

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## Legal Ombudsman

### Conduct complaints – referrals to the Bar Standards Board

#### 1. Introduction

- 1.1 This document provides information for Legal Ombudsman (LeO) staff on the approach to take in identifying conduct matters that require referral to the Bar Standards Board (BSB).
- 1.2 Distinguishing between service and conduct complaints in relation to the work of relevant person(s) is not straightforward. For the purpose of this document, in accordance with definition 199 at Part 6 of the BSB Handbook, the term ‘relevant person(s)’ is used to refer to:
- individual barristers (registered or unregistered) or registered European Lawyers;
  - authorised (non-BSB) individuals or BSB regulated managers; and/or,
  - BSB authorised bodies (“entities”); and,
  - non-authorised persons employed by a BSB authorised individual or body who were so employed at the time of the conduct complained of.<sup>1</sup>
- 1.3 The majority of practising barristers in England and Wales are self-employed. They are normally engaged by a solicitor on behalf of the client (unless they are engaged under Licensed or Public Access – see section 6 below). From April 2015, the BSB has started authorising and regulating entities. An entity is a legal ‘person’ and can be a partnership, LLP or company. All owners and managers of BSB regulated entities must be authorised individuals, but they do not need to be barristers.<sup>2</sup>

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<sup>1</sup> The full definition of “relevant person” can be found at 199 of Part 6 of the BSB Handbook.

<sup>2</sup> The full details of what an entity is can be found on page 116 of the [BSB Handbook](#) (Part 3 Section E.1).

- 1.4 When engaged by a solicitor on behalf of a client, relevant person(s) will normally only communicate with the solicitor and not directly with the client, except in a conference (a meeting with the client in the presence of the solicitor or solicitor's representative) or at court. It is normally the solicitor who is responsible for communicating directly with the client and for the administrative conduct of the case, such as obtaining relevant documents and evidence, filing documents at court and serving them on other parties (although barristers generally take responsibility for filing written "skeleton arguments" for court hearings and providing copies to opposing advocates). However, increasingly, particularly in criminal cases, barristers do not always have a solicitor or solicitor's representative with them at court and therefore greater responsibility is placed on the barrister to keep an accurate record of what happened at court.

## 2. Professional misconduct

- 2.1. The 8<sup>th</sup> Edition of the Bar's Code of Conduct, which is applicable for conduct up to the 6<sup>th</sup> January 2014 (for conduct after that date see paragraph 2.3 below), defines "professional misconduct" as a failure to comply with any provision of the Code other than those referred to in paragraph 901.1 of the Code.
- 2.2. Paragraph 901.1 covers a range of provisions which are not considered to be misconduct unless they are serious. In particular, the paragraph covers the requirement to act courteously, diligently and with reasonable competence.
- 2.3. The new BSB Handbook came into force on 6<sup>th</sup> January 2014 and applies to conduct by barristers from that date. It changes the technical definition of 'professional misconduct'.
- 2.4. The BSB Handbook defines professional misconduct as a "*breach of this Handbook by a BSB regulated person which is not appropriate for disposal by way of no further action or the imposition of administrative sanctions, pursuant to Section 5.A (the Enforcement Regulations)*".
- 2.5. All breaches of the BSB Handbook are susceptible to the imposition of an administrative sanction such as a fine or warning. It is only where the breach is so serious that the imposition of an administrative sanction would not be sufficiently proportionate and in the public interest that such conduct would become professional misconduct for the purposes of the BSB Handbook and referred to a Disciplinary Tribunal or by means of Determination by Consent<sup>3</sup>.

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<sup>3</sup> The Determination by Consent (DBC) procedure is an alternative way of dealing with cases which would otherwise be referred to a disciplinary tribunal. Involvement in the process is entirely voluntary and requires the relevant person(s) express written consent. Under DBC the case will be dealt with on the papers and the BSB's Professional Conduct Committee (PCC) will decide whether the relevant person(s) is in breach of their professional obligations as set out in the Handbook (or for conduct that happened before 6 January 2014, the Code of Conduct 8<sup>th</sup> edition) and, if so, what sentence to impose.

