

- 3.4 Further information on the BSB and their work can be found on their website here:  
<http://www.barstandardsboard.org.uk/about-bar-standards-board/>
- 3.5 **The Board and the Committees:** The main board of the Bar Standards Board acts as a management committee and delegates the day to day work to seven Committees: Governance, Risk and Audit; Planning, Resources and Performance; Education and Training; Qualifications; Standards; Quality Assurance; Equality and Diversity, and Professional Conduct. The Chairs of the seven Committees sit on the main Board.
- 3.6 Further information on the BSB's Board and Committees can be found on the BSB website here:  
<http://www.barstandardsboard.org.uk/about-bar-standards-board/how-we-do-it>



## 4. Regulatory framework

- 4.1 Monday 6 January 2014 saw the launch by the BSB of a new Handbook. This document incorporates the Code of Conduct, Scope of Practice Rules, Qualification Rules, and the Enforcement Regulations. The latter section means the application of sanctions to address non-compliance with the provisions within the Handbook.
- 4.2 **The Code:** The Code of Conduct, Part 2 of the Handbook, requires those regulated by the BSB to comply with the Core Duties. These duties underpin the regulatory framework, define the core elements of professional conduct and set the mandatory standards that all regulated persons are required to meet. The core duties are supported by a number of mandatory rules. In addition, the Code sets out the outcomes which compliance with the core duties and rules are intended to achieve. Enforcement action will be considered by the BSB where a regulated person is deemed to fail to meet these requirements.
- 4.3 The Code is divided into three sections. The Core Duties, the Conduct Rules, and the Rules applying to particular groups of regulated persons, for example barristers undertaking public access work, registered European lawyers, and unregistered barristers.
- 4.4 **Types of breaches of the Code:** The BSB Professional Conduct Committee (PCC) has the power to take enforcement action in relation to any breach of the Handbook. Given the terms of the new definition of professional misconduct in the Handbook, breaches occurring after 6 January 2014 fall into categories:
- 4.4.1 those which can be appropriately addressed by the PCC by way of no further action or administrative sanctions (i.e. non-disciplinary action) and thereby are not serious enough to amount to professional misconduct. The standard of proof in relation to such breaches is the balance of probabilities; and,
- 4.4.2 those which are serious and would not be appropriate for disposal by means of administrative sanctions and need to be addressed by disciplinary action for professional misconduct (i.e. a referral to the Determination by Consent procedure or

a Disciplinary Tribunal). The standard of proof applied in relation to professional misconduct is beyond reasonable doubt.

- 4.5 The nature of the breach only becomes directly relevant at the post-investigation stage of the process when the BSB takes a decision as to what type of enforcement action, if any, is appropriate. However, it is important to note that the imposition of an administrative sanction is not a disciplinary disposal and details of the decision and the sanction imposed will not be made publically available: this includes communication to the Queen's Counsel Appointment Body and the Judicial Appointments Commission. On the other hand, while no further action decisions are also not formally classed as disciplinary disposals and are not made publically available, they are disclosed by the BSB in relation to applications for silk or judicial appointment.
- 4.6 **The Enforcement Regulations:** COIC panel members and clerks should ensure they are familiar with the Disciplinary Tribunal Regulations at Part B of the Enforcement Regulations. The following brief summary should not be used as a substitute for reading the Regulations themselves.
- 4.6.1 **rE 131 – 141** outline details of the correct composition of both 3 and 5 member tribunals. Members of the COIC Disciplinary Pool should ensure they are fully aware of these, as it is incumbent upon them to report o COIC should their eligibility to sit on disciplinary proceedings become questionable.
- 4.6.2 **rE 104 – 106** provides details of the documents that the BSB is obligated to supply to defendant barristers within 28 days of charges being served. Panel members should strive to ensure that this has been properly complied with, given the detriment that could otherwise be caused to the defendant. Panel members should also be aware of **rE 216 – 217**, which notes the circumstances in which documents are validly served.
- 4.6.3 **rE 142** sets out requirements relating to documents that panel members should receive prior to hearings. Clearly this should be of concern, as it is of considerable importance that panel members are properly prepared to hear a case.
- 4.6.4 **rE 148** allows a tribunal to proceed in the defendant's absence if the relevant procedure has been complied with.

- 4.6.5 **rE 152** relates to circumstances in which charges can be amended. Generally this can occur where the defendant will not suffer substantial prejudice by virtue of the amendment. However, the tribunal may grant, if it considers it necessary, the defendant an adjournment to properly consider the revised charges.
- 4.6.6 **rE 153 – 154** imbues a panel with a more general power to grant an adjournment if it believes it is necessary. Applications for adjournments should always be seriously considered as such decision can be appealed or judicially reviewed where they have been wrongfully refused.
- 4.6.7 **rE 143** provides that the criminal standard of proof applies when adjudicating on charges of professional misconduct and in deciding whether the qualification condition has been established. Refer to paragraph 4.7 below.
- 4.6.8 **rE 157 – 169** deals with sentence. Panel members should be particularly aware of the need to record in writing the fact that a decision is not unanimous. Further, when the Chairman of the tribunal announces sentence, s/he should state whether the decision is unanimous or by majority.

It should be noted that a 3-person tribunal cannot impose a sentence of disbarment, nor can it suspend a barrister's practising certificate for a period longer than 12 months, or suspend a barrister for longer than 12 months. If the panel feels a sentence of greater severity is appropriate, then **rE 161** requires that it must refer the case to a 5-person panel for sentencing.

- 4.6.9 **rE 181** requires the Chairman to prepare a report in writing of the finding, the reasons for that finding and, where applicable the sentence. Where the Chairman deems appropriate, the report may also refer to matters which, in the light of evidence given to the Tribunal, appear to require investigation or comment.

#### 4.7 **Burden of proof**

The burden placed upon a particular party to prove the truth of an issue in dispute. Generally, this falls on the party asserting that truth. In COIC Disciplinary Tribunal hearings, the burden will lie with the prosecution (i.e. the BSB) to prove the charges against the defendant barrister.

### Standard of proof

In order to discharge the burden of proof, a case must be proved to a particular standard. In COIC Disciplinary Tribunal hearings, charges must be proved “beyond reasonable doubt” (the criminal standard). In practical terms, this means that a panel must be “satisfied so that they are sure”<sup>1</sup>.

*A word of caution:* Some panel members may sit on disciplinary or adjudication matters for other professions. Many regulators adopt the civil standard of proof which is “on the balance of probabilities”. Please ensure that you do NOT apply this standard in the context of COIC Disciplinary Tribunals. Please refer to Section 12 for more information about this standard which is applied in Fitness to Practise hearings.

- 4.8 **Case Law:** As well as the Code and the wider BSB Handbook, a voluminous body of case law forms part of the COIC Tribunals regulatory framework. The English legal system is a “common law” one. In extremely simplified terms, this means that legal principles are extracted from cases (usually decided by judges or panel members sitting in higher courts or tribunals) and applied, as “precedent”, to analogous facts in the present case under consideration. Where the law is perceived to be incorrect as applied to particular facts, a judge (always from a higher court) will enunciate a new principle, which will, from thereon in, be applied by the lower courts in future cases involving similar facts.
- 4.9 Such cases can relate to the interpretation of the Code, the Handbook or any other subject in issue during a Tribunal. Frequently parties will also draw on case law developed by other, comparable adjudicatory bodies such as the Solicitors Disciplinary Tribunal and the Medical Practitioners Tribunals Service. Distinctions made between cases can frequently be complex and technical, as parties attempt to tease out small differences between them.
- 4.10 Given the nuances of the English common law system, the law should not be regarded as fixed and unchanging, but as fluid and dynamic. If panel members are to apply proper principles, therefore, it is imperative that they keep a pace with the latest legal developments in the field of professional regulation. To this end, COIC administrative staff publish regular newsletters containing detailed case updates. It is highly recommended that panel members read these at the earliest opportunity.

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<sup>1</sup> Judicial Studies Board guideline

- 4.11 **COIC Appointments Protocol:** This document regulates the appointment of panel members and the body who appoints them (the Tribunals Appointments Body). Significantly, it states the basis on which COIC exercises this authority in its opening “Citation”. It also contains important safeguards against the maladministration of the appointments procedure, given the previous history of the irregularities identified by the Browne Review.







## 5. Overview of the Bar's Complaints Processes

- 5.1 **Regulatory Framework:** The BSB Handbook sets out the professional obligations to which barristers are subject (for further information, see section 4). One of the BSB's aims is to ensure that all those who are regulated by the BSB live up to its standards as set out in the Handbook and as a result it is necessary to have fair and rigorous complaints and disciplinary processes in place to protect the public when barristers fail to live up to the standards. The aims of the complaints and disciplinary system are therefore to:
- act in the public interest;
  - protect the public and consumers of legal services;
  - maintain high standards of behaviour and performance of the Bar;
  - provide appropriate and fair systems for dealing with complaints and disciplinary action;
  - promote public and professional confidence in the complaints and disciplinary process; and,
  - ensure complaints are dealt with fairly, expeditiously and consistently.
- 5.2 The Rules and Regulations covering the complaints and disciplinary processes are set out in part 5, Enforcement Regulations of the BSB Handbook, and, which provide the outline structure for processing complaints, investigating them and taking decisions on them.
- 5.3 **The Complaints Process:** The BSB's Professional Conduct Department (PCD) is responsible for investigating complaints and taking action against barristers who have breached the Code of Conduct.
- 5.4 The PCD deals with:
- **Type 1: External complaints:** These are complaints made by anyone other than the BSB, and may be received:

- i. Via the Legal Ombudsman<sup>1</sup>, where it is deemed that the service complaint referred to them from a client of a barrister also contains matters relating to a breach of the Code; and,
- ii. Directly to the Department, if the complaint is made by someone other than the client of the barrister.

Historically PCD has received between 300 and 350 external cases in total per year.

- **Type 2: Internal complaints:** The BSB also raises internal complaints (or complaints of its own motion) where other activities come to the PCD's attention which show there to be an issue with a barrister's conduct.

Historically the PCD has processed about 200 individual cases of this kind each year. However this number may change with the duty placed upon barristers to self-report serious misconduct in the new Handbook. The new BSB Handbook also includes provision for the use of other intelligence gleaned through supervision visits to indicate or further inform an internal complaint.

- 5.5 Once a complaint is received, it will be subject to a preliminary assessment in order to establish whether the complaint discloses a "potential" breach of the Code or the Handbook. If the complaint reveals a potential breach it is assessed against a set of criteria (Preliminary Assessment Form). Those assessed as high or medium risk cases are forwarded for investigation. Low risk may either be referred to supervision or disposed by dismissal or referral to chambers.
- 5.6 If a complaint warrants formal investigation, it will be assigned to a Case Officer to investigate and obtain relevant information from the complainant, the barrister complained of, and anyone else who may have knowledge about the matter which is the subject of the complaint. At any stage in the process, advice can be sought on

<sup>1</sup> The Legal Services Act 2007 (the Act) created a new Ombudsman service (the Legal Ombudsman) with the jurisdiction to deal with all consumer (client) complaints about the services provided by legal professionals and to provide redress where appropriate. LeO has no powers to deal with complaints of conduct or take disciplinary action and is under a statutory obligation to refer any issues of conduct arising from complaints to the BSB. You can find more information on the work of LeO on their website here: <http://www.legalombudsman.org.uk/>.

<sup>2</sup> You can also find out more about the BSB's interface with LeO here: [http://www.barstandardsboard.org.uk/media/1436012/101001\\_-\\_pe05\\_-\\_guidance\\_for\\_leo\\_on\\_conduct\\_referrals\\_-\\_final.pdf](http://www.barstandardsboard.org.uk/media/1436012/101001_-_pe05_-_guidance_for_leo_on_conduct_referrals_-_final.pdf)

the investigation from a member of the Professional Conduct Committee (PCC) or an Equality & Diversity Advisor.

- 5.7 At the conclusion of the investigation a review of the risk level is carried out and the Case Officer makes recommendation(s) as to whether the complaint should be dismissed or receive an administrative sanction, or be referred to the PCC for disciplinary action by a DT or by determination by consent.

The decision as to whether an administrative sanction is an appropriate disposal in an individual case will be taken as part of the post-investigation assessment stage either by staff or the Committee. Where it is considered that an administrative sanction is appropriate, a decision will need to be taken either by the staff or the Committee as to what type and level of sanction should be imposed. These sanctions cannot be enforced at a Disciplinary Tribunal.

The Handbook defines administrative sanctions (at Part 6, definition 5) as “an administrative warning, fixed penalty fine or other administrative fine up to the prescribed maximum, or any combination of the above in accordance with the [Complaints Regulations]”.

The types of administrative sanction are:

- Warnings;
- Fixed penalty fines – the level of the fine has been set at £400. This amount will be reduced by 50% if early payment is made within 14 days.
- Discretionary fines – The starting point is £400 and the amount will be adjusted according to the circumstances of the breach - aggravating and mitigating factors (refer to section 4 of the pack).

A fixed penalty or discretionary fine can be up to £1000 for individual barristers and up to £3000 for entities.

- Multiple breaches – where a complaint involves more than one breach, all of which are suitable for disposal by administrative sanctions, separate sanctions for each breach should not be imposed but a global sanction imposed covering all the breaches based on the most serious breach. This is in line with the approach taken at the preliminary and post-investigation stages where a complaint is risk assessed as a whole rather than individually by its constituent aspects.

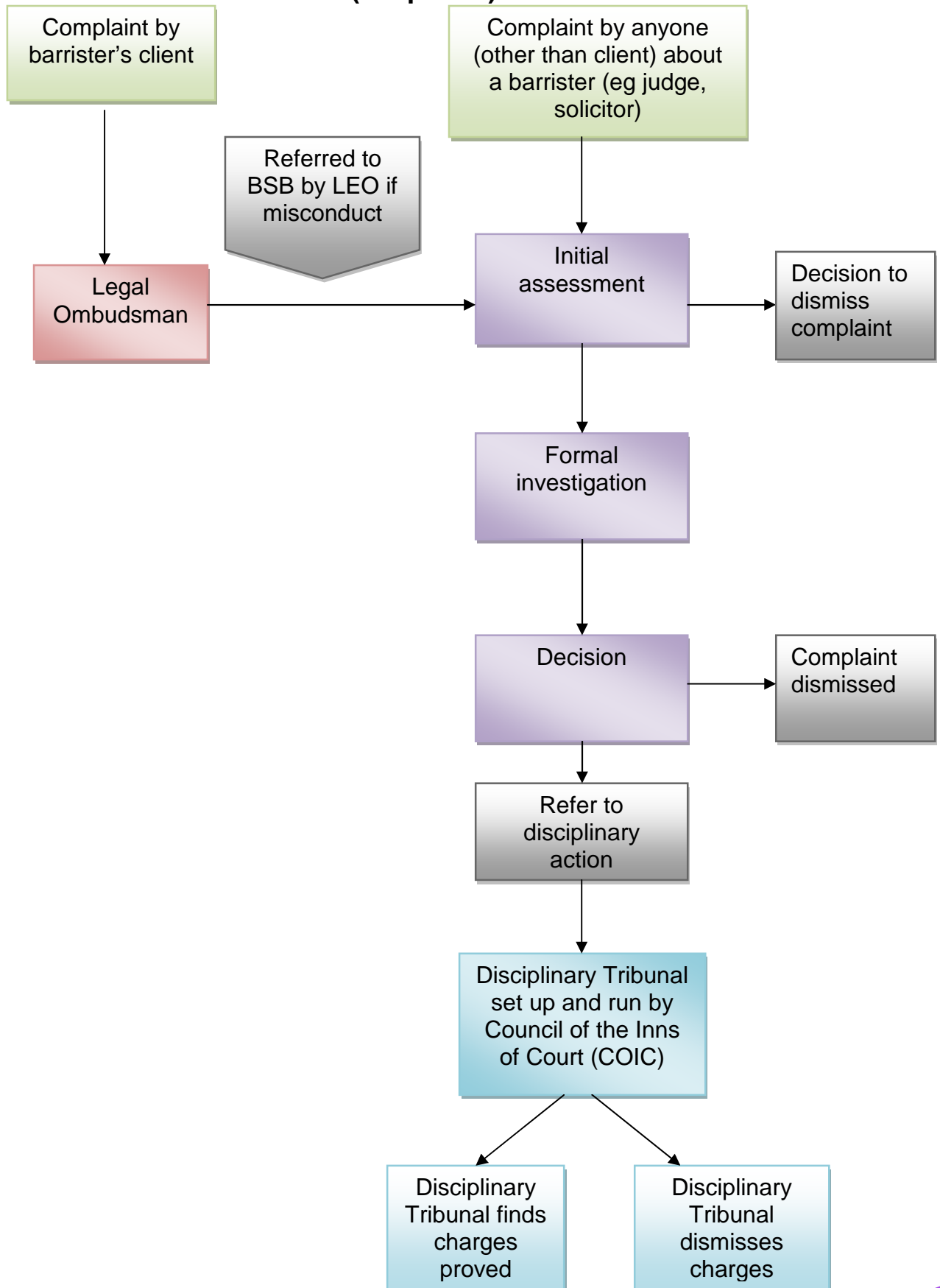
Barristers, who are subject to the imposition of administrative sanctions have a right to appeal the decision to an independent panel, appointed by the Bar Tribunal and Adjudication Service (BTAS).

5.8 Where a complaint is referred to the PCC, the options available for the disposal of the complaint are:

- a. Dismiss the complaint, provided that the majority of the lay members present consent to the dismissal;
- b. Dismiss the complaint but advise the barrister as to his/her future conduct in writing, or direct the barrister to attend on the PCC Chair or a Vice Chair for such advice;
- c. Decide that no further action should be taken on the complaint;
- d. Direct that a formal written warning or financial penalty be imposed under rE 37.3 of the Code of Conduct;
- e. Where there is a realistic prospect of a finding of professional misconduct, refer the complaint to the Determination by Consent procedure or a Disciplinary Tribunal disciplinary action (see below), as long as the regulatory objectives would be best served by doing so; or,
- f. Decide that further information is required before making a decision.

Along with the flow chart below, depicting the full complaints process, further information on the BSB's complaints processes can be found on the BSB's website here: <http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/>.

**Disciplinary Process when someone complains to BSB about a barrister (simplified)**



- 5.9 **The Disciplinary Process:** Where sufficient evidence of professional misconduct exists, the Committee has the power to refer cases to a Disciplinary Tribunal panel or to the ‘Determination by Consent’ procedure to determine the outcome of the disciplinary case.
- 5.10 **Determination by Consent:** Under A5 (rE 67 – 83) of the Complaints Regulations (Part 5, Section A Enforcement Regulations, BSB Handbook), the Professional Conduct Committee has the power to determine the outcome of a disciplinary case with the barrister’s consent. This is known as “Determination by Consent” (DBC). For a case to be suitable for the DBC procedure, there should be no substantial dispute of facts and the breaches of the Code and/or Handbook should not warrant a period of suspension from practice or disbarment. The barrister must consent to the process and if, at any stage, the barrister fails to respond, or a dispute of facts arises, the process will stop and the case will be referred to a Disciplinary Tribunal.
- 5.11 Under the DBC procedure, the PCC can: order the barrister to pay a fine, order the barrister to complete additional CPD requirements, reprimand the barrister, order the barrister to attend on a nominated person to be reprimanded and/or give the barrister advice as to future conduct. Any findings by the PCC have the same status as any other disciplinary finding, such as those made by a Disciplinary Tribunal.
- 5.12 Further information on the DBC procedure can be found on the BSB’s website here: [http://www.barstandardsboard.org.uk/media/1408127/dbc\\_explanatory\\_note\\_for\\_barristers\\_and\\_flowchart\\_-\\_updated\\_10.05.12.pdf](http://www.barstandardsboard.org.uk/media/1408127/dbc_explanatory_note_for_barristers_and_flowchart_-_updated_10.05.12.pdf)
- 5.13 Referral of cases to a Disciplinary Tribunal is dealt with in Section 6 of the **Information and Guidance Pack**.



## 6. Disciplinary Tribunals

- 6.1 Procedures for dealing with complaints referred to Disciplinary Tribunals are laid down in Part 5 of the BSB Handbook; Enforcement Regulations, Section B.
- 6.2 **Nature of Disciplinary Tribunals:** COIC Disciplinary Tribunals are domestic, non-statutory tribunals. As such, the proceedings are intended to be relatively informal. As this Information and Guidance Pack goes to print, the strict rules of civil and criminal evidence are not applied, although they are always used as a basis for deciding how to treat any evidential issues that arise. However, a Working Group is being set up to examine whether rules of procedure and evidence for Disciplinary Tribunals should be placed on a more formal footing. Additionally, as public authorities under the Human Rights Act 1998, COIC Disciplinary Tribunals must be compliant with the European Convention of Human Rights.
- 6.3 **Composition of the panels:** Disciplinary Tribunal panels are composed of either three or five members. Three person panels normally consist of a Queens Counsel (“QC”) as Chair, a lay member and a barrister member of at least 7 years standing. The President of COIC can appoint a judge to chair a three person panel if the defendant is a QC or there is any other good reason to do so. Five person panels consist of a judge as Chair, two barrister members (both of whom should be of at least 7 years standing) and two lay members.
- 6.4 The key difference between three and five member tribunal panels is the sentencing powers available to each. A three person Tribunal panel cannot suspend a barrister for more than twelve months or disbar. However, if a three person panel feels that its sentencing powers are insufficient, it can refer a case to a five person panel for sentencing (rE 161).
- 6.5 If an employed barrister appears before a five person panel, then one of the barristers serving on his panel should also be an employed barrister. Additionally, if a registered European lawyer appears before a five person panel, then one of the barristers should be replaced with a registered European lawyer.

**6.6 Overview of the stages of the Disciplinary Tribunal process:** The Disciplinary Tribunal process has four stages:

Stage 1 - serving the charges and the bundle of supporting documents

Stage 2 - agreeing and complying with the timetable for the case (“directions phase”)

Stage 3 - agreeing and confirming the date of the Disciplinary Tribunal hearing

Stage 4 - the Disciplinary Tribunal.

An end to end process map is provided at Section 6b.

**Stage 1 - Service of the charges and bundle**

6.7 After the Committee refers a case to a Disciplinary Tribunal, the file is passed to the Bar Standards Board’s (the “BSB”) Hearings Team and assigned to a Case Officer. A prosecutor from the BSB’s prosecution panel is instructed and the file is sent to him or her. The prosecutor reviews the file and provides advice on the charges, evidence, the bundle, and directions. The Case Officer then prepares the bundle to be served on the defendant barrister.

6.8 According to the Regulations, the charges must be served on the defendant barrister, together with a copy of the Disciplinary Tribunal Regulations (Section B, Enforcement Regulations) and any directions sought no later than 10 weeks (or 5 weeks if the Professional Conduct Committee has directed that the prosecution of the charges be expedited) after the date on which the complaint was referred to a Disciplinary Tribunal. The BSB will normally serve the supporting bundle of documents on the defendant barrister at the same time as the charges; however, the bundle may be served later if documents are still being obtained. At the same time as serving the charges, the BSB will also serve on the defendant barrister proposed directions. The directions normally cover what documents are admitted into evidence, when a defence statement and defence documents should be served on the BSB, and the timetable for the substantive hearing.

**Stage 2 – Directions**

6.9 The proposed standard directions will usually be sent to a defendant barrister at the time the bundle is served. The defendant barrister has 21 days from the date of



service of the proposed direction to agree the directions or submit any proposed amendments. If the defendant barrister does not provide any information to confirm whether they intend to make any applications to amend, then the defendant is deemed to have accepted the directions.

- 6.10 If special directions have been suggested by the prosecutor (i.e. the BSB), or the BSB has sought to amend the standard directions, then if the defendant barrister does not provide any information that they intend to make an application to amend, the President is invited (rE 109) to appoint a Directions Judge to endorse the proposed amendments to the standard directions or the proposed special directions.
- 6.11 The defendant barrister and the BSB have 14 days collectively to respond and make its own submissions respectively. Where the parties agree, the directions are sent to the President. Where the parties do not agree, the directions and submissions of both parties are sent to the President for consideration by the Directions Judge (rE 113). The judge will decide what directions should be ordered and, if an application has been made by either the BSB or the defendant barrister (or both) for an oral hearing, whether such a hearing is necessary. The directions judge's decision on whether an oral hearing should take place is final and there is no appeal. It should be noted that the directions judge also has the ability, of his/her own motion, to order an oral hearing.
- 6.12 Where an oral directions hearing is ordered by a directions judge, the judge will try to find and if not, fix a date and time, for the oral directions hearing within the six week period immediately after the date of notice.
- 6.13 After the oral directions hearing, or, if one is not required, after the review of the papers by the Direction Judge, the direction order is served on the President. Once served by the president the directions are final and there is no appeal against it.
- 6.14 Oral directions hearings are presided over by a judge. It should be remembered that the directions judge is not acting formally in his/her official judicial capacity, but is acting as a directions judge under the Disciplinary Tribunal Regulations.

### **Stage 3 - Setting the date for the Tribunal hearing**

- 6.15 Dates for hearings are arranged by the BSB first ascertaining the dates of availability of all the relevant parties including witnesses (a deadline for providing available dates

is usually included in the directions). Where the defendant barrister is represented and/or there are a number of witnesses, it can sometimes be difficult to find a suitable date and delays can occur. Once a suitable date has been identified by the BSB, they will request that COIC convene a panel for that date.

- 6.16 After the President has nominated the Chair, panel members and a clerk, a Convening Order is sent to all parties identifying the time and location of the hearing together with the charges and any directions made. The Disciplinary Tribunal Regulations provide that the defendant may at the point of receipt of the Convening Order give notice to the President objecting to one or more of the proposed members of the panel, giving notice as soon as is reasonably practicable and specifying the grounds of objection.
- 6.17 The BSB's bundle of documents will be sent to panel members as soon as possible after the Convening Order is issued and at the latest 14 days before the hearing. The defendant barrister is normally expected (as part of the directions) to submit copies of any defence bundle to the BSB at the very latest 14 days before the hearing. If defence papers have been received, they will be forwarded to panel members with the BSB bundle. If a defendant barrister fails to comply with this direction and sends their papers in late, the BSB or COIC will forward them to panel members as soon as possible after receipt. In some cases, the papers will arrive too late to allow this and panel members will receive the papers on the day of the hearing.

#### **Stage 4 - The Disciplinary Tribunal hearing**

- 6.18 The Disciplinary Tribunal Regulations stipulate the powers of the Disciplinary Tribunal panel but do not dictate specific procedures that should be followed at the hearing. The manner in which the Tribunal is run is a matter for the Chair. Tribunals tend to follow a standard criminal trial process, with the charges being put, pleas entered, the prosecution case being presented, followed by the defence case, a verdict and then the sentence.
- 6.19 The Tribunal applies the criminal standard of proof (beyond reasonable doubt). See section 4 for further detail about the standard of proof.

- 6.20 **Witnesses:** Witnesses are not always required to give evidence at a Tribunal hearing and most cases are considered on the papers alone. However, the defendant barrister may wish to give evidence under oath. If this is the case, the clerk will have the defendant barrister sworn in to give evidence.
- 6.21 If either party to the case (the BSB or the defendant barrister) wishes to call witnesses to give evidence, the witnesses will wait outside the Tribunal Room in the Witness Waiting Room, until such time as they are needed. Most Tribunals take place in public and therefore witnesses are able to remain in the Tribunal room, as observers, after the conclusion of their evidence.
- 6.22 **Length of the Hearing:** The time estimate for the length of the hearing is usually set at the directions stage. Generally, they are fairly accurate. As with any case however, the Tribunal may run short or overrun. Panels may sit well into the evening when it is considered necessary to recover time or conclude a case but Chairs should always bear in the mind that long hearings can be tiring for all concerned.
- 6.23 If it is not possible to conclude the hearing within the allocated time, the hearing can go “part-heard” which means it will be adjourned until another date when all the parties and the panel members are available. It is good practice to try to agree, at the hearing, the amount of extra time that will be needed and set the date(s) as this will avoid further delays. Panel members should, therefore, have their diaries with them at hearings.
- 6.24 **Conduct of the Hearing:** Robes are not worn at the hearing and all parties remain seated throughout (although a defendant barrister may be asked to stand to be sworn in / plead to the charges / receive the finding / sentence of the tribunal). At the outset of the hearing, there may be some preliminary matters for the panel to consider. This could include an application that the Tribunal takes place in private (this being an order that a directions judge will rarely grant since it is for the Tribunal itself to make the final decision on a request of this nature). There is a presumption that hearings take place in public and it is exceptional for them to take place in private. If a Tribunal is ordered to take place in private, the panel has no power to prevent subsequent disclosure of the results where there is a finding against the defendant barrister, although it can direct that the findings are not posted on the BTAS or BSB’s website.

- 6.25 The panel may also have to consider an application to adjourn. Panels should think carefully about adjournments, particularly if there has already been delay in progressing the case.
- 6.26 The hearing will begin by the clerk reading out the charges. The defendant barrister will then enter a plea which will consist of him or her admitting or denying the alleged offence. Even if the defendant barrister is not present, it is good practice for the charges to be read out in order that they are included in the recording of the hearing.
- 6.27 After the charges have been put, the BSB's prosecutor will open the case for the BSB. The prosecution witnesses (if any) are then called. Often, particularly where the prosecutor has produced an opening note, the panel will make it clear that it is familiar with the facts of the case and ask that the prosecutor proceed to the witness evidence. At the end of the prosecution case, the defence team may make a submission of "no case to answer"<sup>1</sup> and the BSB will respond accordingly.
- 6.28 After the BSB has presented its case, the defendant barrister will present his or her case, which may include defence witnesses. If the defendant barrister wishes to present evidence which is not in the papers, he or she should only do this under oath, after which the BSB is provided with an opportunity to cross-examine.
- 6.29 The panel should feel free to request closing speeches if they consider that this would be useful
- 6.30 **Findings:** After hearing all the evidence, the panel will retire to consider the finding(s). This process can be very swift or can take several hours. When the panel has reached its findings on the charges, the panel will return and should give full oral reasons for its decisions (see section 11).
- 6.31 **Sentencing:** After any of the charges against the defendant barrister have been admitted or proved, the hearing will proceed to the sentencing phase.
- 6.32 On 2 April 2013, COIC published comprehensive Sentencing Guidance in relation to disciplinary offences by members of the Bar of England and Wales. A new version applicable to breaches of the BSB Handbook was published on 6 January 2014. A

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<sup>1</sup> i.e.: when the prosecution at the end of their submissions to the panel presents no evidence in support of the charges and the case is accordingly dismissed.

copy of both of these documents can be found on the BTAS website ([www.tbta.org.uk](http://www.tbta.org.uk)). Each includes both guidance on the application of individual sanctions and guidance on appropriate starting points in relation to common breaches.

6.33 The guidance provides decision makers with a basis for considering what sentence is appropriate in any given case and is intended to promote proportionality, consistency and transparency in sentencing. However, it must be stressed that it is not intended to interfere with decision makers' powers to impose whatever sentence is appropriate in the circumstances of individual cases. Decision makers must exercise their own discretion when deciding the appropriate sanction to impose in each particular case and must also ensure that any sentence is proportionate and fair. Written reasons should be given for all sentences imposed, including any aggravating or mitigating factors. Care should be taken to include in the written reasons the basis for departing to a significant extent from the guidance. This ensures transparency in the decision making process.

6.34 Although the BSB will not make any recommendations as to the appropriate sentence, the BSB will inform the panel of any previous disciplinary findings against the defendant barrister and provide copies of the relevant documentation.

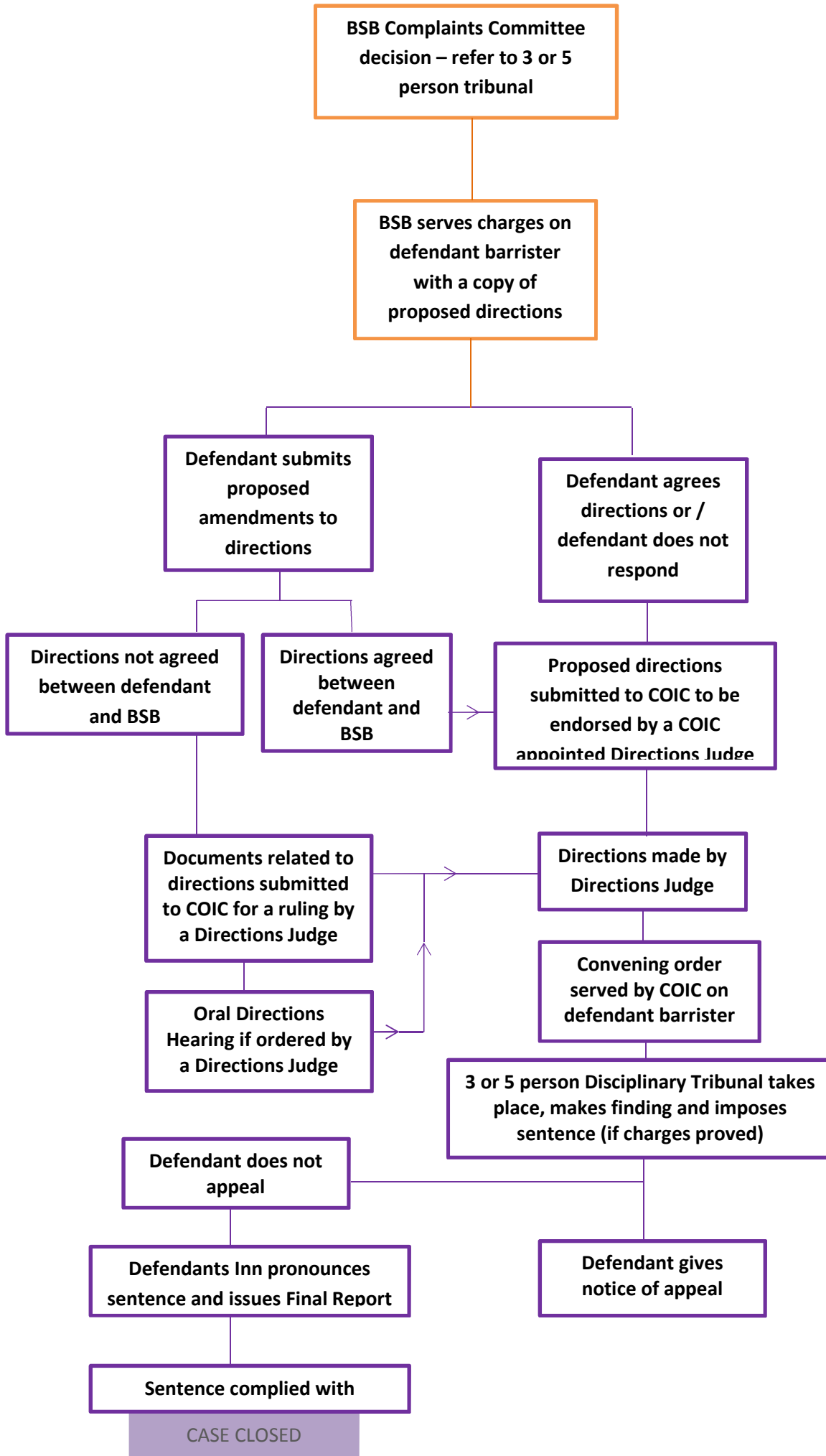
6.35 **Suspension pending Appeal:** Where a Tribunal has imposed a sentence of:

- suspension of more than a year: or,
- disbarment;

the Civil Procedure Rules does not provide for a sentence being held in abeyance until the period to lodge an appeal has past. The sentence will therefore come in to immediate effect unless the Tribunal orders a stay of sentence pending appeal. The Tribunal must consider whether to order that the defendant barrister's practising certificate be suspended by the BSB, after hearing representations from the defendant barrister and the BSB as to whether this would be inappropriate (rE 172). Without conditions being placed upon the barrister's practising certificate, a defendant barrister would be free to continue practising if the sentence is stayed until such time as the sentence was pronounced or the outcome of an appeal was known. Conditions may include limiting the scope of the defendant's practice or imposing requirements that the defendant be prohibited from accepting or carrying out any public access functions, and or any other matters as the Tribunal consider appropriate for the purpose of public protection (rE 173).

- 6.36 If full disbarment or suspension follows, this will be implemented by the relevant Inn of Court via the formal pronouncement of the sentence of the Tribunal (rE 189).
- 6.37 **Costs:** A Disciplinary Tribunal has the power to make an Order for costs against or in favour of defendant barrister.
- 6.38 Defendant barristers may apply for costs and this will usually be done orally. The BSB will generally resist all applications for costs because of the general principle articulated in *Baxendale-Walker v Law Society* [2007] 3 All ER 330, that regulators should not be deterred from performing their functions by the threat of large costs claims.
- 6.39 Where an Order for costs against the defendant barrister are made, the Tribunal should be mindful that the barrister may be unable to pay. BTAS now requests by letter attached to the Convening Order that defendant barristers attend the hearing with evidence of ability to pay.
- 6.40 **Publication of findings:** All findings of professional misconduct are a matter of public record and are published on the BTAS website within seven days of the Tribunal's findings, regardless of whether the sentence has been pronounced or an Appeal submitted. Findings remain on the website for a minimum of two years and findings with a sentence of disbarment or suspension will remain on the website indefinitely. All findings of professional misconduct currently remain on a barrister's record held by the BSB indefinitely, as the concept of "spent convictions" does not exist. This means that even if a finding has been removed from the website, members of the public can still contact the BSB for details about the findings.
- 6.41 BTAS Publication Policy can be found on the website at <http://www.tbts.org.uk/policies-guidance-and-publications/>

# Disciplinary Tribunals



SERVING THE CHARGES

DIRECTIONS

HEARING  
DATE

HEARING

6b







## 7. Appeals

- 7.1 **Background:** All defendant barristers have a right to appeal the findings and/or sentence of a Disciplinary Tribunal. The BSB also has a right to appeal the findings and/or sentences of a Disciplinary Tribunal.
- 7.2 Appeals are made to the High Court (administrative Court) and are conducted in accordance with the Civil Procedure Rules Part 52 (Appeals) and Practice Directions 52A and 52D. Paragraph 27.1A of Practice Direction 52D provides for the appeal route to be the Administrative Court.
- 7.3 **The process:** The Civil Procedure Rule 52.7 provides that unless the Tribunal orders otherwise an appeal does not stay the decision of the Tribunal (see paragraph 6.35 Disciplinary Tribunals).
- 7.4 The first stage in the appeal process is for the barrister to file the appellant's notice in the Administrative Court and to pay the appropriate fee. This must be done within 21 days of the Tribunal decision. The appellant's notice must be lodged at the Administrative Court Office and a copy of the issued (stamped) notice than served on the BSB and on the Council of the Inns of Court as soon as practicable and not later than 7 days after it is filed.
- 7.5 Disciplinary Tribunal proceedings are recorded using digital equipment. The appellant must include a copy of the transcript of the original proceedings in his/her bundle, together with the report of the Disciplinary Tribunal.
- 7.6 **Appeal hearings:** The full appeal hearing ordinarily takes place in public at the Royal Courts of Justice. Date and time of the hearing is fixed by the Listing Office.
- 7.7 The Court has the power to strike out the whole or part of the appellant's or respondent's notice where there is compelling reason to do so. The Court has all the powers of the Disciplinary Tribunal and may affirm, set aside or vary any order of the Disciplinary Tribunal or order a new hearing. If the Court strikes out an appellant's notice or dismisses an appeal and it considers that the notice or appeal is totally without merit it will record that fact.

- 7.8 The appeal hearing will be limited to a review of the Disciplinary Tribunal's decision unless the Court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing. Unless it orders otherwise the Court will not receive oral evidence or evidence which was not before the Disciplinary Tribunal.
- 7.9 An appeal will be allowed where the Disciplinary Tribunal was wrong or unjust due to a serious procedural matter or other irregularity at the tribunal stage.
- 7.10 In most cases the Court will give its decision orally at the end of the appeal hearing. However the Court may decide to reserve judgment and issue the final decision in the form of a written judgment after the hearing.
- 7.11 The decision of the Court is final and therefore no appeal lies against its decision except to the Court of Appeal in the case of a decision to disbar a barrister.
- 7.12 **Appeal costs:** The Court may make an order for the costs of an appeal and may have regard to the means of the parties and all the circumstances of the case.
- 7.13 Guidance on appeals against decision of a Disciplinary Tribunal can be found at [https://www.barstandardsboard.org.uk/media/1562494/140116 - ge13 -  
\\_guidance on appeals - final \\_website .pdf](https://www.barstandardsboard.org.uk/media/1562494/140116_-_ge13_-_guidance_on_appeals_-_final_website_.pdf)



## 8. Guidance for panel members on hearings

- 8.1 **Guidance on preparation:** As soon as possible after the Convening Order has been issued the Bar Standards Board (the “BSB”) will send panel members the bundle(s) of documents for the hearing. They should arrive at the latest about 10 days before the hearing (in exceptional circumstances additional papers or the bundle itself may arrive later than this if documents are still being obtained). Should a panel member not have received the bundle(s) by one week before the hearing date, he/she should contact the BTAS Administrator who will then contact the BSB to expedite the delivery of the bundle(s). Panel members must avoid contacting the BSB direct as this could create a perception of bias.
- 8.2 It is important that panel members check immediately whether the barrister or any witnesses are known to them and consider whether this creates a conflict that will require them to stand down. If there is a conflict, then the panel member should contact BTAS immediately so that an alternative member can be found. Where a panel member knows one of the parties to the proceedings but considers the level of acquaintance does not create a conflict, he/she should still contact BTAS so that the position can be made known to the parties and any objections addressed before the hearing. Failure to do this might result in the issue being raised at the hearing and the case having to be adjourned (for more detail see section 10).
- 8.3 Some cases can be relatively straightforward whilst others may be complex. The amount of material in the bundle(s) can vary widely.
- 8.4 Each panel member will have his/her own methods for studying and analysing the information provided in the bundle(s). However, it is advisable to read through the bundle(s) as soon as possible after receipt or at least a few days before the hearing.
- 8.5 Set out below is a checklist of the matters to be considered when looking at the bundle(s) for the first time.

