

CURRENT GUIDANCE

Reporting Serious Misconduct of Others Guidance

Introduction

1. This guidance provides further explanation about your duty to report the serious misconduct of other barristers. You should read it in conjunction with Rules C66 to C69 and Guidance C95 to C101 in the BSB Handbook.

2. Rule C66 states that, subject to your duty to keep the affairs of each client confidential and subject also to Rules C67 and C68, you must report to the Bar Standards Board if you have reasonable grounds to believe that there has been serious misconduct by a barrister. Where the alleged serious misconduct relates to bullying, harassment or sexual harassment, as set out at gC98A:
 - the BSB recommends making such a report where there is a reasonable suspicion that it occurred. This is due to the importance that the BSB places on identifying and responding to this type of misconduct;
 - the duty to report this type of serious misconduct may be satisfied by reporting either to the BSB or to the Bar Council's Commissioner for Conduct; and
 - the BSB will not take enforcement action against you if you have been the subject of this type of misconduct and you do not report it. The same shall apply in relation to individuals whom the subject has acknowledged as a confidant. For the purposes of this guidance, a confidant is someone in whom a person confides for the purpose of seeking emotional or pastoral support or guidance in response to bullying, harassment or sexual harassment.

3. The BSB intends this rule to achieve the following outcomes:
 - Outcome C2:1 BSB regulated persons are effectively regulated;

- Outcome C22: The public have confidence in the proper regulation of persons regulated by the BSB;
 - Outcome C23: The BSB has the information that it needs in order to be able to assess risks and regulate effectively and in accordance with the regulatory objectives.
4. It is strongly in the public interest that the BSB is made aware of any serious misconduct. The duty to report serious misconduct is also consistent with parallel obligations for professionals in other sectors.
 5. The BSB recognises that the application of this rule may be particularly difficult in some circumstances. If you require further guidance you may wish to contact the Bar Council's Ethical Queries Helpline on 020 7611 1307, or at <http://www.barcouncil.org.uk/for-thebar/introduction-to-member-services/ethical-enquiries-line/>. This service is confidential and is provided by individuals on an approved list who are not subject to the duty to report serious misconduct of which they become aware as a result of dealing with enquiries on the helpline.

What should you report?

6. You are obliged¹ to report to the BSB instances of serious misconduct by other barristers. Whether or not misconduct is *serious* misconduct is a matter of judgement, which will depend on the particular circumstances. It will ultimately be for the BSB to decide whether enforcement or other regulatory action is necessary in the public interest. If, having considered the factors and circumstances discussed below, you remain unsure whether or not the behaviour in question amounts to serious misconduct, you should err on the side of caution and make a report to the BSB.
7. You should refer to the list at Guidance C96 for examples of serious misconduct; however, you should be aware that this is not a closed list and that breaches of other provisions

¹ But note guidance at gC98A in relation to bullying, harassment and sexual harassment

may also amount to serious misconduct. Whether serious misconduct has occurred may be a question of the degree to which one or more of the obligations in the Handbook has been breached. Guidance C96 lists the following examples of serious misconduct:

1. dishonesty (CD3);
2. assault or harassment (CD3 and/or CD5 and/or CD8.) It may also include serious instances of bullying (persistent, unwanted behaviour from a person or group that is either intimidating, malicious or insulting, or an abuse or misuse of power that undermines, humiliates, or causes physical or emotional harm to someone);
3. seeking to gain access without consent to instructions or other confidential information relating to the opposing party's case (CD3 and/or CD5);
4. seeking to gain access without consent to confidential information relating to another member of chambers, member of staff or pupil (CD3 and/or CD5);
5. encouraging a witness to give evidence which is untruthful or misleading (CD1 and/or CD3);
6. knowingly or recklessly misleading, or attempting to mislead, the court or an opponent (CD1 and/or CD3);
7. being drunk or under the influence of drugs in court (CD2 and/or CD7);
8. failure by a barrister to report promptly to the Bar Standards Board pursuant to rC65.1-rC65.5 (duty to report criminal charges, cautions and convictions, and disciplinary action by other regulators) and/or rC66 (duty to report serious misconduct by others);
9. a breach by a barrister of rC67 (for example, reporting, or threatening to report, another person as a litigation tactic or otherwise abusively; or merely to please a client or any other person or otherwise for an improper motive);
10. conduct that poses a serious risk to the public.

