
Summary of the Changes to the Code of Conduct of the Bar of England and Wales

1. Introduction

This report intends to summarise the most significant changes to the Code of Conduct relevant to the Sentencing Guidance Project. The information contained within this report has been provided by the Bar Standards Board. In order to show how the new Handbook differs from the current Code of Conduct, please see the destination table found at:

http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/annex_g.pdf.

The current version of the Code can be found at

<https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/>.

The current version of the Sentencing Guidance can be found at

https://www.barstandardsboard.org.uk/media/30900/130415_-_sentencing_guidance_2013.pdf.

The new Handbook including the Code and relevant parts can be on Legal Services Board website

http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/current_applications.htm.

Breaches of the code will largely stay the same, although charged under a new section or core duty. There are some changes to the potential sanctions for breaches of the Code:

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

- to disbar him;
- 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);
- not to renew his practising certificate;
- to impose conditions on his practising certificate;
- 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;
- to remove or to suspend his authorisation to conduct litigation or to impose conditions on it;
- 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);
- 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;
- to order him to be reprimanded by the Treasurer of his Inn;
- to order him to be reprimanded by the Tribunal;
- to give him advice about his future conduct;
- to order him to attend on a nominated person to be reprimanded; or
- to order him to attend on a nominated person to be given advice about his future conduct.

Three person panels will now have the power to suspend up to a 12 month term; previously this power was capped at 3 months.

2. Summary

2.1. *BSB Handbook*

The Handbook applies to ~~BSB~~ regulated persons rather than simply barristers, which includes both legal disciplinary practices and barrister only entities in addition to their owners, managers and authorised persons and therefore represents a broadening of the scope of regulations by the Bar Standards Board.

2.2. *Introduction (Part I)*

The introduction section highlights the fact that the BSB is a specialist regulator focusing primarily on advocacy, litigation and associated advice services. It also sets out various other things such as applications of the Handbook, commencement and waivers. These are all standard elements of the 8th Edition that have been collected in one convenient section.

2.3. *Code of Conduct (Part II)*

The Code of Conduct includes all the Core Duties, outcomes and conduct rules which will apply to barristers BSB authorised entities and to those who work in such entities.

The Code of Conduct will apply not only to individual barristers but also to BSB authorised bodies, their managers (whether authorised persons or not) and all authorised persons (barristers or others) working in them (whether as managers or as employees). This has required some amendment to the rules but the basic approach has been to apply the same rules with only the minimum necessary differences to all those the BSB regulates.

Core Duties

The Core Duties underpin the entire regulatory framework and set the mandatory standards that all BSB regulated persons are required to meet. They also define the core elements of professional conduct, drawing heavily on the professional principles in the Legal Services Act 2007 plus some additional requirements based in the BSB's analysis of the risks and our various consultations on these issues. They are mandatory and enforcement action can be taken on the basis that the duties have been breached. The Core Duties are new but they build on rules that are contained in the current Code. However, in the new Handbook they have been extended to apply to all barristers, not just practising barristers (therefore unregistered barristers are required to comply with the Core Duties). Under the current Code only rules similar to the Core Duties 1, 2 and 4 apply to barristers without practicing certificates.

The Core Duties are:

- a. **You must observe your duty to the court in the administration of justice [CD1].**
- b. **You must act with integrity and honesty [CD2].**
- c. **You must maintain your independence [CD3].**
- d. **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 [CD4].**
- e. **You must keep the affairs of each client confidential [CD5].**
- f. **You must act in the best interests of each client [CD6].**
- g. **You must provide a competent standard of work and service to each client [CD7].**

- h. You must not discriminate improperly in relation to any person [CD8].**
- i. You must be open and co-operative with your regulators [CD9].**
- j. You must manage your business effectively and in such a way as to achieve compliance with your legal and regulatory obligations [CD10].**

Conduct rules

Supplementing the Core Duties are the Conduct Rules, which have been broken down into the various sections. The sections are as follows:

- a. You and the court;**
- b. Your behaviour towards others;**
- c. You and your client;**
- d. You and your regulator; and**
- e. You and your practice.**

Outcomes

At the beginning of each of the above sections the BSB has identified outcomes, which seek to explain the reasons behind the regulatory scheme and what it is designed to achieve. The outcomes are derived from the regulatory objectives as defined in the LSA 2007 and the risks which must be managed if those objectives are to be achieved. The inclusion of outcomes which describe the purpose of the rules is new. As discussed above, the outcome put the rules into context and together with the Core Duties help barristers determine how they should act if a specific situation is not covered by the rules or it is not clear how a rule should be applied in a particular situation.

The outcomes are not themselves mandatory rules, but they are factors which BSB regulated persons should have in mind when considering how the Core Duties and rules should be applied in particular circumstances. The BSB will take into account considering how to respond to alleged breaches of the Core Duties and the rules.

Misconduct charges and administrative sanctions will continue to be applied for breaches of Core Duties and/or rules. This will provide greater clarity for barristers, entities and clients, especially in situations where the barrister or entity owes conflicting duties.

Rules

The rules are not intended to be exhaustive. In any situation where no specific rule applies, reference should be made to the Core Duties. In situations where specific rules do apply, it is still necessary also to consider the Core Duties, since compliance with the rules alone will not necessarily be sufficient to comply with the Core Duties.

2.4. Summary of charges in the new Handbook (Parts 2 and 3)

Key changes introduced by Part II section D (Conduct rules)

II.C2.R3 . Referral fees

The Handbook maintains the outright ban on barristers paying, or receiving, referral fees. Part II C2 O1 of the Handbook sets out the outcome the BSB wishes to achieve by maintaining this ban: Referrals to BSB authorised persons by third parties are made solely in the interests of clients and are not influenced by the financial interests of the person making a referral.

