

Consultation Paper on Changes to the Guidance on Returning Instructions

Deadline for responses: 25 April 2014

Introduction

1. The new Bar Standards Board (BSB) Handbook came into force on 6 January 2014. A new development in the regulation of barristers, the Handbook is built around the principle of outcomes focused regulation. Less prescriptive than the Code of Conduct that preceded it, the Handbook places more focus on the required outcome of the BSB's regulatory arrangements, rather than attempting to define how a barrister should act in every possible situation. The rules and associated guidance are not only therefore a key tool for barristers, but also ensure that clients and members of the public are aware of what they can expect when instructing a barrister and can understand what action can be taken in the event of improper behaviour by that barrister.
2. Shortly before the introduction of the Handbook, the BSB considered the issue of returning instructions where there were substantive changes to the basis of a barrister's remuneration. Responding in particular to the Legal Aid Agency's Very High Cost Cases (VHCCs) contract changes the BSB issued a policy statement, dated 25 November 2013, clarifying the rules and guidance applicable to barristers considering returning instructions following a change in their remuneration. This drew on the BSB's existing guidance that a change in remuneration would amount to a withdrawal of instructions by the client, meaning that a barrister was entitled to withdraw from the case without regard to the potential detriment to the client.
3. Whilst issuing that guidance, a commitment was made to consult fully on future changes to the guidance on this topic following the Handbook's launch. This was because the issues raised highlighted some wider risks to the regulatory objectives that may not have been adequately addressed by existing guidance. In particular, the Board felt that there was a risk of undue detriment to clients, who through no fault of their own found themselves without legal representation, for example because a third party such as the Legal Aid Agency had changed the rate of remuneration for the barrister. In such cases, the previous guidance was perhaps too a blunt instrument that may not have taken into account all of the relevant regulatory issues.
4. This consultation invites views on updated guidance on returning instructions.

Current Position and the need for change:

5. The new Handbook came into force on 6 January 2014. While as a regulator the BSB allows barristers significant flexibility in the way they operate provided that they achieve specified regulatory outcomes, the Handbook does include a number of prescriptive rules. Each rule underpins one or more of the required regulatory outcomes and the accompanying guidance assists barrister in applying the rule. The relevant outcomes that the BSB is seeking to achieve are:
 - a. BSB authorised persons do not accept instructions from clients where there is a conflict between their own interests and the clients' or where there is a conflict between one or more clients except where permitted by the BSB Handbook;
 - b. Instructions are not accepted, refused or returned in circumstances which adversely affect the administration of justice, access to justice or (so far as compatible with these) the best interests of the client; and
 - c. Clients and BSB authorised persons are clear about the circumstances in which instructions may not be accepted or may or must be returned.
6. Clients "instruct" barristers when they ask them to provide legal services, such as advice or advocacy. In certain circumstances, barristers may be entitled (or in fact obliged by their regulatory duties) to "return instructions", in which case they will stop representing a client. When a barrister ceases to act this may have serious consequences for a client and the wider administration of justice, especially if the client is left without legal representation close to a trial. Given the potentially serious consequences, the BSB has retained a number of prescriptive rules in this area, to ensure that both barristers and clients understand what is expected. Rules C25 – 26 in the Code of Conduct section of the BSB Handbook outline the situations where a barrister is either entitled to or obligated to stop representing a client. The associated guidance at gC83 – 87 provides examples of when it would be appropriate for a barrister to return instructions and what other factors they should consider when deciding whether or not to do so. Guidance, while not mandatory, gives a clear steer as to the wider considerations a barrister should have in mind when applying a rule to their own circumstances.
7. The current guidance at gC87 states that a barrister who, having previously agreed a fee, is made aware of a fundamental change to the basis of their remuneration is to treat that change as amounting to a withdrawal of instructions by the client. Generally, when a client withdraws instructions this means that they have either decided to engage alternative representation, represent themselves or have decided to end their case. If instructions are withdrawn the barrister need not consider his professional obligations any further. The presumption underlying gC87 is that the fundamental change to counsel's remuneration is directly attributable to the client. Therefore provided that the client has been properly informed of the potential consequences of such an action any resulting prejudice suffered would be a direct result of their own informed action.
8. Whilst a barrister's fee may be funded directly by the lay client, in many cases this will be paid by a third party funder. Third party funders include, for example,

insurance companies, special interest groups and the Legal Aid Agency. The presumption behind gC87 does not reflect the position where a decision is made by a third party funder, who may not consult the lay client on that decision, to make a fundamental change to the basis of the remuneration. The BSB is concerned that the current guidance does not reflect the risk caused to the public interest by decisions made by third party funders. Legal proceedings can be a stressful time for clients and a sudden change or loss of representation that impacts on the proceedings adds to that burden and may impact on the client's ability to access justice. The BSB has also considered a barrister's duties in wider circumstances where a client fails to comply with previously agreed contractual terms (in full or in part). In both scenarios, it is important that the barrister exercises his professional judgment in deciding how to respond. Although the barrister may be entitled to withdraw from the case, doing so may be disproportionate and cause detriment to the client, the administration of justice or third parties.