- 2.6. The Bar's Code of Conduct and BSB Handbook are comprehensive and cover most aspects of barristers' professional behaviour. Therefore, nearly all "service" complaints could potentially constitute a breach of the BSB Handbook or professional misconduct. The assessment as to whether or not a service complaint might also amount to a breach of the BSB Handbook or professional misconduct depends on the circumstances: in particular the nature and degree of the barrister's behaviour and the impact on the client. Annex 3 provides further information on the most common breaches and/or serious types of misconduct.
- 2.7. Section 43 of the Legal Services Act 2007 requires the Legal Ombudsman to report to the BSB where it forms the opinion, whilst dealing with a complaint under the Ombudsman scheme, that the conduct of someone the BSB regulates is such that the BSB should consider whether to take action against that person.

### **3. Referring complaints to the BSB – approach to take**

- 3.1. Given the relatively small number of complaints LeO is likely to receive about relevant person(s) regulated by the BSB (i.e. barristers and entities), the BSB recognises that it could be difficult for LeO staff to become fully conversant with the Bar's Code of Conduct/BSB Handbook or develop a sufficiently detailed knowledge of the work of the Bar to be able to determine accurately when a service issue should also be treated as a conduct matter. Therefore the BSB has decided that the approach outlined below should be taken in the referral of conduct issues.

#### **"Service only" complaints that do not require referral**

- 3.2. The BSB has developed a list of the types of complaints that it is content LeO can treat as "**service only**" and **do not need to be referred to the BSB as potential conduct matters**. The list is set out at Annex 1.
- 3.3. The list at Annex 1 is subject to the proviso that, where there may be "significant blame" on behalf of the barrister or "significant harm" to the client, the complaints listed may become conduct issues and therefore should be referred to the BSB (see section 4 below).
- 3.4. All complaints which do not fall within Annex 1 should be referred to the BSB so that the BSB can decide if they amount to a breach of the Code of Conduct or BSB Handbook.

### **4. Guidance on assessing significant blame and/or harm**

- 4.1. It is not possible to be definitive about precisely when a complaint listed in Annex 1 will cross the threshold into being a conduct matter as a result of “significant blame” or “significant harm”, as this will depend on the facts of the individual case. However, set out below is some guidance on what factors will be relevant in assessing whether a complaint listed in Annex 1 should be referred to the BSB as a conduct matter. If in doubt, LeO staff should refer the complaint to the BSB.

### **Significant blame**

- 4.2. When considering “blame”, LeO staff should concentrate on **the extent to** which the all persons and bodies regulated by the BSB can be said to be worthy of direct blame for the poor service provided. The main factors to take into account when assessing “blame” are whether the facts of the complaint indicate that the actions appear to be:
- deliberate or intentional;
  - motivated by financial gain;
  - ones that put his/her personal obligations above the service provided to the client;
  - designed to pressurise the client;
  - intended to cover up more serious issues;
  - symptomatic of wider disorganisation in the management of the barrister’s practice; and/or,
  - ones that indicate that there may be issues about the barrister’s fitness to practise.
- 4.3. Annex 2 includes some examples of how the application of “significant blame” could turn a “service only” complaint into also a potential conduct issue.

### **Significant harm**

- 4.4. “Significant harm” focuses on the effect on the client rather than the behaviour of the person or body regulated by the BSB. The main factors to take into account when assessing “harm” are whether the facts of the complaint indicate that the actions by the person or body regulated by the BSB appear to have caused:
- harm (including humiliation, anxiety or distress) to a vulnerable client e.g. a client who is: sick, a prisoner, elderly, suffering from mental health problems, and/or, has special needs;
  - serious harm to relationships with others;
  - significant loss of, or damage to, property or prejudice to property rights;
  - considerable financial loss (always bearing in mind that a small financial loss may be considerable to a person of limited means).
- 4.5. It may be helpful to consider the following two questions when assessing whether there has been significant harm:

1. How would things have been different if the person or body regulated by the BSB had not acted in the way complained of?
  2. What was the effect on this particular client of the poor service alleged?
- 4.6. Annex 2 includes some examples of how the effect of “significant harm” could turn a “service only” complaint into also a potential conduct issue for the BSB to consider.

## **5. Complaints not listed at Annex 1**

- 5.1. As outlined above, complaints about any matter not listed in Annex 1, whether or not they involve a service issue, should always be referred to the BSB as potential conduct matters. If in doubt, LeO staff should err on the side of caution and refer the matter to the BSB. For reference purposes, Annex 3 provides a list of the most common and/or serious breaches of the Code of Conduct/BSB Handbook. It should be noted that referrals to the BSB should not be made solely because the complainant has requested that LeO do so.