- 8.6 **Check the contents list.** The bundle(s) contain a contents list at the beginning. It is recommended that this list is checked against the contents of the bundle(s) to ensure that all the documents are included.
- 8.7 **Study the charge sheet.** The charge sheet is the first item after the contents list and should be studied carefully. It may assist to cross reference this document with the Bar Handbook. The wording of this document is critical and is often the subject of discussion between members of the panel before the hearing begins. If there are any queries about the charge sheet, a request for clarification can be made at the start of the hearing. Again, panel members must avoid direct contact with the BSB over such issues.
- 8.8 **Study the contents of the bundle(s).** Panel members should read through the bundle carefully and satisfy themselves that they have a good overall understanding of the nature of the charge(s), the evidence and the defence arguments (if any). Individual panel members will each have their own way of doing this.
- 8.9 If the case is very complicated, it may be helpful to make a list of all the allegations against the defendant and match these against the defence statements to establish if any gaps exist.
- 8.10 **Make notes and identify areas requiring clarification.** Panel members should make whatever notes they consider will assist with their understanding of the case and preparation for the hearing. It is good practice to list any queries, areas of concern or issues that need clarification. These can be discussed with other members of the panel immediately prior to the hearing. Lay members may often have questions relating to legal processes or concepts that are referred to in the bundle(s). For example, these could include anything from legal terms or court procedure to the nature of a barrister's practice or the way chambers are organised.
- 8.11 **Prepare questions for the hearing.** It is useful for panel members to make a list of questions they consider should be addressed to the BSB and the defendant barrister at the hearing.
- 8.12 **Prepare a chronology of events.** It is recommended that panel members make a chronological list as they study the documentation: this helps to focus the mind on the

sequence of events. In addition to main events, the list may contain the dates of critical letters and documents. Creating a chronology can aid understanding and may highlight inconsistencies.

- 8.13 **Pre-hearing discussion:** Panel members will normally be asked to attend at least 30 minutes prior to the start of the hearing for preliminary discussions prior to the start of the hearing. However, the Chair may become aware, before the hearing, of issues that will require more detailed preliminary discussion and, as such, require an earlier start time. If this is the case, the Chair will inform BTAS as soon as possible of this requirement, in order to allow BTAS to give the other panel members sufficient notice of the earlier start time.
- 8.14 The clerk should make sure the panel members have all the papers, including any papers that may have been submitted after receipt of the hearing's bundle(s).
- 8.15 The clerk will also advise of the late arrival of any party or of the non-attendance of the defendant barrister. The BSB should inform BTAS whether the barrister is represented or is intending to conduct his or her own defence, in order that tribunal panel members can be informed of arrangements before the start of the hearing.
- 8.16 Usually, the room reserved for the panel is on the opposite side of the corridor. The clerk / panel members must check that doors are closed and that any panel discussions cannot be heard in the room where the parties will be waiting.
- 8.17 During the pre-hearing discussions, panel members can raise any questions they may have arising from the bundle(s) as it may be that the concern can be allayed at this stage.
- 8.18 It is often useful to discuss any anomalies (e.g. with dates) in the material or any information which members of the panel may feel is missing. It may be possible to resolve some queries at this time or ensure questions can be asked at the beginning of the hearing. Panel members should also review and discuss any new material provided by either of the parties since the issue of the bundle(s).
- 8.19 At this point, panel members should feel free to raise any questions that they may have or seek explanation or clarification on aspects of the law or of legal practice and process that are relevant to the case.

- 8.20 The panel members should discuss with the Chair how he or she prefers to handle the proceedings. Different Chairs have varying preferences as to the way they like panels to conduct themselves and questions to be asked during the hearing, for example. Some Chairs do not mind panel members interjecting at any appropriate time during the hearing with questions whilst others may wish to wait until the end of the hearing.
- 8.21 **Procedure during the Hearing:** Disciplinary Tribunal hearings are conducted in much the same way as in a court of law (albeit more informally) and the criminal standard of proof is applied when adjudicating upon charges of breach of the Codes of Conduct and/or Handbook.
- 8.22 When the BSB and the defence team have assembled in the Tribunal room the clerk will advise the panel, who will then proceed to the Tribunal room. Each position will be marked with the relevant person's name.
- 8.23 The Chair may deal with any preliminary matters before the proceedings are formally opened by the clerk reading the charge(s) and the defendant barrister entering pleas. The BSB will then proceed with their case, which may or may not include calling witnesses. The defence will then follow, which similarly may or may not include calling witnesses.
- 8.24 Adequate supplies of note paper will be available at each panel member's position. Panel members are advised to take notes during the proceedings, as not all the information is contained in the bundle(s) and not all the material presented to the Tribunal will be consistent with the bundle(s). Care should, however, be taken to not take notes in such detail that key information is missed.
- 8.25 Panel members should listen carefully to the proceedings. They should watch and listen to how questions are framed and answered, looking at whoever is speaking as much as possible as this may contribute useful information in evaluating the evidence and in later deliberations.
- 8.26 Whilst panel members are generally able to ask questions at any time during the proceedings, cross-examinations and statements should not normally be interrupted except to put brief questions on factual issues. Alternatively, panel members can hold any questions until the end of the relevant stage of the proceedings (following

the Chair's direction at the pre-hearing discussion – see 8.20 above). After each introductory statement and witness cross-examination, the Chair should ask the panel members if they have any questions. Panel members should not feel inhibited from asking questions or seeking clarification from any of the parties during the hearing and should not be reticent or embarrassed to check anything which they do not understand. It is important that all issues are clear and understood.

- 8.27 Panel members should not ask leading questions or questions that would indicate any views about the parties or the evidence.
- 8.28 Panel members should avoid using Latin and obscure legal terminology without explaining it so that proceedings are comprehensible to all those present, including (potentially) the complainant and members of the public.
- 8.29 If a panel member is particularly concerned about anything during the proceedings, then he/she must confer with the Chair or fellow panel members. If it is necessary to conduct a conversation among panel members at any time, the Chair can decide whether to conduct such a discussion quietly during the hearing or to retire.
- 8.30 The proceedings can sometimes become quite intense and it is easy to lose track of how much time has elapsed. Levels of concentration can drop.
- 8.31 **Preliminary applications such as adjournments:** A variety of preliminary applications can be made. There may, for example, be an application by the defendant for the case to be heard in private (Tribunal hearings are normally held in public) or an application for an adjournment. The panel will normally be advised prior to the hearing that such an application has been made (or is likely to be made) and will have the opportunity to discuss it before the hearing begins. The Disciplinary Tribunal Regulations should be referred to for clarification (see Section 14 of this guidance pack).
- 8.32 Any requests for an adjournment should be very carefully considered and not taken lightly. As many cases take a long period from the receipt of a complaint to the hearing stage, it is particularly important that the reason for the adjournment should be rigorously investigated. However, careful consideration of any such application needs to take place so as not to present grounds for appeal due to an unreasonable or unjustified refusal to grant an adjournment request. If the adjournment is based on

the health of the defendant barrister or that of witnesses, the panel should ask for medical evidence. If it is not available on the day, a direction should be given that it is supplied within a specified period of time. Issues such as the non-availability of the barrister's representative should be treated with caution as all parties will have previously indicated that they were available to attend.

- 8.33 **Retiring to consider findings and sentence:** Following the presentation of the BSB's case and the defendant barrister's case, the panel will retire to consider its verdict. There is no time limit set for this. Different Chairs may handle this process in slightly different ways but it should be conducted as an open discussion where all panel members are equals. Set out below are some broad guidelines for panel members which should help during the deliberation process.
- 8.34 Panel members should raise any points on which they are unsure, no matter how insignificant they may seem and regardless of the degree to which a member is uncertain. It happens, at times, that raising such a matter can lead to a material and defining discussion. Also, panel members should raise any concerns they may have about any part of the process from the original complaint to the panel deliberations.
- 8.35 Each member should advise the other panel members of their views as to whether they consider the charge(s) proved and the reasons why they hold that view. They should be prepared to discuss any aspect of their reasoning. If any member is unsure, they should let this be known. This is not an unusual occurrence and is perfectly acceptable.
- 8.36 Each member should listen carefully and respectfully to the views of the other members and be prepared to question and debate with them. No member should allow themselves to be dominated or pressured into making a particular decision by the Chair or any other member of the panel. Each panel member should be open to the views and arguments of other panel members and be prepared to be persuaded by the logic of an argument.
- 8.37 At this stage, the deliberations and findings should not in any way be influenced by what the potential sentence may be if the charge is proved. The findings should be based on the material in the bundle(s) and on the arguments and evidence put forward during the hearing. Sentence and mitigation will be considered at a later stage in the process



- 8.38 Chairs should be aware of the importance of lay members and ensure that the barrister members of the panel do not unduly dominate or influence the panel. For this reason, a Chair may ask the lay members to give their verdict and reasons before the barrister members are consulted.
- 8.39 Once the panel has agreed upon a finding, the Chair will draft the written findings and reasons with the assistance of the panel members. All members are expected to contribute to the preparation of the document. The panel should not be constrained by the space available on the sheet and should use additional pages where necessary. The findings should be recorded and signed by all the panel members before the panel returns to give its verdict. It is of the utmost importance that this document is well reasoned, carefully written and does not contain inconsistencies. Giving inadequate reasons for a finding may be a valid ground for appeal and, in any event, will not provide the necessary transparency of process. Should the panel members not arrive at a unanimous agreement as to the finding on any charge, the finding to be recorded on that charge shall be that of the majority. If the panel members are equally divided as to the finding on any charge, then, the burden of proof being on the BSB, the finding recorded on that charge will be that which is the most favourable to the defendant barrister.
- 8.40 The findings should be written in plain English and without the use of legal terminology. The complainant, who may be present, should be able to understand the findings. This is particularly important if the panel finds the charge(s) are not proved. Where appropriate, the reasons should make clear that the credibility of the complainant is not being impugned.
- 8.41 Following the completion of the written reasons, the panel will return to the Tribunal hearing room where the Chair will deliver the oral verdict with reasons.
- 8.42 Once the findings have been delivered, the panel will hear submissions on sentence. The BSB will draw to the panel's attention the relevant parts of the Sentencing Guidance and will also inform the panel of any previous disciplinary findings. The defendant may put forward mitigation. For more detailed guidance on sentencing, see the Sentencing Guidance at Section 15.
- 8.43 The panel's deliberations on sentence should follow the same guidelines as described above for the deliberation on the verdict. Written reasons should be given

for the sentence imposed and any aggravating or mitigating circumstances should be recorded. Panels are free to depart from the Sentencing Guidance, but if doing so should provide comprehensive reasons. The Sentencing Guidance is publicly available and the defendant barrister and complainant will want to know why the panel decided to impose a sentence that differs from the Guidance. Further, a sentence may be challenged on appeal and the appeal judge will also need to understand the panel's reasons.

- 8.44 **The role of lay members and importance of their participation:** Lay members are individuals who, by virtue of their independence, help to provide assurance to the public and the profession that barristers are regulated in a manner that is open, transparent and fair. Lay membership also has the advantage of enabling the panel to gain from the knowledge and skills of experts in different fields.
- 8.45 Lay members have a role equal to that of the legal professionals in all deliberations and decisions of the panel. It is vital that lay members understand this and act accordingly.
- 8.46 It is important that lay members do not feel concerned about revealing their lack of legal knowledge either in the pre-hearing discussion, during the hearing itself, or in the deliberations and recording of findings and sentence. They are not expected to have knowledge of the law or of legal processes because they have been appointed to provide independent, non legal assessments and viewpoints. A point that might seem obvious from an outside perspective could be the very thing that the legal professionals may have overlooked. Lay members have a role to challenge the thought processes and views of the legal professionals on the panels and those acting for the Bar Standards Board and the defendant. They also have a role to challenge the customs and practices of the legal profession. It may sometimes be the case that custom and practice within the legal profession may be considered by other professions or business areas to be questionable for a variety of sound reasons. Lay members, by virtue of their varied backgrounds and experiences, provide a different perspective and thought process to individual cases.
- 8.47 **The Role of the Chair:** The Chair is responsible for leading and managing proceedings so that hearings are operated in a fair, consistent, transparent and efficient manner. The Chair shall encourage a culture which fosters the highest

standards of integrity and probity, so as to facilitate high quality decision-making in the public interest.

- 8.48 At the outset of a hearing, the Chair should ensure that, all those in attendance understand the role of those present and the process to be followed at each stage of the hearing.
- 8.49 The Chair should ensure that all members of the Tribunal, whether legal or lay, have an equal voice and are able to contribute constructively to the both the hearing and the decision making process.
- 8.50 The Chair will be able to guide the panel members through the legal framework. However, decisions on how the law should be applied remain collective ones for the full panel to make.
- 8.51 The Chair should seek to ensure that witnesses are comfortable and that appropriate special arrangements have been or are made for vulnerable witnesses, in accordance with the BTAS Vulnerable Witness Policy (<http://www.tbta.org.uk/wp-content/uploads/2013/10/Vulnerable-Witness-Policy.pdf>)
- 8.52 The Chair is responsible for the general conduct of the hearing, for example, when the panel should put questions to the BSB, the defendant or witnesses. The Chair should ensure that the panel members do not interfere excessively or in an unduly aggressive manner so as to give rise to an allegation of bias (see section 10 on Fairness and natural justice) and should, in particular, ensure that where there is a vulnerable witness, overly-aggressive cross examination is avoided.
- 8.53 When retiring to consider finding and sentence, the Chair is responsible for leading panel discussions. Each panel member should be afforded a proper opportunity to contribute and the Chair should ensure that at each stage of the process a clear decision or consensus is reached.
- 8.54 The Chair should ensure that that the decision making is approached in a structured manner and that the panel's reasoning is fully explored. The Chair should have in mind at all times that providing adequately reasoned decisions is an essential part of a 'fair' hearing process.

- 8.55 Additionally, the Chair is responsible for preparing a written report of the findings, sentence and reasons for both. More information on the Chair's Report can be found at Section 11c and 11d.
- 8.56 In terms of the practical aspects of management of a hearing, the Chair shall work with the Clerk to the Disciplinary Tribunal on matters of time management and practical arrangements, allowing the Clerk to keep the parties, witnesses, press or other relevant persons appropriately informed.
- 8.57 The following documents are provided to guide members of the COIC Disciplinary Pool through the hearings process:
- an aide memoire intended to guide a Chair through a hearing (Section 8b)
  - an aide memoire intended to guide a panel member through a hearing (Section 8c)
  - hearing room layouts for 5 and 3 person panels (Section 8d)

## HEARING AIDE MEMOIRE: CHAIR

### PRE HEARING PREPARATION

On receipt of hearings bundle (usually 10 days prior to hearing):

- Immediately consider whether there is any conflict of interest which would require you to step down and if there is, contact the COIC Tribunals Service Administrator
- Study and analyse the bundle:
  - check the contents;
  - study the charge sheet;
  - study the contents of the bundle;
  - make notes and identify areas for clarification;
  - prepare questions for the hearing; and,
  - prepare a chronology of events.
- Identify from the Convening Order who is sitting on the panel and whether there are any panel members who have not sat before and may require more support.
- Inform the Tribunals Administrator if more than 30 minutes is required for pre hearing discussion.

### MORNING OF THE HEARING

- Arrive in good time.
- Check with the clerk:
  - whether there have been any changes to the composition of the panel;
  - whether the defendant barrister is present and represented (and if so, the name of the representative, if not known in advance);
  - the name of the BSB prosecutor, if not known in advance;
  - the list of witnesses to be called, if not known in advance, and whether there are any special arrangements;
  - if any members of the press are present; and,
  - if there is any additional documentation.

### PRE HEARING DISCUSSION

- Letter issued by COIC re date etc will specify the time at which panel members must attend for pre hearing discussion.
- At pre hearing discussion, you should:
  - introduce yourself;
  - introduce the other panel members;
  - put any new panel members at their ease, checking they have no concerns;
  - ensure that panel members have all the papers and are aware of any developments since issue of the bundle;
  - ask panel members if they have any questions or concerns etc; and,
  - discuss how the hearing will be handled and how the panel will conduct itself (including agreeing approximate timings of breaks).

## HEARING

### GENERALLY

- Participants should be introduced.
- Participants remain seated throughout.
- Ensure participants understand the process.
- The Chair should take an active role in managing the hearing to ensure that the case is concluded in a timely manner and within the scheduled time.
- The presumption is that the hearing will be held in public (DTR 12), unless there has been a ruling by a Directions Judge or disciplinary panel that the hearing should take place in private.

### NON ATTENDANCE OF DEFENDANT BARRISTER

If the defendant barrister is not present, the panel must decide:

- Whether the Convening Order has been correctly served on the defendant (in compliance with rE 148; and,
- Whether to proceed in the absence of the defendant.

### ADJOURNMENTS

Sometimes a defendant barrister requests an adjournment of proceedings at short notice before the hearing – this request is sent to the Chair of the Tribunal (and the other panel members) plus any submissions from the BSB on the request). The Chair can either decide whether to adjourn prior to the hearing or to take the issue as a preliminary matter at the Tribunal.

### OPENING

- You should introduce panel and deal with any preliminary matters.
- You should ask the clerk to read out the charge(s).
- You should ask the defendant barrister to enter his/her plea(s).

### PROCEDURE AT A HEARING

When determining approach, Chairs should note that:

- Bar Disciplinary Tribunals apply the criminal standard of proof;
- there are no procedural rules and the way a hearing should be run is a matter for the Chair (the Disciplinary Tribunal Regulations specify the powers of the Tribunal, but do not specify the procedures to be followed by the Chair);
- generally, hearings tend to follow a standard criminal trial process; and,
- proceedings are relatively informal, although the rules of civil and criminal evidence tend to be used as the basis for deciding how to treat any evidential issues that arise.

## HEARING (Contd.)

### WITNESSES

- As previously agreed between the clerk and witness, the witness should be sworn in or asked to affirm by the clerk.
- The Chair should ensure that the witnesses are comfortable at all times. This includes ensuring witnesses are given adequate breaks;
- If a witness is to continue to give evidence after a break, the witness must be reminded that they are on oath (and what this means) both at the start of the break and on resumption.

### EVIDENCE

- The BSB Prosecutor sets out the allegations and presents the evidence in support of the case against the defendant barrister, calling any witness(es).
- The defendant barrister or his/her representative presents evidence in defence and may call any witness(es).
- Normally, written witness statements are taken as evidence-in chief, with any witness(es) only giving oral evidence when cross-examined. Panel members may also put questions to the witness(es).
- Closing speeches may be requested if the panel considers that this would be of assistance.

### FINDING

The panel retires to consider finding.

At this stage, panel members should:

- raise any points on which they are uncertain;
- raise any concerns that they may have about any part of the process from the original complaint to panel deliberations;
- ask for explanation or clarification of any points of law or of legal practice and process that are relevant to the case; and,
- assess matters against the criminal standard of proof (*i.e.: facts proven by the prosecution beyond reasonable doubt*).

Each panel member should then indicate their view as to the guilt or innocence of the defendant and the reasons why they hold that view. Panel debate and discussion should follow on verdict and reasons, leading to a panel decision being reached on the finding. Where a majority verdict is not possible, see rE 155..

The Chair will draft written findings and reasons, with the assistance of panel members. The findings should be signed by all the panel members before the panel returns to give its verdict. It should be noted that the provision of reasons gives transparency to the process. Although the reasons need not necessarily be lengthy they should show how, and why, and what particular evidence influenced the panel in making its finding.

Panel returns and Chair delivers the panel's oral verdict with reasons.

## **HEARING (Contd.)**

### **SENTENCE**

The panel then hears submissions on sentence.

The BSB prosecutor will:

- draw the panel's attention to the relevant sections of the appropriate version of the BTAS Sentencing Guidance; and,
- inform the panel of any previous disciplinary findings against the defendant barrister, providing copies of relevant documentation.

The defendant barrister may put forward mitigation.

The Panel should (by reference to the BTAS Sentencing Guidance) agree sentence, giving written reasons for the sentence imposed and recording any aggravating or mitigating circumstances.

The Chair should provide the sentence and reasons orally at the conclusion of the hearing.

### **FINDING AND SENTENCE SHEET**

The Panel will be asked to complete, sign and date a Finding and Sentence sheet for completion.

## **AFTER THE HEARING**

### **CHAIR'S REPORT**

The Chair should agree with the clerk the arrangements for drafting the Chair's report, a first draft of which should then be produced by the clerk. The report should detail the finding/sentence and the reasons for that finding/sentence, including any costs or fines and the date by which they should be paid by.

On receipt of the draft report from the clerk, the BTAS Administrator will liaise with the Chair to agree the final form of the Chair's report.



## HEARING AIDE MEMOIRE: PANEL MEMBER

### PRE HEARING PREPARATION

On receipt of hearings bundle (usually 10 days prior to hearing):

- Immediately consider whether there is any conflict of interest which would require you to step down and if there is, contact the COIC Tribunal Administrator.
- Study and analyse the bundle:
  - check the contents;
  - study the charge sheet;
  - study the contents of the bundle;
  - make notes and identify areas for clarification;
  - prepare questions for the hearing; and,
  - prepare a chronology of events.

### PRE HEARING DISCUSSION

- The letter issued by COIC re date/time etc of hearing will ask panel members to attend at least 30 minutes before the start of the hearing for the preliminary discussion (if more time required for discussion, the Chair should have informed COIC of this on receipt of the hearings bundle).
- At pre hearing discussion, the Chair should:
  - ensure that panel members have all the papers and are aware of any developments since the issue of the bundle;
  - ask panel members if they have any questions or concerns etc;
  - discuss how the hearing will be handled and how the panel will conduct itself; and,
  - agree any breaks.

### HEARING

#### OPENING

- Chair to introduce panel and deal with any preliminary matters, such as an application for an adjournment or for the hearing to be held in private.
- The clerk reads out the charge(s).
- The barrister enters his/her plea(s)

## HEARING (Contd.)

### EVIDENCE

- The BSB Prosecutor sets out the allegations and presents the evidence in support of the case against the barrister, calling any witness(es).
- The barrister or his/her representative presents evidence in defence and may call witness(es).
- Normally written witness statements are taken as evidence-in chief, with witnesses only giving oral evidence when cross-examined. Panel members may also put questions to the witness(es).
- Closing speeches may be requested if the panel considers that this would be of assistance.

### FINDING

The panel retires to consider finding.

At this stage, panel members should:

- raise any points on which they are uncertain;
- raise any concerns that they may have about any part of the process from the original complaint to panel deliberations;
- ask for explanation or clarification of any points of law or of legal practice and process that are relevant to the case; and,
- assess matters against the criminal standard of proof (*i.e.: facts proven by the prosecution beyond reasonable doubt*).

Each panel member should then indicate their view as to the guilt or innocence of the defendant and the reasons why they hold that view. Panel debate and discussion should follow on verdict and reasons, leading to a collective panel decision being reached, if possible, on the finding. Where a majority verdict is not possible, see rE 155..

The Chair will draft written findings and reasons, with the assistance of panel members. The findings should be signed by all the panel members before the panel returns to give its verdict. It should be noted that the provision of reasons gives transparency to the process. Although the reasons need not necessarily be lengthy they should show how, and why, and what particular evidence influenced the panel in making its finding.

Panel returns and Chair delivers the panel's oral verdict with reasons.

## **HEARING (Contd.)**

### **SENTENCE**

The panel then hears submissions on sentence.

The BSB prosecutor will:

- draw the panel's attention to the relevant sections of the COIC Sentencing Guidance; and,
- inform the panel of any previous disciplinary findings against the barrister, providing copies of relevant documentation.

The defendant may put forward mitigation.

The panel retires to consider sentence.

Having regard to the relevant version of the BTAS Sentencing Guidelines, the Panel should agree sentence, giving written reasons for the sentence imposed and recording any aggravating or mitigating circumstances. If there is not unanimity amongst the panel on sentence, see rE 157..

The Panel returns and Chair will normally provide the sentence and reasons orally at the conclusion of the hearing.

### **FINDING AND SENTENCE SHEET**

The Panel will be asked to complete, sign and date a Finding and Sentence sheet for completion.

## **AFTER THE HEARING**

Panel members should pass all the documentation for the hearing to the Clerk for secure disposal.



## Hearing Room layout: 3 person DT panel

Panel  
member 1  
(barrister)

Barrister  
Chair

Panel  
member 2  
(lay)

TABLE  
(On table: Copies of Disciplinary Tribunal Regulations)

Clerk  
(recording  
equipment)

Witness

Defendant

Defendants  
Representative

BSB  
Representative

BSB case  
officer

Public

Public

Public

Public

Public

Public

Public



## Hearing Room layout: 5 person DT panel

Panel  
member 1  
(barrister)

Panel  
member 2  
(lay)

Judicial  
Chair

Panel  
member 3  
(lay)

Panel  
member 4  
(barrister)

TABLE  
(On table: Copies of Disciplinary Tribunal Regulations)

Witness

Clerk

Defendant  
Expert

Defendants  
Representative

BSB  
Representative

BSB case  
officer

Expert  
Advisor  
(if applicable)

Public

Public

Public

Public

Public

Public

Public







## 9. Guidance for clerks

- 9.1. **Introduction:** The smooth running of Disciplinary Tribunal hearings depends greatly on the way in which Disciplinary Tribunal clerks (“clerks”) discharge their duties. The information below provides guidance on how clerks should perform their role.
- 9.2. An important first step for clerks is to familiarise themselves with the BSB Handbook, and in particular the Code of Conduct (Part 2) and the Enforcement Requirements (Part 5) of their respective subsections.
- 9.3. **Overview of role and function:** The primary role of clerks at Disciplinary Tribunal proceedings, as overseen by the Council of the Inns of Court (“COIC”), is to ensure that the needs of the Panel are met during the hearing. A large part of the role is to ensure that the administrative aspects of Disciplinary Tribunal proceedings are attended to.
- 9.4. Clerks do not act in a legal advisory role but they are expected to address any queries raised by the panel about procedural issues. As such issues will arise from time to time during the hearing or during the Panel’s deliberations, it is vital that clerks understand the Disciplinary Tribunal Regulations (Enforcement Requirements, Part 5) and proactively identify any areas where the Regulations are not being followed or clarification is needed.
- 9.5. The clerk’s responsibility is to the Panel and not to the parties to the proceedings. Clerks have a responsibility to raise matters of procedural concern, even in circumstances where nobody else involved in the proceedings has recognised the issue.
- 9.6. **Appointment:** Clerks are appointed to Disciplinary Tribunals by the President of the COIC, by way of a Convening Order made under rE 125.2.(b). Pre-hearing Administrative issues are dealt with by the BTAS Administrator as the clerk currently does not have any involvement outside scheduled hearings.

- 9.7 Cases are presented by counsel on behalf of the Bar Standards Board's Complaints Committee and are investigated and prepared by Case Officers in the Hearings Team of the Bar Standards Board (BSB). However, clerks must avoid making contact with the BSB direct regarding any issues so as to avoid the perception of bias and should channel any request for information or clarification through the BTAS Administrator.
- 9.8 **Preliminary Hearings:** Oral directions hearings or preliminary hearings are held only when the parties cannot agree directions on paper. Oral directions hearings are presided over by a judge see Regulation rE 117 and rE 218 as to which persons can exercise the role of a directions judge. It should be remembered that the directions judge is not acting formally in his/her official judicial capacity, but is acting as a directions judge under the Disciplinary Tribunal Regulations.
- 9.9 Oral directions hearings are often used to hear applications for the striking out of charges. In most cases, both parties will have submitted to the directions judge a copy of their proposed directions and a copy of their submissions in support of those proposed directions and/or their application to strike out. Clerks should have a copy of all relevant documents for their file.
- 9.10 It is important that clerks listen carefully to the directions ordered. It is for the clerk to accurately record the directions which will later be used for the order. The clerk should check with both parties and/or the judge before leaving the hearing if anything is not clear.
- 9.11 In the event that an oral directions hearing is necessary, a clerk is required to attend and prepare a note of any directions given by the judge. The clerk's note of the directions given by the judge should preferably be provided within the 24 hours following the hearing date.
- 9.12 **Correspondence:** Clerks are sent a copy of the Convening Order for the hearing at least 14 days before the hearing, together with the Charge Sheet and directions. However, if any correspondence or telephone calls are received by a clerk after his/her appointment, from the parties or the Panel, they should be referred to the BTAS Administrator immediately for handling. Clerks should avoid contacting either party about issues as this could give the impression of bias: any issues that may need to be addressed by the BSB should be routed via the BTAS Administrator.

- 9.13 **The Tribunal Room:** Since 2013 Disciplinary Tribunals are held in the dedicated Tribunal Suite located in Gray's Inn.
- 9.14 The BTAS Administrator is responsible for setting up the hearing room. Each position is marked with the relevant person's name in order to assist the Panel, parties to identify those in the room who are participating in the proceedings. Copies of the Disciplinary Tribunal Regulations are placed on the Tribunal panel table and copies of the Sentencing Guidance are placed in the retiring room. All documents are available on the BTAS website and free wifi is provided throughout the Tribunal Suite to assist access. While the Tribunal Administrator will make these arrangements, the clerk is responsible for checking everything necessary is in place and, where items are missing, making arrangements for them to be provided. A plan showing the model layout of a 3 person and 5 person hearing room is attached at Section 8d.
- 9.15 The clerk will be given the BTAS Administrator's file of papers prior to commencement of the hearing so that the clerk is in a position to answer questions, if any arise, about service of the Convening Order. The BTAS Administrator sends the Convening Order to the defendant barrister by "recorded delivery" as well as normal first class post. It has to be served on the defendant barrister at least 14 days before the hearing.
- 9.16 **The Hearing – action prior to the start of the hearing:** Prior to the start of the hearing, the clerk should check that all the members of the Panel are present, as well as the parties to the case. In relation to witnesses, the clerk will need to check with both the BSB and the barrister what witnesses they intend to call and whether they are present. If any issues arise regarding the attendance of the parties, or their witnesses, the clerk will need to liaise with the parties already present to obtain their views on how the hearing should proceed. The clerk should then inform the Chair of the situation and ask him/her to decide what action should be taken.
- 9.17 If witnesses are to be called, the clerk should ensure that a copy of the BSB bundle (supplied by the BSB) is available for reference purposes if needed (N.B. to be accessed by witnesses in these circumstances only).
- 9.18 The clerk should check prior to the start of the hearing whether either party intends to make any preliminary applications such as amendments to the original Charge Sheet. If this is the case, the panel should be alerted.

- 9.19 In most cases there will be no problems with attendance and the clerk should inform the Chair when all the parties are present and ready to proceed. Thereafter, it will be a matter for the Chair to give instructions on when the hearing should commence and if any issues need to be addressed before the hearing starts. The clerk will be responsible for liaising with the parties regarding any issues the Chair wants clarified before the Panel enters the room.
- 9.20 Once the Panel is ready to enter the room, the clerk should lead the Panel into the room, saying as the Panel enters “All rise please”. The Panel and the clerk will then take their seats.
- 9.21 **The Hearing – charges:** Once the Panel Members are in position, and any preliminary matters have been dealt with, the Chair will direct the clerk to read the charges to the defendant barrister. The clerk should ask the barrister to stand and after each charge is read, ask the defendant barrister whether he/she “admits” or “denies” the charge. Clerks should not use the terms “guilty” or “not guilty” as Disciplinary Tribunals are not criminal proceedings and such terminology is inappropriate. Once the charges have been read and the pleas entered, the defendant barrister should be asked to sit down.
- 9.22 **The Hearing – witnesses:** The clerk is responsible for escorting witnesses to and from the Tribunal Room as necessary. Witnesses should be asked if they wish to be sworn or to affirm, after which the clerk will administer the appropriate oath or affirmation while the witness is standing. The witness will then be asked to sit. There are a variety of oath cards and religious books available at the hearing and it is good practice for the clerk to check with the witness, before entering the Tribunal Room, which, if any, oath or affirmation is required. Examples of oaths and affirmations are provided at Section 17 of the Information and Guidance Pack.
- 9.23 **The Hearing – the clerk’s notes:** The clerk is not required to keep a full note of the proceedings but it is important that he/she keeps notes of the decisions made by the Tribunal and the pleas entered by the barrister, as well as details of any documents handed to the panel during the hearing. This is to allow the clerk to be able to prepare a draft of the Chair’s report (see paragraph 9.33, below). The clerk is required to operate the digital recording equipment or ensure the BTAS Administrator is alerted to operate the digital recording equipment at the appropriate times when the tribunal are sitting only (this is for the purpose of providing transcripts if required).

- 9.24 **The Hearing - exhibits and documents presented:** If additional documents or exhibits are handed to the Panel during the course of the hearing (beyond the bundle provided to the clerk), the additional documents should be numbered in consecutive order, dated, initialled by the clerk and a note made of the details. At the conclusion of the hearing, copies of all additional documents, including exhibits, should be provided to the BTAS Administrator.
- 9.25 **Retirement of the Tribunal panel:** The Panel may retire during the hearing to deliberate on the following:
- a) Preliminary applications, such as applications to add charges or amendments to existing charges;
  - b) Interim applications, such as applications of no case to answer after the prosecution case has concluded;
  - c) Whether the charges are proved beyond reasonable doubt; and
  - d) The sentence to be imposed on the barrister where charges are proven by the BSB.
- 9.26 The panel retires without the clerk.
- 9.27 When the Panel retires, the clerk should ask how long the Panel thinks they will need for their deliberations and, depending on the timescale, whether the parties may be released during that period of deliberation. The clerk should keep parties informed throughout the Panel's deliberations as to the Panel's likely time of return.
- 9.28 **Defendant barrister:** The clerk is responsible for assisting the defendant barrister through the proceedings. In most cases the defendant barrister, and/or his/her representatives, will be familiar with Tribunal protocol but this should not be assumed. It is good practice to confirm with the barrister prior to the hearings whether he/she understands the hearing process. If not, the clerk should give a brief overview of proceedings. Clerks must not give legal advice or make any comment, other than procedural, on any applications that might be made.
- 9.29 **Record of Findings and Sentence:** The clerk must ensure that the Chair and members of the Tribunal complete and sign the Findings and Sentence sheet, including any fines and costs ordered and the timeframe or on which they should be paid. Once completed, the clerk should place the documents in the file and return it to the BTAS Administrator.

- 9.30 **Clearing the room at the end of the hearing:** After the hearing has concluded, or at the end of the hearing day, the clerk should collect the Panel's documentation and return it to the BTAS Administrator. If the hearing is for more the one day, the clerk should ask the BTAS Administrator about the secure holding arrangements for documentation.
- 9.31 The clerk should retain his/her copy of all the papers to allow preparation of the first draft of the Chair's report (see paragraph 9.33 below). Once the report is finalised the bundle and any other papers should be returned to the BTAS Administrator for secure disposal.
- 9.32 Where the defendant barrister has been ordered to attend on the Treasurer of his/her Inn to be reprimanded or for advice as to their future conduct, the clerk should clearly mark the relevant paperwork for the attention of the BTAS Administrator. This will avoid the BTAS Administrator disposing of relevant paperwork in line with paragraph 9.31, above.
- 9.33 **Chair's Report:** The Chair of the Tribunal is required to prepare a report of the proceedings – see Regulation rE 181. The clerk should prepare the first draft of the Chair's report, which must be compiled within a maximum of 7 days of the hearing to allow time for the Chair to consider and approve it. The draft should be forwarded to the BTAS Administrator who will in turn liaise with the Chair regarding approval of the final version.
- 9.34 **Hearings: clerk's aide memoire:** An aide memoire intended to guide a clerk through a hearing is provided at Section 9b.
- 9.35 **Invoices:** To assist, invoices should be submitted to the BTAS Administrator as soon as possible after the hearing, clearly stating the name of the clerk, the date(s) of the hearing, the BSB reference number for the case and the name of the defendant barrister. Please refer to the BTAS Expenses Policy for the fee applicable for a hearing.

## HEARING AIDE MEMOIRE: CLERK

### PRE HEARING

- Clerks will be sent a copy of the Convening Order for the Hearing at least 14 days before the hearing, together with the Charge Sheet and directions (N.B.: the nature of pre provided paperwork is to be reviewed and may be subject to revision).
- Any correspondence or telephone calls received by a clerk after his/her appointment, from either the parties or panel members, should immediately be referred to the COIC Tribunal Administrator.

### MORNING OF THE HEARING

The clerk will be provided with the Tribunal Administrator's file of papers prior to commencement of the hearing so that the clerk is in a position to answer questions, if any arise, about service of the Convening Order. This file will include the BSB's bundle, any defence documents which may have been sent and a blank Findings and Sentence sheet.

The clerk should check:

- that the hearing room is ready for the hearing;
- that all the members of the Panel are present, as well as the parties to the case;
- with both the BSB and the defendant barrister what witness(es) they intend to call and whether they are present; and
- whether either party intends to make any preliminary applications such as amendments to the original Charge Sheet. If this is the case, the panel should be alerted.

If any issues arise regarding the attendance of the parties, or their witness(es), the clerk will need to liaise with the parties already present to obtain their views on how the hearing should proceed. The clerk should then inform the Chair of the situation and ask him/her to decide what action should be taken.

The panel will assemble for a pre hearing discussion (usually arriving 30 minutes before the start of the hearing). The clerk takes no part in these discussions.

If witnesses are to be called, the clerk should ensure that a copy of the BSB bundle (supplied by the BSB) is available on the "witness table" for reference purposes if cross examined (N.B. to be accessed by witnesses in these circumstances only).

## MORNING OF THE HEARING (Contd.)

### DEFENDANT BARRISTER

Clerks should confirm with the defendant barrister prior to the hearing whether he/she understands the hearing process, if not, the clerk should give a brief overview of the proceedings.

Clerks should not give legal advice or make any comment, other than procedural, on any applications that might be made.

### WITNESSES

Clerks should check with the witness, before entering the hearing room, whether they wish to be sworn or to affirm and which, if any, oath or affirmation is required.

## HEARING

### START OF HEARING

Once the Panel is ready to enter the room, the clerk should lead the Panel into the room, saying as the Panel enters "All rise please". The Panel and the clerk will then take their seats (see hearing room layout at Section 8d).

### OPENING

The Chair will introduce the panel and deal with any preliminary matters.

### CHARGES

The Chair will then direct the clerk to read the charges to the barrister: the clerk should ask the barrister defendant:

- to stand;
- (and after each charge is read) whether he/she "*admits*" or "*denies*" the charge; and,
- (and once the charges have been read and the pleas entered), to sit down.

Clerks should not use the terms "guilty" or "not guilty", as these are not criminal proceedings.



## **HEARING (Contd.)**

### **WITNESSES**

The clerk should:

- escort witnesses to and from the Tribunal room, as necessary;
- invite the witness to sit at the witness desk; and,
- ask the witness to take the pre-agreed oath or affirmation as to the truth of their evidence.

### **EXHIBITS AND DOCUMENTS**

If additional documents or exhibits are handed to the Panel during the course of the hearing (beyond the bundle provided to the clerk), the clerk should:

- number the documents in consecutive order;
- date the documents;
- initial the documents; and,
- make a note of document details.

The additional paperwork should be provided to the COIC Tribunal Administrator at the conclusion of proceedings.

### **RETIREMENT OF PANEL**

The Panel may retire during the hearing to deliberate on the following:

- a) preliminary applications such as applications to add charges or amendments to existing charges;
- b) interim applications such as applications of no case to answer after the prosecution case has concluded;
- c) whether the charges are proved beyond reasonable doubt; and
- d) the sentence to be imposed on the barrister where charges are proven by the BSB.

The panel will retire without the clerk.

When the panel retires, the clerk should ask how long the panel thinks it will need for deliberations and, depending on the timescale, whether the parties may be released during that period of deliberation. The clerk should keep parties informed as to the panel's likely time of return.

## HEARING (Contd.)

### NOTE TAKING

Both three and five person Disciplinary Tribunal proceedings are recorded using digital equipment.

Clerks should:

- *(in the case of both five person and three person hearings)*, keep a note of the **decisions** made by the Tribunal and the **pleas** entered by the defendant barrister as well as details of any **documents handed to the panel** during the hearing (so that the clerk may produce a first draft of the Chair's report).

### FINDINGS AND SENTENCE SHEET

Normally, the finding, sentence and reasons will be given orally by the Chair at the end of the hearing. The clerk should then provide the Panel with a copy of the Findings and Sentence sheet for completion. The Clerk must ensure that the Chair and members of the Panel complete, sign and date the Findings and Sentence sheet.

