BAR STANDARDS BOARD

REGULATING BARRISTERS

Professional Conduct Department	
Title: Guidance on three and five person disciplinary tribunal cases, disqualification orders and appeals	
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Introduction

1.1. The Disciplinary Tribunal Regulations 2017 ("the Regulations") in Part 5.B of the Bar Standards Board Handbook set out the regulations that apply to disciplinary tribunal proceedings. This guidance supplements the regulations and is not intended to be exhaustive. Case Officers (COs) should seek advice from their line manager/ the Investigations and Hearing ('I&H') Team Manager at any point if they are unclear as to how to proceed.

1.2. The guidance also includes a checklist of tasks that should be completed before and after the hearing at Annex 1.

1.3. Whilst the checklist includes keeping the complaint and any witnesses updated after a hearing, it should be noted that both will also need to be updated regularly as the matter proceeds to tribunal. In particular, at each 'milestone' in the case, for example after directions, any hearing, when a date is set and in advance of the hearing. Further guidance can be found in "*PG27 - Guidance on working with witnesses"*.

1.4. Although all disciplinary procedures follow almost the same processes, this document is divided into three parts:

- Part 1: Disciplinary Tribunals dealing with professional misconduct;
- Part 2: Disciplinary Tribunals dealing with disqualification orders; and
- Part 3: Post hearing procedure.

1.5. For the purpose of part 1 of this document, in accordance with definition 37 of the BSB Handbook (part 6), the terms "BSB regulated persons" and "respondent" are used to refer to:

- Barrister (including, for the avoidance of doubt, unregistered barristers);
- Registered European lawyers;
- BSB authorised bodies;[1]
- Authorised (non-BSB) individuals; and
- BSB regulated managers.

1.6. For the purpose of part 2 of this document, in accordance with definition 199 at Part 6 of the BSB Handbook, the terms "relevant person(s)" and "respondent" are used to refer to:

[1] Under rE39, the PCC may not make a referral to a Disciplinary Tribunal on charges of professional misconduct against a non-authorised individual. In such cases, the PCC may only make an application to the Disciplinary Tribunal that the non-authorised individual be subject to a disqualification order. Therefore, the term 'relevant person' is not applicable to Part 1 of this document.

- an individual barrister (registered or unregistered) or European Lawyer;
- a BSB authorised body (an "entity"); and/or,
- a non-authorised person or persons employed by a BSB authorised person or body at the time of the conduct complained of.[2]

1.7. The disciplinary proceedings described in parts 1 and 2 may be taken against an individual BSB regulated person(s)/relevant person(s) or a number of BSB regulated person(s)/relevant persons(s) working in a BSB authorised entity. For cases involving entities, there is no difference in the procedure to follow. Those BSB regulated person(s)/relevant person(s) on whom the charges are to be served will be identified in the course of the investigation process.

PART 1: Disciplinary Tribunals dealing with professional misconduct

2. Deadlines and instructing a prosecutor

2.1 **Time limits:** following a referral to disciplinary action by the Professional Conduct Committee (PCC) or by a duly authorised member of staff, the deadline for serving the agreed charges is 10 weeks from the date of the decision to refer the matter to a Tribunal, or five weeks if the PCC has ordered an expedited prosecution (rE102). The PCD works to an internal deadline of eight weeks for service of the charges (and the bundle and directions –see 2.2 below) to ensure the relevant documents are served on time – this allows two weeks' leeway in case there are any problems with service.

2.2 **Service of the bundle of evidence and directions:** ideally the proposed directions and bundle of evidence should be served on the respondent at the same time as the charges. In any event, rE103 states that the directions and bundle are to be served as soon as practicable after the issue of the charges. If the bundle and/or directions are not served with the charges, the letter serving the charges should include a date indicating when the BSB expects to serve them. If they cannot be served within 28 days of the service of the charges, then the BSB is required to inform the respondent of what evidence is being sought and when it will be supplied to the respondent. If there are further difficulties in meeting this deadline then the Case Officer should write to the respondent in good time, with an explanation for this and a revised date.