When discrimination becomes serious misconduct

8. Discrimination can constitute serious misconduct. You should be aware of the seven different types of discrimination under the Equality Act 2010.
9. These are:

- Direct discrimination – where someone is treated less favourably than another person because of a protected characteristic¹.
- Associative discrimination – this is direct discrimination against someone because they are associated with another person who possesses a protected characteristic.
- Discrimination by perception – this is direct discrimination against someone because others think that they possess a particular protected characteristic. They do not necessarily have to possess the characteristic.
- Indirect discrimination – this can occur when a rule or policy that applies to everyone disadvantages a person with a particular protected characteristic.
- Harassment – this is behaviour that is deemed to be offensive by the recipient. Recipients can now complain about behaviour that they find offensive even if it is not directed at them.
- Victimisation – this occurs when someone is treated badly because they have made or supported a complaint or grievance under this legislation.

Harassment and victimisation

10. The Bar functions on a system based on trust and confidence between colleagues, and individual barristers depend to a large extent on the reputation they hold amongst their colleagues. In this context it is understandable that some barristers may be concerned about the personal impact of reporting serious misconduct. This is especially the case where the nature of the misconduct itself relates to harassment or victimisation.

11. Harassment is defined in the Equality Act 2010 as:

- Unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant, or violating the complainant's dignity.
- Unwanted conduct of a sexual nature (sexual harassment).

¹ The Equality Act 2010 introduced the term 'protected characteristics' to refer to groups that are protected under the Act. These are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, and sexual orientation.

- Treating a person less favourably than another person because they have either submitted to, or did not submit to, sexual harassment or harassment related to sex or gender reassignment.
12. Rule C69 creates an obligation on all barristers not to victimise anyone for making in good faith a report of serious misconduct. This means that barristers must not treat any individual less favourably because they have made such a report to the BSB. This rule is intended to expressly protect you where you make a report of serious misconduct. It is of vital importance to the intended outcomes of Rule C66, discussed above, that individuals are not discouraged from reporting serious misconduct by the risk of suffering victimisation as a result of doing so.
 13. You should also take account of the fact that pupil barristers and barristers of fewer years' standing may be particularly vulnerable due to their relatively junior status and their relative dependence on more senior barristers for work, guidance and support. Pupils or new entrants to the profession may worry that by reporting to the BSB they will subsequently be treated less favourably or otherwise subjected to unwanted conduct, or that their career may be impacted negatively (whether or not such concerns are well founded in particular instances).
 14. If you are a pupil barrister, or relatively new entrant to the profession, who has become aware of behaviour potentially amounting to serious misconduct, you may wish first to discuss your concerns with relevant colleagues, with your supervisor, the head of chambers or head of legal practice. You may wish to establish whether any other person is aware of the misconduct in question and/or whether that individual is willing to report the misconduct, or has already done so. You do not need to make a report yourself if you reasonably believe that another person has already done so. You can also contact the Bar Council's Ethical Enquiries Helpline for further assistance.
 15. If you are the subject of misconduct that relates to bullying, harassment or sexual harassment then gC98A applies (see paragraph 2, above.) Nevertheless, we would

encourage you to report matters to the BSB or to the Commissioner for Conduct and we will always treat such reports sensitively.

16. In addition to this guidance, barristers should take full account of the Equality Rules in the Handbook and should refer to the Supporting Information on the Equality Rules wherever relevant.
17. If you are in doubt as to whether or not particular behaviour amounts to serious misconduct you should consider discussing this with the Bar Council's Ethical Enquiries Helpline (see above). It is important to be aware that reporting what you believe may be serious misconduct simply puts the BSB in a position to decide what action, if any, to take by making a fair assessment as to whether or not serious misconduct (or any misconduct) has in fact occurred. Action will only be taken in relation to the barrister or lawyer concerned where this is appropriate, proportionate and in accordance with the BSB's policies.

How should you report?