9. Barristers who enter into contracts for the supply of services are entitled, as would any other professional providing a service to the public, to reconsider their position if the agreed terms of that contract are changed. It would be unfair for barristers to be obligated in all circumstances to continue to represent clients if the terms of the contract between them had been unilaterally changed. In most cases, if the contractual terms were clear, the revised guidance will not prevent instructions being returned. Only in cases where returning instructions will result in a disproportionate impact on the lay client, administration of justice or public interest will it be necessary for a barrister to continue.
10. The BSB is required by the regulatory objectives of the Legal Services Act 2007, amongst other things, to promote and protect the interests of clients, the rule of law, access to justice, administration of justice and adherence by barristers to the professional principles. Depending on the circumstances a withdrawal of representation, following a decision made by a third party funder, may cause serious prejudice not only to the lay client but to other consumers, witnesses, jurors and the administration of justice as a whole. The proposed changes to the relevant guidance are intended to ensure that the public interest is adequately protected in circumstances where the person whom the barrister represents is not himself responsible for adversely altering the basis of the barrister's engagement and/or where exercising his/her right to withdraw may be disproportionate in view of the degree of prejudice to that person and/or to the administration of justice.
11. The revised guidance is intended to protect the client, and the wider public interest, by requiring barristers to consider the wider implications of treating instructions as having been withdrawn. For example under the current construction of gC87 a barrister can consider their instructions to have been withdrawn and cease to act for a lay client without further consideration. The revised guidance requires a barrister to consider whether the lay client was responsible for the change or default and whether ceasing to act has any wider implications. This additional consideration does not necessarily prevent a barrister from returning instructions but it does ensure that all factors relevant to a barrister's professional duties are part of that decision.
12. There may be situations where it is not possible for instructions to be returned immediately but it does not necessarily follow that the barrister is then obligated to continue until the case concludes. It may be that a barrister can undertake

necessary residual work to bring a case to a point where those instructions can reasonably be returned in accordance with the guidance. Once instructions have been returned, the barrister is not obliged to undertake any further action on the case, for example to assist the client to secure new representation.

Proposed amendments

13. In line with its regulatory objectives and the risk of prejudice to lay clients and/ or to the administration of justice the BSB proposes to make the amendments to the Handbook guidance that are identified by deletion or insertion (bold type) in the guidance associated with rC26 (gC83 – gC87) set out below. In drafting this guidance, the BSB has had regard to the various competing factors that a barrister should have in mind when deciding whether it is appropriate to return instructions. In applying this guidance, the barrister should exercise his professional judgement, having regard to the relevant Handbook outcomes, in particular that instructions are not accepted, refused, or returned in circumstances which adversely affect the administration of justice, access to justice or (so far as compatible with these) the best interests of the client.

14. The Handbook includes the following rule (the BSB is not amending the rule):

rC26 You may cease to act on a matter on which you are instructed and return your instructions if:

- .1 your professional conduct is being called into question; or
- .2 the client consents; or
- .3 you are a self-employed barrister and:
 - .a despite all reasonable efforts to prevent it, a hearing becomes fixed for a date on which you have already entered in your professional diary that you will not be available; or
 - .b illness, injury, pregnancy, childbirth, a bereavement or a similar matter makes you unable reasonably to perform the services required in the instructions; or
 - .c you are unavoidably required to attend on jury service;
- .4 [not currently in force];
- .5 you do not receive payment when due in accordance with terms agreed, subject to Rule C26.7 (if you are conducting litigation) and in any other case subject to your giving reasonable notice requiring the non-payment to be remedied and making it clear to the client in that notice that failure to remedy the non-payment may result in you ceasing to act and returning your instructions in respect of the particular matter; or
- .6 you become aware of confidential or privileged information or documents of another person which relate to the matter on which you are instructed; or
- .7 if you are conducting litigation, and your client does not consent to your ceasing to act, your application to come off the record has been granted; or

- .8 there is some other substantial reason for doing so (subject to Rules C27 to C29 below).

15. The following guidance is provided on Rule 26 (the BSB proposes to make the highlighted changes):

gC83 In deciding whether to cease to act and to return existing instructions in accordance with Rule C26, you should, where possible and subject to your overriding duty to the court, ensure that the client is not adversely affected because there is not enough time to engage other adequate legal assistance.

gC84 If you are working on a referral basis and your professional client withdraws, you are no longer instructed and cannot continue to act unless appointed by the court, or you otherwise receive new instructions. You will not be bound by the cab rank rule if appointed by the court. For these purposes working on a “referral basis” means where a professional client instructs a BSB authorised individual to provide legal services on behalf of one of that professional client’s own clients.

gC85 You should not rely on Rule C26.3 to break an engagement to supply legal services so that you can attend or fulfil a non-professional engagement of any kind other than those indicated in Rule C26.3.

gC86 When considering whether or not you are required to return instructions in accordance with Rule C26.6 you should have regard to relevant case law including: English & American Insurance Co Ltd & Others -v- Herbert Smith; ChD 1987; (1987) NLJ 148 and Ablitt -v- Mills & Reeve (A Firm) and Another; ChD (Times, 24-Oct-1995).