2.3 When generating the document setting out the directions it will be watermarked that these are in 'Draft'. This watermark should remain until it the

[2] The full definition of "relevant person(s)" can be found at definition 199 of Part 6 of the BSB Handbook.

directions are sent to the Directions Judge, either for approval or in advance of consideration as set out in part 8 of this guidance.

2.4 **Allocation of a prosecutor:** Once a matter has been referred to a Disciplinary Tribunal, a prosecutor, normally from the BSB's Prosecution Panel, should usually be instructed. The Investigations and Hearings (I&H) administrative team are responsible for identifying prosecutors for cases to ensure a fair and even distribution of cases. The administrative staff should establish with the CO whether any particular specialism is required before checking availability. All communications in relation to finding a suitable prosecutor and the final allocation should be recorded on the prosecutor log.

2.5 Some internal complaint cases do not require a prosecutor to be instructed **immediately** and the case can be progressed by the CO without the need for a prosecutor until a hearing date is listed. In such cases, the CO will be responsible for finalising the charges of professional misconduct, preparing the bundle and addressing any other preparatory issues. COs will need to remember that a finding of professional misconduct may not be made against a non-authorised individual (see Part 2).

2.6 **Instructions to the prosecutor:** Where a prosecutor is required, a letter instructing the prosecutor **to** draft and/or settle charges, advise on evidence and witnesses and to confirm whether standard or non-standard directions are required is prepared by the Case Officer. In some instances, the CO will undertake some of this preparatory work prior to instructing in order to assist the prosecutor work and, where relevant, the CO may also decide to prepare a chronology.

2.7 The letter to the prosecutor represents the formal instructions to act on behalf of the BSB and therefore must be sent in the name of someone who has the authority to instruct barristers, either by virtue of their status as a practising lawyer (barrister, solicitor or **fellow** of CILEx) or via the grant of a direct access licence. If in doubt the letter should be sent in the name of a Casework Supervisor.

2.8 The **administration** team should then send the instructions and supporting documents to the prosecutor and update the file location on the enforcement database. The prosecutor should be asked to return the file with their advice within three weeks to allow any further recommended work to be completed by the CO prior to serving the charges, bundle and draft directions.

2.9 **Further action by administrative staff:** on referral, the administrative staff should ensure that they **obtain** the following documents:

a) Where the respondent is a barrister, a copy of the certificate of call from the relevant Inn of Court; and
b) Where the respondent is a licensed entity, a copy of the authorisation from the Supervision Team.

3. Prosecution witnesses

3.1. Where there are BSB witnesses it will be the CO's responsibility, along with the administration team to coordinate their attendance. Consideration should be given to any advice from the prosecutor as well as responses received from the respondent when deciding on the need for witnesses to attend. This should be reviewed as the case progresses.

3.2. Given this, contact with witnesses should be made prior to serving the bundle to ensure that they are available and we can obtain relevant witness statements to serve with the bundle where necessary.

3.3. Prior to the hearing, the CO should ensure that the witness(es) have received a copy of their statement and the document entitled "notes for witnesses". They should also note any need for special measures or reasonable adjustments and invite them to visit the tribunal suite prior to the hearing.

3.4. More detailed guidance on dealing with witnesses and the process to be followed is contained within "*PG27 – Guidance on Working with Witnesses"*. Case Officers and Administrative Staff should be familiar with the contents of this document.

4. Advice from the prosecutor and further evidence

4.1. Where a prosecutor has been instructed, he/she should return the paper file with their advice by the date stipulated in the original instruction letter. The administration team is responsible for chasing the advice if necessary and ensuring the return of the file.

4.2. The prosecutor may recommend obtaining further evidence to prove the charges: for example, transcripts of court proceedings, witness statements or documents. It is the CO's responsibility to ensure that all steps are taken as advised by the prosecutor – any questions or difficulties should be raised with the prosecutor at the earliest opportunity. Given the tight time-frame for service of the charges and evidence, COs should work quickly to gather any additional evidence.