## **6. Licensed Access & Public Access**

- 6.1. In most cases, self-employed barristers are engaged by a solicitor and not directly by the client. However, the BSB Handbook and the Bar’s previous Code of Conduct allows self-employed barristers to take instructions directly from clients under the Licensed Access and, more commonly, Public Access schemes.

### **Licensed Access**

- 6.2. A client who can demonstrate the necessary knowledge, experience and facilities may be licensed by the BSB under the Licensed Access scheme to instruct self-employed barristers directly. Licensed access is normally used to allow other professionals, such as accountants, surveyors and architects, to instruct a barrister direct.
- 6.3. A list of current licensees is maintained on the BSB website. Most Licensed Access clients are large organisations and only a very few Licensed Access clients, e.g. some charities, will have a right to complain to LeO.

### **Public Access**

- 6.4. Members of the public can instruct a self-employed barrister directly, but only where the barrister has undergone the required training and is formally registered with the Bar Council as a “public access” barrister under the Public Access scheme.

- 6.5. The guidance above about service complaints and misconduct matters applies equally to cases involving barristers instructed under the Public Access scheme. Since a member of the public instructing a barrister under the Public Access scheme may be relatively unsophisticated and does not have a solicitor, the impact on a client of poor service from a public access barrister may be greater. LeO staff should bear this in mind when considering issues of “blame” and “harm” in relation to complaints about public access barristers.
- 6.6. Barristers who have been instructed under the Public Access scheme may carry out some tasks that would normally be carried out by a solicitor, such as entering into correspondence on behalf of their client. Where a barrister has been instructed on a public access basis, they must provide their client with a client care letter. Under the BSB Handbook introduced on 6 January 2014, self-employed barristers are now able to apply to the BSB for authorisation allowing them to conduct litigation. This was previously prohibited under the Bar’s Code of Conduct. If a barrister is authorised by the BSB to conduct litigation, this information will appear on their entry in the Barristers’ Register on the Bar Standards Board’s website and LeO staff should check this register when considering complaints about the service provided by barristers as the implications of the conduct of the barrister will be different according to the status held.
- 6.7. Self-employed barristers, including **public access barristers and barristers authorised to conduct litigation**, are prohibited from handling client money, except as payment for their fees. This means that a barrister cannot make payment of “disbursements” on behalf of a client, such as paying court fees, and the client must therefore make such payments themselves. The only way a barrister can be become involved in handling client money is to subscribe to an “escrow” approved by the BSB. Such services allow for client money to be held by a third party and not the barrister. As at April 2014, the only escrow service available to barristers is that provided by BARCO which is a third party company regulated by the Financial Conduct Authority. BARCO can receive and distribute funds from clients in relation to legal matters. However, in any circumstances where LeO staff see evidence that a barrister has personally handled client money, this should be referred to the BSB.

## **Annex 1**

### **Conduct complaints – referrals to the Bar Standards Board**

#### **Service only complaints**

Set out below is a list of the types of complaints the BSB considers LeO can treat as being “service only” and therefore will not require referral to the BSB as conduct issues, unless there is “significant blame” on behalf of the barrister or “significant harm” to the client (see Annex 2).

#### **Treatment of the client**

- Failing to acknowledge receipt of instructions/documents
- Delay in accepting instructions
- Failing to answer questions in instructions
- Discourtesy (but this does not include deliberate rudeness, bullying or aggressive behaviour, which may be misconduct)
- Failing to advise promptly of problems with barrister’s ability to complete work or to attend conference or court
- Failing to report on discussions/negotiations with other parties (but this does not include failing to seek instructions about offers to resolve important issues or the whole case, which may be misconduct)
- Failing to provide information about fees chargeable
- Failure to set out the work undertaken for the fee charged
- Failing to respond to queries or requests for clarification
- Failing to advise of problems encountered in the course of work (e.g. as to missing documents)
- Failing to keep appointment without prior warning

#### **Manner in which the work is undertaken**

- Failing to complete work and, if required, return papers within reasonable time
- Failing to return brief promptly in the case of conflict or other reason for inability to act
- Failing to follow instructions without good reason
- Failing to comply with provisions relating to data protection (but this does not include any breach of client confidentiality or any other serious breach of confidentiality, which may be misconduct)
- Failing, when required to advise, to advise adequately about law, issues, evidence or costs
- Failing, when required to draft a document, to draft that document properly
- Asking wrong questions or making erroneous allegations or submissions at a court hearing
- Failing to advise the court of obvious errors in approach or judgement
- Inadvertent loss of documents