~~gC87 If a fundamental change is made to the basis of your remuneration, you should treat such a change as though your original instructions have been withdrawn by the client and replaced by an offer of new instructions on different terms. Accordingly:~~

~~———.1——— you must decide whether you are obliged by Rule C29 to accept the new instructions;~~

~~———.2——— if you are obliged under Rule C29 to accept the new instructions, you must do so;~~

~~———.3——— if you are not obliged to accept the new instructions, you may decline them;~~

~~———.4——— if you decline to accept the new instructions in such circumstances, you are not to be regarded as returning your instructions, nor as withdrawing from the matter, nor as ceasing to act, for the purposes of Rules C25 to C26, because the previous instructions have been withdrawn by the client.~~

gC87 **A fundamental change made to the basis of your remuneration or a substantial failure to meet agreed contractual terms may well amount to “some other substantial reason” justifying your withdrawing from a case or returning instructions within Rule C26. However before doing so you must consider (and the BSB will have regard to) all relevant circumstances in deciding whether your withdrawing from the case can reasonably be justified, including:**

- .1 the materiality of the default or change and the notice you were given of it;**
- .2 whether the client or some other person is responsible for the default or change;**
- .3 the likelihood of it being remedied within a reasonable time and, where the client is responsible for the default or change, whether reasonable notice was given to him to remedy the default, with a warning of the consequences of failing to do so;**
- .4 whether the risk of your withdrawing from the case in the event of a change or default was clearly explained to the client;**
- .5 the likely consequences (if any) that withdrawing from the case at that stage would have, in particular the nature and extent of any prejudice that is likely to be caused to:**
 - .a the client (for example whether the client is likely to be able represent himself in the proceedings or is likely to be able to have sufficient time to engage other adequate legal assistance);**
 - .b other parties, witnesses and other persons immediately affected by the case; and**
 - .c the administration of justice;**
- . 6 Specific consideration needs to be given to any prejudice that is likely to be caused by withdrawal to third parties who are vulnerable (whether clients, other parties or witnesses)**
- .7 the nature and extent of any prejudice that is likely to be caused to you if you do not withdraw from the case and the extent to which you have other means of effective redress for the change or default, including redress against any third party.**

16. The main differences from the current provisions of the Handbook are:

- a. A fundamental change in the basis of remuneration will no longer automatically entitle a barrister to treat the instructions as having been withdrawn by the client and hence he should cease to act.
- b. Barristers must consider who is actually responsible for any breach of agreed terms including remuneration. Due consideration must also be given to the client's awareness of both the breach and implications for their continued representation.
- c. An obligation for a barrister fully to consider the wider impact of withdrawal including to the lay client, the administration of justice and other parties affected by the case. Specific consideration must be given to any person impacted by the withdrawal who is vulnerable.

- d. The addition of new grounds to return instructions on the basis of a substantial failure to meet contractual terms by the client.
- e. Guidance on the applicability of Rule C29 (cab rank), following a withdrawal of instructions, to accept further instructions on the same matter has been deleted. It is intended that should new instructions, on the same matter, be offered that rC29 will apply and further guidance is not therefore required.

Consultation questions and how to respond

Question One:

Have we adequately identified the risks to clients, the administration of justice, third parties and the wider public interest where a barrister withdraws from a case? Are there any additional impacts or any unintended consequences arising from this guidance?

Question Two:

Are the additional considerations included in gC87 .1 - .7 adequate to assist a barrister in deciding whether or not they would be justified in withdrawing?

Question Three:

Do you consider it proportionate to remove the automatic assumption in guidance that instructions are withdrawn if there is a fundamental change in remuneration? Does the revised guidance achieve the right balance between the interests of the barrister and of clients, witnesses and the interests of justice? If not what safeguards would you propose to protect the wider public interest?

Question Four:

Are there any further matters the BSB should take into account that are relevant to this guidance?

How to respond

17. If you wish to respond, please complete the response form at the end of this document and email it to:

rpragnell@barstandardsboard.org.uk

Alternatively, you can post completed forms to:

The Bar Standards Board
Regulatory Policy Team
289-293 High Holborn
London
WC1V 7HZ

The deadline for responses is 25 April 2014.

CONSULTATION RESPONSE FORM:

BSB consultation on Changes to Returning Instructions Guidance

About you

Name:

Contact details:

Are you responding on behalf of an organisation (if so, please provide details)?

Are you content for your response to be made public?

Q.1: Have we adequately identified the risks to clients, the administration of justice, third parties and the wider public interest where a barrister withdraws from a case? Are there any additional impacts or any unintended consequences arising from this guidance?

Q.2: Are the additional considerations included in gC87 .1 - .7 adequate to assist a barrister in deciding whether or not they would be justified in withdrawing?

Q.3: Do you consider it proportionate to remove the automatic assumption in guidance that instructions are withdrawn if there is a fundamental change in remuneration? Does the revised guidance achieve the right balance between the interests of the barrister and of clients, witnesses and the interests of justice? If not what safeguards would you propose to protect the wider public interest?

Q.4: Are there any further matters the BSB should take into account that are relevant to this guidance?

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