4.3. **Witness statements:** where necessary, the CO should take and prepare witness statements. If it is not practicable for the CO to prepare or take the statement, this task can be outsourced if necessary; however, the cost of doing so should be considered and discussed with the COs immediate supervisor before an external party is commissioned to take a statement. In most cases, either the CO or their line manager will be able to take a statement from a witness. COs should note that drafts of witness statements and attendance notes of contact with witnesses are disclosable and are to be included with the final statement.

4.4. **Chronologies:** it is good practice for the CO to prepare a chronology of the case particularly where the case is complex and/or where there is a significant amount of documentation/ correspondence. There will normally not be time for a chronology to be prepared before the case is allocated to a prosecutor but the CO should ensure early liaison with the prosecutor to establish if a chronology is necessary. Whether or not the chronology is served on the respondent will be a matter for the prosecutor to decide. COs should also note that, sometimes, a chronology may be on a specific issue raised by the defence rather than a general chronology.

4.5. **Hearsay evidence:** Case Officers should be aware of the power in rE166.3, which allows a Tribunal to exclude any hearsay evidence if it is not satisfied that reasonable steps have been taken to obtain direct evidence of the facts sought to be proved by the hearsay evidence. It is therefore important that COs take steps to obtain the best evidence possible and that, where hearsay evidence is relied upon, the COs are able to provide justification to the Tribunal as to why direct evidence was not able to be obtained.

5. Drafting charges

5.1. If a prosecutor is instructed, the prosecutor is responsible for settling the final charges. However, the CO must ensure that the final charges correctly reflect the matters referred for disciplinary action, that they are in the correct format, and that the correct Code/Handbook provisions are relied upon. The CO should raise any questions or issues about the charges with the prosecutor before the charges are served.

5.2. Charges may be brought for a breach of the Core Duties or a breach of the Core Duties and Rules. COs should ensure that charges are fully particularised, do not include duplication/repetition, and that each individual charge relates to a single alleged breach of the Handbook/Code. In some circumstances, it may be appropriate for charges to be drafted in the alternative – if this is the case, it should be made clear on the charge sheet. If

a CO has any questions about how the charge(s) should be framed, advice should be obtained from a prosecutor or the I&H Manager.

5.3. COs should note that merely because a prosecutor has drafted a charge does not mean that it will be accurate in every respect and therefore all the details of charges should be checked very carefully before they are finalised for service. Where a number of charges are drafted, particular care should be taken to checking the details.

5.4. Any copy of charges at this stage will be watermarked with 'Draft' and should be checked by the Case Officer's line manager before finalisation. Once finalised, the watermark should be removed when sent as part of the bundle in part 6 below.

6. Bundle preparation

6.1. The evidence that the BSB relies on to prove the charges is presented in a bundle of documents. The bundle should include an index and should be paginated (this is a requirement for both parties under rE152). It should also be tabbed with the following documents inserted in order.

Tab 1:

- the charge sheet;
- relevant extracts from the Handbook, including the relevant Core Duties, rules and guidance (or if the conduct took place before 6 January 2014, the relevant rules from the Code of Conduct in force at the time of the conduct);
- the respondent's certificate of call/authorisation (see paragraph 2.9); and

Tab 2: all documentary evidence that the BSB relies upon presented in a logical order (normally chronological). If the case arises from an external complaint, it is advised that this section is divided into two parts:

- the complaint form and evidence submitted by the complainant; and,
- all subsequent evidence, including relevant correspondence and the respondent's response to the complaint.

6.2. In some cases, it may be appropriate to have further tabs for witness statements or other discrete documents; however, this is a judgement for the CO/prosecutor to make on a case by case basis.

6.3. In cases relating to entities, greater thought should be given by the Case Officer as to how to present the evidence where the charges relate both to an entity (authorised body) and an individual.

6.4. In cases where a prosecutor has not been allocated, it is the CO's responsibility to identify the documents required to prove the charge(s) against the respondent.

6.5. Documents that should not be included in the BSB's bundle of evidence are the Case Examiner's note for the PCC and any correspondence not required to prove the charges. However, in line with the guidance in "*PG16 – Disclosure of documents in disciplinary proceedings*", the CO should ensure that any relevant documents that support the defence or undermine the BSB's case but which the BSB is not intending to rely on ("unused material") are disclosed to the respondent.