Once completed, the clerk should place the Findings and Sentence sheet in the defendant barrister's file and return it to the BTAS Administrator, together with the other documentation.

## AFTER THE HEARING

### DOCUMENTS

The clerk should collect the Panel's documentation and return it to the BTAS Administrator. Where the barrister has been ordered to attend on the Treasurer of his/her Inn to be reprimanded or for advice as to their future conduct, the clerk should clearly mark the relevant paperwork for the attention of the BTAS Administrator.

If the hearing is for more than one day, the clerk should ask the BTAS Administrator about the secure holding arrangements for documentation.

The clerk should retain his/her copy of the papers in order to prepare the first draft of the Chair's Report. On completion of the draft report, all papers should be returned to the BTAS Administrator for secure disposal.

### **AFTER THE HEARING (Contd.)**

#### **CHAIR'S REPORT**

The clerk should prepare the first draft of the Chair's report, which must be compiled within a maximum of 7 days of the hearing to allow time for the Chair to consider and approve it. The draft should be forwarded to the BTAS Administrator who will in turn liaise with the Chair regarding approval of the final version.





## 10. Fairness, natural justice and the Human Rights Act 1998

- 10.1 **Introduction:** In 1923 the then Lord Chief Justice, Lord Hewart, observed in the course of a judgment:

*“... it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”*

- 10.2 That is a principle to which all Disciplinary Tribunal panel members should have regard when performing their duties. The purpose of this section is to explain particular applications of this broad principle in the Disciplinary Tribunal context.

- 10.3 Regulation rE 144 of the Disciplinary Tribunal Regulations state the “rules of natural justice” apply to the proceedings of a Disciplinary Tribunal. These “rules” consist of a number of principles which the common law has established through case law. Amongst them are two broad propositions:

- (a) the right to a hearing before an unbiased Tribunal; and
- (b) the right to be heard (i.e. to be able to properly put one’s case) before that tribunal.

- 10.4 The European Convention on Human Rights (“the Convention”) became part of English substantive law with effect from 2 October 2000 following the enactment of the Human Rights Act 1998. The relevant provision of the Convention is Article 6, which provides that:

*“In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*

- 10.5 The European Court of Human Rights has held that the right to practise a profession is a civil right within the meaning of Article 6. Because disciplinary proceedings before a COIC Disciplinary Tribunal could result in the defendant being deprived, either by suspension or disbarment, of the right to practice as a barrister, Article 6 applies to the proceedings of the Tribunal.

- 10.6 For present purposes, the English common law principles of natural justice and the requirements of Article 6 of the Convention can be regarded as identical. The summary that follows is intended as a brief guide to what is a very extensive area of the law and is in no way a comprehensive document. For convenience, the two broad topic headings used at paragraphs 10.3 (a) and (b) above have been adopted.
- 10.7 **An independent and impartial tribunal:** The requirements of the Convention for an independent and impartial tribunal correspond to the need to avoid actual and apparent bias in the rules of natural justice. In the paragraphs directly below, each form of bias shall be described in turn.
- 10.8 **Actual Bias:** Actual bias occurs where a decision-maker in proceedings is partial, whether consciously or not. Apart from favouring one party over another for reasons other than the merits of the case, the obvious example of actual bias is where a member of a Tribunal has an interest (which may not be financial) in the subject matter of the proceedings, unless it can be disregarded as trivial. This corresponds to lack of independence under Article 6 and upholds the fundamental maxim of English law that “no man is to be a judge in their own cause”.
- 10.9 So in the old case of *Dimes v. Grand Junction Canal Proprietors* (1852) a judge was disqualified from sitting on an appeal involving a company in which he owned some shares.
- 10.10 A prominent and relatively recent example of a non-financial interest acting to disqualify a judge arose in 2000 when the former dictator of Chile, General Pinochet, tried to avoid extradition from the United Kingdom to Spain. In the House of Lords, a number of interested parties, including Amnesty International, were allowed to make submissions. When it was disclosed that Lord Hoffman, one of the Law Lords who had sat in the appeal, was a director of Amnesty International Charity Limited, an organisation wholly controlled by Amnesty International, the judgment of the House of Lords had to be set aside and the case re-heard. Lord Hoffman was held to have had, because of his position, an interest in the outcome of the case, notwithstanding that no-one suggested he was consciously biased.
- 10.11 In *P (a barrister) v General Council of the Bar* (2005) a lay member of the Committee which then decided on prosecutions of barristers was disqualified from sitting on an

appeal by a barrister who had been suspended from practice. This was because of her membership of the Committee, even though she had not attended the meeting of the Committee when the decision was taken to prosecute him. Because of her membership of the Committee, she was held, like Lord Hoffman, to have an interest in the outcome of the appeal.

- 10.12 Proof of actual bias always requires the disqualification of the Tribunal member, or the decision being set aside if actual bias is only subsequently demonstrated. This can be avoided only where there has been full disclosure at the outset and the parties have had a reasonable opportunity to consider their positions and agree to carry on notwithstanding the member's particular interest.
- 10.13 Mere membership of a particular group or cause will not usually be enough to lead to automatic disqualification of a decision-maker. However, as is demonstrated by the *Pinochet* and *Re P* cases, active involvement in and promotion of it may well do. Subsequent cases have stressed the exceptional nature of the *Pinochet* case. The Privy Council has held that, where a complaint was brought by a Bar Association, the fact that two members of the Advisory Council dealing with the case were members of the Bar Association did not lead to their disqualification.
- 10.14 **Apparent Bias:** Apparent bias is a less precise concept. It is concerned with the notion that "justice should manifestly and undoubtedly be seen to be done." Various members of the judiciary have also identified its importance in guarding against the pernicious influence of "sub-conscious" bias.
- 10.15 The test for apparent bias has been framed as follows:
- "whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased."*
- 10.16 This is an objective test dependent on the set of circumstances. The courts have held that the fair-minded and informed observer as a reasonable member of the public is neither complacent nor unduly sensitive or suspicious. Situations which may give rise to a conclusion that there is real possibility of bias are endless. A text book cites as examples: expressions of personal hostility, or friendship, familial relationship or close acquaintance with a party or witness. Commencing a hearing with a pre-formed view or a 'closed mind' will obviously defeat the requirement of impartiality. Thus, previously expressed views on a question at issue in extreme and unbalanced

terms may well arouse suspicion that the Tribunal member is unable to try the issue objectively. However, the expression of a provisional view subject to hearing evidence or submission on the points is legitimate, so long as its tentative nature is made clear.

- 10.17 Conversely, objections cannot soundly be made on the basis simply of shared or different religion, ethnic origin, gender, age, class, means or sexual orientation between the decision maker and the defendant or witness. Nor ordinarily should a decision-maker be recused on the basis of social, educational or employment background or history, previous political associations or membership of social, sporting or charitable bodies (though see above). Prior knowledge of a party or witness will not, of itself, represent apparent bias unless the prior relationship was close or the circumstances suggest the likelihood of bias. However, failure to disclose a prior contact, close or not, may well, of itself, give rise to suspicion. Knowledge of previous findings against a barrister is normally a valid ground for objection, though a Tribunal member with such personal knowledge must disclose it and would be wise to withdraw unless there is no objection.
- 10.18 In *Laval v Northern Spirit*, it was held that apparent bias arose where one (lay) member of the Employment Appeal Tribunal (EAT) hearing an appeal had sat previously in another case in the EAT with a part-time judge who appeared as counsel for one party in the present appeal. The fair-minded and informed observer might have concluded that the lay member might have been (though there was no evidence that he would have been) unduly influenced by his previous experience of the barrister in the latter's judicial capacity.
- 10.19 Consequently, if a Tribunal member is in any doubt, the sensible course is either to decline to sit or, if the position does not become apparent until immediately before or at the start of the hearing, to make full disclosure at the beginning of the hearing so as to give the parties the opportunity to apply for the matter to be adjourned to a differently constituted Tribunal. There is no embarrassment in this; far more embarrassing would be a situation where, after a hard fought hearing, the proceedings are set aside to be re-heard by a fresh Tribunal because of a Tribunal member's non-disclosure.
- 10.20 Regulations rE 126 and 127 permit the defendant to give notice, on grounds which must be specified, objecting to one or more proposed members of the Disciplinary Tribunal and for the nomination of substitute members.



- 10.21 Some safeguards have been put in place to avoid COIC Disciplinary Tribunal members finding themselves in situations of apparent bias. For instance, Regulation rE 135 stipulates that an individual is ineligible to serve on disciplinary tribunals if s/he is a member of the Bar Council or any of its committees, or the Bar Standards Board or any of its committees. Moreover, if an individual who has been appointed to serve as a Disciplinary Tribunal panel member subsequently joins the Bar Council or the Bar Standards Board (or one of their respective committees), s/he will be, from that point onwards, automatically disqualified from continuing to act as a disciplinary tribunal panel member.
- 10.22 The COIC Appointments Protocol reflects these provisions, and provides additional protections. Under its terms, before becoming eligible to apply to serve as COIC Disciplinary Tribunal panel member, a two year 'quarantine' period is imposed upon an individual who was on the Bar Council or BSB (or any of their respective committees) or who was employed by either of those organisations.
- 10.23 **The right to be heard:** This broad heading encompasses a number of related matter:
- 10.24 **The right to prior notice of the case against the defendant.** The allegations which the Defendant must face must be identified with sufficient clarity to enable him or her properly to prepare his or her defence. This applies not just to the charges but requires disclosure of copies of the documents on which the charges depend or which may be necessary to the barrister's defence. The rule applies both to the case originally sought to be made against the defendant and to any significant amendment to that case during the course of the proceedings.
- 10.25 Reflecting this, under Regulation rE 102, a copy of all the charges against the defendant must be circulated to him or her no later than 10 weeks (or 5 weeks if the BSB Professional Conduct Committee has directed that prosecution of the charges be expedited) after the case was first referred to the Disciplinary Tribunal. Regulations rE 104, 105 and 106 also provide a list of the categories of documents that must be served upon the defendant in order for him or her to adequately prepare his case.
- 10.26 **The right to adequate time to prepare for the hearing.** This applies both to the fixing of the hearing itself and to any changes to the prosecution case once proceedings have been started. If significant new material is forthcoming at a late

stage, this may be a reason to grant an adjournment of the hearing. It might be, for example, that the defendant wishes to call a witness to deal with the new material who is unable to attend the hearing. Or it may be that new material has come to light which the prosecution wishes to investigate. The grounds for seeking an adjournment are almost unlimited and Tribunals must consider the arguments for and against carefully in the light of the potentially very serious consequences for the barrister who genuinely needs more time to put forward a proper defence, the duty of the prosecution to put forward a proper case and the need of both parties to speedily resolve the matter.

- 10.27 Under Regulation rE 154, the Disciplinary Tribunal has a general power to adjourn proceedings. A specific power to adjourn hearings where the charge or charges have been amended is found at Regulation rE 152.
- 10.28 **The right to equality of arms.** This does not mean that the defendant has a right to the same level of representation as the prosecution; e.g., if the BSB retained Queen's Counsel it would not follow that the defendant barrister would have the right to the same level of representation. Instead, the test is a broader one, namely that the defendant must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis à vis his opponent.
- 10.29 The defendant has the right either to represent himself or to be represented by counsel before the Disciplinary Tribunal. Since barristers can usually obtain representation via their professional indemnity insurance, lack of representation is unlikely to be an issue (although representation is not available in relation to all charges and there may be reasons why cover is not available in individual cases).
- 10.30 Regulation rE 148 is an exception to this rule and permits the Disciplinary Tribunal to proceed in the defendant's absence where it is satisfied either that the relevant procedure has been complied with or that it has not been practicable to comply with the relevant procedure.
- 10.31 **The right to a hearing within a reasonable time.** The principal reasons for this are obvious: first, it is oppressive for the defendant to have hanging over him or her, for a prolonged period, pending proceedings which may affect his livelihood and second, where factual matters are in dispute, the passage of time is likely to affect witnesses' recollections. If an unreasonable amount of time has passed, this may form the subject of an application for charges to be struck out or form a ground of appeal.

However, case law indicates that the delay would need to be substantial (a term which cannot be more closely defined, depending as it does on the circumstances, but many months at least) before it would undermine the validity of the proceedings.

- 10.32 **The right to a public hearing.** It is a fundamental requirement of Article 6 and the rules of natural justice that hearings are held in public. Secret justice is anathema. This is to ensure proper scrutiny of the administration of justice and to retain public confidence in the court and tribunal system. This principle applies equally to COIC Disciplinary Tribunals. Thus Regulation rE 130 of the DTRs provides that all hearings before a Disciplinary Tribunal must be in public unless it has been directed that a hearing shall not be held in public. Such a direction may be given, exceptionally, on the application of a party if the Tribunal is convinced it is necessary to do so for the maintenance of public order or the proper protection of private life. Simply because a barrister, complainant or witness is embarrassed by the fact that the hearing is in public and may be reported by the media is no reason for directing that it be held in private. Judgment must be given in public or at least be published and accessible (and see below).
- 10.33 **The right to address all matters considered by the Tribunal to be relevant.** The Tribunal must not take into account a matter of law, fact or opinion which has not been raised with the parties in a way which has allowed them to address the matter. If the Tribunal is concerned about a point which has not been raised by either party, the Tribunal should itself raise it with the parties and invite submissions on it.
- 10.34 **The right to a reasoned decision.** Regulation rE 155 of the DTRs requires the finding of the Disciplinary Tribunal on each charge, together with its reasons, to be set down in writing and signed by the chairman and all members of the Tribunal. Regulation rE 157 provides for broadly the same procedure to be adopted in relation to the sentence passed by the Tribunal. Both parties are entitled to know the factual and legal basis for the Tribunal's decision.
- 10.35 Whilst in a complex case the decision need not address every single point which has been canvassed, it must address all the principal points (factual and legal) relied on by each side. It is necessary that both sides have a sufficiently reasoned decision to know how and why the judgment was reached, so as to be able to consider the merits of any appeal.





## 11. Reporting on proceedings and giving reasoned decisions

- 11.1 As mentioned in Section 10, the defendant barrister has a right to a reasoned decision both in terms of any finding(s) of guilt and the imposition of sanctions. It is very important for all panels to provide comprehensive and reasoned decisions for any finding(s) and sentence at Disciplinary Tribunal hearings. Provision of reasons is essential if transparency is to be achieved and a panel's failure to provide adequate reasons can be used as a ground for appeal.
- 11.2 At Disciplinary Tribunals, reasons for findings and sentence, where appropriate, should be given orally at the hearing. This is important whether or not the defendant barrister is present and the reasons should be read out so they are recorded for the transcript. Whether or not the defendant barrister is present, the transcript will be used as part of any appeal.
- 11.3 A recent case in the High Court indicates that where there is a conflict in the evidence before a panel, the decision to prefer one account above another must be clearly addressed and explained by the Panel. The reason why the panel prefers one account when there is material in existence at odds with that account, should be articulated in the Chair's report.
- 11.4 **Completion of Finding and Sentence sheet:** At the hearing, the panel must complete a Finding and Sentence sheet (which will be provided by the Clerk). A copy of the pro forma is provided at Section 11b. The panel should record whether the charges were admitted, proved or dismissed. If any of the charges were admitted or proved, the sanction(s) should be written on the following pages, and brief reasons provided. If the sentence is in line with the Sentencing Guidance, this should be noted. If it is not, comprehensive reasons should be given. In all cases, any mitigating and/or aggravating factors should be recorded. Further advice on the wording of the Finding and Sentence sheet is provided in the Sentencing Guidance 2014. The completed Finding and Sentence sheet should be signed by all members of the panel and the Clerk and dated. A copy of this document will then be provided to both the defendant barrister, the BSB and in the case of appeal to the Administrative Court.

- 11.5 **Chair's Report:** Following the Tribunal hearing, the Chair of the panel is required, under rE 181, to *“prepare a report in writing of the finding(s) on the charges of professional misconduct and/or on any applications, and the reasons for those findings and the sentence, if any.”* This Regulation does not require a detailed account of the proceedings before the Tribunal, but should at the very least include the following:
- the outcome of decisions on any preliminary matters with reasons (such as applications for adjournments, or for the hearing to be held in the defendant's absence);
  - where a defendant was absent, proof of service in accordance with rE 148;
  - the finding in relation to each charge, including those which are dismissed, with reasons;
  - the reasons for the findings with reference to the evidence and any points of law (this should be a repeat of the written reason recorded at the hearing and should not include any new reasons which were not agreed by the panel); and,
  - the sentence and the reasons for it, as set out on the Findings and Sentence sheet.
- 11.6 An example of a previous Chair's Report can be found at Section 11c. As will be seen from the front page (rE 181 & 182), a copy of the Chair's Report will be provided to the defendant barrister and a number of interested parties in accordance with the rules and regulations.
- 11.7 A template for the production of the Chair's Report is also included at Section 11d. It is not mandatory for Chairs to use the template but it is a useful guide to what should be included and will assist with consistency in reporting.
- 11.8 Both the Findings and Sentence sheet and the template for the Chair's Report will be reviewed in the near future, as a result of a request from the Bar Standards Board for provision of more detailed reasons. In the meantime, the aim should be to provide comprehensive and reasoned decisions for any finding(s) and sentence.



The Council of the Inns of Court

9 Gray's Inn Square  
London  
WC1R 5JD

### **Disciplinary Tribunal – Finding Sheet**

**Defendant -** \_\_\_\_\_

**Delete as appropriate:**

**Charge 1:** Admitted / Proved / Dismissed

**Charge 2:** Admitted / Proved / Dismissed

#### **Signatures:**

Chair: \_\_\_\_\_

Lay member: \_\_\_\_\_

Lay member: \_\_\_\_\_

Barrister: \_\_\_\_\_

Barrister: \_\_\_\_\_

Clerk: \_\_\_\_\_

Date: \_\_\_\_\_

## Disciplinary Tribunal – Sentence Sheet

**Defendant -** \_\_\_\_\_

Write in the sentence imposed in accordance with the wording at Annex 2 of the Sanctions Guidance. Under reasons, please list any aggravating or mitigating factors with reference to the attached list (please list numbers/letters), or write in any factors not covered by the list, such as dates by which any fines / costs / sanctions must be complied by.

**Charge 1:**

**Reasons:**

**Signatures:**

Chair: \_\_\_\_\_

Lay member: \_\_\_\_\_

Lay member: \_\_\_\_\_

Barrister: \_\_\_\_\_

Barrister: \_\_\_\_\_

Clerk: \_\_\_\_\_

Date: \_\_\_\_\_



## Disciplinary Tribunal – Sentence Sheet (contd.)

**Defendant -** \_\_\_\_\_

Write in the sentence imposed in accordance with the wording at Annex 2 of the Sanctions Guidance. Under reasons, please list any aggravating or mitigating factors with reference to the attached list (please list numbers/letters), or write in any factors not covered by the list.

**Charge 2:**

**Reasons:**

**Signatures:**

Chair: \_\_\_\_\_

Lay member: \_\_\_\_\_

Lay member: \_\_\_\_\_

Barrister: \_\_\_\_\_

Barrister: \_\_\_\_\_

Clerk: \_\_\_\_\_

Date: \_\_\_\_\_

N.B. Comprehensive advice is provided on (1) the wording of the Finding and Sentence sheet at Annex 2 to the Sentencing Guidance and (2) Aggravating and Mitigating circumstances at Annex 1 to Sentencing Guidance.

**The following list is for example only and is not exhaustive:**

Mitigating factors	Aggravating factors
<ol style="list-style-type: none"> <li>1. Admits charge(s)</li> <li>2. Genuine remorse (as expressed in e.g. a willingness to apologise to the complainant and/or compromise over matters such as fees)</li> <li>3. Limited experience within the profession</li> <li>4. The breach was unintentional</li> <li>5. Single incident (not applicable if behaviour involves discrimination)</li> <li>6. Heat of the moment (not applicable if behaviour involves discrimination)</li> <li>7. Co-operation with the investigation</li> <li>8. Voluntary steps have been taken to remedy or rectify the breach</li> <li>9. Evidence of attempts to prevent reoccurrence.</li> <li>10. Previous good character (not applicable if behaviour involves discrimination)</li> <li>11. Legitimate delays in correspondence being received by the barrister</li> <li>12. Evidence of financial hardship (only applicable when it has a direct impact on the commission of the offence)</li> <li>13. Advice was sought and obtained from the Bar Council's professional ethics helpline</li> <li>14. Unusual personal circumstances that provide a reasonable explanation for the behaviour. In particular, bereavement, relationship breakdown and divorce (matters such as pressure of work and bankruptcy should be treated with caution as these factors may indicate a greater risk to the public in the barrister's ongoing practice.)</li> <li>15. Good references (only of limited applicability and very much dependant on the nature of the offence and the role and identity of the referee)</li> </ol>	<ol style="list-style-type: none"> <li>A. Premeditation</li> <li>B. Motive of financial gain</li> <li>C. Corruption/gross deception</li> <li>D. Coercion</li> <li>E. Involvement of others</li> <li>F. Persistent conduct/conduct over a lengthy period of time</li> <li>G. Undermining of the profession in the eyes of the public</li> <li>H. Attempts to hide the misconduct or wrongly lay blame elsewhere</li> <li>I. Effect on the complainant/particular vulnerability of the complainant</li> <li>J. Actions accompanied by discriminatory behaviour or motivation (does not require intent)</li> <li>K. Breach of trust</li> <li>L. Position of responsibility within the profession</li> <li>M. Previous disciplinary findings for similar breaches</li> <li>N. Previous disciplinary findings for any types of breaches, particularly where the breaches show an unwillingness to comply with the Code</li> <li>O. Lack of remorse for having committed the offences</li> <li>P. Failure to respond promptly to communications from the BSB, or inappropriate behaviour that frustrates the administration of the complaint</li> <li>Q. Failure to attend a Tribunal without explanation</li> <li>R. Indication of an element of dishonesty</li> </ol>



## The Council of the Inns of Court

9 Gray's Inn Square  
London  
WC1R 5JD

Case Reference: PC[number]/D3/ D5 [name]

### Private and Confidential

The Lord High Chancellor of Great Britain  
Lord Chief Justice of England and Wales  
The Attorney General  
The Director of Public Prosecutions  
The President of the Council of the Inns of Court  
The Chairman of the Bar Council  
The Chairman of the Complaints Committee  
The Treasurer of the Honourable Society of:-

Lincoln's Inn  
Inner Temple  
Middle Temple  
Gray's Inn

### Disciplinary Tribunal

#### Defendant: [name]

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated the [day, month, year]. I sat as Chairman of a Disciplinary Tribunal on [day, month, year] to hear and determine four charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against [name] barrister of the Honourable Society of [name of Inn of Court].

### Panel Members

1. The other members of the Tribunal were:

[name] (Lay Member)

[name] (Barrister Member)

## **Charges**

2. The Charge/s are set out in Annex 1 to this report.

## **Parties Present and Representation**

3. The Defendant was/was not present and was/was not represented. The Bar Standards Board (“BSB”) was represented by [name].

## **Pleas**

4. The Defendant admitted / denied the Charges.

## **Evidence**

5. Prosecuting Counsel (PC) presented the case on behalf of the BSB, noting in opening that the Defendant is a bencher of [name] Inn.
6. In outlining the facts, PC directed the Tribunal towards the unsuccessful attempts made by the BSB to contact the Defendant between X and X with regard to his outstanding CPD requirements. Referencing various methods including letters, voicemails and diverse e-mail addresses, namely those provided with the Defendant’s registration and additional addresses provided by his clerks, [name] submitted that the Defendant despite being a pre-eminent practitioner had failed to put in place a working system for correspondence to be forwarded to him whilst working in other jurisdictions.
7. Upon initial contact with the Defendant, he informed the BSB that although he had received some of the latter e-mails, sent to an address provided by his clerks, he had not read them, believing them to be of a promotional nature.
8. In concluding, PC noted that the Defendant had apologised, submitted additional written mitigation in advance of the hearing and had no previous matters.
9. In mitigation, the Defendant expressed his embarrassment and shame at finding himself before the Tribunal noting that the proceedings may represent a big blow to his practice in several jurisdictions.
10. The Defendant submitted that he had not seen the previous communications due to a number of issues including domestic building works, a loss of telephone, workspace and storage facilities within his Chambers and a misunderstanding that received e-mails were marketing material. With regard to letters, the Defendant explained that those marked ‘personal’ remained unopened by his clerks. The Defendant also stated that he had perhaps become confused as to the sign-off of his CPD requirements.
11. In closing, the Defendant re-iterated the importance of his reputation to both his career and wider standing in different jurisdictions and that had he been aware of the attempted communications of the BSB as to his CPD requirements he would have responded at once. The Defendant assured that Tribunal that he put in a place a system with his clerks to prevent a re-occurrence of non-communication.

## Sentence

12. The Tribunal retired to consider its sentence.
13. The Tribunal took account of the Defendant's mitigation in writing and orally and in particular the chastening effect of these findings upon a barrister of his eminence. We also took account of the Defendant's full compliance in respect of other years and his previously unblemished career. However, the Tribunal were of the view that it is incumbent upon the individual barrister to provide up to date contact details to BSB and make proper arrangements for potentially important communications to be forwarded for his prompt attention. Work with long absences from chambers is not unusual at the bar. The Defendant's arrangements that resulted in BSB communications not reaching him for over a year were unsatisfactory.

## Charge 1

14. Having regard to the guidelines and the oral and written mitigation we concluded that a fine of £1,000 was appropriate. The order is that the Defendant shall within 28 days of the date on which this sentence becomes effective pay to the Bar Standards Board:

- i) a fine of £1,000

In addition, the Defendant shall by *[date]* provide to the Bar Standards Board i) evidence of satisfactory completion of 12 CPD hours in respect of *year* and ii) a duly completed record card.

## Charge 2

15. For the same reasons as Charge 1, the Tribunal ordered that the Defendant shall within 28 days of the date on which this sentence becomes effective pay to the Bar Standards Board a fine of £1,000.

## Charge 3

16. Having regard to the fact that the administrators time has been paid and to the fines imposed on the other charges, we concluded that no further penalty should be imposed.

## Charge 4

17. We accepted that for a prolonged period communications from the BSB did not actually come to the attention of the Defendant but considered that there was no sufficient explanation for his failure to ensure that correspondence was forwarded to him and/or to deal with it upon receipt. The Defendant shall within 28 days of the date on which this sentence becomes effective pay to the Bar Standards Board a fine of £1,000.
18. Aggravating Circumstances included:
  - i) the Defendant's persistent conduct over a lengthy period of time; and
  - ii) the Defendant's failure to response to communications from the BSB.

Mitigating Circumstances included:

- iii) the Defendant's guilty plea;
- iv) the Defendant's genuine remorse;
- v) the Defendant's voluntary steps in attempting to remedy his communications;  
and
- vi) the Defendant's previous good character.

19. The Treasurer of the Honourable Society of *[name]* Inn is requested to take action on this report in accordance with Regulation 27 of the Disciplinary Tribunal Regulations 2009.

**Dated:**

*[day, month, year]*

**Chairman of the Tribunal**

*[name and signature]*



The Council of the Inns of Court

*[insert name and address of Inn]*

**Case reference:** *[insert BSB reference number]*

### **Private and Confidential**

The Lord High Chancellor of Great Britain  
Lord Chief Justice of England and Wales  
Attorney General  
The Director of Public Prosecutions  
The Chairman of the Bar Council  
The Chairman of the Professional Conduct and Complaints Committee  
The Treasurer of the Honourable Society of:-

Lincoln's Inn  
Inner Temple  
Middle Temple  
Gray's Inn

### **Disciplinary Tribunal**

**Defendant:** *[insert defendants name]*

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated *[insert date]*, I sat as Chair of a Disciplinary Tribunal on *[insert date(s)]* to hear and determine *[insert number]* of charge(s) of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against *[insert defendants name]*, barrister of the Honourable Society of *[insert name of Inn]*.

### **Panel members**

2. The other members of the Tribunal were:

*[list the names of other members of the Tribunal panel]*

### **Charges**

3. The charge(s) are set out Annex 1 to this report.

## **Parties present and representation**

4. *[state whether the barrister was present and the name of his/her representative and include the name of the BSB prosecutor]*

## **Pleas**

5. *[state whether the barrister admitted or denied the charges and, if a combination of the two, list the charges along with the relevant pleas to each]*

## **Preliminary matters [if relevant, otherwise delete heading]**

6. *[give brief details of any preliminary matters raised by the defendant or the BSB and the outcomes e.g. applications to adjourn, hold the hearing in private, exclude or admit evidence etc]*

## **Proof of service [only if defendant was not at the hearing, otherwise delete heading]**

7. *[If the defendant was absent, include brief details of how the panel established that service had been properly affected, in accordance with Regulation rE 148]*

## **Evidence**

8. *[List in respect of each party the names of witnesses who gave evidence indicating whether orally or by way of written statement.]*

## **Findings**

9. *[Include the findings of the Tribunal on each charge together with its reasons as set out in the signed Findings and Sentence sheet, or otherwise in accordance with Regulation rE155-156. Do not include any reasons that were not duly agreed and recorded on the Finding and Sentence sheet. Where the barrister was absent, include details as specified in Regulation rE 180]*

## **Sentence and Reasons**

10. *[List the sanctions imposed on each charge with the reasons and any aggravating or mitigating circumstances, as set out in the Findings and Sentence sheet]*
11. The Treasurer of the Honourable Society of *[insert name of Inn]* is requested to take action on this report in accordance with Regulation rE189 of the Disciplinary Tribunal Regulations 2009.

**Date:** *[insert date of report]*

*[signature of the Chair]*

***[insert name of and title of Chair]***  
**Chair of the Tribunal**





## 12. Fitness to Practise Hearings

**12.1 Background:** A case does not need to be referred to a Fitness to Practise Panel merely because an Individual is unwell, even if the illness is serious. However, an individual's fitness to practise is brought into question if it appears that he/she has an incapacity due to a medical condition (including an addiction to drugs or alcohol), and as a result, the individual's fitness to practise is impaired to such an extent that restrictions on practise are necessary. For example, an individual who has an incapacity but does not appear to be following appropriate medical advice about modifying his or her practice as necessary in order to minimise risk to the public may be "unfit to practise".

**12.2 Preliminary hearing of a Fitness to Practise panel:** At the preliminary hearing the Fitness to Practise Panel will consider:

- (a) whether to give directions for a full hearing of the Panel;
- (b) whether the Individual should be suspended or prohibited from accepting or carrying out any public access instructions pending the conclusion of the matter; and,
- (c) any undertakings as to the Individual's conduct or behaviour pending the conclusion of the full hearing.

### Directions for the full hearing

**12.3** At a preliminary hearing the Fitness to Practise Panel may direct that the Individual undergo an examination by a Medical Examiner nominated by the Panel (Regulation rE 299.1). On nominating the Examiner, the Panel will take into account the available information about the Individual's condition and have regard to any reasonable objections to the nominated Medical Examiner raised by the Individual.

**12.4** The examination will involve an assessment of the Individual's physical and/or mental condition by a Medical Examiner who is a registered medical practitioner appointed by the Panel. The Medical Examiner will then prepare a report which shall be disclosed to the Panel and the Individual in accordance with Regulation rE 299.2.

**12.5** The Individual may also be asked to authorise disclosure of his or her relevant medical records to such Medical Examiner for the purpose of the examination and producing the report. Such disclosure will only be required to the extent that is

reasonably necessary to enable the Medical Examiner to perform the examination to the appropriate standard and to report to the Fitness to Practise Panel on any relevant matters.

12.6 While the Fitness to Practise Panel cannot compel an Individual to submit to an examination or agree to disclosure of his or her medical records, it shall be entitled to take any refusal to supply relevant medical records into consideration when deciding if the Individual is unfit to practice.

12.7 The Fitness to Practise Panel may also direct the Professional Conduct Committee of the BSB to carry out such other investigations as the Panel considers appropriate to the matters for consideration at the full hearing. The nature of any further investigations required will depend on the circumstances of the case, but may include obtaining documentary evidence and taking statements from witnesses.

### Interim Restrictions

When considering whether to direct an interim suspension, prohibition or disqualification, the Panel should bear in mind that its primary duty is to protect members of the public and the wider public interest, and not to assume responsibility for, or give priority to, the treatment or rehabilitation of the Individual.

12.8 If the Panel is satisfied that:

12.8.1 In all the circumstances there may be impairment of an Individual's fitness to practise which poses a real risk to members of the public (as discussed at Paragraph 5), or is otherwise in the public interest or the interests of the Individual; and

12.8.2 After balancing this against the impact on the Individual, the Panel considers that an interim order is a proportionate response;

The appropriate order should be made.

12.9 In reaching a decision whether to direct an interim order, the Panel should consider the following issues:

12.9.1 The seriousness of the risk to members of the public if the Individual continues to practise pending conclusion of the full hearing. In assessing this risk the Panel should consider the seriousness of the allegations, and the weight of the information, including information about the likelihood of a further incident(s) occurring during the relevant period. For this purpose the Panel should pay no regard to the complexity of the legal work generally undertaken by the Individual;

- 12.9.2 Whether public confidence in the profession is likely to be seriously damaged if the Individual continues to practise during the relevant period;
- 12.9.3 Whether it is in the Individual's interests to practise unrestricted. For example, the Individual may clearly lack insight as to the impact of his or her health condition or ability to practice;
- 12.9.4 Whether the public can be sufficiently protected by accepting any undertakings as to their practise, and the Individual's willingness to make such undertakings.
- 12.10 The period of any interim suspension, prohibition or disqualification must be specified. Except in exceptional circumstances, the period shall not exceed 3 months (rE 303). In considering the period for which an interim suspension, prohibition or disqualification should be imposed, the Panel should bear in mind the time that is likely to be needed before the matter is resolved (for example, the time needed to complete any investigation into allegations regarding the Individual's fitness to practise, including obtaining assessments of the Individual's health and for the case to be listed for a full hearing of the Fitness to Practise Panel).

#### Reviewing Interim Restrictions

- 12.11 The Panel may direct that a review of the interim restriction is held, before the period expires (rE 305.1). The Individual may also request a review in the event of a significant change in circumstances or other good reason, in accordance with rE 305.
- 12.12 When reviewing an interim order or undertakings, the Panel must fully consider all the circumstances relating to the case, including any new information and may exercise any of the powers of the Fitness to Practise Panel to confirm, extend, vary or replace the previous direction.
- 12.13 **Full Hearing of the Fitness to Practise Panel:** Once all relevant medical reports have been completed, the Individual is notified of the arrangements for a full hearing of the Fitness to practice Panel.
- 12.14 A Fitness to practice Panel consists of five members; a Chair who is a Queen's Counsel, two practicing barristers, a medical member and a lay member. [A Medical Examiner is a registered medical practitioner, nominated by the Panel to conduct a medical examination of the Individual. The Medical Examiner is responsible for reporting his or her findings to the Panel, and may be required to give evidence of those findings before the Panel and/or provide expert advice or opinion on the case. The Individual or

his or her representative shall be entitled to cross-examine the Medical Examiner. In contrast, the role of the Medical Member on the Panel is to provide general experience and context as part of the panel's overall ability to determine the issues in relation to the barrister's fitness to practise. It is not their role to provide expert or medical evidence in relation to proceedings].

**12.15 Attending a hearing:** The attendance of the Individual at any hearing of the Fitness to Practise Panel and Review Panel is required. However, , if the Individual does not attend, the Panel may proceed in his or her absence if it is satisfied that:

- (a) it is appropriate to do so; and,
- (b) all reasonable efforts have been made to serve the Individual with notice of the hearing, by post to the Individual's address or, where agreed, by email; and,
- (c) no acceptable explanation for the Individual's absence has been provided. Examples of what is acceptable may include ill health supported by relevant medical evidence, child/dependent care arrangements falling through unexpectedly, death/bereavement or serious accident involving family members.

**12.16** If the Panel is not satisfied the above conditions have been met, it shall adjourn.

**12.17** In considering whether proceeding in the absence of the Individual is appropriate, the Panel should take into account the following factors, where applicable:

- (a) the nature and circumstances of the Individual's behaviour in absenting himself or herself from the hearing, and in particular whether the behaviour was voluntary and deliberate and so plainly waived the right to be present;
- (b) whether an adjournment might result in the Individual attending voluntarily;
- (c) the likely length of such an adjournment;
- (d) whether the Individual, though absent, is, or wishes to be represented or has, by his or her conduct, waived his or her right to representation;
- (e) whether the Individual's representative was able to receive instructions from him or her and the extent to which they could present his or her defence;
- (f) the extent of the disadvantage to the Individual in not being able to present his or her account of events, having regard to the nature of the evidence against him or her;
- (g) the risk of the hearing reaching an improper conclusion about the absence of the Individual;

- (h) the general public interest and the particular interest of any witnesses that a hearing should be held within a reasonable time; and,
- (i) the effect of the delay on the memories of witnesses.

**12.18 Decision-making:** At the conclusion of a full hearing of the Fitness to Practise Panel it shall determine whether the Individual is unfit to practise, and if so, what restrictions to impose.

*Determining whether the individual is unfit to practise*

**12.19** The Panel must first determine whether any facts in dispute are proved, and shall apply the civil standard of proof. This is the balance of probabilities; in other words, the Panel must be satisfied that it is more likely than not that an event occurred. It is then for the Panel to decide, exercising its judgment, whether, on the basis of the facts proved, the Individual is unfit to practice.

**Balance of probability** is a legal standard applied when deciding upon civil cases. The general rule is that the burden of proof falls upon the party advancing the matter in question. It is a lower standard than proof beyond reasonable doubt (to be so sure as to be certain) applied in criminal cases.

The balance of probability standard of proof means that the panel is satisfied an event occurred if it considers that, on the evidence, the occurrence of the event was more likely than not. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

**12.20** An individual is unfit to practice where he or she:

- 12.20.1** Is incapacitated due to his physical or mental condition (including any addiction); and is,
- 12.20.2** As a result, the Individual's fitness to practise is impaired; and,
- 12.20.3** His or her suspension, prohibition, or disqualification, or the imposition of conditions is necessary for the protection of the public.

**12.21** "Incapacity" means that the Individual is unable or incapable of functioning as normal. The incapacity must have a material effect on his or her ability to function on a day-

to-day basis. The incapacity must impair the Individual's fitness to practise, in that, his or her ability to practise must be damaged or harmed by reason of his or her incapacity. Finally, it must be necessary to restrict the Individual's ability to practise either in the public interest or in the Individual's own interests.

12.22 The following evidence may be taken in to account when considering if an Individual is unfit to practice:

- 12.22.1 Any evidence of actual self-harm or a risk of self-harm;
- 12.22.2 Any evidence of actual harm, or a risk of harm to clients, colleagues or to the public;
- 12.22.3 The Individual's current physical or mental condition;
- 12.22.4 Whether the Individual's condition is episodic, recurrent, or in remission, if it is likely to recur, and whether it is capable of causing impairment if it recurs;
- 12.22.5 Whether the Individual's condition has been sustained over a long period;
- 12.22.6 Whether there has been a failure by the Individual to seek relevant help, treatment or support for the condition;
- 12.22.7 Whether there has been a failure by the Individual to comply with reasonable undertakings which were intended to assist him or her to work effectively within the constraints of his or her condition;
- 12.22.8 Whether there has been a failure by the Individual to comply with a drug regime, treatment regime or medical supervision relating to the condition;
- 12.22.9 Whether there has been a failure by the Individual to comply with instructions from a health professional about relevant testing, investigations and medical assessment relating to the condition;
- 12.22.10 Whether circumstances have prevented the individual from seeking treatment, or the receipt of treatment is not relevant or available;
- 12.22.11 The Individual's insight in relation to the condition and the impact on his or her ability to practice;
- 12.22.12 Any previous findings that the Individual was unfit to practise or otherwise impaired by reason of his or her health by any other regulatory body. However, in such cases the Panel should bear in mind that the findings may have been made at a time when equality legislation such as the Equality Act 2010 or Disability Discrimination Act 2010 did not exist; or,
- 12.22.13 Any refusal to comply with reasonable requests in relation to a medical examination or the disclosure of relevant medical records.

- 12.23 If the Individual's fitness to practise is not impaired by any incapacity, or if restricting practise is not necessary for the protection of the public or in the Individual's own interests, the Panel must conclude that an Individual is *not* unfit to practise, and no action needs to be taken.
- 12.24 The Panel must give reasons for its determination as to whether the Individual is unfit to practise. Where facts are disputed, the Panel must also give reasons as to why an Individual's evidence was not preferred. Such reasons need not be detailed and need only refer to, for example, the Individual's demeanour, attitude or approach to specific questions (*Southall v General Medical Council* [2009] EWHC 1155). However, the demeanour of an individual may be directly related to a disability or impairment and Panels should ensure they take this into account when assessing the evidence.
- 12.25 **Restrictions:** If the Panel is satisfied that the Individual is unfit to practise, the Panel will then consider what directions to make in relation to the Individual's practice. In deciding what restriction to impose, the Panel should weigh the interests of the public against the interests of the Individual, and should have regard to any mitigating factors, which may include, but are not limited to:
- (a) Evidence of the Individual's insight and understanding of his or her condition, and his or her attempts to address it, which may include seeking and undergoing relevant treatment for his or her condition (where relevant and available), and expressions of regret and apology;
  - (b) Evidence of the Individual's overall adherence to important principles of good practice. Mitigation could relate to the circumstances leading up to the incidents as well as the character and previous medical history of the Individual;
  - (c) Matters of personal and professional mitigation, such as testimonials, or evidence of personal hardship and work related stress. However, features such as these should be considered and balanced carefully against the central aim of restrictions, that being the protection of the public and the maintenance of standards and public confidence in the profession.
- 12.26 When assessing whether an Individual has insight, the Panel will need to take into account whether he or she has demonstrated insight consistently throughout the hearing, eg the Individual has not given any untruthful evidence to the Panel or falsified documents. But the Panel should be aware that there may be differences in the way that insight is expressed, for example, whether or how an apology or expression of regret is framed and delivered and the process of communication, and

that this may be affected by the Individual's circumstances, for example, his or her ill health.