18. You should report serious misconduct to the BSB's Contact and Assessment Team by completing the online form on the 'reporting concerns' section of the BSB's website – there is an option on the online form for reports of serious misconduct. Alternatively, if the report relates to bullying, harassment or sexual harassment, you may report the matter to the Bar Council's Commissioner for Conduct.
19. Using the online form is the best way to report your concerns to the BSB. However, if you do not wish to report using the online form, you have any access requirements or you would first like advice on the reporting process, please contact our Information Line on 020 7611 1445.
20. You should make a report to the BSB as soon as reasonably practicable. You will receive an acknowledgement of receipt of the report, including an explanation of how the BSB will handle the information we receive. Our Contact and Assessment Team will assess the

report you have made and decide what the initial regulatory response should be. This may include sending for enforcement action or passing the information to our Supervision Team.

21. Please note that, while the BSB would not normally stay in contact with you once you have made a report and it has been acknowledged, the BSB may request your assistance in supplying further information if it is necessary to carry out a proper assessment of the information or an investigation. All reports made to the BSB will be treated sensitively. If you wish to provide information confidentially, we may be able to take reasonable steps to protect your identity. However, depending on the facts of the case, it may be difficult to take enforcement action without identifying you.

When should you report?

22. Your duty to report serious misconduct is intended to help ensure that the BSB has the information that it needs in order to be able to assess risks and regulate effectively and in accordance with the regulatory objectives. With this practical purpose in mind, you are not expected to report unnecessarily or simply as a matter of form. Rule C68 removes the duty to report where:

- the relevant facts are already in the public domain; and/or
- you reasonably consider that those facts will have come to the BSB's attention; and/or
- the relevant person has already reported the misconduct to the BSB.

23. Rule C68 exempts you from the duty to report if you are aware that the relevant person who committed the serious misconduct has already reported it to the BSB. In other cases, if you are aware that another relevant person, such as the head of chambers, head of legal practice, or a person or committee within a practice which has responsibility for the administration of that practice or for investigating the matter in the first instance, has made a report, then you do not need to do so yourself. However, if you are aware for any reason that the relevant person or committee has failed to report the matter to the BSB, or if there

is another reason for not doing so, you should be prepared to report the matter yourself. Guidance C96 lists failure by a barrister to report such matters promptly to the BSB as an example of potential serious misconduct.

24. You should also apply your professional judgement to whether there has been serious misconduct. Guidance C97 sets out some matters you should consider before reporting.

These are:

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

25. Depending on the nature of the misconduct, you may also wish to take further circumstances into account. In particular, you should consider whether there is a risk that the misconduct will continue or be repeated if no action is taken. For example, if the individual's behaviour relates to discrimination, harassment, victimisation, there may be a further risk of discrimination, harassment or victimisation occurring in the future (see below).

26. Having taken into account these and any other relevant circumstances, you should then go on to consider whether you have reasonable grounds to believe the individual has committed serious misconduct¹. You should report misconduct where you have material before you which as it stands establishes a reasonably credible instance of serious misconduct. Issues of competence will not normally constitute serious misconduct unless

¹ In the case of bullying, harassment or sexual harassment, consider whether there is a reasonable suspicion that it occurred

so serious that it poses a serious risk to the public or would diminish the trust and confidence which the public places in the profession.

27. Rule C67 states that you must never make, or threaten to make, a report of serious misconduct without a genuine and reasonably held belief that the obligation to report applies. For example, you should not report serious misconduct merely speculatively, out of malice, or to use the reporting of misconduct, or the threat of it, as a 'litigation tactic'. You should only make a report with regard to the outcomes which the rule is intended to achieve, described above.

Barristers acting in a judicial capacity

28. Serious misconduct before the court will usually be apparent to the judge, and in such cases, the judge hearing the matter may bring the serious misconduct in question to the attention of the BSB. If you are a barrister acting in a judicial capacity, your conduct duties as a judge take precedence over your professional duties as a barrister. The BSB would not expect to take enforcement action against a barrister acting in a judicial capacity. Whilst the obligation to report does not impact on a barrister sitting in a judicial capacity, nothing in this guidance should be taken as preventing barristers from reporting to the regulator serious misconduct observed by a barrister, when sitting, in the normal way.
29. Rules E5 – E9 cover the BSB approach to concerns raised about a regulated person acting in judicial or quasi-judicial capacity and generally preclude the BSB from exercising enforcement powers in respect of such a regulated person. Any concerns raised with the BSB about the conduct of a barrister acting in a judicial capacity will be referred to the Judicial Conduct Investigations Office (<http://judicialconduct.judiciary.gov.uk/>).

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Bar Standards Board