6.6. It is good practice to disclose unused material in a separate bundle at the same time as the BSB's bundle of evidence is served but this may not always be possible and "unused material" should be disclosed to the respondent as soon as practically possible. (**NOTE:** the obligation to disclose relevant documents is ongoing and therefore where additional documents are received, consideration should always be given to whether they need to be disclosed to the respondent – see also Section 13 below).

6.7. The CO should indicate which documents are to be included in the 2 bundles and for the administration team to then put together a separate bundle and separate index for the used and unused. Once complete, the administration team should send copies[3] to BTAS to be passed to panel members, to the respondent BSB regulated person(s) and to the prosecutor. COs should be familiar with the BSB's policy on disclosure ("*PG16 - Disclosure of Documents in Disciplinary Proceedings"*) and in particular the continuing duty of disclosure. Although the administration team will prepare a draft bundle based on the documents the CO states should be included, it is the COs responsibility to check the bundle and ensure all the necessary documents are included.

6.8. All documents in both the bundle of evidence and the bundle of unused material should be included in the disclosure log. Any documentation served at a later date must also be added to the log to ensure that it presents and accurate record for the life of the case.

[3] Six copies in the case of a five person DT, four copies in the case of a three person DT – rE151. These copies **must** be sent to BTAS at least fourteen days before the hearing and must be indexed and paginated.

Disclosure of administrative sanction history to the Tribunal

6.9. Case Officers should be cautious about disclosing a respondent's administrative sanction history to a Tribunal. Imposed sanctions should only be disclosed where relevant, that is, where the history is directly related to the conduct charge. Investigations resulting in a finding of no breach, or which are still under investigation, should not be disclosed.

6.10. There are two main situations in which disclosure may be appropriate. The first is where the existence of previous administrative sanctions goes to prove professional misconduct. This will only be needed if the question of seriousness is raised by the respondent or by the Tribunal, or if it is asserted that the respondent was not aware of a particular regulatory requirement. That is, disclosure of administrative history for this purpose should only be reactive, in order to prevent the Tribunal gaining a misleading impression.

6.11. The second situation where administrative sanction history may be of relevance is when the Tribunal is considering sentence, as it can be an aggravating factor suggesting a lack of insight and/or a risk of repetition. In these situations, the respondent needs to be put on notice in advance of the hearing that this history will be raised with the Panel if a finding of professional misconduct is made. The respondent's consent for disclosure should be sought where possible. In line with our general policy of non-disclosure of administrative sanctions, the administrative sanction history should be provided to the Panel in writing and, if possible, not referred to in open proceedings. The Tribunal should be asked that if discussion of the history is required, that part of the hearing should be dealt with in private.

6.12. In both situations, disclosure needs to be approved under rule E93.9. As this may prove difficult in the first, reactive, situation, Case Officers should be cautious to obtain approval from an authorised staff member in advance of hearing, if it is considered that reactive disclosure may become necessary.

7. Service of charges, the bundle and draft directions

7.1. After the charges have been settled, the BSB must serve them, accompanied normally by the supporting evidential bundle and draft directions, on the respondent. For cases involving entities, the charges will be served on a named role and address identified during the investigation process. A copy of the charges, bundle and directions must be filed with BTAS at the same time as they are served on the respondent. The CO must ensure that the 'Draft' watermark is removed from the charges.

7.2. The regulations relating to service are found at rE249. Service will normally be affected by sending documents to the respondent's practising address (or last known address), where the respondent is a BSB regulated person(s); or, at the entity address for cases relating to entities, by guaranteed delivery. The respondent may request that documents are sent to a different address (for example, a private address). Such requests must be made in writing and a copy retained on the file. Email service of charges and documents is also acceptable but can only be relied upon where prior written agreement of the respondent has been obtained in advance. However, it is still useful to serve documents by email without obtaining the respondent's consent, in addition to standard service, where there are concerns that service may be an issue. In this regard, COs should bear in mind that we are only able to send emails with attachments under 20Mb, so it will usually not be appropriate for serving bundles.