- 12.27 The Panel should also have regard to any aggravating factors, such as any previous findings and restrictions imposed by a Fitness to Practise Panel at a full hearing or by any other regulator. The Panel must not, however, give undue weight to any decision to impose an interim suspension, prohibition or disqualification pending full hearing, as the Panel, when considering whether to direct an interim restriction at a preliminary hearing applies a lower test. That decision will also have been reached without making a finding on the facts or on the Individual's fitness to practise.
- 12.28 Whatever restriction is directed, the Panel must explain its reasons for doing so. This will help show that all relevant issues have been addressed and why a particular course of action has been taken. The explanation should include:
- (a) The factual basis of the decision
  - (b) The legal power or authority being relied upon; and
  - (c) Conclusions on the main submissions made by the parties or representatives.
- 12.29 Reasons must be given in sufficient detail so that interested parties may understand why a determination has been made and should include reference to the mitigating and aggravating factors that influenced its decision. The determination should include an explanation as to why a particular period of restriction was considered necessary, and, in the interest of proportionality, must also demonstrate that the less serious conditions and restrictions were considered, and the reasons as to why the Panel did not consider they were appropriate.
- 12.30 **Conditions on practise:** The Fitness to Practise Panel may make the Individual's right to continue to practise (or right to resume practise after any period of suspension, prohibition or disqualification) subject to such conditions as it thinks fit. The purpose of conditions is to enable the Individual to deal with his or her health issues while continuing to practise in a way that protects the public.
- 12.31 Before imposing conditions the Panel should satisfy itself that:
- (a) the Individual's medical condition can be appropriately managed through conditions;
  - (b) the Individual has genuine insight into his or her health problem(s);



- (c) the Individual will abide by conditions relating to his or her medical condition(s), treatment and supervision, and that circumstances do not prevent the Individual from doing so;
- (d) the public will be protected and will not be put at risk either directly or indirectly; and,
- (e) it is possible to formulate appropriate and practical conditions to impose on registration.

12.32 Where conditions are imposed they should be:

- (a) clear, so that an Individual knows what is expected of him or her, and a Panel at any future review hearing is able to ascertain the original concerns and the exact proposals for their correction;
- (b) relevant;
- (c) addressed to the Individual (not to third parties);
- (d) necessary in order to protect the public or in the interests of the Individual;
- (e) proportionate to the impairment;
- (f) formulated so that the conditions are not in effect a suspension; and,
- (g) written in such a way that compliance can be easily verified, for example by providing for reports prepared by treating medical practitioners to be provided to the PCC or a Panel considering the matter on review

12.33 It is open to a Panel to impose conditions as it sees fit in the circumstances of any particular case, whilst taking account of the general principles outlined above.

However, appropriate conditions may include conditions relating to relevant medical treatment, as well as conditions relating to an Individual's day-to-day practise. For example, appropriate conditions may include:

- (a) A requirement to place him or herself under the care of a medical practitioner/health care practitioner specialising in the Individual's condition, attend upon them as required and follow their advice as to treatment of his or her condition;
- (b) Allowing the PCC to exchange information with the medical practitioner/health care practitioner responsible for the Individual's care about his or her health and any relevant treatment he or she is receiving, such information to be disclosed to the Fitness to Practise Panel when reviewing the case;

- (c) A requirement to attend upon one or more Medical Examiners for regular examination, whose reports will be made available to the Chair of the PCC and/or any Fitness to Practise Panel when reviewing the case;
- (d) A requirement to place him or herself under the care of a professional supervisor as nominated by the Panel, to attend upon them as required and to follow their advice and recommendations as to day-to-day practise;
- (e) Allowing the PCC to exchange information with the Individual's Supervisor on his or her progress under supervision and compliance with these conditions, such information being disclosed to the Fitness to Practise Panel when reviewing the case; and,
- (f) Where an Individual is unfit to practise by reason of a substance addiction, appropriate conditions may include limiting consumption of that substance in accordance with relevant medical advice obtained.

12.34 Where an Individual is subject to undertakings or conditions following a hearing, these will be monitored and reviewed by the PCC. If evidence suggests that these have been breached or that the Individual's fitness to practise has otherwise deteriorated, then the Individual will generally be referred for a Review Hearing in order that appropriate action may be taken. Where the breach raises a question of professional misconduct, the matter will be referred to the PCC to consider a referral to the Disciplinary Tribunal.

**12.35 Suspension or prohibition from accepting or carrying out public access**

**instructions:** *the following applies to practising barristers only.* If a Fitness to Practise Panel determines that a period of suspension or prohibition from carrying out any public access instructions is necessary for public protection, it may direct a suspension or prohibition, either for a period not exceeding six months.

12.36 Suspension will be appropriate where the Panel is satisfied that no conditions can be formulated to protect the public or the barrister's interests.

12.37 The Panel is required in the interests of proportionality to balance the need to take action to protect the public, with the interests of the member, including any personal misfortune that a period of suspension would result in for the authorised individual or his or her family. However, the Panel must remember that its primary function is to protect the public.

- 12.38 A Panel must provide reasons for the period of suspension chosen, including the factors that led them to conclude that the particular period of suspension was appropriate.
- 12.39 **Undertakings:** In lieu of making a direction to impose a period of restriction or to make his or her practise subject to conditions, a Panel may accept undertakings from an Individual. Those undertakings may relate to any conditions on practise, or any period of suspension, prohibition or disqualification, and must be such as a Panel would have imposed.
- 12.40 Undertakings will only be appropriate where a Panel is satisfied that an Individual will comply with them, for example, because the Individual has shown genuine insight into his or her condition. The Panel may wish to see evidence that the Individual has taken responsibility for his or her own actions and/or otherwise taken steps to mitigate his or her actions.
- 12.41 Panellists should ensure that any undertakings are appropriate, proportionate, are sufficient to protect clients and the public, and are an effective way of addressing the concerns about the Individual. The guidance above in relation to conditions similarly applies where undertakings impose conditions on the right to practise.
- 12.42 Where a Panel accepts undertakings, the PCC will monitor the Individual's progress and consider any new information received in relation to him or her, including any representations from the Individual to suggest that the undertakings are no longer appropriate.
- 12.43 Where there has been a breach of undertaking, or where further concerns about the Individual's fitness to practise arise (including new information indicating a deterioration in the Individual's health), the matter may be referred for a review hearing at the discretion of the Chair of the PCC. Where the breach raises a question of professional misconduct, the matter will be referred to the PCC to consider a referral to the Disciplinary Tribunal.
- 12.44 **Review Hearings:** Where a Panel directs restrictions on practice, they shall be reviewed by the BSB Chair of the PCC. There may be a "significant change in circumstances or other good reason" where, for example, new and relevant evidence has come to light which could not reasonably have been known before the restrictions were imposed, or where circumstances have changed. Any change in circumstances must be significant having in mind the issues in the case, that is, be

capable of leading the Panel on review to revoke or vary the order. Whether there is a significant change in circumstances or other good reason warranting a review hearing will be a question of judgment for the Chair of the PCC, who shall decide whether to convene a Fitness to Practise Panel to review the case.

- 12.45 On review, the Fitness to Practise Panel must determine whether the Individual remains unfit to practise, and if so, whether the restriction imposed should be extended or varied.
- 12.46 It is important that no Individual should be allowed to resume unrestricted practise following a period of conditional registration or restriction unless the Panel considers that he or she is fit to resume practise and that the public will not be placed at risk by resumption of practise or by the imposition of conditions on practice.
- 12.47 The Panel will take into account any evidence produced in relation to the Individual's conduct or behaviour following the imposition of a restriction, including any evidence arising from any conditions, as well as evidence from any medical examinations undertaken.
- 12.48 Where a review hearing cannot be concluded before the expiry of the period of conditional registration or restrictions, the Panel may extend that period for a further short period to allow for re-listing of the review hearing as soon as practicable, with the objective of preserving the status quo pending the outcome of the review hearing.
- 12.49 If a Panel finds that the Individual failed to comply with any term of suspension, prohibition or disqualification or any conditions imposed [or undertaken], it may refer the matter to the PCC to consider whether a charge of professional misconduct should be brought before a Disciplinary Tribunal.
- 12.50 **Appeals:** An individual may appeal a decision of the Fitness to practise Panel to impose, extend, vary or replace a period of restriction by notifying the President in writing that he or she wishes to do so, no more than 14 days after the date of the decision subject to appeal.
- 12.51 A pending appeal to an Appeal Panel does not operate as a stay of the decision subject to appeal.

12.52 At the conclusion of an appeal hearing, the Appeal Panel may:

- (a) Allow the appeal;
- (b) Confirm the decision that is subject to appeal;
- (c) Exercise any of the powers of the Fitness to practise Regulations (rE 309 03 310).

12.53 The Chair of the Panel must record in writing the decision of the Panel together with its reasons and the terms of any restriction imposed or undertakings accepted.

12.54 There is no right of appeal from a decision of an Appeal Panel.





## **The Bar Tribunals & Adjudication Service**

# **Expenses Policy**

*Date of implementation*      6 January 2014

*Date of next review*      31 December 2014

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# 1. POLICY

## Introduction

All those appointed to serve on the Tribunal Appointments Body, the Disciplinary Tribunal, the Inns Conduct Committee, the Strategic Advisory Board and any working groups or sub-committees who may from time-to-time be established by The Bar Tribunals and Adjudication Service or the Council of the Inns of Court (or its successor body) may incur expenses in the fulfilment of such appointments. This policy describes the current position on expenses and details reimbursements.

In discharging an expenses policy which is equal, fair and timely, it is also important that controls are in place to prevent excessive, inappropriate or fraudulent claims.

The objects of this document are to:

- Define the policy and procedures relating to travel and expenses;
- Provide authoritative guidelines as to the type and nature of expenditure that will and will not be reimbursable; &
- Achieve compliance with HM Revenue & Customs ("HMRC") guidance and policy on travel, subsistence and other benefits

## General Principles

All expenditure should be consistent with the needs of The Bar Tribunals & Adjudication Service. Money must be spent carefully and judiciously, as if it were one's own, and costs reported promptly and accurately. Claimants will be expected to exercise good judgement and always travel in a cost-efficient manner. They should neither gain nor lose financially as a result of incurring expenditure whilst undertaking business for or on behalf of The Bar Tribunals & Adjudication Service. All expense claims must pass the 'blush test' i.e. not be a source of embarrassment if challenged by a member of the public or the barrister profession.

The Bar Tribunals & Adjudication Service reserves the right not to reimburse expenses where this Policy has not been complied with and The Bar Tribunals & Adjudication Service has the right to challenge any claim. Any attempt knowingly or falsely to claim expenses in breach of this Policy will result in disciplinary action.

### Key Rules

- Claims are only accepted when submitted on the approved form
- There is a time limit of three months for the submission of claims
- Claims must be accompanied by original receipts (not photocopies)
- One claim should be submitted for each individual trip/occasion
- Claims must be physically signed (electronic signatures are not acceptable)
- Claims must be authorised by the appropriate budget holder

## **Categories of Claimants**

It is envisaged that expenses may be claimed by the following:

- COIC Tribunal Appointments Body (TAB) members
- Disciplinary Tribunal Lay, Barrister and QC members
- Inns Conduct Committee (ICC) Lay, Barrister and QC members
- Any carer or assistant to a disabled Lay, Barrister or QC member of the Disciplinary Tribunal or the ICC
- BTAS Strategic Advisory Board (SAB) members
- Individuals appointed or nominated to serve on time-limited working groups or sub-committees of the Bar Tribunals and Adjudication Service.

This list is not necessarily exhaustive.

## **Reasonable Adjustments**

The Bar Tribunals & Adjudication Service will make all reasonable adjustments on request for claimants that are disabled, pregnant or have temporary mobility issues. The cost of a reasonable adjustment in relation to expenses will be reimbursed by The Bar Tribunals & Adjudication Service and will not be passed back to the claimant in any circumstances. Advice must be sought from the Registrar of The Bar Tribunals & Adjudication Service in the first instance.

## **2. PROCEDURES**

### **Making a claim**

When signing a claim form, the claimant declares that:

- (i) Expenditure has actually been incurred and not previously claimed from The Bar Tribunals & Adjudication Service or from any other organisation;
- (ii) Everything claimed has been incurred wholly, exclusively and necessarily for the purposes of The Bar Tribunals & Adjudication Service business;
- (iii) Only reimbursement of actual expense is sought and no element of profit is included;
- (iv) Travel only to and from the home address (lay members) and chambers address (QC and barrister members) as held on record by BTAS may be claimed. Travel to or from any other location will not be reimbursed;
- (v) No part of the claim is of a personal nature or made in a private business capacity;
- (vi) Any costs relating to a spouse, partner or non-Bar Tribunals & Adjudication Service travelling companion have been deducted, excluding disabled persons' assistants; &
- (vii) The claimant understands that information relating to a claim may be made available, if a request is made relating to the Freedom of Information Act.
- (viii) The claim form should be posted to The Bar Tribunals & Adjudication Service, first floor, 9 Gray's Inn Square, London WC1R 5JF.

### **Authorisation Procedures**

The person authorising the claim must ensure that:

- (i) The claim complies with this Policy;
- (ii) All costs are appropriate and proportionate;
- (iii) No private or family travel component has been charged;
- (iv) No travel to and/or from a location other than that held on record by BTAS has been charged;
- (v) The claim is accompanied by original receipts; &
- (vi) Expenditure is allocated to an identified budget code.

After authorisation, claim forms must be forwarded for payment.

Payment will be made by BACS or cheque within 10 working days of receipt of an authorised claim form.

### **Advance Payment of Expenses**

If anticipated expenditure on a trip is such that it is unreasonable to expect an individual to claim expenses retrospectively, an advance payment may be obtained, with the approval of the Registrar. Once expenditure has been submitted and authorised, any balance will be reimbursed on receipt of an authorised claim form as above.

### **3. TRAVEL**

As most travel takes place in response to a need identified in advance, all claimants are expected to plan ahead and take advantage of advanced booking and other concessions whenever possible.

#### **Rail Travel**

Standard Class rail travel applies.

Claimants may travel First Class only if they are prepared to meet the difference between the First Class and the cheapest Advanced Standard Class fares at their own expense.

Any claimant, who qualifies for a concessionary railcard, entitling them to reduced rate fares, is not permitted to claim the full fare price.

Should a hearing or committee run so long such that the specified time of travel associated with an advanced booked ticket is missed, then any additional cost incurred may be claimed. Receipts for the original and subsequent ticket purchase must all accompany the expense claim.

Kindly note: should a hearing or committee run short (including any adjournment) additional expense incurred in travelling earlier than the specified time on an advanced booked ticket will not be reimbursed.

#### **Journeys within London: Public Transport**

Journeys within London shall normally be made by public transport (tube or bus). As well as standard fare tickets, reimbursement may be claimed for the use of Oyster cards. Where an Oyster card is used, the card will need to be registered, so that an itemised statement can be provided for fares exceeding £5.

#### **Taxis**

The use of taxis within the London area is strictly limited to exceptional circumstances, as follows:

- Claimant is disabled, either temporarily or permanently;
- Claimant is pregnant;
- Claimant is transporting heavy/bulky packages.

However, outside of London, taxis may be used to travel between railway stations and final destination.

#### **Air Travel**

UK internal flights in place of train travel must be agreed in advance with the Registrar.

## Use of own transport

If travel mileage is claimed at 45p per mile (table below refers), claims for travel must not exceed the standard rail fare.

HMRC approved mileage rates have been adopted for reimbursement purposes. The rates continue to remain as described by HMRC for 2011/2012 as:

From 2011/12	First 10,000 business miles in the tax year	Each business mile over 10,000 in the tax year
Cars and vans	45p	25p
Motor cycles	24p	24p
Bicycles	20p	20p

**Passengers** 5p per mile for carrying fellow members in a car for the same Bar Tribunals & Adjudication Service business matter

Claimants using their own vehicles on business must check that their insurance policy permits use for occasional business purposes. The Bar Tribunals & Adjudication Service will not reimburse additional costs incurred to extend cover.

The Bar Tribunals & Adjudication Service will not accept liability for any injury or damage arising from the use of private motor vehicles while on business occasions.

## Parking and Congestion Charges

Parking and toll road costs incurred on Bar Tribunals & Adjudication Service business journeys may be reclaimed along with the above mileage rates. Where a claimant drives into the congestion charge zone, they must make the payment themselves, but can then reclaim this cost.

Any motoring related fines or penalties are the responsibility of the driver and will not be refunded.

#### **4. SUBSISTENCE & ACCOMMODATION**

The nature of The Bar Tribunals & Adjudication Service work and the source of its income demand that all expenditure under this heading should be moderate in scale and application.

##### **Subsistence**

Food/drink costs while travelling may be claimed within maximum limits as follows:

- (i) Journeys over 90 minutes in duration: Beverage/Snack £5.
- (ii) Journeys at a time when a meal would normally be taken:  
Breakfast £10, Lunch £15, Dinner £25.
- (iii) The total amount claimed for any 24 hour period must not exceed £50.
- (iv) The cost of any alcoholic beverages will not be reimbursed.

Where a Disciplinary Tribunal is convened for a whole day, lunch to a maximum of £15 may also be claimed.

##### **Accommodation**

If an overnight stay is absolutely necessary, the Registrar should be contacted for prior authorisation.

The maximum reimbursement for a room will be £135 within Central London and £100 outside (excluding the cost of breakfast which will be reimbursed as above). These rates may only be exceeded in special circumstances and when authorised in advance by the Registrar on a stay by stay basis.

##### **Hospitality Allowance**

Where accommodation costs are saved by staying with friends, relatives or other hosts, an allowance of up to £25 per night may be claimed. This should be used to buy a present or provide a meal to your host.

## **5. Tax liability**

### **Attendance fees**

Where attendance fees are payable to Disciplinary Tribunal Lay members, Inns Conduct Committee Lay members, and lay members of the Tribunal Appointments Body and the Strategic Advisory Board, the following daily rates shall apply:

Whole day	£300
Half day or less	£150

Clerks may claim a daily rate of £200, or a half day rate of £100.

### **Cancellation – when fees shall remain payable**

Should a hearing be cancelled at less than 3 working days' notice, 50% of the scheduled whole or half day fee may be claimed. If cancelled at less than 24 hours' notice, 100% of the scheduled whole or half day fee may be claimed.

It is incumbent upon each individual member or clerk to declare such income to HMRC and to settle tax liability as calculated and demanded by HMRC. The Bar Tribunals & Adjudication Service will not collect tax or National Insurance contributions on behalf of any members.

### **Phones and Broadband**

The Bar Tribunals & Adjudication Service will reimburse the cost of business calls made from home or mobile telephones but will not make any contribution to fixed charges, such as line rental or monthly price plans. Claims must be submitted with an itemised listing on which business calls have been identified; round sums or fixed percentages will not be reimbursed. Telephone expenses which do not comply with these rules will be classed as a taxable benefit and should be declared to HMRC via an annual tax return.

Taxation matters relating to Broadband are similar to those for telephones, with the added complication that it is difficult to demonstrate to what extent the facility is being used for business purposes. Claims for broadband charges will be treated as above for phone charges, and declared to HMRC.

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Reason for Claim: \_\_\_\_\_

Travel (public transport – standard class only)						
Date(s)	Mode (Train, tube, bus, taxi)	From	To	Total (£) including VAT		Account No/ Cost Centre
				TOTAL		
Travel (car mileage) For prevailing rates please refer to Expenses Policy						
Date(s)	From	To	Mileage rate	Total (£) including VAT		Account No/ Cost Centre
				TOTAL		
Authorised overnight accommodation						
Date(s)	Description			Total (£) including VAT		Account No/ Cost Centre
				TOTAL		
Subsistence and/or Congestion Charge						
Date(s)	Description			Total (£) including VAT		Account No/ Cost Centre
				TOTAL		
Daily fees						
Date(s)	Description: Lay panel members      Half day £150, Whole day £300 Clerks      Half day £100, Whole day £200			Total		Account No/ Cost Centre
				TOTAL		

KINDLY NOTE: ALL CLAIMS MUST BE ACCOMPANIED BY **ORIGINAL** RECEIPTS.

TOTAL		
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## Authorisation

Sign .....

Name (Print) .....

Date \_\_\_\_\_





# **Annex 1**

## **Section B: The Disciplinary Tribunal Regulations, BSB Handbook Enforcement Regulations**



# B. THE DISCIPLINARY TRIBUNALS REGULATIONS

## B1. Arrangement of regulations

These *Disciplinary Tribunal* Regulations are organised as follows:

- Service of Charges and/or Applications
- Documents to be served on the defendant
- Directions etc
- Setting the date, appointing a tribunal and issuing a Convening Order
- The *Disciplinary Tribunal*
- Provision of documents to the *Disciplinary Tribunal*
- Procedure at the hearing
- Decision of a court or tribunal
- Absence of defendant
- Recording of proceedings
- Amendment of charge(s) and/or application(s)
- Adjournment
- The finding
- The sentence
- Sentence of suspension from practice or from authorisation or licensing
- Power to order that a sentence has deferred effect
- Power to activate a deferred sentence
- Wording of the sentence when defendant not present
- Report of finding and sentence
- Appeal to the High Court
- Appeal: sum payable
- Action to be taken by the Inn (in circumstances where a Barrister has been sentenced to be disbarred or suspended)
- Action to be taken by the Council of the Inns of Court (in all other circumstances)
- Publication of finding and sentence
- Suspension/withdrawal of practising rights pending the hearing of any appeal
- Costs
- Miscellaneous
- Exclusion from providing representation funded by the Legal Aid Agency – Application for termination
- Citation, commencement and revocation
- Annex 1: Sentencing powers against Barristers
- Annex 2: Sentencing powers against BSB legal services bodies
- Annex 3: Sentencing powers against licensed bodies
- Annex 4: Sentencing powers against registered European Lawyers
- Annex 5: Sentencing powers against all other BSB regulated persons
- Annex 6: Standard Directions

## B2. The regulations

### Service of charges and/or applications

- rE101** Once the *PCC* has decided to refer a matter to a *Disciplinary Tribunal* in accordance with Section 5.A, the *Bar Standards Board* must appoint a *person* or *persons* to represent the *Bar Standards Board* in respect of the charge(s) and or application(s).
- rE102** The *BSB Representative*, once appointed, must ensure that a copy of the charge(s) and/or application(s) is served on the relevant *defendant(s)*, together with a copy of these Regulations not later than 10 weeks (or 5 weeks if the *PCC* has directed that the prosecution of the charges be expedited) after the date on which by the *PCC* decides to refer the matter to a *Disciplinary Tribunal*.
- rE103** The *BSB Representative* must at the same time ensure that copies of the charge(s) and/or application(s) are sent to the *President*.

### Documents to be served on the defendant

- rE104** As soon as practicable after the issue of the charges and/or applications to the *defendant(s)*, the *BSB representative* must give the *defendant(s)*:
- .1 a copy of the evidence of any witness intended to be called in support of any charge(s) or application(s) (which, for the avoidance of doubt, may be a formal witness statement or an informal document such as a letter or attendance note); and
  - .2 a copy of any other documents intended to be relied on by the *BSB Representative*; and
  - .3 either:
    - .a the *standard directions* which, subject to rE107, automatically apply to the case and must include such timetable as may be considered reasonable by the *BSB representative*, having regard to the facts of that case; or
    - .b the *standard directions*, together with any proposed amendments to the *standard directions* that the *BSB representative* considers reasonable; and
  - .4 details of any *special directions* for which the *BSB Representative* proposes, in default of agreement, to apply for (which may include, but are not limited to):
    - .a any of the matters listed at rE107.2 below; or
    - .b an application for leave to amend and/or add charges and/or applications.
- rE105** If the documents referred to in rE104.1 and/or rE104.2 are not sent to the *defendant(s)* within 28 days of the service of the charges on the *defendant(s)* in accordance with rE102 above, then the *BSB representative* must provide to the *defendant(s)* within that period:
- .1 details of the *evidence* that is still being sought; and
  - .2 details of when it is believed that it will be practicable to supply that evidence to the *defendant(s)*.
- rE106** Nothing in rE104 or rE105 above shall prevent a *Disciplinary Tribunal* from receiving the evidence of a witness which has not been served on the *defendant(s)* in accordance with s rE104 or rE105, or of a document not included in the list of documents referred to at rE104.2 above, provided that the Tribunal is of the opinion either that this does not materially prejudice the *defendant(s)*, or that the evidence is accepted on such terms as are necessary to ensure that no such prejudice occurs.



## Directions etc

**rE107** Within 21 days, after they receive the *standard directions* (or, where relevant, the special direction of which the *BSB Representative* has given notice in accordance with rE104.4) the *defendant(s)* must:

- .1 provide to the *BSB representative* written submissions explaining why the *standard directions* and, where relevant, any special directions of which the *BSB representative* gave notice under rE104.4 above, should be amended, withdrawn or added to; and
- .2 confirm whether they intend, if no of agreement is reached, to make any of the following applications for special directions, namely:
  - .a an application to sever the charges and/or applications;
  - .b an application to strike out the charges and/or applications which relate to the *defendant* who makes the application;
  - .c an application to stay the proceedings;
  - .d an application about the admissibility of documents;
  - .e an application for disclosure of documents in accordance with rE116.2.c;
  - .f an application to extend or abridge any relevant time limits;
  - .g an application to adjourn the substantive hearing;
  - .h an application for the hearing to be held in private;
  - .i an application for separate hearings or an application that proceedings pending against separate *defendants* be dealt with at the same hearing; or
  - .j any other application for special directions (which the *defendant* considers reasonable, having regard to the facts of the case).

**rE108** If, in a case where the *BSB representative* has not suggested any amendments to the *standard directions* pursuant to rE104.3.b above or proposed any special directions in accordance with rE104.4 above, a *defendant* does not provide the information referred to in rE107.1 within the relevant twenty one day period, the *defendant* will be deemed to have accepted the *standard directions* and they shall be deemed to apply to the particular matter, save and in so far as they may have been modified on the application of any other *defendant* to the same proceedings which was made within the relevant twenty one day period. The *BSB representative* must forthwith serve on the *President* any directions which are deemed to apply to the matter in accordance with this rE108.

**rE109** If, in a case where the *BSB representative* has suggested amendments to the *standard directions* pursuant to rE104.3.b above and/or has proposed some special directions in accordance with rE104.4 above, a *defendant* does not provide the information referred to in rE107.1 within the relevant twenty one day period, the *BSB representative* must invite the *President* to appoint a *Directions Judge* in accordance with rE113 below and, once a *Directions judge* has been appointed, the *BSB representative* must apply to him to endorse the proposed amendments to the *standard directions* or the proposed special directions (as appropriate), in accordance with the procedure in rE114 to rE123 below.

**rE110** Within fourteen days of the date when he receives any written submissions from a *defendant* in accordance with rE107.1 and/or rE107.2 above, the *BSB representative* must consider them and must during that fourteen day period:

- .1 inform the *defendant(s)* of those changes to the *standard directions* or the special directions (as appropriate) which he is able to agree; and
  - .2 seek to agree with the *defendant(s)* such other changes to the *standard directions* or the special directions (as appropriate) as may be acceptable to all parties.
- rE111** Where the parties, pursuant to rE110 above, agree the directions and special directions which are to apply to the case, those directions will apply to the case and the *BSB representative* must forthwith serve those directions on the *President*.
- rE112** If, after the end of the fourteen day period referred to in rE110 above the parties have not agreed any of the *standard directions* or special directions (as appropriate) the *BSB representative* must send to the *President* the following (where relevant):
- .1 a copy of the *standard directions* and/or special directions which have been agreed;
  - .2 any written submissions received from the *defendant(s)* in accordance with rE107.1;
  - .3 any notice from the *defendant(s)* that they may be intending to make an application referred to at rE107.2; and
  - .4 the *BSB Representative's* response to any such request(s) and/or submissions.
- rE113** When the *President* has received the documents referred to in rE112 above, the *President* must designate a Judge or Queen's Counsel ("the *Directions judge*") to exercise the powers and functions conferred on the *Directions Judge* in the following Regulations the *Directions Judge* must not be the person who Chairs the *Disciplinary Tribunal*, once convened subject to rE217.
- rE114** The *President* must ensure that copies of the charge(s) or application(s), together with the documentation referred to at rE112 above, are sent to the *Directions Judge* once he has been designated.
- rE115** When he receives the relevant documents, the *Directions Judge* must consider any submissions about directions. In an appropriate case, the *Directions Judge* may decide that an oral directions hearing is necessary.
- rE116** If the *Directions Judge* considers that no oral hearing is necessary, then:
- .1 he must make an order setting out those directions which are to apply in the case taking into account all the relevant circumstances, including any written submissions of the parties and his own findings; and
  - .2 he may consider and decide any other issues which may be necessary including but not limited to:
    - .a how any of the applications referred to at rE104.4 and/or rE107.2 are to be dealt with;
    - .b what documents are to be admitted ;
    - .c what documents which are in the *Bar Standards Board's* possession or control, and/or documents which later come into the possession of the *Bar Standards Board*, and which may support a defence or undermine the *Bar Standards Board's* case should be disclosed;
    - .d what facts should be made the subject of admissions;
    - .e the provision of a statement that the *defendant* has been duly served (in accordance with rE215 of these Regulations) with the documents required by rE102 and rE104;



- .f the extension or abridgement of any time limit governing the proceedings;
- .g fixing the date for the hearing;
- .h such other matters as he consider are expedient for the efficient conduct of the hearing.

- rE117** If the *Directions Judge* considers that an oral hearing is necessary, the *Directions Judge* must give written notice to the *BSB representative* and the *defendant(s)* that an oral hearing is to be held for the purpose of giving directions and taking such other steps as he considers suitable for the clarification of the issues before the tribunal and generally for the just and expeditious handling of the proceedings. The *Directions Judge* shall also provide the *BSB representative* and the *defendant(s)* with a time estimate for the oral directions hearing.
- rE118** Within 7 days of receiving the notice referred to in rE117 above the *BSB representative* and the *defendant(s)* must notify the *President* and the other party of their and, where relevant, their Counsel's available dates and times during the six week period immediately after the date of that notice.
- rE119** The *President* must try to find a date and time within that six week period which are convenient for all parties. If that is not possible, the *Directions Judge* must fix a date and time for the oral directions hearing within that six week period and must notify the *BSB representative* and the *defendant(s)* of that date and time.
- rE120** At the hearing when convened the *Directions Judge* may deal with, amongst other things, all of the issues referred to at rE116 above.
- rE121** A Clerk must take a note of the proceedings at any oral directions hearing and must draw up a record of the directions given and/or any admissions made at it.
- rE122** After the oral directions hearing (or, if one was not required, after the review of the papers by the *Directions Judge*) the *President* must ensure that copies of the directions order are served on the *BSB representative* and on the *defendant(s)*.
- rE123** The directions order served by the *President* under rE122 is be final, and there is no appeal against it..

***Setting the date, appointing a tribunal and issuing a convening order***

- rE124** This regulation applies where, after the deemed acceptance, later agreement, of directions, or the service of a directions order by the *President*, the date of the hearing has not been fixed. Where this Regulation applies, each party must submit details of its availability for the substantive hearing to the *Council of the Inns of Court* in accordance with the directions. After he receives such details, or, where no such details are provided, once the time for providing such details has expired, the *President* must fix, the date of the substantive hearing having regard to the availability of the parties (if provided) and the need for the prompt determination of any charges and/or application(s) made against the *defendant(s)* , in accordance with the provisions of these Regulations. The *President* must also inform all parties of the date fixed for the hearing as soon as reasonably practicable after he has fixed the date.
- rE125** On
- .1 the deemed acceptance or later agreement of the *standard directions* by the parties; or receipt of the directions order from the *President*; or
  - .2 where the date of the hearing has not been fixed in the directions referred to in rE125.1 above, the fixing of the date of the hearing in accordance with rE124 above,

the *President* must , in all cases,

- .a appoint an appropriate *Disciplinary Tribunal* to sit on the relevant date(s), taking into account the requirements of these Regulations;
- .b appoint a *person* or *persons* to act as Clerk or Clerks to the *Disciplinary Tribunals* to perform the functions specified in these Regulations and such other functions as the *President*, *Directions Judge* or the Chairman of any Tribunal may direct. No *person* who has been engaged in the investigation of a *complaint* or application against a *defendant* in accordance with the relevant procedure or otherwise shall act as Clerk of proceedings under these Regulations arising out of that *complaint*;
- .c not less than fourteen days before the date of the substantive hearing, serve an order on the *defendant(s)* ("the *convening order*") specifying:
  - .i the name of the *defendant(s)* to the proceedings and such other information as may be relevant to the *defendant(s)*, for example:
    - (1) where any *defendant* is a *barrister*, details of the *barrister's* Inn, his date of *call* and (if appropriate) the date of his appointment as Queen's Counsel, and details of whether or not the *barrister* was acting as a *self-employed barrister* or an *employed barrister* (and, in the latter case, details of his *employer*, including whether or not it is a *BSB authorised body*) and if the *barrister* was acting as a *HOLP* or *manager* of an *authorised body*, identifying this fact and identifying the *authorised body* and whether or not it is a *BSB authorised body*;
    - (2) where any *defendant* is a *BSB authorised body*, details of the date when that body was so authorised or licensed with a summary of the number of *barristers* and other individuals working within that *BSB authorised body*; and
    - (3) where any *defendant* is another type of *BSB regulated person*, details of whether or not the *BSB regulated person* is an *authorised (non-BSB) person* or is otherwise subject to regulation by any other regulator and, if so, the identity of that regulator, and the role of that individual, including whether he was acting as a *HOLP*, *HOFA*, *manager* or *employee* of an *authorised body* and identifying that *authorised body* and its Approved Regulator;
    - (4) where any *defendant* is a *non-authorised individual* employed by a *BSB authorised person*, details of the role of by that individual and identifying the *BSB authorised person* who directly or indirectly employs the *defendant*;
  - .ii the date and time of the sitting of the *Disciplinary Tribunal* at which it is proposed the charge(s) and/or application(s) should be heard; and
  - .iii the names and status (that is, as Chairman, as *lay member*, as *barrister* or other) of those *persons* who it is proposed should constitute the *Disciplinary Tribunal* to hear the case; and
  - .iv the name of the Clerk,

and send copies of that *Convening Order* to the nominated members of the *Disciplinary Tribunal*, the BSB Representative, and the Clerk. In the Order the attention of the *defendant(s)* will be drawn to:

- (1) their right to represent themselves or be represented by counsel, with or without instructing a *solicitor*, as they shall think fit; and
- (2) their right to inspect and be given copies of documents referred to in the list served pursuant to rE104 above; and



- (3) their right (without prejudice to their right to appear and take part in the proceedings) to deliver a written answer to the charge(s) and/or application(s) if they think fit.

- rE126** The *defendant(s)* may, when they receive the *Convening Order*, give notice to the *President* objecting to any one or more of the proposed members of the *Disciplinary Tribunal*. He must give this notice as soon as is reasonably practicable and must specify the grounds for his objection.
- rE127** When the *President* receives such an objection, he must, if satisfied that it is justified (but subject to rE128), exercise the power conferred on him by rE139 to nominate a substitute member or members of the Tribunal, and must notify the *defendant(s)* accordingly. When they receive that notification, the *defendant(s)* may; object to any substitute member or members, in the same way as they may object under rE126; above.
- rE128** No objection to any member of the Tribunal may be made, or if made, may be upheld, on the grounds only that he knows, or might have known, about a previous application to *disqualify*, or a charge of *professional misconduct*, or of breach of proper professional standards, or a charge consisting of a *legal aid complaint*, against the *defendant(s)*, or any finding on any such application or charge, or any sentence imposed on the *defendant(s)* in connection with any such application or charge.
- rE129** The Convening Order must inform the *defendant(s)* of the rights conferred by rE126.

## The Disciplinary Tribunal

### Hearing in private

- rE130** The hearing before a *Disciplinary Tribunal* must be in public, unless it has been directed that it is not to be held in public, and that direction has not been over-ruled by the tribunal.

### Composition of disciplinary tribunals

- rE131** A *Disciplinary Tribunal* must consist of either three persons or five persons.
- rE132** A five-person panel must include the following *persons* nominated by the *President*:
- .1 as chairman, a Judge; and
  - .2 at least one *lay member*; and
  - .3 at least one *practising barrister* of not less than seven years' standing.
- rE133** A three-person panel shall include the following *persons* nominated by the *President*:
- .1 as chairman, a Queen's Counsel or a Judge; and
  - .2 one *lay member*; and
  - .3 one *practising barrister* of not less than seven years' standing.
- rE134** In deciding who will sit on the panel the *President* must have regard to the nature of the charge(s) and/or application(s) being determined and to the identity of the *defendant(s)* against whom the charges have been made. When constituting the panel, as well as taking into account the requirements of rE132 and rE133 above and rE135 below, the *President* must also have regard to (but shall not be bound by) any recommendations by the *PCC*, which may include a recommendation that a Judge rather than a Queen's Counsel be appointed to act as Chairman of a three-person panel.
- rE135** A *person* must not be nominated to serve on a *Disciplinary Tribunal* if they:

- .1 are a member of the *Bar Council* or of any of its committees; or
  - .2 are a member of the *Bar Standards Board* or of any of its committees; or
  - .3 was a member of the *Bar Standards Board* or of any of its committees at any time when the matter was being considered by the *Bar Standards Board*.
- rE136** The *President* may publish qualifications or other requirements made for those appointed to serve on a *Disciplinary Tribunal* and those appointed to be Clerks.
- rE137** For the purposes of rE132 and rE133, a Judge includes:
- .1 a puisne judge of the High Court;
  - .2 a judge of the Court of Appeal;
  - .3 a Circuit judge;
  - .4 a Recorder who has been authorised to sit as a judge of the High Court under section 9(1) of the Supreme Court Act 1981;
  - .5 a deputy judge of the High Court appointed under section 9(4) of the Supreme Court Act 1981; and
  - .6 a *person* who has been a judge of the Court of Appeal, or a puisne judge of the High Court, or a Circuit Judge, provided that he remains permitted by virtue of section 9 of the Supreme Court Act 1981 to be requested to act as a judge of the High Court, or is eligible for appointment as a deputy Circuit judge under section 24 of the Courts Act 1971.
- rE138** If a vacancy in the *Disciplinary Tribunal* arises before the substantive hearing of the charge, the *President* must choose another member of the relevant class to fill that vacancy.
- rE139** At any time before the substantive hearing of the charge starts, the *President* may cancel any or all of the nominations made pursuant to these Regulations, and make such alternative nominations as, in the exercise of his discretion, he deems necessary or expedient, provided always that the *President* notifies the *defendant(s)* of the identity of such substitutes as soon as is reasonably practicable after he has chosen them. The *defendant(s)* may object to such substitute members in the same way as they may object under rE126.
- rE140** The proceedings of a five-person panel will not be invalidated on the sole ground that after the *Convening Order* has been issued (in accordance with rE125 above), one or more of the members becomes unable to act or is *disqualified* from acting, provided that:
- .1 the chairman and at least one *lay member* are still able to act and are present throughout the substantive hearing; and
  - .2 the number of members present throughout the substantive hearing of the charge is not reduced below three.
- rE141** A member of a *Disciplinary Tribunal* who has been absent for any time during a sitting shall take no further part in the proceedings.
- Provision of documents to the Disciplinary Tribunal**
- rE142** There shall be provided to each member of the *Disciplinary Tribunal* before the start of the substantive hearing copies of the following documents:



- .1 the *convening order*;
- .2 the charge(s) and/or application(s) and any particulars of them;
- .3 any documents which the *BSB representative* or the *defendant(s)* propose to rely on, unless a direction has been made that copies of such documents be withheld;
- .4 any written answer to the charge(s) and/or application(s) submitted by or on behalf of the *defendant(s)*;
- .5 such other documents as have been agreed or directed to be laid before the Tribunal before the start of the hearing; and
- .6 the *standard directions* (as amended by the parties) and any agreed special directions, or failing such agreement, the directions order served by the *President* pursuant to rE122.

### Procedure at the hearing

**rE143** The Tribunal must apply the criminal standard of proof when deciding charges of *professional misconduct* and in deciding whether the *disqualification condition* has been established.

