

CURRENT GUIDANCE

## Guidance on Self-Employed Practice

### Investigating or collecting evidence and taking witness statements

1. There is no longer a rule which prohibits a self-employed barrister from investigating or collecting evidence generally or therefore from taking statements from potential witnesses (which is treated for these purposes as investigating or collecting evidence). In this context, taking witness statements means interviewing the potential witness with a view to preparing a statement or taking a proof of evidence. A barrister has always been entitled to settle a witness statement taken by another person, and this is not investigating or collecting evidence. However, Rule C21.10 of the BSB Handbook states 'you must not accept instructions to act in a particular matter if there is a real prospect that you are not going to be able to maintain your independence'. Guidance C73 then states that the rule 'is an aspect of your broader obligation to maintain your independence (Core Duty 4). Your ability to perform your duty to the court (Core Duty 1) and act in the best interests of your client (Core Duty 2) may be put at risk if you act in circumstances where your independence is compromised. Examples of when you may not be able to maintain your independence include appearing as an advocate in a matter in which you are likely to be called as a witness (unless the matter on which you are likely to be called as a witness is peripheral or minor in the context of the litigation as a whole and is unlikely to lead to your involvement in the matter being challenged at a later date)'.

2. It follows that if the nature of the evidence or the circumstances in which it was investigated or collected are such that there is likely to be an issue about that in court, where the barrister might be needed to give evidence, the barrister can properly be involved in the preparations for a case but cannot accept a brief to conduct the case in court, even as the junior member of a team of barristers. Only if the barrister reasonably believes that the investigation and collection of that evidence (as distinct from the evidence itself) is unlikely to be challenged can the barrister properly conduct the case in court. (The above is intended to apply to the case where a barrister properly accepts a brief and then, as part of his conduct of the case at court, has urgently to take a statement from his client or a potential witness. It applies where a barrister has investigated or collected evidence before arriving at court at the start of the case).

3. The Bar Standards Board considers that it is a key function of a junior member of a team of Counsel that s/he should be in a position to conduct the case in court if and when

required, and that it is unacceptable to have briefed as junior counsel in a case someone who may not be in a position to take on the full advocacy role in that case should it become necessary. The risks to the client's interests and to the due administration of justice generally are too great to allow a barrister to conduct a case in court, even as a junior in a team of barristers, if there is a real risk that the circumstances of the taking of the evidence that barrister has collected will be challenged in the case. If a junior member of the team is called upon to conduct the case and the circumstances of his investigation and collection of evidence is an issue in the case, the barrister might have to stand down, damaging the client's interests (the client having then been deprived of each member of his/her chosen team) and the due administration of justice (through the inconvenience and delay in the conduct of the case).

4. When investigating or collecting evidence, barristers should bear carefully in mind the dangers of unconsciously affecting or contaminating the evidence that a witness is able to give. Barristers should also be aware of the risks as a result of becoming involved in investigating or collecting evidence, and take these risks into account when deciding:-

a. whether to undertake such work in the first place; and

b. if they have done, whether or not they can properly accept a brief at a subsequent trial.

5. The BSB Handbook places the onus squarely on the barrister who has investigated or collected evidence prior to accepting a brief to consider and reach a reasonable conclusion whether or not his/her involvement is likely to be challenged.

6. In assessing whether to accept a brief in these circumstances, the barrister should be mindful of the risk where s/he has been involved in the collection or investigation of evidence. The barrister's duty is to reach a reasonable decision on the risk involved before accepting a brief. The brief can only properly be accepted if it is reasonable for the barrister to conclude that the circumstances of his investigation or collection of evidence are unlikely to be challenged. If the barrister's decision is not a reasonable one, and the trial is subsequently adjourned as a result of the barrister withdrawing from the case, the barrister risks being exposed to an order for wasted costs as well as enforcement action being taken against them for a breach of the BSB Handbook.

7. Even where a brief is properly accepted, the question of whether the barrister should continue to act is a matter that s/he must keep under review during the case in light of any later developments. However, Guidance C73 states 'if you are planning to withdraw from a

case because it appears that you are likely to be a witness on a material question of fact, you should only withdraw if you can do so without jeopardising the client's interests'.

### **Attendance at police stations**

8. Previous rules prevented barristers from attending on clients at police stations. That absolute bar has now been removed. However, barristers should pay attention to Guidance C39 of the BSB Handbook, which states 'you should not attend a police station to advise a suspect or interviewee as to the handling and conduct of police interviews unless you have complied with such training requirements as may be imposed by the Bar Standards Board in respect of such work'. Similarly, Rule C120.1 states 'before accepting any public access instructions from or on behalf of a public access client, a barrister must be properly qualified by having been issued with a full practising certificate, by having satisfactorily completed the appropriate public access training, and by registering with the Bar Council as a public access practitioner'.

9. Barristers undertaking publicly funded police station work under a criminal contract must comply with the training requirements specified by the Legal Aid Agency. Barristers undertaking privately funded police station work must complete the Police Station Qualification ("PSQ") and (if they do not hold higher rights of audience) the Magistrates Court Qualification. If a barrister who wishes to undertake privately funded police station work considers they hold relevant previous experience that would exempt them from completing the PSQ, they should contact the Regulatory Policy Department at the Bar Standards Board with full details of their previous experience.

10. Barristers should also pay particular attention to the BSB Handbook provisions set out in paragraph 1 of this guidance: Core Duties 1, 2 and 4, Rule C21.10 and Guidance C73.

11. A particular difficulty facing a barrister who attends at a police station to advise suspects and interviewees or to take part in identification procedures is that the barrister may have to advise the client whether or not to answer police questions or to volunteer a statement, or may see or hear something that is material to the evidence that will be presented in court. The client's decision whether or not to answer questions, and if so which, is very likely to be a significant matter in any subsequent court hearing. So might compliance with PACE Codes of interviews or identification procedures that the barrister sees or hears. If these are significant evidential matters at trial, the barrister in question may find him or herself in serious professional difficulties if acting as advocate in the case.

12. Advising a suspect at the police station or attending on his behalf at an interview or identification procedure always gives rise to the risk that you may become a witness at the trial or at a Newton hearing or pre-trial admissibility hearing. The fact of advising a suspect or being present in those circumstances does not in itself prevent you from appearing as an advocate for that defendant in all circumstances. If the defendant you have advised is going to enter a guilty plea which you know to be acceptable to the Crown, or has given a full comment interview which remains as his account, then the degree of risk may be relatively low. But if the defendant declined, on your advice or not, to answer all or any questions in interview (whether or not there was a prepared statement) then the risk of becoming a witness will, inevitably, be too great to allow you to deal with the case at trial or at a Newton hearing or pre-trial admissibility hearing. This guidance applies equally whether you were to appear as an advocate alone or being led or leading (see paragraph 3 above).

13. Given the possibility that you may be required to give evidence of events at the police station, you should keep detailed, contemporaneous notes of those events.

14. Attending at police stations is subject to the cab rank rule (Rule C29). However, the BSB Handbook states that the cab rank rule does not apply if:

- ‘You are not authorised and/or otherwise accredited to perform the work required by the relevant instruction’ (Rule C21.7), i.e. you have not complied with the Bar Standards Board’s training requirements in respect of attending at police stations (see paragraph 8 above);
- ‘There is a real prospect that you are not going to be able to maintain your independence’ (Rule C21.10);
- ‘Accepting the instructions would require you...to do something other than in the course of [your] ordinary working time’ (Rule C30.2).

In addition, Guidance C89 states that ‘you would not be required to accept instructions to...attend a police station in circumstances where you do not normally undertake such work’.

**Bar Standards Board**

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