The BSB have reviewed the ban on referral fees in the light of the LSB's intended outcomes for consumers and with reference to the Regulatory Objectives, including protecting and promoting both the interests of the consumers (providing value for money) and the public interest more widely; as well as promoting and maintaining adherence to the professional principles. The BSB's duty is, as far as reasonably practicable, to act in a way which is compatible with the Regulatory Objectives and which the BSB, as the approved regulator, consider to be most appropriate for meeting those objectives. In view of the way in which the great majority of barristers work, the BSB have concluded that maintaining the ban is necessary if they are to fulfil that duty.

II.C3.R5 - Not misleading clients and potential clients.

This rule seeks to manage the risks that clients may be misled about the status of the person providing legal services to them. There have been cases, for example, in which unregistered barristers have misled clients into believing that they were practising barristers, covered by insurance and subject to full BSB regulation.

Another example of circumstances where there may be a risk of clients being misled is where services are provided by pupils. Also the new freedom for a self-employed barrister to share premises with non-barristers introduces the risk that clients will assume that the barrister is responsible for services provided by non-barristers.

II.C3.R7 . Accepting instructions.

There have been some amendments to these rules to deal with problems which have occurred in practice, particularly in relation to the late return of instructions. The rules seek to clarify when instructions must be refused or returned, and the circumstances in which instructions may be returned.

II.C3.R14 . Requirement not to discriminate.

The requirement not to discriminate has been extended to cover all services. Previously it related only to advocacy services.

II.C3.R14 . The cab rank rule.

The rule has been extended to apply to all BSB authorised bodies and authorised individuals working in them where instructions are given on a referral basis and seek the services of a named authorised individual. The power of the Bar Council to deem fees to be reasonable for the purposes of the Code has been removed. The rule has been extended to instructions to do work in England and Wales from lawyers in Scotland, North Ireland or EEA Member States.

II.C4.R2 . Reporting requirements.

This is a new reporting requirement to report serious misconduct to the BSB. Regulated persons will be required to self-report and report others in relations to ~~serious misconduct~~ only.

Limiting the requirements to report to cases of ~~serious misconduct~~ should largely meet the concern that regulated persons would otherwise be inhibited from discussing possible marginal breaches of the rules with colleagues. Such conversations help to secure the primary objective of compliance. It is important not to inhibit the seeking of advice from a more experienced colleague if faced with a difficult situation or if worried that some decision which had perhaps to be taken in a hurry had inadvertently breached a rule. It is therefore in public interest that such conversations should normally be confidential. However, if a regulated person does reveal ~~serious misconduct~~, then the public interest requires that the regulator should be informed so that it can take appropriated action. Where legal professional privilege applies, this will override the requirement to report another barristers ~~serious misconduct~~.

An exception to this rule will apply for any discussions held on a confidential basis with the Bar Council's ethical help line. This exception is justified on the basis that it is good regulatory practise to have a confidential source of advice that barristers may use to discuss potential breaches of the Code. If a confidential service was not offered it would lead to situation where barristers were prevented from discussing potentially serious breaches and obtaining advice about how best to resolve the matter. Such a situation would likely increase any potential harm to the lay client and the administration of justice.

2.5. Rule 41

New requirements have been imposed when ceasing to practise to ensure the orderly winding down of business in the interests of the clients.

This section repeats many of the old rules but also includes the various amendments made in the BSB recent rule change application. The BSB has not yet undertaken a wider review of the public access and licensed access rules, but plans on doing so when time and resources permit. The basic policy position being considered is that these rules need to be rationalised further, with some of the detail being replaced by greater guidance issued around existing more general rules that appear in other areas of the Handbook.

2.6. Section D5 . unregistered barristers

II.D5.R1.1-R1.2 (provision of information to clients) is new. They create an obligation for unregistered barristers to explain to more inexperienced clients (defined as including those able to complain to the Legal Ombudsman) that they are not practising as a barrister, are not subject to rules applicable to practising barristers, may not be covered by insurance and that the client cannot complain to the Legal Ombudsman.

All of the core duties will be applied to unregistered barristers when they are providing legal services. When not providing legal services, only the core duties relating to: (a) not

behaving in a way which is likely to diminish the trust and confidence of the public; and
(b) co-operation with regulators will apply.

2.7. Significant omissions

There are a number of deliberate omissions from the new Handbook, which were no longer thought to be necessary:

- “ The ban on making comments to the media on current cases has been removed;
- “ The requirement to have a professional client present when appearing in court has been removed;
- “ Detailed rules on fees have been removed; and
- “ Detailed rules on advertising have been removed.

2.8. Section B: Scope of practices rules

For individual barristers, this section largely replicates the present rules subject to the removal or relaxation of certain current prohibitions and the introduction of the possibility of conducting litigation.

2.9. Removal of prohibitions

The existing rules on sharing premises are replaced with more outcomes focused rules on associations and outsourcing.

The prohibition on undertaking litigation has also been deleted as well as many of the detailed rules in the current Code about the types of activities barristers may undertake. By removing the overly prescriptive rules the BSB has taken a more outcomes focussed approach.

The prohibition on dual authorisation (i.e. authorisation by more than one Approved Regulator at the same time) will remain. The rule avoids unnecessary confusion for clients. It would be problematic to accurately define when a jointly authorised person was (for example) acting as a barrister or acting as solicitor, and consequently what regulatory regime should apply.

2.10. Section C: The Practising Certificate Rules

These rules were approved by the LSB in August 2011. These rules remain largely the same, except rules in relation to the authorisation of barristers to conduct litigation.