**rE144** The rules of natural justice apply to proceedings of a *Disciplinary Tribunal*. Subject to those, the Tribunal may:

- .1 (subject to rE145 below) admit any evidence, whether oral or written, whether given in *person*, or over the telephone, or by video link, or by such other means as the Tribunal may deem appropriate, whether direct or hearsay, and whether or not it would be admissible in a *court* of law;
- .2 give such directions with regard to the conduct of, and procedure at, the hearing, and, with regard to the admission of evidence at the hearing, as it considers appropriate for securing that a *defendant* has a proper opportunity of answering the charge(s) and/or application(s) made against him, or otherwise as shall be just;
- .3 exclude any hearsay evidence if it is not satisfied that reasonable steps have been taken to obtain direct evidence of the facts sought to be proved by the hearsay evidence.

**rE145** Any party may refer to the fact (if relevant) that the *determination by consent* procedure was used before the *complaint* was referred as a charge before a *Disciplinary Tribunal*. However, no reference may be made to the substance of the procedure (including, without limitation, any reference to the contents of any report produced in the course of such procedure, or to the circumstances in which the *determination by consent* procedure ended), unless and until the *defendant* refers to the substance of the procedure in the course of presenting his case, or when he is being sentenced, once the facts have been found.

### Decision of a court or tribunal

**rE146** In proceedings before a *Disciplinary Tribunal* which involve the decision of a *court* or tribunal in previous proceedings to which the *defendant* was a party, the following rules shall apply:

- .1 a copy of the certificate of *conviction* relating to the offence shall be conclusive proof that the *defendant* committed the offence;
- .2 any *court* record of the findings of fact upon which the *conviction* was based (which may include any document prepared by the sentencing judge or a transcript of the relevant proceedings) shall be proof of those facts, unless proved to be inaccurate;
- .3 the finding and sentence of any tribunal in or outside England and Wales exercising a professional disciplinary jurisdiction may be proved by producing an official copy of the finding and sentence and the findings of fact upon which that finding or sentence was based shall be proof of those facts, unless proved to be inaccurate; and

- .4 the judgment of any civil court may be proved by producing an official copy of the judgment, and the findings of fact upon which that judgment was based shall be proof of those facts, unless proved to be inaccurate.

**rE147** In proceedings before a *Disciplinary Tribunal* which involve the decision of a court or tribunal in previous proceedings to which the *defendant* was not a party, the provisions of rE146 do not apply.

#### **Absence of defendant**

**rE148** If a *Disciplinary Tribunal* is satisfied that the relevant procedure has been complied with and the *defendant* has been duly served (in accordance with rE215 of these Regulations) with the documents required by rE102, rE104, and rE125.2.c (as appropriate) but that *defendant* has not attended at the time and place appointed for the hearing, the Tribunal may nevertheless proceed to hear and determine the charge(s) or application(s) relating to that *defendant* if it considers it just to do so, subject to compliance with rE180.1 in respect of that *defendant* if the *Disciplinary Tribunal* finds any charge or application proved.

**rE149** If the relevant procedure has not been complied with, but a *Disciplinary Tribunal* is satisfied that it has not been practicable to comply with it, the Tribunal may hear and determine the charge(s) or application(s) in the absence of that *defendant*, if it considers it just to do so, subject to compliance with rE180.2 in respect of that *defendant* if the *Disciplinary Tribunal* finds any charge or application proved.

**rE150** If the procedure under rE149 has been followed, the *defendant* may apply to the *Directions judge* for an order that there should be a new hearing before a fresh *Disciplinary Tribunal*.

#### **Recording of proceedings**

**rE151** The Clerk must arrange for a record of the proceedings before a *Disciplinary Tribunal* to be made, either by a shorthand writer, or by a recording machine.

#### **Amendment and addition of charge(s) and/or application(s)**

**rE152** A *Disciplinary Tribunal* may at any time before or during the hearing direct the charge(s) and/or application(s) against any *defendant* to be amended, or that new charge(s) and/or application(s) be added, provided that:

- .1 that the Tribunal is satisfied that no *defendant* will by reason of such an amendment or addition suffer any substantial prejudice in the conduct of his defence; and
- .2 that the Tribunal will, if so requested by a *defendant*, adjourn for such time as is reasonably necessary to enable that *defendant* to meet the charge(s) or application(s) as so amended in respect of him.

#### **Adjournment**

**rE153** Subject to the provisions of rE154, the *Disciplinary Tribunal* must sit from day to day until it has made a finding and, if any charge or application is found proved, until sentence has been pronounced.

**rE154** A *Disciplinary Tribunal* may, if the Tribunal decides an adjournment is necessary for any reason, adjourn the hearing for such period or periods as it may decide.

#### **The finding**

**rE155** At the end of the hearing, the *Disciplinary Tribunal* must record in writing its finding(s) on each charge or application, and its reasons. That record must be signed by the chairman and by all members of the Tribunal. If the members of the *Disciplinary Tribunal* do not agree on any charge or application, the finding to be recorded on that charge or application must be that of the majority. If the members of the *Disciplinary Tribunal* are equally divided on any charge or application, then, as the burden of proof is on the *Bar Standards Board*, the finding to be recorded on that charge or application must be that which is the most favourable to the *defendant*. The chairman of the *Disciplinary Tribunal* must then announce the *Disciplinary Tribunal's* finding on the charge(s) or application(s), and state whether each such finding was unanimous or by a majority.



**rE156** In any case where the *Disciplinary Tribunal* dismisses the charge(s) and/or application(s), it may give advice to the *defendant* about his future conduct.

#### The sentence

**rE157** If the *Disciplinary Tribunal* finds any of the charges or applications proved against a *defendant*, it may hear evidence of any previous *disqualification order*, or finding of *professional misconduct*, or of breach of proper professional standards by the *Bar Standards Board*, or by any other regulator, or any finding on a charge consisting of a *legal aid complaint* against that *defendant*, or of the outcome of any previous *determination by consent procedure*. After hearing any representations by or on behalf of the *defendant(s)*, the *Disciplinary Tribunal* must decide what sentence to impose on a *defendant*, taking into account the *sentencing guidelines*, must record its sentence in writing, together with its reasons. If the members of the Tribunal do not agree on the sentence to be imposed on a *defendant*, the sentence to be recorded must be that decided by the majority. If the members of the *Disciplinary Tribunal* are equally divided on the sentence to be imposed on a *defendant*, the sentence to be recorded must be that which is the most favourable to the *defendant*. The chairman of the *Disciplinary Tribunal* must then announce the *Disciplinary Tribunal's* decision on sentence and state whether the decision was unanimous or by a majority.

**rE158** Subject to rE159 below:

- .1 a *defendant* against whom a charge of *professional misconduct* has been found proved may be sentenced by the *Disciplinary Tribunal* as follows:
  - .a in the case of *barristers*, in accordance with Annex 1 to these Regulations;
  - .b in the case of a *BSB legal services body*, in accordance with Annex 2 to these Regulations;
  - .c in the case of a *licensed body*, in accordance with Annex 3 to these Regulations;
  - .d in the case of *registered European lawyers*, in accordance with Annex 2 to these Regulations;
  - .e in the case of all other *BSB regulated persons*, in accordance with Annex 3 to these Regulations;
- .2 in the case of a *defendant* who is a *relevant person* in respect of whom the *Disciplinary Tribunal* finds the *disqualification condition* to be established, the *Disciplinary Tribunal* may make a *Disqualification Order* if the *Disciplinary Tribunal* considers that the making of such a *Disqualification Order* is a proportionate sanction and is in the public interest (there being no other available sentence in respect of a *relevant person* who is a *non-authorised individual* directly or indirectly employed by a *BSB authorised person*).

**rE159** In any case where a charge of *professional misconduct* has been found proved, the *Disciplinary Tribunal* may decide that no further action should be taken against the *defendant*.

**rE160** A three-person panel must not:

- .1 disbar a *barrister* or suspend a *barrister's practising certificate* for a period longer than twelve months; or
- .2 revoke the authorisation or licence (as appropriate) of a *BSB authorised body* or suspend it for a period longer than twelve months; or
- .3 remove a *registered European lawyer* from the *register of European lawyers*; or
- .4 impose a sentence of suspension on any *BSB regulated person* for a prescribed period longer than twelve months; or

- .5 impose a *Disqualification Order* for more than twelve months.

This Regulation does not prevent a three-*person* panel making an order in accordance with rE161 below.

**rE161** In the event that a three-*person* panel considers that a case before it merits (in conjunction with any deferred sentence) the imposition on a *defendant* of any of the sentences referred to in rE160 above or the three-*person* panel otherwise considers that the case of a particular *defendant* is complex enough to warrant sentencing by a five-*person* panel:

- .1 the three-*person* panel must refer the case to a five-*person* panel for it to sentence that *defendant* (but may proceed to sentence any other *defendants* to the proceedings in respect of whom this rE161 does not apply);
- .2 the three-*person* panel must, in order to help the five-*person* panel, prepare a statement of the facts as found (and, where relevant, the sentences passed on any other *defendants* to the proceedings). The *defendant* cannot challenge the facts found by the three-*person* panel; and
- .3 the three-*person* panel must direct within what period of time the sentencing hearing before the five-*person* panel is to be held and make appropriate directions for the parties to provide the *President* with their dates of availability.

**rE162** Following a referral by a three-*person* panel under rE161, the five-*person* panel must be constituted in accordance with rE132. The *defendant* must be informed as soon as practicable of the names and status (that is, as Chairman, as *lay member*, as *barrister* or other) of those *persons* who it is proposed will constitute the five-*person* panel. The *defendant* may, when he is so informed, give notice to the *President* objecting to any one or more of the proposed members of the panel. That notice must be given as soon as is reasonably practicable, must specify the ground of objection, and must be dealt with in accordance with rE127 and rE128.

**rE163** The *President* must fix the date for the sentencing hearing and in so doing shall have regard to the availability of the parties, save that the *President* may disregard the availability of any party where that party has failed to provide any, or any reasonable dates of availability. As soon as is reasonably practicable after he has fixed the sentencing hearing, the *President* must inform all the parties of that date .

**rE164** If the five-*person* panel is satisfied that the requirements of rE162 and rE163 above have been complied with, and the *defendant* has not attended at the time and place appointed for the sentencing hearing, the five-*person* panel may nonetheless sentence the *defendant*, provided that it complies with rE180.3.

**rE165** If the five-*person* panel is satisfied that it has not been practicable to comply with the requirements of rE162 and rE163, above, and the *defendant* has not attended at the time and place appointed for the sentencing hearing, the five-*person* panel may nonetheless sentence the *defendant*, provided that it complies with rE180.4.

**rE166** If the procedure under rE165 has been followed, the *defendant* may apply to the *Directions Judge* for an order that there should be a new sentencing hearing before a fresh five-*person* panel.

**rE167** Sections 41 and 42 of the Administration of Justice Act 1985 (as substituted by Section 33 of the Legal Aid Act 1988 and as amended by Schedule 4 to the Access to Justice Act 1999) confer certain powers (relating to the reduction or cancellation of fees otherwise payable by the *Legal Aid Agency* in connection with services provided as part of the Community Legal Service or Criminal Defence Service and to the exclusion from providing representation funded by the *Legal Aid Agency* as part of the Criminal Legal Aid or Civil Legal Aid) on a *Disciplinary Tribunal* in the cases to which those Sections apply). Accordingly:



- .1 any *Disciplinary Tribunal* which hears a charge consisting of a *legal aid complaint* relating to the conduct of a *defendant* who is a *barrister* may if it thinks fit (and whether or not it sentences the *defendant* in accordance with rE158.1 in respect of any conduct arising out of the same *legal aid complaint*) order that any such fees as are referred to in Section 41(2) of the Act of 1985 shall be reduced or cancelled;
  - .2 where a *Disciplinary Tribunal* hears a charge of *professional misconduct* against a *defendant* who is a *barrister* it may (in addition to, or instead of, sentencing that *defendant* in accordance with rE158.1) order that he be excluded from providing representation funded by the *Legal Aid Agency* as part of the Community Legal Service, or Criminal Defence Service, either temporarily, or for a specified period, if it determines that there is a good reason to exclude him arising from (i) his conduct in connection with any such services as are mentioned in Section 40(1) of the Act of 1985; or (ii) his professional conduct generally.
- rE168** Whether or not a *Disciplinary Tribunal* finds any charge or application proved against a *barrister* who is a *pupil supervisor*, if the *Disciplinary Tribunal* considers that the circumstances of the *complaint* are relevant to the *defendant* in his capacity as a *pupil supervisor*, it may notify the *defendant's Inn* of those concerns in such manner as it sees fit.
- rE169** If a *barrister* is a member of more than one *Inn*, each *Inn* of which he is a member must be mentioned in the sentence imposed on him.

#### **Sentence of suspension from practice or from authorisation or licensing or imposition of conditions**

**rE170** For the purposes of rE171 to rE173:

- .1 The effect of a sentence of suspension for a *BSB authorised individual* is that:
  - .a the *defendant's practising certificate* is *suspended* for the period of the suspension;
  - .b any and all enjoyment of all rights and privileges as a member of the *Inn(s)* of which he is a member are *suspended* for the period of the suspension; and
  - .c the *defendant* is prohibited from practising as a *barrister*, or holding himself out as being a *barrister* when providing *legal services* or as otherwise being authorised by the *Bar Standards Board* to provide *reserved legal activities* or when describing himself as a *Barrister* in providing services other than *legal services* (whether or not for reward) unless he discloses the suspension);
- .2 the effect of a sentence of suspension for a *registered European lawyer* shall mean that the *defendant* is *suspended* from the *register of European lawyers* maintained by the *Bar Standards Board* and is, for so long as he remains *suspended*:
  - .a prohibited from holding himself out as registered with the *Bar Standards Board*; and;
  - .b not authorised to *practice*.
- .3 The effect of a sentence of suspension for a *BSB authorised body* shall mean that the body's authorisation or licence is *suspended* for the period of the suspension such that the *defendant* is not an *authorised person* for that period;
- .4 The effect of a sentence on a *BSB authorised individual* or a *registered European lawyer* requiring completion of continuing professional development shall be in addition to the mandatory requirements set out in the continuing professional development rules at Part 4 of this *Handbook*.

- rE171** The period for which a sentence of suspension from *practice* is expressed to run may be:
- .1 a fixed period; or
  - .2 until the *defendant* has complied with any conditions specified in the order imposing the sentence of suspension.
- rE172** Conditions may be imposed on a *barrister's practising certificate* or on the authorisation or licence of a *BSB authorised body*:
- .1 without its being *suspended*; or
  - .2 to take effect on a *barrister's practising certificate* or on the authorisation or licence of a *BSB authorised body* when a period of suspension ends.
- rE173** Conditions may (depending on the circumstances) include conditions limiting the scope of the *defendant's practice* (after the end of any suspension, if relevant ) to such part as the *Disciplinary Tribunal* may determine, either indefinitely or for a defined period; and/or imposing requirements that the *defendant*, or in the case of a *BSB authorised body*, its *managers* or *employees*, undergo such further *training* as the *Disciplinary Tribunal* may determine; and/or prohibiting the *defendant* from accepting or carrying out any *public access instructions*; and/or such other matters as the Tribunal may consider appropriate for the purpose of protecting *the public* and/or preventing a repetition of the conduct in question.

### Power to order that a sentence has deferred effect

- rE174** Where a sentence imposed by a *Disciplinary Tribunal* includes a fine, condition and/or a suspension from *practice*, the *Disciplinary Tribunal* may direct that those elements of the sentence are to have deferred effect.
- rE175** A sentence may be directed to have deferred effect for a minimum of six months or a maximum of two years (the "*period of deferral*").

### Power to activate a deferred sentence

- rE176** A deferred sentence must be activated if the *defendant* is later found (whether during the period of suspension, or afterwards) to have committed *professional misconduct* during the *period of deferral*.
- rE177** Where a *Disciplinary Tribunal* finds that there has been *professional misconduct* during the *period of deferral*, it shall (at the same time as imposing sentence for the *professional misconduct*) activate the sentence which had been deferred, unless there are exceptional circumstances.
- rE178** A *Disciplinary Tribunal* may (where the conditions for activation of a deferred sentence are satisfied) activate a sentence which has been deferred when imposed by the *PCC* pursuant to the *determination by consent* procedure.
- rE179** Where a deferred sentence is activated pursuant to this Regulation, the sentence must then be pronounced, and any action as may be required to give effect to the sentence must be taken, in accordance with rE189 to rE179 below.

### Wording of the sentence when defendant not present

- rE180** If a *defendant* has not been present throughout the proceedings, the sentence in respect of that *defendant* must include one or more of the following statements:



- .1 if the relevant procedure under rE148 has been complied with, that the finding and sentence were made in the absence of the *defendant* in accordance with rE148;
- .2 if the procedure under rE149 has been complied with, that the finding and the sentence were made in the absence of the *defendant* and that he has the right to apply to the *Directions Judge* for an order that there should be a new hearing before a fresh *Disciplinary Tribunal*;
- .3 if the relevant procedure under rE163 has been complied with, that the sentence was made in the absence of the *defendant* in accordance with rE164;
- .4 if the procedure under rE165 has been complied with, that the sentence was made in the absence of the *defendant* and that he may apply to the *Directions Judge* for an order that there should be a new hearing before a fresh *Disciplinary Tribunal*.

### Report of finding and sentence

**rE181** As soon as is practicable after the end of the proceedings of a *Disciplinary Tribunal*, the chairman must prepare a report in writing of the finding(s) on the charges of *professional misconduct* and/or on any applications, and the reasons for those findings and the sentence, if any. At the discretion of the chairman, the report may also refer to matters which, in the light of the evidence given to the *Disciplinary Tribunal*, appear to require investigation or comment. He must send copies of the report to:

- .1 the *defendant*;
- .2 the Director of the *Bar Standards Board*;
- .3 the Treasurers of the *defendant's Inn of Call* and of any other *Inns* of which he is a member.

**rE182** He must also send copies of the report to:

- .1 those of the following whom he deems, in his absolute discretion, to be appropriate taking into account the circumstances:
  - .a the Lord Chancellor;
  - .b the Lord Chief Justice;
  - .c the Attorney General;
  - .d the Director of Public Prosecutions;
  - .e the Chairman of the *Bar Council*; and
  - .f the Chairman of the *PCC*; and
- .2 in cases where one or more charges of *professional misconduct* have been found proved and any such charge constitutes, or arises out of, a *legal aid complaint*, and/or the sentence includes an order under rE167, the *Legal Aid Agency*.

### Appeal

**rE183** In cases where one or more charges of *professional misconduct* have been proved, and/or a *disqualification order* has been made, an appeal may be lodged with the High Court in accordance with the Civil Procedure Rules:

- .1 by the *defendant* against *conviction* and/or sentence;
  - .2 with the consent of the Chairman of the *Bar Standards Board* or the Chairman of the *PCC*, by the *Bar Standards Board* against sentence on any of the grounds in rE185 below.
- rE184** In any case where any charge of *professional misconduct* or application to *disqualify* has been dismissed, the *Bar Standards Board* may (with the consent of the Chairman of the *Bar Standards Board* or of the Chairman of the *PCC*) lodge an appeal with the High Court, in accordance with the Civil Procedure Rules, on any of the grounds in rE185 below.
- rE185** The *Bar Standards Board* may only lodge an appeal (against sentence or dismissal) where the *Bar Standards Board* considers the *Disciplinary Tribunal* has:
- .1 taken into account irrelevant considerations;
  - .2 failed to take into account relevant considerations;
  - .3 reached a decision that is wrong in law; and/or
  - .4 reached a decision which no reasonable Tribunal could properly have reached.
- rE186** Where a *defendant* lodges an appeal against a disbarment, *Disqualification order* or the revocation of a licence or authorisation, he may at the same time lodge with the High Court an appeal against any requirement imposed pursuant to rE203 to rE205 as appropriate.
- rE187** A complainant (other than the *Bar Standards Board*) has no right of appeal.

### Action to be taken by the Inn (in circumstances where a barrister has been sentenced to be disbarred or suspended)

- rE189** When the Treasurer of the *defendant's Inn of Call* receives a report prepared in accordance with rE181, he must, not fewer than 21 days after the end of the Tribunal's proceedings (or, where the *defendant* has given notice of appeal to the High Court against the finding and/or sentence, once the time for appeal to the High Court has expired and any appeal to the High Court has been disposed of) pronounce the sentence decided on by the Tribunal, and take such further action as may be required to carry the sentence into effect. The Treasurer must inform the *persons* specified in rE181 of the date on which the sentence is to take effect, (which must be no later than two working days after the date when that sentence is pronounced).
- rE190** Similar action must be taken by the Treasurer of any other *Inn* of which the *defendant* is a member, in conjunction with the Treasurer of the *defendant's Inn* of Call.
- rE191** In any case in which the *defendant* has given notice of appeal to the High Court against the finding and/or sentence of the Tribunal on the charges of *professional misconduct*, no action referred to in rE189 and rE190 may be taken until the appeal has been heard by the High Court, or otherwise disposed of without a hearing.
- rE192** Where, pursuant to rE203, a Tribunal has required the *Bar Standards Board* to suspend the *defendant's practising certificate* or not to issue a *practising certificate* to the *defendant* pending an appeal ("the Interim Measure"), the Treasurer must direct that any period of suspension to which the *defendant* has been sentenced will be deemed to have taken effect on the date on which the Interim Measure came into effect, or on the date on which the *defendant* would otherwise have been eligible to be issued with a *practising certificate*, whichever is later.



### Action to be taken by the Council of the Inns of Court (in all other circumstances)

- rE193** If the *Disciplinary Tribunal* has imposed a sentence (other than disbarring or suspending a *barrister* see rE189 to rE192, above), the *Council of the Inns of Court*, when it receives the report prepared in accordance with rE181, must, not fewer than 21 days after the end of the Tribunal's proceedings, pronounce the sentence decided on by the Tribunal, and take such further action as may be required to carry that sentence into effect. The *Council of the Inns of Court* shall inform the *persons* specified in rE181 of the date on which the sentence is to take effect. That date must be no later than two clear days after the date when the sentence is pronounced.
- rE194** In any case in which a *BSB regulated person* has given notice of appeal to the *Visitors* against the finding and/or sentence of the Tribunal on the charges of *professional misconduct*, no action referred to in rE193 may be taken until the appeal has been heard by the *Visitors*, or otherwise disposed of without a hearing.
- rE195** The *Council of the Inns of Court* must take all such steps as may be necessary or expedient to give effect to any requirement made by the Tribunal pursuant to rE189 above.

### Action to be taken by the Bar Council/Bar Standards Board

- rE196** Subject to rE197, below, after the sentence has been pronounced in accordance with rE189, above, the *Bar Council/Bar Standards Board* must, as appropriate, in accordance with the finding and/or sentence of the Tribunal: :

- .1 remove the relevant *BSB authorised individual's practising certificate, litigation extension* and/or right to undertake public access work (as appropriate),
- .2 impose conditions on the relevant *BSB authorised person's* authorisation and/or licence (as appropriate);
- .3 either include a note on the *Bar Standards Board's* register of *BSB authorised persons* that the *BSB authorised person* is *disqualified, suspended* or is otherwise subject to certain conditions on the terms of his authorisation/licence or that the *relevant person* is the subject of a *disqualification order*,

except that in any case in which a *BSB regulated person* has given notice of appeal to the High Court against the finding and/or sentence of the Tribunal on the charges of *professional misconduct*, no action referred to in this rE196 may be taken until the appeal has been heard by the High Court or otherwise disposed of without a hearing.

- rE197** Where the finding and/or sentence of the Tribunal is that the *BSB authorised person* should be subject to an immediate suspension and/or immediate imposition of conditions in accordance with rE202 below, the *Bar Council/Bar Standards Board* must immediately:
- .1 remove the relevant *BSB authorised individual's practising certificate, litigation extension* and/or right to do public access work (as appropriate),
  - .2 impose conditions on the relevant *BSB authorised person's* authorisation and/or licence (as appropriate);
  - .3 either include a note on the *Bar Standards Board's* register of *BSB authorised persons* that the *BSB authorised person* is *suspended* or is otherwise subject to certain conditions on the terms of his authorisation/licence, the actions of the *Bar Council/Bar Standards Board* must not be deferred even if the *BSB regulated person* has given notice of appeal to the High Court against the finding and/or sentence of the Tribunal on the charges of *professional misconduct*.

**rE198** The *Bar Standards Board* and/or the *Council of the Inns of Court* also:

- .1 must publish the finding and sentence of the Tribunal on the relevant website(s) within fourteen (14) days of the date when the Tribunal's proceedings end, unless the Chairman of the Tribunal directs that publication shall be delayed until *the President* has published the finding under rE198; and
- .2 may where charges have been dismissed publish the decision of the Tribunal on their websites at any time provided that in this case all details of the relevant parties involved in the hearing are anonymised.

### Publication of finding and sentence

**rE199** The following procedures apply to the publication of the finding and sentence of a *Disciplinary Tribunal*:

- .1 When the Tribunal has found that one or more charges of *professional misconduct* are proved, then, as soon as it has heard from the Inn. or from the *Council of the Inns of Court* (as the case may be), of the date that any sentence is to take effect, *the President* must publish those charges, the sentence, and the date when that sentence is to take effect.
- .2 When the Tribunal has found that the *disqualification condition* is established and has made a *Disqualification order*, as soon as it has heard from the *Council of the Inns of Court* on what date that order is to take effect, *the President* must publish the findings on which that order was based, the terms of the *Disqualification Order*, and the date when that order is to take effect.
- .3 When the Tribunal has found that any charge of *professional misconduct* has not been proved *the President* must not publish that charge, or the finding unless the *defendant* asks him to subject to rE197.2.

**rE200** When publishing any finding, sentence or decision in accordance with rE198, *the President* must communicate it in writing to:

- .1 the *defendant*;
- .2 the Chairman of the *Bar Standards Board*;
- .3 the *defendant's* head of chambers, *HOLP*, or employer (as appropriate);
- .4 in the case of a *registered European lawyer*, his *home professional body*;
- .5 the Treasurers of the *defendant's Inn of Call* and of any other Inns of which he is a member;
- .6 other *Approved Regulators* and the *LSB*; and
- .7 one or more press agencies or other publications.
- .8 the following *persons* only where *the President* deems, in his absolute discretion, to be appropriate, taking into account the circumstances:
  - .a the Lord Chancellor;
  - .b the Lord Chief Justice;
  - .c the Attorney General;
  - .d the Director of Public Prosecutions;
  - .e the Chairman of the Bar Council;



## Suspension/withdrawal of practising rights pending the hearing of any appeal

**rE201** rE202 to rE209 below apply to any *defendant* who:

- .1 Is a *barrister*, who has been sentenced to be disbarred or to be *suspended* or to be prohibited from accepting or doing any public access work or *instructions* for more than one year;
- .2 is a *BSB authorised individual*, who has been sentenced to be *disqualified* or to be *suspended* for more than one year;
- .3 is a *BSB authorised body*, which has been sentenced to have its authorisation or licence revoked or *suspended* for more than one year; or
- .4 is a *BSB authorised person*, who has been sentenced to have conditions placed on his *practising certificate*, authorisation or licence (as appropriate) prohibiting him from accepting any *public access instructions* or *conducting any litigation* or for more than one year.

**rE202** Where rE201 applies the Tribunal must seek representations from the *defendant* and from the *BSB representative* on the appropriateness or otherwise of taking action under rE203 below.

**rE203** Having heard any representations under rE201 above, the Tribunal must (unless in the circumstances of the case it appears to the Tribunal to be inappropriate to do so), either:

- .1 in relation to rE201.1 and rE201.2, require the *defendant* to suspend his *practice* immediately, in which case the Bar Standards Board must suspend that *defendant's practising certificate* with immediate effect; or
- .2 in relation to rE201.3, decide that the condition prohibiting the *defendant* from accepting *public access instructions* or conducting any litigation, shall take effect immediately; or
- .3 where the *defendant* has been sentenced to be disbarred or to be *suspended*, and where that *defendant* does not currently hold a *practising certificate*, require the Bar Standards Board not to issue any *practising certificate* to him.

**rE204** If the Tribunal decides that it would be inappropriate to require immediate suspension or immediate imposition of conditions (as the case may be) it may nonetheless require the *defendant* to suspend his *practice* or to impose conditions, from such date as the Tribunal may specify.

**rE205** Where the *defendant* is permitted to continue to practise for any period before being *suspended* under rE204, the Tribunal may require the *Bar Standards Board* to impose such terms on the *defendant's practice* as the Tribunal deems necessary to protect *the public* until the suspension comes into effect.

**rE206** Where an order is made in respect of a *defendant* under rE203 above and that *defendant* considers that, due to a change in the circumstances, it would be appropriate for that order to be varied, he may apply to *the President* in writing for it to be varied.

**rE207** When *the President* receives an application made pursuant to rE206 above, he must refer it to the Chairman and to one of the *lay members* of the Tribunal which originally made the order.

**rE208** Any application made pursuant to rE206 above must be sent by the applicant, on the day that it is made, to the *PCC* and the *PCC* may make such representations as they think fit on that application to those to whom the application has been referred by *the President*.

**rE209** The *persons* to whom an application made pursuant to rE206 above is referred may vary or confirm the order in relation to which the application has been made.

- rE210** References in rE206 to the *Bar Standards Board* shall be treated as referring to such body as may from time to time have the power to issue or suspend *practising certificates* or to impose conditions on *practising certificates* and the authorisations and licences of *BSB authorised bodies*.

## Costs

- rE211** A *Disciplinary Tribunal* may make such Orders for costs, whether against or in favour of a *defendant*, as it shall think fit.
- rE212** It makes such an Order a *Disciplinary Tribunal* must either itself decide the amount of such costs or appoint a suitably qualified *person* to do so on its behalf.
- rE213** Any costs ordered to be paid by or to a *defendant* must be paid to or by the *Bar Standards Board*.
- rE214** All costs incurred by the *PCC* preparatory to the hearing before the Tribunal must be borne by the *Bar Standards Board*.

## Miscellaneous

### Representation of complainant's interests

- rE215** The *BSB representative* must keep the complainant (if any) informed of the progress of the *complaint*.

### Service of documents

- rE216** In any documents required to be served on a *defendant* in connection with proceedings under these Regulations shall be deemed to have been validly served:

- .1 If sent by registered post, or recorded delivery post, or receipted hand delivery to:
  - .a in the case of a *BSB authorised individual*, the address notified by him pursuant to the requirements of Part 2 of this *Handbook* (or any provisions amending or replacing it) as his *practising address*; or
  - .b in the case of a *BSB regulated person* or *non-authorised individual* acting as a *manager* or *employee* of a *BSB authorised body*, the address provided by the *BSB authorised body* as his home address or, in the absence of such information, the address of the relevant *BSB authorised body* notified pursuant to the requirements of Part 2 of this *Handbook*; or
  - .c in either case, an address to which the *defendant* has asked in writing that such documents be sent; or
  - .d in the absence of any of the above, to his last known address or; in the case of a *BSB regulated person* or *non-authorised individual* acting as a *manager* or *employee* of a *BSB authorised body*, the last known address of the relevant *BSB authorised body*,

and such service shall be deemed to have been made on the second working day after the date of posting or on the next working day after receipted hand delivery;

- .2 If served by e-mail, where:

- .a the *defendant's* e-mail address is known to the *Bar Standards Board*; and
- .b the *defendant* has asked for or agreed to service by e-mail, or it is not possible to serve by other means;

and such service shall be deemed to have been made on the second working day after the date the e-mail is sent;

- .c If actually served;



- .d If served in any way which may be directed by the *Directions judge* or the Chairman of the *Disciplinary Tribunal*.

**rE217** For the purpose of this regulation "receipted hand delivery" means by a delivery by hand which is acknowledged by a receipt signed by the *defendant* or by a relevant representative of the *defendant* (including, for example, his clerk, a *manager* or *employee* of the *BSB authorised body* at which he works).

### Delegation

**rE218** The powers and functions conferred by these Regulations on a *Directions judge* may be exercised by any other Judge or Queen's Counsel nominated by *the President*, including the Judge designated in the *convening order* as Chairman of the Tribunal appointed to hear and determine the charge or charges against the *defendant*, if the *Directions judge* is unable to act due to absence, or to any other reason.

**rE219** Any duty or function or step which, pursuant to the provisions of these regulations, is to be discharged or carried out by *the President* may, if he is unable to act due to absence or to any other reason, be discharged or carried out by any other member of the *Council of the Inns of Court*, the Treasurer of any Inn, or by any other *person* nominated in writing by *the President* for any specific purpose.

**rE220** Anything required by these Regulations to be done or any discretion required to be exercised by, and any notice required to be given to, *the President* may be done or exercised by, or given to, any *person* authorised by *the President* (either prospectively or retrospectively and either generally or for a particular purpose) subject to rE218.

### Other

**rE221** When the Treasurer of an *Inn* is a Royal Bench, references in these Regulations to the Treasurer shall be read as references to his deputy.

### Exclusion from providing representation funded by the Legal Aid Agency – application for termination

**rE222** A *defendant* who has been excluded from legal aid work under Section 42 of the Administration of Justice Act 1985 may apply for an order ending his exclusion from providing representation funded by the *Legal Aid Agency* as part of the Criminal Legal Aid or Civil Legal Aid in accordance with this rE222 and rE223 below.

**rE223** Any such application must be in writing and addressed to *the President*.

**rE224** *The President* may dismiss the application, or may decide that the *defendant's* exclusion from providing representation funded by the *Legal Aid Agency* as part of the Criminal Legal Aid or Civil Legal Aid be ended forthwith, or on a specified future date.

**rE225** *The President* must notify his decision in writing to all those *persons* who received copies of the report of the *Disciplinary Tribunal* which ordered that the *defendant* be excluded from providing such representation.

**rE226** When the Treasurer of the applicant's *Inn* of Call, and of any other *Inn* of which he is a member, receives any such report, he shall take action equivalent to that which he took in respect of the report of the *Disciplinary Tribunal* which sentenced the *defendant* to be excluded from providing representation funded by the *Legal Aid Agency* as part of the Criminal Legal Aid or Civil Legal Aid.

**rE227** The procedures about the publication of the decision of *the President* on any such application as is referred to in this Regulation are those which applied to the publication of the finding and sentence by which the applicant was excluded from providing representation funded by the *Legal Aid Agency* as part of the Criminal Legal Aid or Civil Legal Aid.

**rE228** *The President* may make such order for costs as he thinks fit and rE211 to rE214 apply with all necessary modifications.

**Interpretation**

**rE229** In Section 5.B2 all italicised terms shall be interpreted in accordance with the definitions in Part 4.



### B3. Citation and commencement

**rE230** These Regulations may be cited as "The *Disciplinary Tribunal* Regulations".

**rE231** These Regulations come into force in accordance with the provisions of Part 1 of this *Handbook*.

## B4. Annexes to the *disciplinary tribunals* regulations

### Annex 1 – Sentencing powers against barristers

When a charge of *professional misconduct* has been found proved against a *barrister*<sup>1</sup> by a *Disciplinary Tribunal*, the *Disciplinary Tribunal* may decide:

1. to disbar him;
2. to suspend his *practising certificate* and suspend his rights and privileges as a member of his *Inn* for a prescribed period (either unconditionally or subject to conditions);
3. not to renew his *practising certificate*;
4. to impose conditions on his *practising certificate*;
5. be prohibited, either indefinitely or for a prescribed period and either unconditionally or subject to conditions, from accepting or carrying out any *public access instructions*;
6. to remove or to suspend his authorisation to *conduct litigation* or to impose conditions on it;
7. to order him to pay a fine of up to £50,000 to the *Bar Standards Board* (or up to £50,000,000 if the charges relate to his time as an *employee* or *manager of a licensed body*);
8. to order him to complete continuing professional development of such nature and duration as the Tribunal may direct, whether outstanding or additional requirements, and to provide satisfactory proof of compliance with this order to the *supervision team*;
9. to order him to be reprimanded by the Treasurer of his *Inn*;
10. to order him to be reprimanded by the Tribunal;
11. to give him advice about his future conduct;
12. to order him to attend on a nominated *person* to be reprimanded; or
13. to order him to attend on a nominated *person* to be given advice about his future conduct.

1. If an application to disqualify the *Barrister* from acting as HOLP, manager or employee of an *authorised person* is made in the same proceedings, the *Disciplinary Tribunal* may also disqualify the *Barrister* in accordance with the provisions of Annex 6.

## Annex 2 – Sentencing powers against BSB legal services bodies

If a *Disciplinary Tribunal* finds a charge of *professional misconduct* proved against a *BSB legal services body*, the *Disciplinary Tribunal* may decide to :

1. remove its authorisation to practise as a *BSB legal services body*;
2. impose conditions on its authorisation to practise as a *BSB legal services body*;
3. suspend its authorisation to *practise* for a prescribed period (either unconditionally or subject to conditions);
4. re-classify it as a *licensed body* (either unconditionally or with conditions imposed on its licence to practise as a *licensed body*);
5. withdraw, or suspend its authorisation to *conduct litigation* or to impose conditions on it;
6. order a fine of up to £250,000 to the *Bar Standards Board*;
7. order that its *managers* or *employees* complete continuing professional development of such nature and duration as the Tribunal may direct and to provide satisfactory proof of compliance with this order to the *supervision team*;
8. reprimand it;
9. give it advice about its future conduct; or
10. order it to attend (by its *HOLP* or other *person* identified in the order) on a nominated *person* to be given advice about its future conduct.

### Annex 3 – Sentencing powers against *licensed bodies*

If a *Disciplinary Tribunal* finds a charge of *professional misconduct* proved, against a *licensed body* the *Disciplinary Tribunal* may decide to: :

1. revoke its licence to practise revoked;
2. suspend its licence to practise for a prescribed period (either unconditionally or subject to conditions);
3. impose conditions on its licence to practise;
4. withdraw or suspend its *right to conduct litigation* or to impose conditions on it;
5. order it to pay a fine of up to £250,000,000 to the *Bar Standards Board*;
6. order it to ensure that its *managers* or *employees* complete continuing professional development of such nature and duration as the Tribunal shall direct and to provide satisfactory proof of compliance with this order to the *supervision team*;
7. reprimand it;
8. give advice to it about its future conduct; or
9. order it to attend (by its *HOLP* or other *person* identified in the order) on a nominated *person* to be given advice about its future conduct.

## Annex 4 – Sentencing powers against registered European lawyers

If a *Disciplinary Tribunal* finds a charge of *professional misconduct* proved against a *registered European lawyer*, the *Disciplinary Tribunal* may decide to:

1. remove him from the *register of European lawyers*;
2. suspend him from the *register of European lawyers* for a prescribed period (either unconditionally or subject to conditions);
3. impose a condition on him prohibiting him, either indefinitely or for a prescribed period and either unconditionally or subject to conditions, from accepting or carrying out any *public access instructions*;
4. order him to pay a fine of up to £50,000 to the *Bar Standards Board* (or of up to £50,000,000 if, the charges relate to his time as an *employee* or *manager* of a *licensed body*);
5. order him to complete continuing professional development of such nature and duration as the Tribunal shall direct, whether outstanding or additional requirements, and to provide satisfactory proof of compliance with this order to the *supervision team*;
6. reprimand him;
7. give him advice about his future conduct;
8. order him to attend on a nominated *person* to be reprimanded; or
9. order him to attend on a nominated *person* to be given advice about his future conduct.



### Annex 5 – Sentencing powers against all other *BSB regulated persons*

If a *Disciplinary Tribunal* finds a charge of *professional misconduct* proved against any other *BSB regulated person*<sup>2</sup>, the *Disciplinary Tribunal* may decide to:

1. order him to pay a fine of up to £50,000 to the *Bar Standards Board* (or up to £50,000,000 if the charges relate to their time as an *employee* or *manager* of a *licensed body*);
2. reprimand him;
3. give him advice about his future conduct;
4. order him to attend on a nominated *person* to be reprimanded;
5. order him to attend on a nominated *person* to be given advice about his future conduct.

2. If an application to disqualify is made in the same proceedings, the *Disciplinary Tribunal* may also disqualify a *BSB regulated person* in accordance with these Regulations.

## Annex 6 – Standard directions

Pursuant to the *Disciplinary Tribunal* Regulations:

1. The hearing will be in public;
2. That by [ ] the *defendant* is required to specify:
  - (a) whether he admits the charges;
  - (b) whether any of the facts relied on by the *Bar Standards Board* and set out in the documents provided pursuant to rE104 are admitted;
3. That the *defendant* provide by [ ] a list of the documents, rely and of the witnesses, on which and on whom he intends to rely, and copies of any witness statements on which he intends to rely;
4. That on or before [ ] both the *BSB representative* and the *defendant* serve written notice of the witnesses (if any) whom they require the other party to tender for cross-examination;
5. That the *defendant* provide to the *Bar Standards Board* at least fourteen days before the date fixed for the substantive hearing [ ] copies of any defence bundle already provided pursuant to direction (3) above for circulation to the Tribunal members;
6. That the estimated length duration of the hearing is [ ] days/hours;
7. That the substantive hearing shall take place on [ ];

OR

8. By [ ] all parties I provide *the President* with dates when they are available for the substantive hearing, failing which *the President* may fix the hearing without reference to the availability of any party;
9. Any skeleton argument to be relied on at the hearing be served on *the President* and on the other parties at least 48 hours before the time fixed for the hearing.
10. That there be liberty for the parties to agree in writing to vary these directions;
11. That there be liberty to apply to the *Directions judge* for further directions.