- Declining to release papers without good reason
- Failing to make oneself available on reasonable notice for pre-hearing conference
- Late attendance at court or conference
- Inadequate time estimate for hearings
- Inadequate or inappropriate dress
- Failing to keep adequate records of work done and fees charged or, when required, to provide proper justification for fees charged

## Annex 2

### Conduct complaints – referrals to the Bar Standards Board

#### Examples of the application of “significant blame” and “significant harm”

This Annex sets out examples of how the application of “significant blame” or “harm” could tip the “service only” complaints listed in Annex 1 into being complaints of professional misconduct also and therefore require referral to the BSB.

#### “Significant blame” – examples:

- **Deliberate or intentional behaviour**

*A relevant person intentionally decides not to inform a client of discussions or negotiations with the other side rather than just forgetting to do so.*

- **Motivation of financial gain**

*A relevant person knowingly delays in accepting instructions because he/she is awaiting instructions in a more a lucrative case.*

- **Putting personal obligations above the service to the client**

*A relevant person returns instructions because he/she/it is no longer available but the unavailability is due to a recently booked holiday/personal engagement.*

- **Pressurising the client**

*A relevant person declines to release client documents until an outstanding or disputed fee has been paid.*

- **Intention to cover up more serious actions**

*A relevant person fails to provide a detailed breakdown of the fees charged but the overall fees are higher than the client expected and therefore the refusal to provide the information may be an attempt to cover up that the barrister has charged for more hours than was originally indicated would be necessary to complete the work.*

- **Symptoms of wider disorganisation**

*A relevant person arrives late at a conference without the papers saying that the papers had not been received but the evidence clearly shows they were received.*

- **Fitness to practise issues**

*The relevant person's handling of the original case and/or the responses to the complaint indicate that his/her health, either physically or mentally, could be a factor in the provision of the poor service.*

**“Significant harm” – examples:**

- **Harm to vulnerable clients**

*A relevant person delays in advising a convicted prisoner on the prospects of success for an appeal and the implications of the sentence imposed by the Court.*

- **Serious harm to relationships with others**

*A relevant person makes allegations in the course of a divorce hearing that are not in accordance with his/her instructions and this leads to the client's spouse refusing to give access to the children when previously access was agreed.*

- **Significant loss of or damage to property or prejudice to property rights**

*A relevant person fails to inform the client of an offer made by the other side which could have been beneficial if the client had known about it and might have been accepted (as opposed to failing to inform a client of an offer that clearly would have been rejected by the client and would have made no difference to the final outcome).*

- **Considerable financial loss**

*A relevant person is late for a court hearing for reasons unconnected with the case. As a direct result, a “wasted costs” order is made but the barrister still charges for the hearing and refuses to reimburse the client.*

## Annex 3

### Conduct complaints – referrals to the Bar Standards Board

#### Potential reportable breaches of the Code/misconduct issues

For information, listed below are the most common and/or serious breaches of the Code of Conduct/BSB Handbook which should be reported to the BSB. The list is not exhaustive.

- Criminality;
- Conduct which is:
  - dishonest or otherwise discreditable<sup>4</sup> to a barrister or which undermines a barrister's honesty; integrity and independence (or could reasonably be seen by the public as doing so); or,
  - prejudicial to the administration of justice; or,
  - likely to diminish public confidence in the administration of justice or the legal profession.
- Misleading a court;
- Discrimination on unlawful grounds (such as race, gender or sexual orientation);
- Bullying or aggressive behaviour;
- Failing to comply with a duty to a court (such as failing to inform the court of any relevant law or procedural rule);
- Failing to put the client's interests first (subject to any duty to a court);
- Failing to seek instructions about offers to settle cases or about other important issues in a case;
- Breaking client confidentiality or any other serious breach of confidentiality;
- Acting in conflict of interest i.e. acting or continuing to act where the barrister has a personal involvement in the case or is subject to any other unresolved issue of conflict; and,
- Making unnecessary or unwarranted allegations against third parties.

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<sup>4</sup> Please note that the term "discreditable conduct" is only applicable to complaints pre-6 January 2014 as this provision was removed with the implementation of the BSB Handbook