# **Annex 2**

## **Sentencing Guidance 2014**





**The Bar Tribunals and Adjudication Service**

# **Sentencing Guidance: Breaches of the BSB Handbook**

**This document is intended to provide guidance and is not intended to inhibit decision makers from using their own discretion when considering an appropriate sanction in individual cases.**

**Version 3**

Date of implementation: January 2014

Date of next review: January 2016

## Introduction from the President of the Council of the Inns of Court

I am pleased to present the third edition of the Sentencing Guidance endorsed by the Council of the Inns of Court. This is an entirely new version of the Sentencing Guidance in line with the introduction of the Bar Standards Board new Handbook (which includes a revised Code of Conduct), which will be effective from January 2014. This version of the guidance is a result of a comprehensive project undertaken by a BTAS Working Group who carried out four discrete pieces of research, a public consultation, and an Equality Impact Assessment to inform the final product.

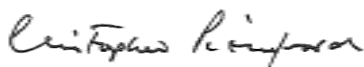
The function of the Sentencing Guidance is unchanged; it is designed to assist those whose responsibility it is to impose the appropriate sanction under the disciplinary processes for breaches of the Bar Standards Board Handbook. The aim of this guidance is to promote consistency and transparency. It will inform the profession and the public about the principles on which sanctions will be applied and identify the probable range of sentence for the misconduct under consideration.

Professional sanctions are imposed to protect the public from further harm and to maintain the standards imposed by the Code of Conduct in the interests both of the public and the profession. As Lord Bingham observed in ***Bolton v Law Society*** [1994] 1 WLR 512:

*'Lawyers practising in this country...should discharge their professional duties with integrity, probity and complete trustworthiness...A profession's most valuable asset is its collective reputation and the confidence which that inspires...The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.'*

Part I of the guidance provides general information about the range of sanctions available and the circumstances in which they may be imposed. Part II of the guidance sets out the "starting points" for sentencing in relation to the breaches of the Handbook and the likely charges under the Handbook. The examples given do not represent all potential breaches of the Handbook. Decision makers should use their judgement and discretion to meet the requirements of the case. The Bar Standards Board retains the discretion to charge breaches of the Handbook as they see appropriate.

The contents of this document are intended as guidance. It is not prescriptive. Decision makers are free to depart from the guidance but if they do they must explain their reasons with clarity.



Christopher Pitchford  
President of the Council of the Inns of Court

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# Part I - General guidance

## Section 1 - Introduction

- 1.1. This guidance has been developed by The Bar Tribunals and Adjudication Service ('BTAS') Working Group on Sentencing Guidance in collaboration with the Bar Standards Board ('BSB'), for use by the Professional Conduct Committee of the BSB and members of BTAS's Disciplinary Tribunals ('decision makers') when considering what sanctions should be imposed where a finding of professional misconduct has been made for a breach of the BSB Handbook which replaces the 8<sup>th</sup> edition of the Code of Conduct.
- 1.2. The guidance is publicly available and allows defendant barristers<sup>1</sup>, complainants and other interested parties to gauge, in advance, the potential sanction that might be imposed in a particular case. For more information on BTAS's Disciplinary Tribunals please visit the BTAS website ([www.tbts.org.uk](http://www.tbts.org.uk)). For more information about the complaints process, please see the Complaints and Professional Conduct section on the BSB's website ([www.barstandardsboard.org.uk](http://www.barstandardsboard.org.uk)).
- 1.3. The guidance provides decision makers with a basis for considering what sanctions are appropriate in any given case and is intended to promote proportionality, consistency and transparency in sentencing. **However, it must be stressed that it is not intended to interfere with decision makers' powers to impose whatever sanctions are appropriate in the circumstances of individual cases. Decision makers must exercise their own judgement when deciding on the sanctions to impose and must also ensure that any sentence is appropriate and fair, based on the individual facts of the case.** Written reasons should be given for all sanctions imposed including any aggravating or mitigating factors. **Care should be taken to include in the written reasons the basis for departing to a significant extent from this guidance.**

### Equality and diversity statement<sup>2</sup>

- 1.4. The Bar Tribunals and Adjudication Service is committed to eliminating unlawful discrimination and encouraging diversity and inclusion. BTAS will monitor and publish equality and diversity data in line with any similar requirement placed upon the BSB by the Legal Services Board. Similarly, BTAS will monitor and publish equality and diversity data in relation to our disciplinary panel members, clerks and Inns' Conduct Committee (ICC)<sup>3</sup> lay members. BTAS opposes all forms of unlawful discrimination.

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<sup>1</sup>Including self-employed barristers, employed barristers, unregistered barristers and BSB authorised persons as per the BSB Handbook.

<sup>2</sup>For further detail about BTAS's commitment to equality and diversity please see BTAS's Equality and Diversity Policy.

<sup>3</sup>The Inns' Conduct Committee (ICC), a committee responsible for adjudicating on any misconduct issues arising from applications for admission to an Inn of Court or misconduct matters relating to student members of an Inn.

- 1.5. BTAS is committed to playing its part in furthering the regulatory objectives set out in the Legal Services Act 2007 to encourage an independent, strong, diverse and effective legal profession. It is also committed to meeting in full the Equality Duty (section 149 of the Equality Act 2010), as well as complying with the requirements of the Equality Act 2010 (Specific Duties) Regulations 2011.
- 1.6. BTAS will therefore have due regard to the need to take steps to meet the aims of Equality Duty, namely to:
  - eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited by the Act;
  - advance equality of opportunity between people who share a protected characteristic and people who do not share it; and,
  - foster good relations between people who share a protected characteristic and people who do not share it.
- 1.7. The BSB is equally committed to the meaningful compliance with equalities legislation in every aspect of its work, to demonstrate best equalities and anti-discrimination practice. More information on the BSB's approach to equality and diversity can be found at <https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/>.
- 1.8. Everyone who is acting for or on behalf of BTAS including panel members is expected to adhere to the spirit and letter of the Equality Act 2010. Panel members should bear this commitment in mind when considering sentencing.
- 1.9. This document has been equality analysed and a copy of the analysis can be found on BTAS's website.

## **Section 2 - Aims and objectives of the Bar's enforcement system**

- 2.1 The Bar Tribunals and Adjudication Service ('BTAS') is responsible for recruiting; appointing and administering disciplinary panels, including Disciplinary Tribunals which consider allegations of professional misconduct against barristers. The Bar Standards Board investigates and prosecutes disciplinary offences and BTAS's involvement ensures the independence of the adjudicatory panels.
- 2.2 BTAS is committed to the statement of purpose set out in the COIC disciplinary tribunals and hearings review group final report<sup>4</sup> to:
- provide a hearings service that is efficient, effective, timely, professional and transparent and one that uses up to date practises and approaches.
  - facilitate high quality decision-making in the public interest; and,
  - be independent, providing clear separation of the adjudicatory function from the BSB, as the prosecuting body for the Bar.

### **Background to the Bar's enforcement system**

- 2.3 The BSB came into existence on 1 January 2006 following a decision to separate the regulation of the Bar from the representative functions of the Bar Council. The Bar Council has delegated to the BSB all of its regulatory functions including investigation of complaints and the subsequent prosecution of barristers for breaches of the Handbook. However, the final decision as to whether a barrister has breached the Handbook is a matter for independent panels appointed by the Bar Tribunals and Adjudication Service (BTAS). In limited circumstances, the Professional Conduct Committee of the BSB can determine disciplinary charges for professional misconduct with the agreement of the barrister.
- 2.4 The operation of the Bar's enforcement system is governed by the BSB's high level strategic objectives as well as the specific aims and objectives of the enforcement system. Therefore, all decisions regarding the action to be taken in relation to individual complaints are taken by the BSB in the context of the objectives and aims set out below.
- 2.5 The BSB's aims applicable to the enforcement system are:
- To act in the public interest;
  - To protect the public and other consumers of legal services;
  - To maintain the high standards of the Bar;
  - To promote confidence in the complaints and disciplinary process, and,
  - To make sure that complaints about conduct are dealt with fairly, consistently and with reasonable speed.

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<sup>4</sup> In late 2011, COIC commissioned a Review Group, chaired by Desmond Browne QC, to examine its disciplinary procedures. The Review Group published their report ("the Browne Report") to COIC on 18 July 2012; the full report is available at: <http://www.graysinn.info/index.php/disciplinary-tribunals-review-coic>. The statement of purpose can be found at annex 15, paragraph 2 in the summary of recommendations.



2.6 In taking these aims forward, the BSB is committed to ensuring that the Bar's enforcement system operates according to the following objectives:

- To deal with complaints made against barristers promptly, thoroughly and fairly;
- To ensure appropriate action is taken against barristers who breach the BSB Handbook; and,
- To be open, fair, transparent and accessible.

2.7 Most decisions regarding the sanctions to impose in relation to professional misconduct are taken by the independent panels appointed by BTAS who are not directly subject to the aims and objectives of the BSB. Nevertheless, BTAS fully supports the BSB's aims and objectives, and urges disciplinary panel members to take them into account when dealing with disciplinary cases.

## **Section 3 - Purpose and principles of sentencing**

- 3.1 The purposes of applying sanctions for professional misconduct are:
- a) To protect the public and consumers of legal services;
  - b) To maintain high standards of behaviour and performance at the Bar;
  - c) To promote public and professional confidence in the complaints and disciplinary process.
- 3.2 The three purposes of applying sanctions (outlined above) have equal weighting; in fulfilling the purposes it is important to avoid the recurrence of behaviour by the individual as well as provide an example to other barristers in order to maintain public confidence in the profession. Decision makers must take all of these factors into account when determining the appropriate sanction to be imposed in an individual case. Decision makers should also bear in mind that sanctions are preventative and not intended to be punitive in nature but nevertheless may have that effect.

### **Deterrence and upholding standards**

- 3.3 In some cases, the sanction imposed may be necessary to act as a deterrent to other members of the profession. Therefore, when considering a sentence, it may be necessary not only to deter the individual barrister from repeating the behaviour, but also to send a signal to the profession and the public that the particular behaviour will not be tolerated. A deterrent sentence would be most applicable where there is evidence that the behaviour in question seems to be prevalent in relation to numbers of barristers within the profession.

### **Proportionality**

- 3.4 In deciding what sanctions (if any) to impose, the decision maker should ensure that the sanctions are proportionate, weighing the interests of the public with those of the practitioner. Proportionality is not a static concept and will vary according to the nature of the breach and the background of the individual barrister. For example, a first time breach of the practising requirements would rarely, if ever, warrant a suspension or disbarment but a similar breach, having been committed many times without remorse or any attempt to remedy the situation, might warrant consideration of suspension or disbarment. Repeated breaches of relatively minor provisions of the Handbook may indicate a significant lack of organisation, integrity, or insight on the part of the barrister which could represent a risk to the public and undermine confidence in the profession. Sentences should be reflective of the seriousness and circumstances of the conduct e.g. where the incentive for breaching the Handbook was for financial gain the sentence should reflect that. The sanction imposed should be no more onerous than the circumstances require, the lowest proportionate punishment should be imposed in any particular case. The decision maker should consider the totality of the breaches when considering proportionality.

## Determining Sentence

3.5 When a panel has found a charge proven or when the defendant admits the misconduct charged, the panel must then consider sentence. The panel then hears submissions on sentence before retiring to determine the appropriate sanction for the breach. Below is a step by step guide to determining sentence:

### Step 1

Consider the following checklist of relevant factors:

- Individual facts of the case - breaches of the Handbook will differ significantly. The panel is entitled to form a view based on the individual facts of each case.
- Assessing the seriousness of the breach - How serious is the breach? Where does the breach sit on the scale of seriousness?
- Culpability - how culpable is the defendant for the breach? Did the breach arise from planned or intentional actions?
- Actual harm or the risk of harm - what was the outcome of the breach? Did the breach involve actual harm or the risk of harm? Does the breach impact the general reputation of the bar? Is there harm to the public as a result of the breach?
- Aggravating & mitigating factors - see Annex 1 for a list of potential aggravating and mitigating factors, please note this list is not exhaustive.
- Personal circumstances of the individual barrister
- Previous disciplinary/professional record - is the barrister of previous good professional standing (see paragraphs 7.1 & 7.2)
- Reflect on any equality and diversity factors within the case and the panel's commitment to the Equality Act 2010 (see paragraph 1.6 above).

Step 2 – Look up the offence/breach within the Guidance (Part 2).

Step 3 – Decide whether to reduce, stay at or increase the sentence in the circumstances of the case.

Step 4 – Decide whether a concurrent or consecutive sentence would be appropriate.

Step 5 – Give your reasons

## Giving reasons

- 3.6 You must give reasons for the sentence imposed. Reasons need not be unduly extensive but must clearly inform the parties why you have reached the decision you have.
- 3.7 The following points may prove useful when drafting reasons for sentence:
- Summarise submissions and any evidence offered on sentencing and the Panel's position on them.
  - Explain the Panel's decision and the reasons for that decision with reference to this guidance. .
  - Include any aggravating or mitigating factors present within the case that were taken into account.
  - If conditions or suspension have been imposed on the barrister, explain the reason(s) for their duration.
  - Explain any significant departure from the Sentencing Guidance

## What happens next<sup>5</sup>?

- 3.8 Once the panel have completed, signed and dated the finding and sentence sheet, a Chairman's report will be produced outlining the finding/sentence and reasons for that finding /sentence, including any costs or fines and the date by which they should be paid.
- 3.9 All findings of professional misconduct will be published on the BTAS<sup>6</sup> website within seven days of the Tribunal's finding, regardless of whether the sentence has been pronounced or an appeal submitted. All findings of professional misconduct currently remain on the barrister's record indefinitely<sup>7</sup>.
- 3.10 The defendant has 21 days in which to submit a notice of appeal against finding or sentence.
- 3.11 If the defendant has not appealed the finding/sentence or such an appeal by the defendant has been dismissed, the defendant's Inn of Court will pronounce the sentence and a final report will be issued.

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<sup>5</sup> For an in depth explanation of the procedure of Disciplinary Tribunals see BTAS's Information and Guidance pack

<sup>6</sup> See BTAS's Publication Policy for further details.

<sup>7</sup> The BSB is in the process of revising its approach to disclosure and publication of findings and this is liable to change in 2014.

## Section 4 - Breaches of the Handbook and professional misconduct

### Introduction

- 4.1 The behaviour of barristers both in their professional lives and, to a limited extent their personal lives, is governed by the Handbook, particularly the Code of Conduct which is set out in Part 2 of the Handbook. The BSB's Professional Conduct Committee ('PCC') is responsible for considering complaints about breaches of the Handbook. It has the power to refer complaints for disciplinary action, to determine some charges of professional misconduct with the barristers consent<sup>8</sup>, impose administrative sanctions, and decide to take no further action or dismiss a complaint. The full powers of the PCC are set out in Part 5 of the Handbook.
- 4.2 The structure of the Handbook has changed and it is now based on Core Duties supplemented by Conduct Rules which are accompanied by Guidance. Parts 1 -3 of the Handbook list at the beginning the Outcomes the Rules in that section are designed to achieve. The Core Duties and the Rules are mandatory whereas the Guidance is not. Failure to comply with the guidance is not in itself a breach of the Handbook but the barrister will need to show how their obligations have been met if they depart from the Guidance. The Outcomes are also not mandatory but will be taken into account by the BSB when considering how to respond to alleged breaches.
- 4.3 Professional misconduct is now defined in the Handbook as *"a breach of [the] Handbook by a BSB regulated person which is not appropriate for disposal by way of no further action or the imposition of administrative sanctions"*. All breaches of the Handbook (i.e. breaches of the Core Duties and the Conduct Rules) can now potentially be dealt with by the imposition of an administrative sanction by the BSB or no further action and, by definition, where such disposals are made; the breaches do not constitute professional misconduct. Complaints will only be referred to a Tribunal by the PCC where it does not consider administrative sanctions or no further action is appropriate. The only exception is where the complaint involves a conviction for dishonesty or deception. In such cases the Complaints Regulations require that the complaint must be referred to a Disciplinary Tribunal.

### Powers to address breaches of the Handbook

- 4.4 Where the PCC has decided that administrative sanctions or no further action are not an appropriate means to address a complaint, it will only refer a matter to a Disciplinary Tribunal where it considers there is a realistic prospect of a finding of professional misconduct being made and it is in the public interest, having regard to the regulatory objectives, for a referral to be made.
- 4.5 When considering a referral to a Disciplinary Tribunal, the PCC also has the option, in appropriate cases, to direct instead that the complaint be subject to the Determination by Consent procedure (DBC). This procedure allows the PCC to determine charges of professional misconduct on the papers but only with the consent of the barrister. The PCC powers of sentencing under the DBC procedure are limited to reprimands, advice as

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<sup>8</sup> The Determination by Consent Procedure

to future conduct, orders to complete continuing professional development and fines; it cannot impose a suspension or disbar a barrister.

## **Section 5 - Available sanctions**

- 5.1 This section of the guidance sets out the various sanctions available for breaches of the Handbook. The available sanctions are based on the nature and seriousness of the professional misconduct arising from a breach of the Handbook and vary according to the type of breach. There is nothing to prevent a sentence including more than one sanction and in many cases a combination of sanctions will be appropriate (e.g. a fine, a suspension and advice as to future conduct). A general overview of how to approach each sanction is provided in Section 6. Section 7 includes other important issues to consider.

NOTE: In reaching its finding on a charge of professional misconduct, a Tribunal could determine that the charge has not been proved to the criminal standard of standard of proof, or the breach is not so serious as to amount to professional misconduct, but nevertheless consider that it would have been appropriate for the imposition of an administrative sanction applying the lower standard of proof. However, a Tribunal has no current powers<sup>9</sup> to impose administrative sanctions itself and in these circumstances the charge would have to be dismissed.

### **Administrative warnings and fines (which are NOT available to Disciplinary Tribunals)**

- 5.2 The PCC may impose an administrative sanction on a BSB regulated person where:
- the PCC is satisfied on the balance of probabilities that the breach has occurred; and
  - the PCC considers that to impose an administrative sanction is a proportionate and sufficient in the public interest.
- 5.3 The PCC may impose the following administrative sanctions:
- A warning
  - A fixed penalty fine; and
  - A fine of up to £1,000.

### **Professional misconduct**

- 5.4 The sanctions available for professional misconduct are:
- Disbarment (only available to a five-person Disciplinary Tribunal);
  - Suspension from practice (a three-person panel can only impose a suspension of up to twelve months for acts or omissions that took place after 6<sup>th</sup> January 2014. For acts omissions that took place before 6<sup>th</sup> January

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<sup>9</sup> The BSB in conjunction with BTAS is considering amending the Disciplinary Tribunal Regulations to give Tribunals the power to impose administrative sanctions – such powers, if agreed, are unlikely to come into force until towards the end of 2014.

2014 a three person panel may suspend up to 3 months; there is no limit on the period of suspension a five-person panel can impose, although more than 3 years is thought to be tantamount to disbarment);

- Prohibition (temporary or permanent) from accepting public access instructions;
- Exclusion from providing representation funded by the Legal Aid Agency;
- A fine of up to £50,000 (for acts or omissions that took place on or after 6<sup>th</sup> January 2014) A fine of up to £15,000 (for acts or omissions that took place on or after 31 March 2009) or up to £5,000 (for acts or omissions that took place prior to 31 March 2009);
- Additional CPD requirements, including in specific areas of law;
- Reprimand;
- Advice as to future conduct.

5.4. Disciplinary Tribunals have the power to award costs to either party. A Costs Order is not a sanction and therefore not covered in this guidance. The sentencing decision should precede, and is independent of, any consideration of an application in respect of costs. However, in the case *Matthews v Solicitors Regulation Authority* [2013]<sup>10</sup> the High Court held that means should be taken into account when tribunals consider costs and fines combined.

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<sup>10</sup> EWHC 1525 (Admin)



## Section 6 - General approach to individual charges and sanctions

- 6.1 This section gives guidance on the approach to take in relation to the application of individual sanctions. Decision makers should always take into account that a combination of sanctions may be appropriate in relation to a single breach of the Handbook. Also, it is important that the terms of any sanction are clear and therefore guidance is provided in Annex 2 as to the suggested wording to be used on findings and sentence sheets.

### Dishonesty

- 6.2 Any dishonesty on the part of a member of the Bar, in whatever circumstances it may occur, is a matter of great seriousness. It damages the reputation of the profession as a whole, quite apart from its effect on the reputation of the individual barrister. Dishonesty is incompatible with the duties placed on barristers to safeguard the interests of their clients and their overriding duty to the court. Public interest requires, and the general public expects, that members of the Bar are completely honest and are of the highest integrity. Therefore, in cases where it has been proved that a barrister has been dishonest, even where no criminal offence has been committed, disbarment will almost always have to be considered (see Part II section B - Acts of dishonesty) For guidance on dealing with situations where the barrister has been, or may have been, dishonest during the course of proceedings, see paragraph 7.5.

### Disbarment (Disciplinary Tribunal only)

- 6.3 The sanction of disbarment is only available to five-person Disciplinary Tribunals. Disbarment is the most serious sanction that can be imposed and should be reserved for cases where the need to protect the public or the need to maintain confidence in the profession is such that the barrister should be removed from the profession. It is not possible to provide a definitive list of the circumstances in which disbarment will be appropriate as it will depend on the facts of the case and the individual background of the barrister. However, as Sir Thomas Bingham M.R. stated in Bolton v The Law Society [1994] 2 All ER 486:

*“To maintain [the] reputation and sustain public confidence in the profession, it is often necessary that those guilty of serious lapses are not only expelled but denied readmission .... the reputation of the profession is more important than the fortunes of any individual barrister.”*

Therefore, disbarment may be appropriate where one or more of the following factors apply:

- a) a serious and/or persistent departure or departures from professional standards;
- b) serious harm has been caused to either the administration of justice, the reputation of the Bar or any person including the individual complainant and there is a continuing risk to the public or the reputation of the profession if the barrister is permitted to continue in practice;
- c) the barrister has committed a serious criminal offence involving dishonesty, violence or sexual offences;
- d) the barrister has acted dishonestly regardless of whether it was in connection with a criminal offence (see 6.2 below)
- e) the barrister has shown a persistent lack of insight into the seriousness of his/her actions or the consequences for his/her practice, the administration of justice or the reputation of the Bar.

6.4 In the case of *SRA v Sharma*<sup>11</sup> Mr Justice Coulson outlined the following points in relation to the appropriate sanction for dishonesty:

- a) Save in exceptional circumstances, a finding of dishonesty will lead to the solicitor being struck off the roll, see *Bolton*<sup>12</sup> and *Salisbury*<sup>13</sup>. That is the normal and necessary penalty in cases of dishonesty, see *Bultitude*<sup>14</sup>.
- b) There will be a small residual category where striking off will be a disproportionate sentence in all the circumstances, see *Salisbury*.
- c) In deciding whether or not a particular case falls into that category, relevant factors will include the nature, scope and extent of the dishonesty itself; whether it was momentary or over a lengthy period of time, such as *Bultitude*; whether it was a benefit to the Solicitor, and whether it had an adverse effect on others.

### **Suspension from practice (Disciplinary Tribunal only)**

6.5 This sanction is only available to Disciplinary Tribunals. Suspension from practice is a serious matter and should be reserved for cases where the barrister represents a risk to the public which requires that he/she be unable to practise for a period of time and/or the behaviour is so serious as to undermine public confidence in the profession and therefore a signal needs to be sent to the barrister, the profession and the public that the behaviour in question is unacceptable.

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<sup>11</sup> *Solicitors Regulation Authority v Sharma* [2010] EWHC 2022 (Admin)

<sup>12</sup> *Bolton v the Law Society* [1994] 1 WLR 512

<sup>13</sup> *The Law Society v Brendan John Salisbury* [2008] EWCA Civ 1285

<sup>14</sup> *Bultitude v the Law Society* [2004] EWCA civ 1853

6.6 Relevant factors to take into account are not limited to but include:

- a) actual harm or the risk of harm to the public;
- b) the seriousness of any breach of the Handbook;
- c) abuse of position or abuse of trust;
- d) the barrister has shown a lack of insight into and understanding of his/her actions and their consequences;
- e) the barrister has shown a lack of integrity that is not so serious as to warrant disbarment; and
- f) the behaviour is likely to be repeated or has been repeated since the initial incident.

6.7 **Period of suspension:** it is usual to impose a suspension for a specified period of time. The Disciplinary Tribunal Regulations do not stipulate an upper limit to the period of suspension a five person panel can impose. However, very long periods of suspension are tantamount to disbarment and therefore where a suspension of more than three years is considered appropriate, the Disciplinary Tribunal should give serious consideration to disbarment unless the circumstances are exceptional. The Visitors to the Inns of Court stated in the case of Durand (1961) that *“three years ... must ... be the maximum sentence of suspension which in practice can properly be given”*. Any period of suspension will inevitably have a serious negative impact on the barrister’s level of knowledge and up to date experience. Therefore, the longer the period of suspension the more difficult it will be for the barrister to return to practice as an effective advocate. If exceptionally a period of suspension longer than three years is considered appropriate, it should be combined with conditions regarding retraining so as to ensure that before the barrister returns to practice appropriate refresher training has been undertaken.

6.8 **Suspension subject to conditions:** while a specific period of suspension is the norm it is also acceptable to make the period of suspension unless or until the occurrence of a specified event or completion of a specified activity. For example, a barrister could be suspended pending completion of practising requirements, a specified training course or other similar activity. In these circumstances, the suspension would cease when acceptable evidence is provided to the BSB of the relevant activity being completed. The Tribunal should ensure that the terms of any order of suspension from practice are clear particularly where conditions on the suspension are imposed. Barristers should be in no doubt about what actions they need to take to bring a suspension to an end and what evidence they need to present to allow the suspension to be lifted.

## Prohibition from accepting public access instructions (Disciplinary Tribunal only)

- 6.9 This sanction is only available to Disciplinary Tribunals. It is generally applicable in cases where the barrister was acting under formal Public Access instructions; however, there may be circumstances where a barrister's treatment of a client, even when instructed by a solicitor, indicates that the barrister should not be allowed to accept Public Access instructions. It is a requirement that any barrister providing this type of access must have completed a Public Access training course and must also provide the client, in advance, with prescribed information about the terms and extent of the work that can be carried out. Clients who instruct barristers by this means are exposed to greater risk than those who use a solicitor and therefore panels need to look carefully at whether the barrister's behaviour represents a risk to the public which requires some level of restriction on his/her ability to continue accepting public access instructions.
- 6.10 In general, such a sanction would be appropriate where the barrister's behaviour directly relates to, or arises from, the circumstances of the public access instructions. For example, the barrister has either failed completely, or in part, to comply with the prescribed terms for Public Access or has in some way exploited the Public Access relationship to the detriment of the client. In particular, panels should take into account the manner in which the barrister has handled the issue of fees including both the way in which the fee level has been set and the arrangements for payment. A time-limited prohibition would be appropriate where the barrister's behaviour indicates a level of risk that could be addressed via a period of contemplation and a review of his/her practices which would mitigate the potential risk to clients (this may apply to situations where the barrister has failed during the proceedings to recognise the seriousness of the effect of his or her conduct). A permanent prohibition would be appropriate where there is evidence that the barrister has intentionally exploited the relationship, has persistently provided a poor service to clients, has charged unreasonable rates, or has taken on instructions with no chance of success.

## Fines (Disciplinary Tribunal or Professional Conduct Committee)

- 6.11 The imposition of a fine is a sanction that can easily be combined with other sanctions and decision makers should always consider whether this would be appropriate. The maximum limit of a fine is £50,000 but fines at the upper end of the scale should be reserved for serious breaches of the Handbook where the barrister does not represent an on-going risk to the public but appears to have profited substantially from the breach. Fines, on the whole, are a "deterrent" sanction and their main purpose is to mark the severity of the breach and prevent its re-occurrence.
- 6.12 **The means of the barrister:** The decision maker should first decide if a fine is the appropriate sanction, then consider the appropriate level of fine based on the breach, and finally look at adjusting the fine level in order to take into account a barrister's financial situation. A fine should not be increased merely because a barrister can afford it but it is reasonable to reduce the level of fine to take into account the barrister's financial circumstances or increase it where there is evidence that indicates that the barrister has profited from the breach. All defendants will be invited by BTAS to bring evidence of financial means to the Tribunal in readiness for sentencing (in the event the charge is proven and is subject to a fine).

- 6.13 **Time to pay and instalments:** When a decision maker orders that a fine should be paid, the sum will technically become due for payment immediately after the appeal period has expired or, in the case of Determination by Consent, when the finding is accepted by the barrister. It is, however, good practice for decision makers to specify when the fine is due in their decision (see paragraph A2.8 for wording of the sentence).
- 6.14 Decision makers should bear in mind that it is open to a barrister to negotiate a payment plan with the BSB following a Tribunal. In most cases, the issue of payment by instalments is better left to the BSB to negotiate with the barrister after the hearing as the BSB will be able to make more detailed enquiries regarding the barrister's financial situation and will have time to negotiate a mutually acceptable plan. Where decision makers consider that it is appropriate to order an instalment plan they should take into account the cost to the BSB of administering the plan. It is helpful to limit any instalment plan to a maximum period of twelve months because small instalments over a lengthy period of time can be expensive to administer and involve costs to the profession far in excess of the original fine. Additionally, lengthy instalment plans can lead to substantial delay in it becoming apparent that action needs to be taken for non-compliance.

### **Continuing Professional Development**

- 6.15 The purpose of ordering that a barrister complete additional Continuing Professional Development (CPD) hours is to ensure that barristers are sufficiently trained and knowledgeable in areas where the breach of the Handbook may demonstrate that they are lacking in the required expertise. It is a rehabilitative sanction and can often be appropriately combined with other sanctions. Decision makers should avoid making a general order to complete further hours but instead specify the area or subject matter in which additional training is required. Further, the order should stipulate a specific date by which the hours should be completed and the completion reported to the BSB. Additional CPD hours should not be imposed solely as a punishment but should serve a useful purpose that will help to prevent the breach of the Handbook being repeated in the future.
- 6.16 Where a barrister has failed to complete the required number of CPD hours for a particular year or years, then it is important that the decision maker orders that the outstanding hours be completed within a specified period. It may also be appropriate to order that failure to complete the outstanding hours within the specified period will result in an automatic suspension from practice for a specified period.

### **Reprimands (Disciplinary Tribunal or Professional Conduct Committee)**

- 6.17 A reprimand is appropriate in cases where the breach of the Handbook is at the lower end of the professional misconduct scale and there is no continuing risk to the public but the decision maker wishes to indicate formally that the behaviour is unacceptable and should not occur again. A reprimand is a "backwards looking" sanction and represents censure of previous behaviour. It is therefore appropriate where the behaviour is unlikely to be repeated in the future. The sanction should include an order as to how the reprimand should be made. In most cases, it will be made at the Tribunal and probably form part of the general sentencing decision. However, Tribunals may consider that it is appropriate to order that the reprimand be made in the form of a written document. Reprimands can be given by the decision maker at the hearing or in the report, or by ordering the barrister to

attend on a nominated person to be reprimanded. Relevant positive factors that would indicate whether a reprimand is appropriate include, but are not limited to, the following:

- a) no evidence of loss to any person including the individual complainant;
- b) appreciation and understanding on behalf of the barrister of the failings;
- c) the behaviour was isolated;
- d) the behaviour was not intentional (not applicable in cases of discrimination);
- e) genuine expressions of regret/remorse; and
- f) previous good history.

#### **Advice as to future conduct (Disciplinary Tribunal or Professional Conduct Committee)**

- 5.5 Advice as to future conduct will be appropriate in cases where the professional misconduct has not had any lasting consequences for the complainant but the decision maker considers it would be helpful if the barrister is given some guidance as to how to behave in the future. Advice is a “forward looking” sanction which should be used where it is thought that the barrister needs to change his/her behaviour. Advice as to future conduct would be particularly appropriate where a barrister appears to have a lack of appreciation or understanding of the nature of the conduct and the reasons why disciplinary action was considered necessary. The advice can be given by the decision maker at the hearing or in the report, or by ordering the barrister to attend on a nominated person to be given advice. Such sanctions are particularly appropriate where the barrister is inexperienced in the profession and could benefit from guidance rather than censure.

#### **No further action (Disciplinary Tribunal<sup>15</sup> or Professional Conduct Committee)**

- 6.18 The option to take no further action in cases where a breach of the Handbook has been proved is open to all decision makers. It is only appropriate where the barrister’s behaviour presents no risk to the public and there are no on-going or lasting effects in relation to the behaviour. Taking no further action would be appropriate in cases where the barrister has fully acknowledged the breach; the effects of bringing disciplinary action have already had a significant impact on the barrister’s reputation or practice and where no purpose would be served by ordering other sanctions.

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<sup>15</sup> Please note this sanction is only available to Disciplinary Tribunals where there has been a finding of professional misconduct.

## **Section 7 - Other important issues to consider**

### **Character evidence**

- 7.1 Barristers are entitled, as part of their mitigation, to put forward character references/witnesses to support their submissions. However, while such evidence can be relevant to the sanctions imposed, it should be treated with caution and panels should be wary of becoming distracted from the main issues by an abundance of character evidence. The fact that a barrister was previously of “good character” and has a good reputation, can only go so far in mitigating his/her behaviour and the more serious the breach, the less weight should be attached to character evidence. The emphasis should be on the nature of the breach and the circumstances in which the breach occurred.
- 7.2 If the character evidence indicates that the person providing it knows the barrister well and has a clear basis for assessing that the behaviour in question was a genuine anomaly/one-off then some weight should be given to it. However, if the character evidence indicates that the person supplying it can only have limited direct knowledge of the barrister, then it should be treated with caution and it may be that little or no weight can be given to it. The general approach should be that character evidence is treated with caution and should not unduly affect the sanctions imposed: a person of good character and impeccable reputation can still commit breaches of the Handbook that, by virtue of the finding of professional misconduct, are serious and warrant the same sanctions as any other barrister. Authors of testimonials will be expected to have been informed of the charges. The better and longer the author has known the barrister, the more weight the testimonial is likely to carry.

### **Fitness to practise**

- 7.3 Within the BSB’s regulatory arrangements, the term “fitness to practise” is only used when considering whether a barrister is unfit to practise due to health reasons (including addiction). The Fitness to Practise Rules are contained at Section E Part 5 of the BSB Handbook. Fitness to Practise proceedings are not disciplinary in nature and are run entirely separately from any disciplinary proceedings. The primary purpose is to ensure the protection of the public by considering whether a barrister is medically fit to practise and if not, imposing any necessary restrictions.
- 7.4 Some disciplinary cases may give rise to concern about a barrister’s fitness to practise as a result of material submitted as part of the barrister’s defence and/or mitigation or as a result of their behaviour during the proceedings. This will often include information relating to, or indicating, an on-going or recurring addiction or mental health problem. If a decision maker has information before it that gives rise to concern about a barrister’s fitness to practise, it should:
- a) Proceed with making a decision on the case before it based on all the facts and evidence;
  - b) State in the decision sheet (along with the decision on the case) that there is concern about the barrister’s fitness to practise and give reasons for such concern (including reference to relevant documents); and



- c) Formally refer their concerns to the Professional Conduct Committee of the BSB, who will consider the evidence and, if necessary, invoke the relevant procedure under the Fitness to Practise Rules.

### **Dishonesty during the course of disciplinary proceedings**

- 7.5 Where the barrister is not facing a specific charge alleging dishonest conduct, but the panel nonetheless decides that he/she has engaged in dishonest behaviour during the course of the disciplinary proceedings, the panel may refer the matter to the Professional Conduct Committee of the BSB to consider raising a fresh complaint. The panel must sentence the barrister only in relation to the charges currently before it; however, it should ensure that it details the circumstances and basis of any concerns of dishonest behaviour by the barrister as this will be relied upon in any future disciplinary proceedings.

### **Multiple charges**

- 7.6 Panels should not impose one sentence for the most serious sanction because this can cause problems if the barrister decides to appeal. If a decision is taken on appeal to overturn the finding or sentence on the most serious charge but not any of the other charges, it can be difficult to establish what sanction should apply to those charges that remain or determine how seriously the original Tribunal viewed each of the remaining charges. To avoid this situation Panels should impose a separate sentence for each charge.

### **Concurrent and consecutive/cumulative sanctions save in respect of fines (which by definition are cumulative)**

- 7.7 Where there are multiple proved charges that warrant a sanction on each charge, the decision maker will have to decide whether the sanction on each charge should run concurrently or consecutively: imposing a concurrent sentence means that the sanctions will run alongside each other, whereas imposing a consecutive sentence means that the sanctions will run after each other. Decision makers should be cautious about imposing consecutive sanctions unless they are sure that the totality of the consecutive sanctions is warranted based on the cumulative seriousness of the charges. See paragraph 6.7 when considering consecutive suspensions.

### **Deferred sentences**

- 7.8 The Professional Conduct Committee and Disciplinary Tribunals have the power to defer sentences. This means that a sanction can be imposed but be subject to deferred implementation based on whether a further breach of the Handbook occurs within a stipulated period. The stipulated period should be between six months and two years. Further findings of professional misconduct within the stipulated period will leave the barrister open to activation of the original deferred sentence as well as sanctions for the new breach.

- 7.9 A deferred sentence can only be imposed where the sanction is a fine or a suspension. Therefore, it is appropriate in circumstances where the behaviour is relatively serious (and therefore warrants a fine or suspension), the behaviour is unlikely to be repeated and there is no immediate need to protect the public, but the barrister needs to be encouraged to change the way in which he/she behaves. Lengthy periods of suspended sanctions should be reserved for cases where the barrister may need to have a control mechanism in place to temper his/her behaviour.

### **Suspension of practising certificate pending appeal**

- 7.10 The Disciplinary Tribunal Regulations give Disciplinary Tribunals the power to order that the BSB suspend a barrister's practising certificate pending the outcome of an appeal where the sanction imposed is one of more than one year's suspension or disbarment. This power is different from imposing a sanction of suspension or disbarment in that suspension of a practising certificate only affects the barrister's ability to provide legal services as a barrister. Only the Inns of Court have the ability to suspend barristers formally or disbar them and in doing so also remove other privileges attached to call to the Bar including membership and use of the Inn's facilities.
- 7.11 The need for a provision that allows the BSB to suspend the right to have a practising certificate arises because sanctions imposed by Tribunals will not be implemented until after the outcome of any appeal is known. Clearly where a Tribunal considers that the barrister represents an immediate risk to the public which warrants a lengthy suspension or disbarment, it would be wrong to allow the barrister to continue practising merely because an appeal has been submitted. The Regulations stipulate that a Tribunal should order that the barrister's practising certificate be suspended pending appeal unless there is good reason not to do so.

### **Reporting the barrister's unsuitability as a pupil supervisor**

- 7.12 In any case where a barrister is a pupil supervisor and the breach of the Handbook indicates that the barrister may no longer be suitable to continue in that role, the decision maker should order that a report be made to the barrister's Inn so that consideration can be given to removing the barrister from the list of pupil supervisors. Decision makers do not have the power to order that a barrister's status as a pupil supervisor be removed: this is a matter solely for the Inns of Court but it is important that a report is made to the relevant Inn where the circumstances warrant it.

## Part II - Guidance on breaches of the Handbook

1. The structure of the Handbook regulating barristers has been transformed in its entirety. The new BSB *Handbook* is based on outcomes focused and risk based approach to regulation, the Code of Conduct contained within Part 2 of the *Handbook* includes the ten Core duties applicable to all barristers:

**Core Duty 1:** You must observe your duty to the court and the administration of justice.

**Core Duty 2:** You must act in the best interests of each client.

**Core Duty 3:** You must act with honesty and integrity.

**Core Duty 4:** You must maintain your independence.

**Core Duty 5:** You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession.

**Core Duty 6:** You must keep the affairs of each client confidential.

**Core Duty 7:** You must provide a competent standard of work and service to each client.

**Core Duty 8:** You must not discriminate unlawfully against any person.

**Core Duty 9:** You must be open and co-operative with your regulators.

**Core Duty 10:** You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way to achieve compliance with your legal and regulatory obligations.

2. These Core Duties underpin the Handbook and the BSB's entire regulatory framework. The Core Duties are supplemented by rules in Part 2 of the *Handbook*, both the Core Duties and the rules are mandatory. The Handbook also contains details of outcomes which compliance with the Core Duties and rules is designed to achieve. The outcomes provide guidance to the PCC when considering if a breach of the Core Duties and/or rules has occurred but they do not alone amount to a breach of the Handbook. Charges for professional misconduct therefore may be brought under the Core Duties and/or the rules.
3. This section provides guidance in relation to the starting points for sanctions in respect of the most common breaches of the Handbook. For ease of reference the most common breaches have been set out in the same order as can be found in the Handbook.
4. The guidance is not intended to represent a tariff for the breaches and decision makers must decide each case on its own facts. The suggested sanctions do not necessarily represent the most likely sanction to be given and the guidance merely indicates where a decision maker might start before considering all the relevant factors.

5. It is important that consistency and proportionality in sentencing are maintained and therefore where a decision maker imposes a lesser or higher sanction than suggested by this guidance, it is important that full reasons are given as to why the sanction is considered appropriate. This will not only give the barrister and the complainant a clear indication of the reasons for a lenient or harsh sentence but will provide justification for the decision should the case go to appeal. It is particularly important for decision makers to give full written reasons for the sentencing should they impose a deferred sanction, as the decision to activate the sanction may be taken by a different body and that body will require detailed reasons in order to make a fair decision.
6. In assessing the appropriate sanction for a professional misconduct, decision makers must consider any aggravating or mitigating factors that may cause the sanction to be increased or decreased. Details of aggravating and mitigating factors applicable to all breaches are set out in Annex 1. In addition to this, the individual tables relating to common breaches provide examples of aggravating and mitigating factors applicable to each breach. The factors listed are examples and the lists are not intended to be exhaustive.
7. It must be made clear that the guidance in relation to the common breaches is not intended to detract from decision maker's complete discretion to impose any sanction which is appropriate to an individual case: the final decision is a matter for decision makers alone.
8. In relation to fines and suspensions, rather than including specific amounts, the following table shows the three bands for fines and suspensions which are referred to in the rest of Part 2.

<b>Fines</b>	<b>Suspensions</b>
Low level = up to £1,000	Short = up to 3 months
Medium level = over £1,000 and up to £3,000	Medium = over 3 months and up to 6 months
High level = over £3,000 and up to £50,000	Long = over 6 months and up to three years

## Section A - The barrister and the court

### A.1 Misleading the Court

Description	
<p>Barristers are under a duty not to mislead the Court and doing so is usually considered to be a serious breach of the Handbook. This may be a breach of Core Duty 1; and is likely to be charged under Part 2 of the Handbook, section C1, rule C3 1 (2.C1.rC3): Every barrister owes a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligation that the barrister may have.</p> <p>As the circumstances surrounding this offence can vary widely, the appropriate sanction may range from giving advice to disbarment. One key element that could warrant more serious sanctions for this breach is whether or not the breach was committed intentionally.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. Recklessly misleading the Court	a. Reprimand and/or advice as to future conduct
b. Knowingly misleading the Court	b. A short suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"><li>• Personal or professional advantage gained (financial or otherwise)</li><li>• Negative impact on the complainant, client or other party</li><li>• Actions of the barrister adversely affected the course of the proceedings.</li></ul>	<ul style="list-style-type: none"><li>• Immediate apology</li><li>• Remedial action taken at an early point</li></ul>
NB - Acting on a client's instructions should not be considered as a mitigating factor as this runs contrary to a barrister's overriding duty to the Court.	

## A.2 Abusing the role of an advocate

Description	
<p>Barristers have a duty to ensure they do not make submissions, or draft documents, that are not properly arguable or supported by evidence. In particular, allegations of fraud should be supported by evidence regardless of the client's instructions. This may be a breach of Core Duty 1; these types of breaches are likely to be charged under Part 2 of the Handbook, section C.1, rule C6 (II. C1.rC6): a barrister has a duty not to mislead the court or <b>to permit the court to be misled</b>. However, depending on the nature of the circumstances, it may also breach Core Duty 3 and may be charged under Part 2, section C2, rule C9 (2.C2.rC9).</p> <p>As the circumstances surrounding these breaches can vary widely, the appropriate sanction may range from giving advice to disbarment. One key factor to take into account in determining the level of sanction is whether the breach was committed intentionally. Protection of the public is particularly relevant in relation to allegations of fraud; as such allegations are usually made against an individual and therefore may impact on the credibility and reputation of that person.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. Recklessly making unsupported submissions	a. Reprimand and/or advice as to future conduct
b. Recklessly making allegations of fraud	b. Medium level fine to short suspension
c. Making intentional unsupported submissions or allegations of fraud	c. Medium suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>Personal or professional advantage gained (financial or otherwise)</li> <li>Negative impact on the complainant, client or other party</li> <li>Dishonest motive</li> </ul>	<ul style="list-style-type: none"> <li>Immediate apology</li> <li>Remedial action taken at an early point</li> </ul>
<p>NB - Acting on a client's instructions should not be considered as a mitigating factor, as this runs contrary to a barrister's overriding duty to the Court.</p>	

## Section B - Behaving ethically

### B.1 Conviction for drink driving and related offences

Description	
<p>In general a criminal conviction is a serious matter for barristers given their role in the administration of justice and the need to maintain public confidence in the profession. A criminal conviction for drink driving is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part 2 of the Handbook, section C2, Guidance paragraph C25 (2.C2.gC25).</p> <p>It may also be accompanied by a separate charge for any other related convictions, such as dangerous driving.</p> <p>The sanction that is imposed should relate to the breach of the Handbook for a barrister having been convicted of a criminal offence. It is not intended to be a second form of punishment, or “double jeopardy”, for the actual criminal offence.</p> <p>The starting point for a first time conviction for drink driving should normally be a reprimand and a low level fine. Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted.</p> <p>It is important to note that an underlying addiction to alcohol is excluded from the Equality Act 2010 and is not considered a disability.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. A first time conviction for drink driving only	a. A reprimand and a low level fine
b. A conviction for drink driving that involves an element of dangerous driving	b. A medium level fine and/or a short suspension
c. A conviction for drink driving that is accompanied by further related convictions (e.g. leaving the scene, driving whilst disqualified)	c. A short to medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Injury to persons</li> <li>• High alcohol level</li> <li>• Lack of cooperation with the police</li> </ul>	<ul style="list-style-type: none"> <li>• Compelling emergency situation</li> </ul>



## B.2 Conviction for assault and violent acts

Description	
<p>A criminal conviction for violence is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part 2 of the Handbook, section C2, Guidance paragraph C25 (2.C2.gC25).</p> <p>The guidance below is also applicable to charges relating to domestic violence, which should not be treated any less seriously than other forms of violence.</p> <p>The sanction that is imposed should relate to the breach of the Handbook for a barrister having been convicted of a criminal offence. It is not intended to be a second form of punishment, or “double jeopardy”, for the actual criminal offence.</p> <p>The starting point for a conviction of minor assault should normally be a reprimand and a medium level fine, which may increase to a short suspension. Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. A conviction for low level assault	a. Reprimand and medium level fine to a short suspension
b. A conviction for an act of violence causing injury	b. A medium level suspension
c. A conviction for an act of serious violence	c. Disbarment (or in exceptional circumstances, a long suspension)
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Previous criminal convictions</li> <li>• Lack of cooperation with the police</li> <li>• Use of a weapon</li> <li>• Victim was particularly vulnerable</li> <li>• Intent to cause harm</li> <li>• Discriminatory motivation</li> <li>• Serious injury to the victim</li> </ul>	<ul style="list-style-type: none"> <li>• Isolated incident in difficult and unusual circumstances</li> <li>• Element of self-protection or protection of others/property</li> </ul>

### B.3 Conviction for drug possession or supply

Description	
<p>A criminal conviction for drug possession or supply is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part 2 of the Handbook, section C2, Guidance paragraph C25 (2.C2.gC25)</p> <p>The sanction that is imposed should represent the offence under the Handbook for a barrister having been convicted of a criminal offence. It is not intended to be a second form of punishment, or “double jeopardy”, for the actual criminal offence.</p> <p>The starting point for a conviction of drug possession (normally tried in the Magistrates’ Court) should be a reprimand and a medium level fine. Where a conviction results in a custodial sentence, the general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. A conviction for drug possession (any class)	a. A reprimand and a medium level fine
b. A conviction for supply or intent to supply (any class)	b. Disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Previous criminal convictions</li> <li>• Lack of cooperation with the police</li> <li>• Medium/large scale operation</li> </ul>	<ul style="list-style-type: none"> <li>• No intention to gain financially</li> </ul>

## B.4 Dishonesty

Description	
<p>Dishonesty is likely to be a breach of Core duty 3 and/or Core Duty 5 see Part 2 of the Handbook, section C2, Guidance paragraph C25 (2.C2.gC25).</p> <p>Please see paragraphs 6.2 above regarding the general approach to be taken towards dishonesty within the profession.</p> <p>There are a number of different types of breaches of the Handbook that involve dishonesty and different charges that may be brought in relation to each.</p> <p>Dishonesty can amount to criminal dishonesty (even though no criminal charges may have been brought - see also criminal convictions) or personal or professional dishonesty that does not amount to a crime.</p> <p>Some examples of dishonest behaviour that may form the basis for charges of professional misconduct include:</p> <ul style="list-style-type: none"><li>• Making a false declaration on Call</li><li>• Inflating marks or experience on an application form</li><li>• Falsification of documents</li><li>• Certain types of criminal convictions, such as theft, perjury, or fraud</li><li>• Deliberate misuse of client money</li><li>• Dishonesty in connection with disciplinary proceedings (see paragraph 7.5)</li></ul> <p>Dishonesty is not compatible with practice in a profession which requires exceptional levels of integrity. The general starting point should be disbarment unless there are clear mitigating factors that indicate that such a sanction is not warranted. Therefore, no common circumstances are listed below but instead the emphasis should be on the potential mitigating factors that might reduce the sanction from disbarment.</p>	
Common circumstances	Starting Point
	a. Disbarment
Aggravating factors	Mitigating factors
	<ul style="list-style-type: none"><li>• Clear evidence that behaviour was out of character and the consequences were not intended (see 7.1 &amp; 7.2 of this guidance)</li><li>• Behaviour limited to personal life and no evidence of dishonesty in professional life ( see 7.1 &amp; 7.2 of this guidance)</li></ul>

## B.5 Discrimination and harassment

Description	
<p>Unlawful discrimination and harassment is likely to be a breach of Core Duty 8 (a barrister must not discriminate unlawfully against any person) and is likely to be charged under Part 2 of the Handbook, section C2, rule C12 (2.C2.rC12); a barrister must not discriminate unlawfully against, victimise or harass any other person on the grounds of race, colour, ethnic or national origin, nationality, citizenship, sex, disability, gender re-assignment, sexual orientation, marital or civil partnership status, pregnancy, maternity, age, religion or belief.</p> <p>This type of breach is <b>not</b> intended to cover the situation where a barrister has been convicted of a criminal offence for harassment in his/her personal capacity. This section relates to behaviour in the course of a barrister's professional work that amounts to any form of harassment or bullying.</p> <p>The starting point for a finding of either discrimination or harassment should be a medium level fine, although a suspension or disbarment would be appropriate in circumstances where the behaviour is of a serious nature and/or continues over an extended period of time.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. An isolated incident which had a limited impact on the complainant	a. A medium level fine
b. The behaviour took place over an extended period of time and/or the barrister was in a position of power or acting in a supervisory role	b. A high level fine and a short suspension
c. Physical or particularly strong verbal actions towards a vulnerable individual or group	c. A medium suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• A significant negative impact on the victim</li> <li>• Failure to accept responsibility for actions</li> <li>• The vulnerability of the victim in the circumstances</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology</li> </ul>

## Section C - The barrister and the client

### C.1 Acting without a professional client

Description	
<p>A barrister may only supply legal services to a client if he/she is instructed by a professional client (normally a solicitor) or the barrister is acting under Licensed or Public Access. The rules prohibiting acting directly for a client are designed to protect the public and accepting instructions without a professional client can put the public at risk. Breaches are likely to be charged under Part 3 of the Handbook, Section B3, rule S24 (3.B3.rS24).</p> <p>The starting point should normally be a reprimand and/or a medium level fine. The main factors in determining the sanction will be the risk posed to the client, whether the breach involved a level of exploitation of the client and/or whether the behaviour was motivated by financial gain.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Acting without a professional client (not financially motivated)	a. Reprimand and/or advice as to future conduct
b. Acting without a professional client (financially motivated)	b. Medium level fine to a short suspension
c. Acting without a professional client over a prolonged period of time	c. Short to medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"><li>• Negative impact on the client</li><li>• Particularly vulnerable client</li></ul>	<ul style="list-style-type: none"><li>• Limited level of legal services provided</li><li>• Remedial action taken at an early point</li></ul>

## C.2 Breach of cab-rank rule

Description	
<p>A self-employed barrister acting on instructions from a professional client must not withhold services on the basis of the nature of the case, the client's opinions or beliefs or on the basis of the source of the financial support. These requirements are known collectively as the "cab-rank rule". Breaches of these obligations are likely to be charged under Part 2 of the Handbook, section C3, rule C29 (2.C3.rC29).</p> <p>The starting point should normally be a reprimand and/or a medium level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Breach of cab-rank rule (financial motive).	a. Reprimand and medium level fine.
b. Breach of cab-rank rule (discriminatory motive).	b. Reprimand and short suspension.
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>Actions of the barrister adversely affected the course of the proceedings.</li> </ul>	<ul style="list-style-type: none"> <li>Immediate apology.</li> </ul>

### C.3 Accepting instructions when professionally embarrassed

Description	
<p>There are a range of circumstances in which a barrister may be professionally embarrassed. These include (but are not limited to) accepting instructions when the barrister is likely to be a witness or his/her connection to the case will make it difficult to maintain independence, when there is a potential conflict of interest and when there is a significant risk of confidential information being communicated. Breaches are likely to be charged under Part 2 of the Handbook, section C3, rule C21 (2.C3.rC21).</p> <p>The sanctions should normally be a reprimand and/or a medium to high level fine. More serious sanctions should be imposed where the breach has had a significant impact on the client or the progress of the proceedings.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Accepting instructions when professionally embarrassed (inadvertently)	a. Reprimand and/or advice as to future conduct
b. Accepting instructions when professionally embarrassed (intentionally)	b. Reprimand, medium to high level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Actions of the barrister adversely affected the course of the proceedings</li> <li>• Financial motivation</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology</li> <li>• Remedial action taken at an early point</li> </ul>



## C.4 Late withdrawal

Description	
<p>A late withdrawal from a case is likely to be charged under Part 2 of the Handbook, section C3, rule C27 (2.C3.rC27). .</p> <p>The starting point should normally be a reprimand and/or a medium to high level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Circumstances	Starting point
a. Late withdrawal (not financially motivated).	a. Reprimand and/or advice as to future conduct.
b. Late withdrawal (financially motivated).	b. Reprimand, medium to high level fine.
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"><li>• Actions of the barrister adversely affected the course of the proceedings.</li><li>• Lateness/complexity of case prevents client from finding suitable alternative representation.</li></ul>	<ul style="list-style-type: none"><li>• Immediate apology.</li><li>• Positive steps taken to find/assist an alternative barrister.</li></ul>

## C.5 Breach of Court Direction or failure to comply with a Court Order

Description	
<p>Breach of a Court direction or order usually occurs in the course of a barrister representing a client. However it is possible that such a breach may occur in the course of a case that a barrister is involved with on a personal level. Charges are likely to be brought under Core Duty 5.</p> <p>Given a barrister's responsibilities to the Court and for upholding the integrity of the profession, such behaviour should be considered more seriously than if committed by a lay person. Disrespect for the authority of a Court should be considered as a serious matter.</p> <p>In most cases the starting point should be a reprimand and/or a fine. The level of fine will be dependent on the circumstances of the breach and the barrister's attitude. In cases where the breach might amount to a criminal offence (usually this occurs in relation to personal matters where a barrister, for example, breaches a restraining order), a medium level fine or a suspension would be appropriate. Suspensions should be reserved for cases where the impact on the complainant is significant.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Inadvertent breach of a direction/order that did not have implications for the future course of the proceedings.	a. Reprimand
b. Inadvertent breach of a direction/order that resulted in a change to the course/outcome of the proceedings.	b. Reprimand and low level fine
c. Deliberate breach of an order/direction in order to gain advantage.	c. Medium fine and/or medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Deliberate disobedience based on gaining advantage for the barrister or his/her client.</li> <li>• Continued breach in face of warnings from the Court.</li> <li>• Evidence of previous failures to obey Court Orders/Directions.</li> <li>• Significant impact on the complainant or case.</li> </ul>	<ul style="list-style-type: none"> <li>• Unintentional</li> <li>• Confusion as to the nature of the order</li> <li>• Immediate apology</li> <li>• Remedial action taken at an early point</li> </ul>

## C.6 Failure to comply with a Court judgment

Description	
<p>Usually a failure to comply with a Court judgment will occur as result of an event in the barrister's personal life although it is possible that it will result from representing a client. Charges are likely to be brought under Core Duty 5.</p> <p>It is a serious matter for a barrister to fail to comply with a Court judgment because it shows a level of contempt for the legal process which is not compatible with the standards expected of professionals with a responsibility to the Court. Therefore, a barrister's non-compliance with a Court judgment should be considered to be more serious than that of "lay person". However, the nature of the judgment will be relevant as will be the point at which the non-compliance has reached.</p> <p>The starting point should be a fine with the level increasing according to the circumstances. A deliberate breach of a judgment resulting in significant implications for the complainant/proceedings may warrant a short suspension.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Breach of judgement related solely to personal financial obligations	a. Low level fine as well as reprimand and/or advice as to future conduct
b. Deliberate disregard for the authority of the court combined with a significant impact on the complainant/case	b. Medium level fine and/or medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>Deliberate attempt to evade financial obligations</li> </ul>	<ul style="list-style-type: none"> <li>Late compliance with the judgment</li> <li>Genuine attempts to meet the judgment</li> <li>Reason for breach is due to disability, illness, maternity or pregnancy.</li> </ul>

## C.7 Improper conduct relating to fees

Description	
<p>This breach is likely to be charged under Core Duty 5 (behaving in a way that is likely to diminish the trust and confidence which the public places in you or the profession). It is a serious breach in that it will inevitably involve a victim whether that is the public purse, a company or an individual.</p> <p>Normally a starting point of medium level fine would be appropriate but the level of fine will be highly fact specific and should reflect the extent and circumstances of the breach. Where the breach consists of knowingly charging for work/hours not completed, decision makers should carefully consider whether the behaviour includes an element of dishonesty and may warrant disbarment (see paragraph 6.2 on dishonesty).</p> <p>Acceptance of referral fees is likely to fall within this category but the level of sanction will be dependent on the specific circumstances surrounding the breach and its severity.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. In respect of a privately paying or commercial client	a. Medium level fine,
b. In respect of a client who is publicly funded	b. High level fine or short suspension,
c. Knowingly charging for work/hours not completed.	c. Medium suspension to disbarment
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Significant amount of overcharging</li> <li>• Particularly vulnerable client</li> <li>• Pattern of repeated behaviour</li> <li>• Public Access client</li> </ul>	<ul style="list-style-type: none"> <li>• Overcharged fee repaid voluntarily</li> <li>• Genuine mistake</li> </ul>

## C.8 Discourtesy

Description	
<p>Discourtesy, in most cases, will be directed towards a Judge or Magistrate but can also involve conduct towards a lay client or other individual involved in the proceedings. Discourtesy is likely to be charged under Core Duty 5. When considering discourtesy it will be important to consider the circumstances of the act and whether or not it was an isolated incident as opposed to repeated acts of discourtesy in the face of repeated warnings from the Judge or Magistrate.</p> <p>In most cases the starting point should be a reprimand accompanied by a low level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. An isolated incident within proceedings	a. Reprimand, possibly accompanied by a low level fine
b. Repeated pattern of discourtesy against a background of repeated warnings or interventions from the Judge/Magistrate	b. Reprimand accompanied by a medium level fine
c. A high level of the discourtesy that had a significant impact on the victim	c. Reprimand accompanied by a medium to high level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Lack of remorse</li> <li>• Failure to acknowledge impact of behaviour</li> <li>• Adverse impact on the course of the proceedings</li> <li>• Bullying behaviour</li> </ul>	<ul style="list-style-type: none"> <li>• An isolated incident in difficult or unusual circumstances</li> <li>• Immediate apology</li> </ul>

## C.9 Using status to influence

Description	
<p>The circumstances in which a barrister may attempt to use his/her status to influence usually arise in relation to the barrister's personal life. A typical breach under this heading might arise where a barrister sends correspondence on a personal matter on chambers' letterhead holding him or herself out as a barrister in an attempt to influence or pressurise someone to accede to a course of action. Using status to influence is likely to breach Core Duty 3 (acting without honesty and integrity) and Core Duty 5 (behaving in a way that is likely to diminish the trust and confidence which the public places in you or in the profession).</p> <p>In most cases the starting point should be a low level fine. However, if the pressure is severe and amounts to "bullying", then a higher level fine would be appropriate.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common Circumstances	Starting Point
a. A single incident of using status to influence when he or she ought to have realised that it was inappropriate	a. A low level fine
b. Repeated incidents where the barrister is attempting to exploit his/her status as a means of exerting pressure or there is a financial motivation involved	b. A medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Victim is particularly vulnerable</li> <li>• Behaviour over an extended period of time</li> <li>• Motivation is financial gain</li> </ul>	<ul style="list-style-type: none"> <li>• An isolated incident</li> <li>• Immediate apology</li> </ul>

## C.10 Incompetence

Description	
<p>Incompetence is likely to breach Core Duty 7 (you must provide a competent standard of work and service to each client) and Core Duty 5 (behaving in a way that is likely to diminish the trust and confidence which the public places in you or in the profession) and Core Duty 7 (providing a competent standard of work and service to each client). Incompetence may be charged under Part 2 of the Handbook, section C.3, rule C21.8 (2.C3.rC21.8). .</p> <p>The level of incompetence and seniority of the particular barrister concerned will be important factors in deciding what sanction is appropriate. It will also be important to consider whether the incompetence has had a direct impact on the client's case.</p> <p>In most cases the starting point should be a reprimand and/or advice as to future conduct however this may be accompanied by a fine for more serious cases. Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. An isolated act on the part of an inexperienced barrister which did not adversely affect the client's case (under the new Handbook this offence is likely to be dealt with by way of administrative fine or warning).	a. Advice as to future conduct and/or reprimand and low level fine
b. Significant or repeated acts of incompetence which had an adverse effect on the proceedings	b. A medium level fine to a short suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>Failure to take responsibility for actions</li> </ul>	<ul style="list-style-type: none"> <li>Immediate apology</li> <li>Remedial action taken at an early point</li> </ul>



## C.11 Delay

Description	
<p>Delay is likely to breach Core Duty 7 (you must provide a competent standard of work and service to each client).</p> <p>The length of the particular delay will be relevant and persistent instances of ignoring related communications from the client. The workload of the barrister is not a relevant factor to take into account as barristers are required by the Handbook to refuse instructions if they do not have adequate time or opportunity to prepare that which is required.</p> <p>It will also be important to consider whether or not the delay had a direct impact on the client's case.</p> <p>In most cases the starting point should be a low level fine.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. A delay with limited impact on the proceedings	a. A low level fine
b. A significant delay in the face of repeated communications seeking a response	b. A medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Lack of remorse</li> <li>• Previous convictions for similar breaches</li> <li>• Adverse effect on the course of the proceedings</li> <li>• Distress or worry caused to client</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate apology</li> <li>• Remedial action taken at an early point</li> <li>• Reason for breach is due to disability, illness, maternity or pregnancy.</li> </ul>

## Section D - Barristers and their regulator

### D.1 Failure to report a criminal charge or conviction promptly

Description	
<p>Barristers are required to report nearly all criminal convictions and also the fact that charges have been preferred in relation to a range of criminal offences. Failure to report a criminal charge, caution or conviction is likely to breach Part 2 of the Handbook, section C4, rule C65 (2.C4.rC65).</p> <p>Failure to report a criminal conviction will usually be accompanied by a disciplinary charge relating to the specific conviction. Although there may be multiple charges, a separate sanction should be imposed for each.</p> <p>The starting point for failure to report a criminal charge or conviction promptly should be a low level fine. Given the nature of the offence, the range of appropriate sanctions is limited and it is unlikely that more than a medium level fine will be appropriate. However, the sanctions for the criminal conviction itself are likely to be more severe.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting point
a. Failure to report promptly being charged with a relevant criminal offence	a. A low level fine
b. Failure to report promptly a relevant criminal conviction	b. A low to medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"><li>• Substantial delay in reporting the conviction</li><li>• Attempts to conceal conviction and/or relevant facts or details relating to the conviction</li></ul>	<ul style="list-style-type: none"><li>• Genuine and understandable ignorance of the duty to report</li></ul>

## D.2 Failure to respond

Description	
<p>Barristers are required, under Part 2 of the Handbook, section C4, rule C64 (2.C4.rC64), to promptly provide all such information to the Bar Standard's Board as it may, for its regulatory functions, from time to time require and to notify it of any material changes to that information,</p> <p>Failure to respond is most often accompanied by other charges for breaches of the Handbook. However, in some circumstances, a late response from the barrister results in the main issues of complaint being dismissed but a charge for failing to respond is still brought because of the inconvenience/delay caused either to the BSB or the complainant and/or because of the barrister's attitude towards the authority of the BSB.</p> <p>In most cases the starting point should be a low level fine increasing according to the circumstances, the barrister's attitude and the level of delay/inconvenience caused. A short suspension might be appropriate where the behaviour has been repeated in relation to a number of separate complaints.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Delays in responding but with some level of engagement with the BSB	a. Low level fine
b. Failure to respond at any point to BSB enquiries	b. Low level fine (upper end)
c. Deliberate decision not to engage with the BSB showing a disregard for the authority of the regulator	c. Medium level fine
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Lack of explanation for the failure to respond</li> <li>• Distress and inconvenience to the complainant</li> <li>• Substantial delay in being able to deal with the complaint</li> <li>• Persistent failures to respond</li> </ul>	<ul style="list-style-type: none"> <li>• Reason for breach is due to disability, illness, maternity or pregnancy.</li> </ul>

### D.3. Failure to comply with an Order of a BTAS Tribunal or the Professional Conduct Committee

Description	
<p>Where a barrister fails to comply with an Order of a previous Tribunal or disciplinary panel (including financial penalties) the only option available is to take further enforcement action and if necessary bring further proceedings for professional misconduct in front of a Tribunal. Under Part 2 of the Handbook, section C4, rule C64 (2.C4.rC64) barristers must comply in due time with any decision or sentence imposed by the Bar Standards Board, a Disciplinary Tribunal, the Visitors, an interim panel, a review panel, an appeal panel or a medical panel.</p> <p>The appropriate sanction will depend on the nature of the original sentence, whether compliance of whole or part of the order remains outstanding and the reasons why the breach occurred. It is therefore difficult to set an overall starting point. A financial penalty may not be appropriate where previous financial orders remain outstanding. In most cases, where order(s) remain outstanding, and no serious attempts have been made to comply, a conditional short suspension could be appropriate (i.e. the suspension does not become operative unless the barrister fails to comply with conditions set by the Tribunal).</p> <p>Where compliance has been achieved by the date of the Tribunal, the starting point should be a low level fine combined with a reprimand/advice as to future conduct.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity.</p>	
Common circumstances	Starting Point
a. Failure to comply in due time or with only part of an order	a. Low level fine and reprimand/advice as to future conduct
b. Failure to comply with any part of the orders of the Tribunal/panel	b. Conditional short suspension
c. Deliberate decision not to engage with the BSB showing a disregard for the authority of the regulator	d. Medium suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Similar previous findings</li> <li>• No attempt to comply with the order</li> </ul>	<ul style="list-style-type: none"> <li>• Genuine attempts to comply</li> <li>• Late compliance</li> <li>• Reason for breach is due to disability, illness, maternity or pregnancy.</li> </ul>

#### D.4 Failure to report serious misconduct

##### Description

Under the new Handbook barristers are required to self-report and report others in relation to 'serious misconduct' (there will be an exemption for barristers giving advice via the Bar Council ethics helpline). This breach is likely to be charged under Core Duty 9 and/or under Part 2 of the Handbook, section C4, rule C65 (2.C4.rC65).

As this breach is new there can only be limited guidance. The starting point for failure to report serious misconduct is likely to reflect that for failing to report a criminal charge or conviction promptly under D.1 of this guidance.

Common circumstances for this breach are likely to be where there has been a substantive breach of serious misconduct and the defendant has failed to self-report.

The Bar Standards may be able to deal with breaches of this nature by way of administrative sanctions. For further guidance on serious misconduct and the duty to report see the guidance on the rule under Part 2 of the Handbook, section C4, gc95 –gc101.

The aggravating and mitigating factors under Annex 1 of this guidance may be relevant when dealing with this breach.

## Section E - Barristers and their practice

### E.1 Poor administration of practice/chambers

Description	
<p>All self-employed barristers have an obligation to ensure that their practices are efficiently and properly administered and they can be held personally responsible for any failures to do so. All members of chambers are now under an obligation to take reasonable steps to ensure that their chambers are administered competently and efficiently. What steps it is reasonable for a barrister to take depends on all the circumstances including the arrangements in place for the management of chambers and the role the barrister play in those arrangements. Poor administration of practice/chambers is likely to be charged under multiple rules in Part 2 of the Handbook, section C5 (2.C5) dependant on the circumstances of the individual case.</p> <p>In most cases advice as to future conduct will normally be appropriate. Fines in the low to medium range would be appropriate where there is financial gain or the problems are systemic within practice/chambers.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity:</p>	
Common circumstances	Starting Point
a. Failure to return papers/keep proper records of cases/fees	a. Advice as to future conduct
b. Systemic failures to manage a wide-range of areas of practice/chambers in order to save money or increase income	b. Reprimand and a low to medium fine (dependent on potential financial gain)
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Financial gain</li> <li>• Persistent or wide ranging failures in administration</li> <li>• Adverse impact on other members of chambers</li> </ul>	<ul style="list-style-type: none"> <li>• One off/limited duration due to break down in technical support or staff mistakes</li> <li>• Problems in staffing outside the control of an individual barrister</li> <li>• Remedial action taken at an early point</li> </ul>

## E.2 Holding out

Description	
<p>“Holding out” is the short hand term to describe a barrister who is not entitled to practise presenting him/herself to others in a way that would lead people to believe that he/she is entitled to practise and offer legal services as a barrister. This breach is likely to be charged under Part 3 of the Handbook, section B1 (3.B1) no practice without authorisation.</p> <p>Holding out can occur in a variety of circumstances. The type of cases that are likely to lead to charges of professional misconduct are those where the barrister has deliberately stated that he is entitled to practise and has provided legal services for financial gain when he/she is not entitled to do so.</p> <p>The starting point should be a reprimand or advice as to future conduct with fines being more appropriate where the behaviour is deliberate/financially motivated.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity:</p>	
Common circumstances	Starting Point
a. Using misleading description of status on a business card/letter head	a. Reprimand/advice as to future conduct
b. Inappropriate use of title as a marketing device	b. Reprimand/advice as to future conduct and low level fine
c. Providing legal services for financial gain in circumstances where the client is misled into believing the barrister is entitled to practise.	c. Medium level fine to suspension dependent on the extent of the financial gain (disbarment could be considered where there is a clear risk to the public and the barrister may be likely to persist in the behaviour)
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Failure to pay administrative fine on time or at all</li> <li>• Providing legal services in return for payment</li> <li>• Persistent pattern of behaviour</li> <li>• Motivation is financial gain</li> <li>• Using status of barrister to threaten or exploit</li> <li>• Failure to take remedial action when asked to do so by the BSB</li> </ul>	<ul style="list-style-type: none"> <li>• No direct impact on members of the public</li> <li>• Breach was inadvertent and unintentional</li> </ul>



### E.3 Breach of practising requirements

Description	
<p>The requirements a barrister must meet to practise as a self-employed barrister are set out in Part 3 of the Handbook, Scope of Practice and Authorisation Rules. The requirements include completion of Continuing Professional Development (CPD), payment of practising fees and obtaining insurance cover.</p> <p>It is likely that charges of professional misconduct in relation to breach of the practising requirements will only come before a Tribunal in the case of persistent or uncooperative defaulters who will have received repeated warnings as to the potential consequences of their continued default and may also have previously been subject to administrative sanctions.</p> <p>It is possible that a charge sheet in relation to practising requirement breaches will also include a charge in relation to a failure to pay an administrative fine and/or a failure to respond to the BSB.</p> <p>Often panels will be faced with a charge sheet which includes up to three charges for: failing to pay the administrative fine, failing to meet the relevant requirement and failure to respond.</p> <p>Panels should treat any of the above failures seriously given that the barrister will have had a number of previous opportunities to rectify his/her non-compliance and considerable resources will have been expended in trying to make the barrister meet his/her obligations. Each breach should be sentenced separately.</p> <p>The starting point for each charge should be a low level fine towards the top end. Therefore in cases where three charges are included on the charge sheet, the total fine could amount to £3,000. The starting point for persistent offenders should be a short conditional suspension - the condition being the barrister should meet the practising requirement by a specified date. Immediate suspensions should be considered where the barrister has previously been subject to a conditional suspension of a similar offence.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity:</p>	
Common circumstances	Starting Point
a. Failing to meet practising requirements in due time (compliance achieved late)	a. Low level fine with starting point of £600
b. Failing to meet practising requirements (compliance still outstanding)	b. Low to medium level fine with starting point of £900 and an order to comply with outstanding requirements by a specified date

c. Failure to pay an administrative fine	c. Low to medium level fine with starting point of £900
d. Repeated failures to meet practising requirements (but no previous disciplinary history of this)	e. Short suspension (usually conditional)
d. Previous disciplinary history of failing to meet practising requirements (including previous suspension)	f. Medium to long suspension conditional on requirements being met
<b>Aggravating factors</b>	<b>Mitigating factors</b>
<ul style="list-style-type: none"> <li>• Previous disciplinary findings for failing to meet practising requirements</li> <li>• Failure to attend a Disciplinary Tribunal without explanation</li> </ul>	<ul style="list-style-type: none"> <li>• Attempts to comply and/or previous responses to BSB enquiries</li> <li>• Attempts to prevent recurrence</li> <li>• Financial hardship causing inability to pay</li> <li>• Reason for breach is due to disability, illness, maternity or pregnancy.</li> </ul>

## E.4 Breach of pupillage advertising/funding requirements

Description	
<p>All pupillages must be advertised in order to allow for open selection and equality of opportunity. It is also a requirement that pupillages are funded at a minimum prescribed level or more. This breach is likely to be charged under Part 2 of the Handbook, section C5, rule C89.4 (2.C5.rC89.4)</p> <p>Breaches of the advertising requirements may be unintentional and stem from lack of knowledge of the requirements. However, failures to provide funding are more serious as they are likely to be motivated by financial gain and in most cases will involve some level of exploitation of the pupil. Deliberate evasion/circumvention of both requirements should be taken seriously.</p> <p>Where the breach is unintentional, a reprimand or advice as to future conduct would be appropriate. Intentional breaches of the funding requirements should attract a relatively heavy fine, particularly where the arrangements involved a level of exploitation of the pupil.</p> <p>Listed below are common circumstances in which breaches might occur set out according to severity:</p>	
Common circumstances	Starting Point
a. Failure to advertise but no pupillages were offered in contravention of the rules	a. Reprimand/advice as to future conduct
b. Deliberate failure to advertise where pupils have been taken on in contravention of the rules	b. Reprimand and low level fine
c. Deliberate failure to provide funding motivated by financial gain	c. Medium to high level fine dependent on the level of potential or actual financial gain
d. Intentional failure to comply with recruitment requirements as well as failure to provide funding requirements	d. Short suspension
Aggravating factors	Mitigating factors
<ul style="list-style-type: none"> <li>• Financial gain</li> <li>• Exploitation of a pupil</li> <li>• Breach resulted in the pupillage not being registered</li> <li>• Persistent breaches involving numbers of pupils</li> <li>• Lack of response to warnings from Pupillage and Training Committee of the BSB</li> </ul>	<ul style="list-style-type: none"> <li>• Unintentional</li> <li>• One off where previous pupillages had been properly handled</li> <li>• Remedial action taken at an early point</li> </ul>

## **Annex 1 - Aggravating and mitigating factors**

Before the panel determine the appropriate level of sentence for the breach of the Handbook the panel will need to have due regard to any evidence of factors that aggravate or mitigate the seriousness of the breach. Aggravating and/or mitigating factors can include the level of culpability of the defendant and/or the level of harm caused to the profession and/or the public. It is important to note that different aggravating and mitigating factors may apply to different charges, panel members should make this clear within their reasons.

### **Aggravating factors**

The following factors, if present, may determine whether a higher sanction for a breach should be imposed. The factors listed are only examples and are not exhaustive:

- Premeditation
- Motive of financial gain
- Corruption/gross deception
- Coercion
- Involvement of others
- Persistent conduct or conduct over a lengthy period of time
- Undermining of the profession in the eyes of the public
- Attempts to hide the misconduct or wrongly lay blame elsewhere
- Effect on the complainant or particular vulnerability of the complainant
- Actions accompanied by discriminatory behaviour or motivation (does not require intent)
- Breach of trust
- Bullying or harassment (does not require intent)
- Position of responsibility within the profession
- Previous disciplinary findings for similar breaches
- Previous disciplinary findings for any types of breaches, particularly where the breaches show an unwillingness to comply with the Handbook
- Lack of remorse for having committed the offences
- Failure to respond promptly to communications from the BSB, or inappropriate behaviour that frustrates the administration of the complaint
- Failure to attend a Tribunal without explanation
- Indication of an element of dishonesty (see paragraph 6.2 on a finding of dishonesty and paragraph 7.5 on dishonesty during proceedings)
- Lack of insight

## Mitigating factors

The following factors, if present, may determine whether a lower sanction for a breach should be imposed. The factors listed are only examples and are not exhaustive:

- Guilty plea
- Genuine remorse (as expressed in e.g. a willingness to apologise to the complainant and/or compromise over matters such as fees)
- Limited experience within the profession
- The breach was unintentional (not applicable if behaviour involves discrimination, harassment or bullying).
- Single incident (not applicable if behaviour involves discrimination)
- Heat of the moment (not applicable if behaviour involves discrimination)
- Co-operation with the investigation
- Voluntary steps have been taken to remedy or rectify the breach
- Evidence of attempts to prevent reoccurrence
- Previous good character
- Evidence of financial hardship (only applicable when it has had a direct impact on the commission of the offence)
- Advice was sought and obtained from the Bar Council's professional ethics helpline
- Particular personal circumstances that provide a reasonable explanation for the behaviour. In particular, bereavement, relationship breakdown and divorce (matters such as pressure of work and bankruptcy should be treated with caution as these factors may indicate a greater risk to the public in the barrister's on-going practice)
- Good references (only of limited applicability and very much dependent on the nature of the offence and the role and identity of the referee)

## Annex 2 - Wording of sentences and Findings and Sentence sheet

### Wording of sentences

A2.1 Prescriptive requirements for the wording of sanctions are no longer included in the Disciplinary Tribunal Regulations but it is still important that panels include on the findings and sentence sheet clear details of the sanction(s) imposed. Therefore set out below is guidance on the wording that should be used when imposing each of the individual sanctions, including any sanction imposed under the Determination by Consent procedure. It is based on the previous wording of the Disciplinary Tribunal Regulations and may appear very formal but it provides a sound basis for ensuring that any sanctions imposed are not subject to confusion. It is mandatory to use one of the statements contained in paragraph A2.2 below where a defendant is absent from a Tribunal hearing.

### Absence of the barrister charged

A2.2 Where the barrister charged has not been present throughout the proceedings, the sentence must include one of the following two statements:

- (i) If the relevant procedure under Regulation 48 has been complied with, that the finding and sentence were made in the absence of the barrister in accordance with Regulation 48.
- (ii) If the procedure under Regulation 49 has been complied with, that the finding and the sentence were made in the absence of the barrister and that he has the right to apply to the Directions Judge for an order that there should be a new hearing before a fresh Disciplinary Tribunal.

### Disbarment

A2.3 "That [X] be disbarred and expelled from the Honourable Society of [X] [*and any other Inn of which he/she is a member*] ...."

### Removal from the Register of European Lawyers

A2.4 "That [X] be removed from the register of European lawyers maintained by the Bar Council."

### Suspension from practice

A2.5 "That [X] be suspended for [X] weeks/months/year."

"That [X] be suspended until he/she has complied with [state the practising requirement with which the barrister should comply]."

"That [X] be suspended from accepting or carrying out any [state the area of practice that the suspension shall apply to] for [X] weeks/months/years."

"That [X] be suspended from accepting or carrying out any [state the area of practice that the suspension shall apply to] until he/she has complied with [state the practising requirement with which the barrister should comply]."

### **Suspension from the Register of European Lawyers**

A2.6 "That [X] be suspended from the register of European lawyers maintained by the Bar Council for [X period]."

"That [X] be suspended from the register of European lawyers maintained by the Bar Council until he has complied with [state the practising requirement with which the barrister should comply]."

"That [X] be suspended from the register of European lawyers maintained by the Bar Council with regards to accepting or carrying out any [state the area of practice that the suspension shall apply to] for [X] weeks/months/years."

"That [X] be suspended from the register of European lawyers maintained by the Bar Council with regards to accepting or carrying out any [state the area of practice that the suspension shall apply to] until he has complied with [state the practising requirement with which the barrister should comply]."

### **Prohibition on accepting or carrying out public access instructions**

A2.7 "That [X] be prohibited from accepting or carrying out any public access instructions."

"That [X] be prohibited from accepting or carrying out any public access instructions for [X] weeks/months/years."

"That [X] be prohibited from accepting or carrying out any public access instructions until he has complied with [state the practising requirement with which the barrister should comply]."

### **Payment of fine**

A2.8 "That [X] pay a fine of £[ ] to the Bar Standards Board, within [X] weeks/months of the expiry of any appeal period."

"That [X] pay a fine of £[ ] to the Bar Standards Board, to be paid in monthly installments of £[ ] to commence within [X] weeks/months of the expiry of any appeal period."

### **Continuing Professional Development**

A2.11 "That [X] shall by [date] complete a minimum of [X] hours of continuing professional development (in addition to the mandatory requirements set out in the Continuing Professional Development Regulations under Part 4, section C of the Handbook) [in the subject of ...] and provide satisfactory proof of compliance with this Order to the Bar Standards Board."



## **Reprimand**

A2.13 "That [X] has been reprimanded by the Tribunal."

"That [X] is ordered to attend on [X- the nominated person] to be reprimanded."

## **Advice as to future conduct**

A2.15 "That [X] has been advised by the Tribunal as to his future conduct in regard to....."

"That [X] is hereby ordered to attend on [X – the nominated person] to be given advice as to his future conduct in regard to.....".

## **Order for reduction of Legal Aid fees**

A2.16 "That the fees otherwise payable to [X] by the Legal Aid Agency in connection with the legal services provided by him/her are reduced in the following sum £[ ] according to the attached list. *(a list of the reductions should be provided)* "

## **Order for cancellation of Legal Aid fees**

A2.17 "That the fees otherwise payable to [X] by the Legal Aid Agency in connection with services provided by him/her should be cancelled in accordance with the attached list. *(a list of the cancelled services should be provided)* "

## **Exclusion from Legal Aid work**

A2.18 "That [X] be excluded from providing representation funded by the Legal Aid Agency (as explained in Section 42(4)(b) of the Administration of Justice Act 1985 as substituted by Section 33 of the Legal Aid Act 1988 and amended by Schedule 4 to the Access to Justice Act 1999) until [X date] or for a period of [X time]beginning on [X date].

## Annex 3 - Glossary

### A

**Administrative sanction** - means the imposition of an administrative warning, fixed penalty fine or other administrative fine up to the prescribed maximum, or any combination of the above in accordance with Section 5.A of the BSB Handbook.

**Aggravating factor** – means any circumstance surrounding a breach of the Handbook that acts to increase its seriousness or add to the risk of harm or actual harm.

### B

**Bar** - means the Bar of England and Wales.

**Bar Council** - means The General Council of the Bar

**Barrister** - has the meaning given in s. 207 of the Legal Services Act 2007 and means an individual who— (a) has been called to the Bar by an Inn of Court, and

(b) is not disbarred by order of an Inn of Court;

**Bar Tribunals & Adjudication Service (BTAS)** – means the functioning arm of the Council of the Inns of Court (COIC) responsible for administering disciplinary and fitness to practise hearings.

**Bar Standards Board** - means the board established to exercise and oversee the regulatory functions of the Bar Council.

**Breach** – means a breach of the BSB Handbook.

### C

**Cab-rank rule** – means a rule under which barristers theoretically should accept any cases within their specialist field, subject to their availability during the appropriate time, which are offered to them at a fair and proper fee. (Osborn's Concise Law Dictionary, 11e)

**Call to the bar** - means a formal act by which a person is awarded the degree of barrister by an Inn of Court. .

**Chairman's report** – means a report prepared by the Chairman of the Tribunal detailing the finding, reasons and where applicable the sentence.

**Chambers** - means a place at or from which one or more self-employed barristers carry on their practices.

**Client** - means, the person for whom a barrister acts.

**Conviction** - means a criminal conviction for an indictable offence.

**Complaint regulations** - means the rules set out at part 5.A of the BSB Handbook

**Complainant** – means one who makes a complaint.

**Council of the Inns of Court (COIC)** - means the Council of the Inns of Court and its successors including any entity or part through which it exercises its functions.

**Criminal offence** - means any offence, wherever committed, under the criminal law of any jurisdiction (including non-exempt offences under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013) except:

- (a) an offence for which liability is capable of being discharged by payment of a fixed penalty; and
- (b) an offence which has as its main ingredient the unlawful parking of a vehicle;

**Custodial sentence** – means a sentence of imprisonment.

## D

**Defendant** - means the relevant person who is the subject of the disciplinary charge or charges brought before a Disciplinary Tribunal and/or of a disqualification application made to the Disciplinary Tribunal under the Complaints Regulations.

**Determination by consent** - means the procedure set out in part 5 section A5 of the BSB Handbook.

**Directions** – means case management directions by the court or tribunal giving a timetable for pre-hearing procedures.

**Directions Judge** - means a Judge or Queen's Council designated by the President of the Council of the Inns of Court.

**Disbarment** – means to expel a barrister from his Inn of Court.

**Disciplinary Tribunal** - means a Tribunal convened pursuant to part 5, section 2 of the BSB Handbook to consider an allegation of professional misconduct against a barrister.

**Discrimination** - has the same meaning as in chapter 2 of the Equality Act 2010.

**Diversity data** - means monitoring information relating to the protected characteristics under the Equality Act 2010 in respect of an individual.

**Double jeopardy** - means the principle that a person cannot be tried twice for the same offence.

## E

**European lawyer** - means a person who is a national of a Member State and who is authorised in any Member State to pursue professional activities under any of the professional titles appearing in article 2(2) of the European Communities (Lawyer's Practice) Order 1999, but who is not any of the following:

- a) a solicitor or barrister of England and Wales or Northern Ireland; or
- b) a solicitor or advocate under the law of Scotland;

**Final report** – means the report described at r181 & r182 under part 5 of the BSB Handbook.

**Fitness to practise** – means any question concerning whether a Barrister is unfit to practise.

**Fitness to practise rules** – means the regulations set out at part 5 E of the BSB Handbook.

## H

**Handbook** – means the BSB Handbook which replaces the 8<sup>th</sup> edition of the Code of Conduct of the Bar of England and Wales.

**Harassment** - has the same meaning as in section 26 of the Equality Act 2010.

## I

**Inns' Conduct Committee** – means the committee set up to deal with conduct issues relating to student members and applicants to the Inns of Court.

**Inn of Court** - means one of the four Inns of Court, namely, the Honourable Societies of Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn.

## L

**Legal aid** – means the scheme which publically funds advice, assistance and/or legal representation in legal proceedings.

**Legal Aid Agency** - means the executive agency established under Legal Aid Sentencing and Punishment of Offenders Act 2012 to manage and administer the legal aid system

**Legal services** - includes legal advice representation and drafting or settling any statement of case witness statement affidavit or other legal document but does not include:

- a) sitting as a judge or arbitrator or acting as a mediator;
- b) lecturing in or teaching law or writing or editing law books articles or reports;
- c) examining newspapers, periodicals, books, scripts and other publications for libel, breach of copyright, contempt of court and the like;
- d) communicating to or in the press or other media;

- e) giving advice on legal matters free to a friend or relative or acting as unpaid or honorary legal adviser to any charitable benevolent or philanthropic institution;
- f) in relation to a barrister who is a non-executive director of a company or a trustee or governor of a charitable benevolent or philanthropic institution or a trustee of any private trust, giving to the other directors trustees or governors the benefit of his learning and experience on matters of general legal principle applicable to the affairs of the company institution or trust;

**Legal Services Board** - means the independent body established under the Legal Services Act 2007 to be the over-arching regulator for the legal profession as a whole.

## M

**Mitigating factors** - means any circumstance surrounding a breach of the Handbook that acts to decrease its seriousness or that lessens the extent of harm.

## P

**Panel members** – see decision maker

**Practice** - means the activities, including business related activities, in that capacity, of:

- a) a practising barrister;
- b) a barrister exercising a right of audience in a Member State other than the United Kingdom pursuant to the Establishment Directive, or the European Communities (Lawyer's Practice) Regulations 2000;

**Practising barrister** – means a barrister who holds a current practising certificate.

**Practising certificate** - means a full practising certificate, a provisional practising certificate, a limited practising certificate, or an European lawyer's practising certificate or a temporary practising certificate issued by the Bar Council.

**Practising requirements** – means the requirements a barrister must fulfill in order to practise as a barrister at the bar of England and Wales. To obtain authorisation to practise a barrister will be asked to:

- a) Verify their current contact details
- b) Verify their practising status and entitlement to exercise reserved legal activities
- c) Confirm whether they have completed the requisite amount of continuing professional development (CPD) activity
- d) Declare that you have obtained and paid for adequate indemnity insurance

- e) Pay the practising certificate fee, and
- f) Sign a declaration of truth, which is designed to ensure understanding of the process and new system.

**The President** - means the President of the Council of the Inns of Court.

**Professional client** - means in relation to giving instructions to a BSB authorised person:

- a) any person authorised by another approved regulator or licensing authority;
- b) an employed barrister or registered European lawyer;
- c) any practising barrister or registered European lawyer acting on his own behalf;
- d) a foreign lawyer;
- e) a Scottish or Northern Irish Solicitor; or
- f) the representative of anybody (such as a Legal Advice Centre or Pro Bono or Free Representation Unit) which arranges for the supply of legal services to the public without a fee, and which has been and remains designated by the Bar Standards Board (subject to such conditions as may be imposed by the Bar Council or Bar Standards Board in relation to insurance or any other matter whatsoever) as suitable for the instruction of barristers, and which instructs a barrister to supply legal services without a fee;

any member of a profession who is acting on behalf of their own client;

**Professional Conduct Committee (PCC)** – means the committee with the power to refer complaints for disciplinary action, decide to take no further action or dismiss a case due to lack of evidence.

**Professional misconduct** – means a breach of [the] Handbook by a BSB regulated person which is not appropriate for disposal by way of no further action or the imposition of administrative sanctions.

**Public access client** – means a client (other than a licensed access client) that instructs a barrister directly.

**Public access instructions** - means instructions given to a barrister by or on behalf of a public access client, in accordance with Part 2 Rules C119-C130 of the BSB Handbook.

**Pupil** - means an individual who is undertaking either 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 Bar Standards Board as a pupil.

**Pupil supervisor** – means an individual, qualified barrister who has been approved as a pupil supervisor by his or her Inn of Court, and in accordance with the Bar Training Regulations under part 4 of the BSB Handbook.

**Pupillage** – means the period of professional training required before applying for authorisation to practise as a barrister.

## R

**Referral fee** - means any payment or other consideration made in return for the referral of professional instructions by an intermediary.

**Regulatory objectives** - has the meaning given to it by section 1 of the Legal Services Act 2007 and consists of the following objectives:

- a) protecting and promoting the public interest;
- b) supporting the constitutional principles of the rule of law;
- c) improving access to justice;
- d) protecting and promoting the interests of consumers;
- e) promoting competition in the provision of the services;
- f) encouraging an independent, strong, diverse and effective legal profession;
- g) increasing public understanding of the citizen's legal rights and duties;

and

- promoting and maintaining adherence to the professional principles;

## S

**Sanctions** – means a penalty for breaching the BSB Handbook.

**Self-employed barrister** – means a practising barrister who is self-employed.

**Serious misconduct** – means conduct as defined under part 2 C4 (gC95) of the BSB Handbook.

**Strategic objectives** – means the BSB's strategic objectives as set out in the BSB's Strategic Plan 2013 - 2016.

**Submissions** – means a statement made by a barrister in support of their client's case.

## U

**Unregistered barristers** - means an individual who does not hold a practising certificate but who has been called to the Bar by one of the Inns and has not ceased to be a member of the Bar.





# **Annex 3**

## **Fitness to Practise Regulations Section E, BSB Handbook Enforcement Regulations**



# E. THE FITNESS TO PRACTISE REGULATIONS

These Regulations, commencing 6 January 2014, are made by the *Bar Standards Board*, in liaison with the *Council of the Inns of Court*, under section 21 (regulatory arrangements) Legal Services Act 2007, under authority delegated by the General Council of the Bar as the Approved Regulator of the Bar under Part 1 of Schedule 4 to the Legal Services Act 2007, and with the approval of the *Legal Services Board* under Paragraph 19 of Schedule 4 to the Legal Services Act 2007.

## E1. Preliminaries

### Commencement and application

**rE288** These Regulations will come into effect on 6 January 2014 and shall apply to all cases referred to a *Fitness to Practise Panel* or an *Appeal Panel* prior to that date under the Regulations then applying, and any step taken in relation to any *Fitness to Practise Panel* or *Appeal Panel* pursuant to those Regulations shall be regarded as having been taken pursuant to the equivalent provisions of these Regulations.

**rE289** Anything required by these Regulations to be done or any discretion required to be exercised by, and any notice required to be given to, the *President* of the Council of the Inns of Court or the *PCC*, may be done or exercised by, or given to, any *person* or body authorised by the *President* or by the *PCC* as the case may be (either prospectively or retrospectively and either generally or for a particular purpose).

### Definitions

**rE290** Any term defined in *Definitions Section* of the *Handbook* shall carry the same meaning in these Regulations. For the purpose of the Fitness to Practise Regulations, "Individual" means any 'BSB authorised individual'

## E2. Constitution of panels

- rE291** The *President* shall constitute *Fitness to Practise Panels* and *Review Panels* to exercise the functions afforded to those Panels under these Regulations, in accordance with the provisions set out Schedule 1.

## E3. The fitness to practise procedure

### Referral to a Fitness to Practise Panel

- rE292** Where the *PCC* receives information suggesting that an *Individual* is *unfit to practise*, the matter shall be considered under Regulation E294.
- rE293** The *PCC* may carry out any investigation, appropriate to the consideration of whether the *Individual* may be *unfit to practise*, prior to consideration of any referral under Regulation E295.
- rE294** Where the *PCC* receives information under Regulation E292, the Chair of the *PCC* shall, subject to Regulation 6, as soon as reasonably practicable, write to the *Individual* concerned:
- .1 notifying him or her that information has been received which appears to raise a question of whether he or she is *unfit to practise*; and,
  - .2 providing him or her with copies of any information received under Regulation 5 or obtained under Regulation E293.
- rE295** Where the *PCC*, following receipt of information under Regulation E292 or during its consideration of a complaint of professional misconduct under the *Complaints Regulations*, considers that an *Individual* may be *unfit to practise*, it shall refer the matter to a *Fitness to Practise Panel* for determination (Regulation E298).
- rE296** No decision to refer shall be taken under Regulation E295 without the *Individual* having been provided with a reasonable opportunity (as to the circumstance) to make representations on the matter.
- rE297** In reaching a decision under Regulation E295, the *PCC* shall take into account any information received under Regulation E292 or obtained under Regulation E293, and any representations submitted by the *Individual*.

### Preliminary Hearings

- rE298** As soon as reasonably practicable after referral of a matter by the *PCC* to a *Fitness to Practise Panel*, the Chair of the Panel shall send a notice in writing of the referral to the *Individual* which shall:
- .1 contain a summary of the case and the reasons why it has been referred to a *Fitness to Practise Panel*;
  - .2 inform the *Individual* of the time and date for a preliminary hearing before the Panel;
  - .3 inform the *Individual* of his or her right to attend and be represented at the preliminary hearing, and to produce evidence at the preliminary hearing, in accordance with Regulations E324.2 and E324.3 below;
  - .4 inform the *Individual* of the Panel's powers at a preliminary hearing under Regulations E299 and rE302 to rE305 below; and,
  - .5 inform the *Individual* of his or her right to appeal under Regulation E317 below.

### Directions

- rE299** At a preliminary hearing, the *Fitness to Practise Panel* may give directions for the full hearing before the Panel, which may include that:
- .1 the *Individual*, within a specified period of time, submit to a relevant medical examination to be carried out by a *Medical Examiner* nominated by the Panel;



- .2 the *PCC* instruct a *Medical Examiner* to conduct such examination and to provide a report setting out an opinion as to whether the *Individual* is *unfit to practise* and as to any other matters as may be specified by the Panel;
- .3 the *Individual* authorise disclosure to the *PCC* and the *Medical Examiner*, of such of his or her relevant medical records as may be reasonably required for the purposes of the medical examination and subsequent report; and,
- .4 the *PCC* carry out such other investigations or seek such advice or assistance as the Panel considers appropriate to the matters for consideration at the full hearing, and where it gives a direction under Paragraph .1 or .3 above, it shall inform the *Individual* that failure to comply with the direction may be taken into account by the Panel in accordance with Regulation E308.2

## Medical examinations

**rE300** Where a *Medical Examiner* is nominated by a Panel under Regulation E299.1 or E309.2.a, the *Medical Examiner* shall:

- .1 within the period specified by the Panel, undertake a relevant medical examination of the *Individual* in accordance with any directions from the Panel;
- .2 prepare a report which shall express an opinion as to:
  - .a whether the *Individual* has a physical or mental condition;
  - .b whether the *Individual* is fit to practise either generally or on a restricted basis; and
  - .c any other matters which he or she has been instructed to address, in accordance with any directions of the Panel; and
- .3 where requested by the *PCC* to do so, attend a hearing to present his or her findings.

**rE301** An *Individual's* medical records and any report prepared by a *Medical Examiner* under these Regulations shall not be used for any other purpose than is provided for in these Regulations and shall not be disclosed to any other *person* or body without the consent in writing of the *Individual*.

## Interim restrictions

**rE302** At a preliminary hearing, a *Fitness to Practise Panel* may, where it is satisfied that it is necessary to protect the public, is otherwise in the public interest or is in the *Individual's* own interests to do so, direct that the *Individual* is subject to an interim *restriction*.

**rE303** An interim *restriction* may be imposed subject to such conditions as the Panel may consider appropriate, and shall have effect pending the determination of the matter at a full hearing before the *Fitness to Practise Panel* for a specified period, which shall not, save in exceptional circumstances, exceed 3 months.

**rE304** In lieu of imposing an interim *restriction* under Regulation E302 above, the Panel may accept from the *Individual* an undertaking in writing on terms satisfactory to the Panel:

- .1 agreeing to an immediate interim *restriction* for such period as may be agreed; or,
- .2 as to the *Individual's* conduct or behaviour pending the conclusion of the full hearing.

**rE305** Where it has directed an interim *restriction* under Regulation E302 or accepted undertakings under Regulation E304, a Panel may, at any point during the period of an interim *restriction*:

- .1 at the request of the Chair of the *PCC*, or at the request of the *PCC* or of the *Individual*, direct that the interim *restriction* or undertaking be reviewed at a further hearing of the Panel, on such date as the Panel shall specify, or on an unspecified date provided that the *Individual* is served with no less than 14 days' notice in writing of the hearing;
- .2 at the request of the *Individual*, direct an expedited full hearing of the *Fitness to Practise Panel*; and, shall:
  - .a inform the *Individual* of his or her right to request a *Fitness to Practise Panel* to review the interim *restriction* or undertaking under Regulation E313 below;
  - .b inform the *Individual* of his or her right of appeal under Regulation E317 below.

**rE306** The Chair of the Panel shall record, in writing, the decision of the Panel, together with its reasons and the terms of any direction made, interim *restriction* imposed or undertakings accepted.

### Full Hearings before a Fitness to Practise Panel

**rE307** As soon as reasonably practicable after receipt of any report prepared by a *Medical Examiner* or, where no report has been prepared, the *PCC* considers that the case is ready for hearing, the Chair of the Panel shall send a notice in writing of hearing to the *Individual* which shall:

- .1 contain a summary of the case and a copy of the report, where applicable;
- .2 inform the *Individual* of the time and date of the full hearing;
- .3 inform the *Individual* of his or her right to attend and be represented at the hearing, and to produce evidence at the hearing, in accordance with Regulations E324.2 and .3 below;
- .4 inform the *Individual* of the Panel's powers at a full hearing under Regulations E308 to E310 below; and,
- .5 inform the *Individual* of his or her right to appeal under Regulation E317 below.

### Decisions of a Fitness to Practise Panel

**rE308** At a full hearing, the *Fitness to Practise Panel* shall decide whether the *Individual* is *unfit to practise* and, in reaching its decision, shall be entitled to take into account:

- .1 the *Individual's* current physical or mental condition, any continuing or episodic condition experienced by the *Individual*, or any condition experienced by the *Individual* which, although currently in remission, may be expected to cause impairment if it recurs; and
- .2 any failure by the *Individual* to comply with a direction to undergo a relevant medical examination made under Regulation E300.1.

**rE309** Where a *Fitness to Practise Panel* has decided that an *Individual* is *unfit to practise*, the Panel may direct:

- .1 that the *Individual* be subject to a *restriction* which may be subject to such conditions as the Panel may consider appropriate, and which may be imposed indefinitely or for such period, not exceeding six months, as shall be specified in the direction;
- .2 that the *Individual's* right to continue to practise, or to resume practice after any period of *restriction* shall be subject to such conditions as the Panel may think fit, including that the *Individual*:



- .a submit for regular examination before one or more *Medical Examiners* nominated by the Panel,
- .b authorise disclosure to the *PCC* and the *Medical Examiner* such of his or her medical records as may be reasonably required for the purposes of the medical examination and subsequent report,
- .c is reviewed by a registered medical practitioner and shall follow the treatment they recommend in respect of any physical or mental condition, which the Panel consider may be a cause of the *Individual* being unfit to practice.

**rE310** In lieu of imposing any direction under Regulation E309 above, the Panel may accept from the *Individual* one or more undertakings in writing in which the *Individual* agrees to such period of *restriction*, or such conditions, as the Panel would otherwise have imposed.

**rE311** Where it has made a direction under Regulation E309 or agreed undertakings under Regulation E310, the Panel shall inform the *Individual*:

- .1 of his or her right to request a *Fitness to Practise Panel* to review any direction made, or undertakings agreed, under Regulation E313 below;
- .2 of his or her right of appeal under Regulation E317 below; and
- .3 that a failure to comply with the direction or undertakings would be likely to result in a charge of professional misconduct being brought against the *Individual* before a Disciplinary Tribunal.

**rE312** The Chair of the Panel shall record, in writing, the decision of the Panel, together with its reasons and the terms of any direction made or undertakings accepted.

## E4. Reviews and appeals

### Review of decisions made by a Fitness to Practise Panel

- rE313** At any time during which an *Individual* is subject to a period of *restriction* or conditions, directed or undertaken pursuant to these Regulations, the Chair of the *PCC* may, of his or her own motion, or at the request of the *PCC* or of the *Individual*, refer the matter to be reviewed before a *Fitness to Practise Panel*, where he or she considers there has been a significant change in the *Individual*'s circumstances or that there is some other good reason for a review to be undertaken.
- rE314** Where a case has been referred to a *Fitness to Practise Panel* for a review hearing under Regulation E313, Regulations E298 to E312 and E324 shall apply, save that the Chair of the Panel and the *Individual* may agree in writing that no preliminary hearing shall be held.
- rE315** At the conclusion of a review hearing, the *Fitness to Practise Panel* may:
- .1 confirm or revoke the direction made or undertakings agreed;
  - .2 extend or vary (or further extend or vary) the period for which the direction has effect, or agree with the *Individual* concerned an extension or variation of the period for which an undertaking has been agreed;
  - .3 replace the direction or undertakings, exercising any of the powers of a *Fitness to Practise Panel* under Regulations E302, E304, E309 or E310 above.
- rE316** Where a case has been referred to a *Fitness to Practise Panel* for a review hearing under Regulation 26 above and the review hearing cannot be concluded before the expiry of any period of *restriction* imposed under Regulation E302 or E309.1, or agreed under Regulation E304.1 or E310, the Panel may extend the *restriction* for such period as it considers necessary to allow for the conclusion of the review hearing.

### Appeals before a Review Panel

- rE317** An *Individual* may appeal a decision of a *Fitness to Practise Panel* to impose, extend, vary or replace a period of *restriction* by notifying the *President* in writing that he or she wishes to do so, no more than 14 days after the date of the decision subject to appeal.
- rE318** As soon as reasonably practicable after receipt of an appeal under Regulation E317, the Chair of the *Appeal Panel* shall send a notice in writing of the appeal hearing to the *Individual*, which shall:
- .1 inform the *Individual* of the time and date of the appeal hearing;
  - .2 inform the *Individual* of his or her right to attend and be represented at the hearing, and to produce evidence at the hearing, in accordance with Regulations E324.2 and .3 below; and
  - .3 inform the *Individual* of the Panel's powers under Regulation E320 below.
- rE319** A pending appeal to an *Appeal Panel* shall not operate as a stay of the decision subject to appeal.

## Decisions of a Review Panel

**rE320** At the conclusion of an appeal hearing, the *Appeal Panel* may:

- .1 allow the appeal;
- .2 confirm the decision that is subject to appeal;
- .3 exercise any of the powers of a *Fitness to Practise Panel* under Regulations E309 or E310 above;

**rE321** The *Appeal Panel* shall inform the *Individual*:

- .1 of his or her right to request a *Fitness to Practise Panel* to review any direction made, or undertakings agreed, under Regulation E313 above; and
- .2 that failure to comply with a *restriction* or condition imposed under Regulation E320.3 above would be likely to result in a charge of professional misconduct being brought before a *Disciplinary Tribunal*.

**rE322** The Chair of the Panel shall record, in writing, the decision of the Panel, together with its reasons, and the terms of any *restriction* imposed or undertakings accepted.

**rE323** There shall be no right of appeal from a decision of an *Appeal Panel*.



## E5. Conduct of Fitness to Practise and Review Panel Hearings

### Procedure before a panel

- rE324** At any hearing before a *Fitness to Practise* or *Appeal Panel*, the proceedings shall be governed by the rules of natural justice, subject to which:
- .1 the procedure shall be informal, the details being at the discretion of the Chair of the Panel;
  - .2 the *Individual* shall attend the hearing and may be represented by another member of the bar or a solicitor, save that where the *Individual* does not attend and is not represented, the hearing may nevertheless proceed if the Panel is satisfied that it is appropriate to do so and that all reasonable efforts have been made to serve the *Individual* with notice in writing of the hearing in accordance with these Regulations;
  - .3 the *Individual* may, on his or her own behalf or through his or her representative:
    - .a make representations in writing or orally,
    - .b produce evidence, provided (but subject to the discretion of the Chair) that a proof of such evidence has been submitted no less than 24 hours prior to the hearing, and
    - .c put questions to any *Medical Examiner* whose report is in evidence before the Panel;
  - .4 the hearing shall be in private, unless the *Individual* requests a public hearing, and shall be recorded electronically;
  - .5 decisions shall be taken by simple majority;
  - .6 where the votes are equal the issue shall be decided, at a hearing before a *Fitness to Practise Panel*, in the *Individual*'s favour and, in an appeal case, against the *Individual*.
- rE325** If at any time it appears to a Panel that it would be appropriate to do so, the Panel may refer the case to the *PCC* for consideration of whether to refer any matter for a hearing before a *Disciplinary Tribunal*.
- rE326** Where it considers it necessary, a Panel may appoint a practising barrister or solicitor to assist it on any question of law or interpretation of these Regulations, by providing an independent advice either orally or in writing, such advice to be tendered in the presence of the parties, or, where the parties are not present at the hearing, copied to the parties as soon as reasonably practicable.
- rE327** A Panel shall have no power to award costs.
- rE328** The proceedings before an *Appeal Panel* shall be by way of a rehearing.
- rE329** At any review hearing before a *Fitness to Practise Panel* or appeal hearing before an *Appeal Panel*, copies of the report of any expert or any proof of evidence referred to at any previous hearing of the Panel in respect of the same case may be referred to by the Panel.
- rE330** In the arrangements that it makes to perform its functions, and in undertaking its functions, in particular, in reaching any decision concerning an *Individual*'s fitness to practise, a Panel shall:
- .1 take into account its duties to make reasonable adjustments which arise under the Equality Act 2010; and
  - .2 have due regard to the need to:

- .a eliminate unlawful discrimination and other conduct prohibited by the Equality Act 2010, and
- .b advance equality of opportunity and foster good relations between *persons* who share a relevant protected characteristic as set out in Section 149 of the Equality Act 2010 and those who do not.

### Postponement, adjournment and cancellation

- rE331** Before the opening of any hearing in which notice has been served in writing in accordance with these Regulations, the Chair of the Panel may, of his or her own motion or on the application of the *PCC* or the *Individual*, postpone the hearing until such time and date as he or she thinks fit.
- rE332** Where any hearing under these Regulations has commenced, the Panel considering the matter may, at any stage in the proceedings, whether of its own motion or on the application of the *PCC* or the *Individual*, adjourn the hearing until such time and date as it thinks fit.
- rE333** No hearing shall be postponed or adjourned under Regulations E335 or E336 unless the *Individual* has been given reasonable opportunity to make representations on the matter.
- rE334** Where a hearing has been postponed or adjourned, the parties shall be notified as soon as reasonably practicable of the time, of the date and place at which the hearing is to take place or to resume.
- rE335** Where notice of hearing has been served in writing under these Regulations, the Chair of the Panel may, on application of the *PCC* or the *Individual*, cancel the hearing where the Chair considers that there are no reasonable grounds for questioning whether the *Individual* is *unfit to practise*.

### Notice and publication of Decisions

- rE336** Where a decision has been taken by *Fitness to Practise Panel* or an *Appeal Panel* under these Regulations, the Chair of the Panel shall, as soon as reasonably practicable, serve notice in writing of the decision on the *Individual* concerned.
- rE337** Where a decision is taken at a full hearing of a *Fitness to Practise Panel* or at an *Appeal Panel* hearing, unless the decision is to take no action and the *Individual* is permitted to continue to practise without *restriction*, the Chair shall provide notice in writing of the decision to any *person* to whom he or she considers it to be in the public interest to do so.

### Service of documents

- rE338** Regulation rE216 of the Disciplinary Tribunals Regulations (section 5B) shall apply for the purposes of the service of any notices or documents under these Regulations save that, for the reference in Regulation rE216.2.d to the "*Directions Judge* or the Chairman of the *Disciplinary Tribunal*", there shall be substituted the "*Chair of the Panel*".
- rE339** Where a Panel directs that an *Individual's* ability to practise be subject to *restrictions*, conditions or agreed undertakings, the *President* shall always communicate brief details of the decision, in writing to:
- .1 the *Individual*;
  - .2 the Chair of the *PCC*;
  - .3 the Director of the *Bar Standards Board*;
  - .4 the Barrister's Head of Chambers, where relevant;

- .5 the Treasurers of the Barrister's Inn of Call and of any other Inns of which he is a member, where relevant; and
- .6 other regulators, where relevant.

**rE340** The following shall have details of the decision of the Panel communicated to them in writing, at the discretion of the *President*:

- .1 the Chair of the *Bar Council*;
- .2 the Lord Chancellor;
- .3 the Lord Chief Justice;
- .4 the Attorney General;
- .5 the Director of Public Prosecutions; and
- .6 the Leaders of the six circuits.



## Schedule 1

### Constitution of Fitness to Practise and Review Panels

1. The *President* shall appoint and maintain:
  - (a) a list of barristers and *lay persons* eligible to be members of *Fitness to Practise Panel*;
  - (b) a list of barristers and *lay persons* eligible to be members of an *Appeal Panel*; and,
  - (c) from the lists at (a) and (b), lists of Queen's Counsel eligible to act as Chairs of a *Fitness to Practise Panel* and an *Appeal Panel* respectively.
2. The *President* shall remove from the lists at Paragraph 1 *persons*:
  - (a) whose term of appointment has come to an end, unless that term is renewed;
  - (b) who resign from the relevant list by giving notice in writing to that effect to the *President*; or
  - (c) who in the opinion of the *President* have ceased to be eligible for appointment.
3. The *President* shall appoint, and ensure that arrangements are in place to be able to access suitably qualified *medical members* to sit on *Fitness to Practise* and *Appeal Panels*.
4. A *Fitness to Practise Panel* shall consist of five members selected by the *President* from the list of *persons* under Paragraph 1(a) and in line with the arrangements arising from paragraph 3, being:
  - (a) a Chair whose name appears on the relevant list at Paragraph 1(c);
  - (b) two practising barristers;
  - (c) a *medical member*; and
  - (d) a *lay member*.
5. An *Appeal Panel* shall consist of four members selected by the *President* from the list of *persons* under Paragraph 1(b) and in line with paragraph 3, being:
  - (a) two practising barristers, including a Chair whose name appears on the relevant list at Paragraph 1(c), and who shall, unless the *Appeal Panel* decide otherwise, be the most senior of the barrister members;
  - (b) a *medical member*; and
  - (c) a *lay member*.
6. No *person* shall be selected to sit on a *Fitness to Practise Panel* or an *Appeal Panel* if:
  - (a) they are a member of the *PCC* or of the *PCC* or any of its other Committees; or
  - (b) they were a member of the *PCC* when the matter being dealt with by the Panel was considered by the *PCC*.
7. No *person* shall sit on a *Fitness to Practise Panel* or an *Appeal Panel* for the hearing of a case that they have previously considered or adjudicated upon in any other capacity.



8. The proceedings of a *Fitness to Practise Panel* or an *Appeal Panel* shall be valid notwithstanding that one or more members of the Panel become unable to sit or disqualified from sitting on the Panel, or are replaced by another member from the appropriate list or by the arrangement at paragraph 3, subject to there being a minimum of three Members which shall include a Chair from the relevant list held under Paragraph 1(c), a *medical member* and a *lay member*.
9. The validity of the proceedings of a Panel shall not be affected by any defect in the appointment of a member.





# Annex 4

## Guidance

- 1) Oaths and Affirmations at Disciplinary Tribunals
- 2) Disciplinary Tribunals at the Inns of Court – attendance of judges as witnesses





## Oaths and Affirmations

### Baha'i

Note: They may choose either to affirm or to swear an oath

Wording for oath: **'I swear by the Bab that the evidence that I shall give shall be the truth, the whole truth and nothing but the truth.'**

Note: may use the Bab or Almighty God

Wording for affidavit: **'I swear by the Bab that this is my name and handwriting and that the contents of this, my affidavit are true.'**

### Buddhist

Note: Buddhists will normally affirm as oaths are incompatible with the practice of most Buddhists, but may swear an oath.

Wording for oath: **'I swear by the Buddha that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by the Buddha that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy Book: The Pali scripture and a large body of Mahayana literature

Tipitaka (for Theravada school)

Tripitaka (for Mahayana school)

### Christian

Note: Witnesses may choose either to affirm or to swear an oath.

There are Christians who will not swear an oath because they believe that it contrary to the teachings of the Bible.

Outside of the Catholic, Orthodox and Protestant traditions, groups such as Mormons, Seventh Day Adventists, Quakers and Jehovah's Witnesses will affirm; although some Jehovah's Witnesses may have no objection to taking an oath on the Bible.

Wording for oath: **'I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

According to section 3 of the Oaths Act 1978 and to section 1-646 of Stone's Justices' Manual, a Scottish witness (especially a Presbyterian) may wish to swear the following which does not involve a holy book:

**'I swear by Almighty God, as I answer to God on the Great Day of Judgment, that I will speak the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by Almighty God that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy Book: Holy Bible/New Testament (which could be kept in a light blue bag)

Roman Catholics may want to swear on the Common Bible (New Jerusalem or Douai)

### Hindu

Note: Witnesses may choose either to affirm or to swear an oath on the Gita

Wording for oath: **'I swear by the Gita that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by the Gita that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy book: The Vedas, an extract (on which the oath is sworn) is the Bhagavad Gita (Gita) – should have red covering cloth

Hindus may ask permission to wash their hands, feet or other parts of the body before taking the oath, particularly the hands.

### Islam

Note: Witnesses may choose either to affirm or to swear an oath on the Qu'ran.

Wording for oath: **'I swear by Allah that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by Allah that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy Book: The Qu'ran (Koran) – should have a green covering cloth and be in an elevated position.

Muslims may want to wash their hands and cover their head before taking the Qu'ran in their hand.

Muslim witnesses may wish to hold the Qu'ran in the right hand or in both hands.

Muslim witnesses should not be asked to remove their head covering in court including the veil (Niqab) worn to cover the face by many Muslim women. (The exceptions are for security purposes in front of a female officer or if instructed to do in court by the Judge.)

Muslim women are not permitted to touch the Qu'ran during menstruation and may choose to affirm.

It is accepted that a Muslim witness may wish to take the oath without the Qu'ran, as it is not necessary for Muslims to hold the Qu'ran when taking an oath, as an oath taken by Muslims is a declaration before Allah.

### Jain

Note: Witnesses will either affirm or possibly will swear an oath.

Questions of ritual purity may arise.

Wording for oath: **'I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by Almighty God that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy Book: The Kalpa Sutra

Note: Since there are many different groupings, no single text can be specified, but some may choose to take an oath on a text such as the Kalpa Sutra.

Sometimes, a witness will swear an oath by elevating a holy scripture above their head and swearing by it. If such a witness does not stipulate such a practice and does not have the appropriate text in court, they should affirm.

### Judaism

Note: Witnesses will either swear an oath or affirm.

Note: Most observant Orthodox Jews are not permitted by Jewish law to take an oath on the Hebrew Bible (called the Torah), but can affirm.

Whilst some male Jews may prefer to cover their heads, this is not a requirement and failure to cover the head should not be seen as an indication of untruthfulness. Jewish Law regards the act of taking an oath or affirmation as equally binding whether the head is covered or



uncovered. Certain Jews who wish to have their heads covered at all times should not be regarded as disrespectful in court.

Wording for oath: **'I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by Almighty God that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy Book: Hebrew Bible (the Tenach or Torah) – may have a black covering cloth

The books with the title 'Old Testament' can still be used, although the title is from a Christian viewpoint.

### Paganism

Note: Witnesses may choose either to affirm or to swear an oath.

Wording for oath: **'I swear by all that I hold sacred that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by all that I hold sacred that this is my name and handwriting and the contents of this, my affidavit are true.'**

Holy Book: Individuals will not need a holy book to swear by. However, if they do, they will supply their own personal holy book, which should not be touched by others without permission, other than for security purposes.

### Rastafarianism

Note: Witnesses may choose either to affirm or to swear an oath.

Many Rastafarians will wear a hat in the court or tribunal, as it is part of their religious custom to cover their heads. A Rastafarian who wishes to keep the hat on when appearing in court in any capacity should be allowed to do so.

Wording for oath: **'I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by Almighty God that this is my name and handwriting and that the contents of this, my affidavit are true.'**

### Sikhism

Note: Witnesses should affirm as Sikhism does not recognise swearing an oath. In Sikh culture, there is no swearing on a holy book.

Wording for oath: If do choose to swear (although the advice given by the Network for Sikh organisations is the Sikhs should affirm):

**'I swear by Sundar Gutka that the evidence that I shall give shall be the truth, the whole truth and nothing but the truth.'**

Note: may use Almighty God or Sundar Gutka

Wording for affidavit: **'I swear by Sundar Gutka that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Note: may use Almighty God or Sundar Gutka

Holy Book: The Guru Granth Sahib

A portion of it, called the Sundar Gutka (or Pun Granthi or Sacred Nit-Nem), may be obtained and covered with an orange or yellow cloth.

Guru Granth Sahib as the book is considered a life and is considered by Sikhs to be the eleventh Guru.

If they wish to swear on the Sundar Gutka, they may wish to wash before handling the holy book, may want to hold it the right hand and may want to remove their shoes before taking the oath.

### Taoism

Note: Witnesses may choose either to affirm or to possibly swear an oath. Those also practising other faith traditions (such as Buddhism, Christianity or Islam) may choose to swear upon their appropriate holy scripture.

Wording for Oath: **'I swear by Almighty God that the evidence that I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by Almighty God that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy Book: Tao Te Ching

## Zoroastrianism

Note: Witnesses may choose either to affirm or to possibly swear an oath.

Wording for oath: **'I swear by Almighty God that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**

Wording for affidavit: **'I swear by Almighty God that this is my name and handwriting and that the contents of this, my affidavit are true.'**

Holy Book: The Avesta

## DISCIPLINARY TRIBUNALS OF THE INNS OF COURT

### Attendance of Judges As Witnesses

This note sets out the points agreed at a meeting between the President of the Council of the Inns of Court, the Chairman of the Professional Standards Committee of the Bar Council, the Chairman of the Professional Conduct and Complaints Committee of the Bar Council, the Sub Treasurer of the Inner Temple and the Head of Professional Standards and Legal Services of the Bar Council.

The meeting considered the concerns raised by the Vice-Chancellor and the Lord Chief Justice about the issue of calling Judges as witnesses at Disciplinary Tribunals. The following points were agreed:

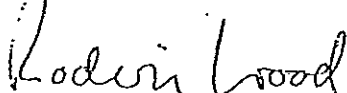
1. Where a matter, originally raised by a Judge, is referred to a Disciplinary Tribunal the complainant should be, and as and when necessary be described as, the Bar Council.
2. In all such cases the Bar Council will, initially, rely on the transcript of the hearing or other official record of the proceedings without seeking to adduce oral evidence from the Judge. To that end the Bar Council will
  - (a) seek directions from the Directions Judge that oral evidence from the Judge will not be required unless the respondent satisfies the Directions Judge that the complaint cannot fairly be adjudicated without it;
  - (b) itself (rather than the Directions Judge) communicate with the Judge in so far as it may be necessary to ascertain whether and if so what evidence he might give and so inform the Directions Judge and the respondent if and to the extent required.



Morritt LJ, President of the Council of the Inns of Court



Roy Amlot QC, Chairman of the Professional Standards Committee



Roderic Wood QC, Chairman of the Professional Conduct and Complaints Committee