7.3. Service will be deemed to have been made on the second working day after the documents were sent by recorded delivery or an email has been sent – this time must be taken into account when calculating internal deadlines for service. If there are doubts about whether the respondent can be contacted at the last known address, the CO should still serve the charges, bundle and directions on that address.

7.4. Case Officers should take care when intending to rely on a direction of deemed service. All reasonable enquiries need to be made, and proved. In some circumstances, this may include instructing a process server. If seeking to rely on deemed e-mail service under rule E216.2.d, the documents this deemed service needs to cover must be specified by the Directions Judge or Chair of the Disciplinary Tribunal (depending on who makes the direction). If a document is not specified, there is a risk that the Tribunal may assume that such an order of deemed service is not retrospective, which may result in service of charges being out of time.

7.5. If the respondent has instructed a solicitor (and notice of acting has been received), all documents should be served on the respondent's solicitor. If the respondent has instructed counsel (but not solicitors), the CO should serve the documents on the respondent unless counsel representing the respondent has been authorised to conduct litigation and the CO has received a written request from the respondent to serve documents on their authorised representative.

7.6. The administration team will prepare, for approval by the relevant member of staff, the standard covering letters for service of the charge(s) and the bundle and will keep a record of the recorded delivery reference number, which can later be checked on the Royal Mail website under "Track and Trace". It is the

CO's responsibility to ensure that service is effected at the correct address and by the correct method – this is particularly important when the respondent has not engaged with the process because, if they do not attend the disciplinary tribunal, the tribunal will need to be satisfied that all documents were properly served in accordance with rE249.

7.7. **Return of service documents**: if the service documents are returned to the office by the postal service, consideration should be given to instructing a tracing agent to establish the current address of the respondent. A record should be kept of all action to trace a respondent as this information will need to be included in the "service" bundle where the respondent has not engaged and is unlikely to attend the hearing. Consideration should also be given to serving the charges and bundle on any alternative addresses, including electronic addresses that we or the Records Department have on file.

7.8. When there are difficulties in effecting service, it may be necessary to seek a direction from a Directions Judge regarding a suitable address for service. If there is any question about whether such a direction is necessary or appropriate, COs should speak to their immediate supervisor. Any such direction should be sought as early in the process as possible in order to prevent delay caused by service not being completed.

7.9. **Notification to BSB insurers:** if a respondent is represented (by BMIF or otherwise), COs must ensure that the BSB's insurers are notified as quickly as possible, using the notification template on the database. In addition, there may be occasions when it is necessary to notify the insurers of a litigant in person who may be claiming costs. If in doubt the CO should discuss this with a casework supervisor or the Investigations and Hearings Manager. If this is not done and a costs order is made against the BSB, we may not be able to recover the costs under our insurance policy. The Administrative Team Manager should be copied in on all communications with the insurers as a matter of course.

8. Directions (agreeing on paper, decided on paper, or listing an oral hearing)

8.1. In all cases referred to a disciplinary tribunal, the respondent is required to attempt to agree or negotiate directions. The regulations setting out the directions process are contained in rE106-rE126 of the BSB Handbook and the standard directions are set out at Annex 6 to the Disciplinary Tribunal Regulations.

8.2. The CO must first consider whether to use the standard directions or whether any non-standard directions should be requested. The standard directions can be amended to include proposed changes/additions that the CO considers reasonable – for example, this might include a direction that a witness gives evidence by video-link. Non-standard directions should also be sought if more time is required to serve all the necessary evidence.

8.3. The respondent has 21 days to agree to the proposed directions or to explain whether the standard and/or non-standard directions sought should be amended and/or whether they will be making any applications (rE106).

8.4. If the BSB has not suggested any amendments to the standard directions and is not seeking any non-standard directions and if the respondent does not respond within the 21 day period, the respondent is deemed to have accepted the standard directions (rE108). The BSB must then serve the "deemed" directions on the respondent and file them with BTAS. The CO should endeavour to file the directions with BTAS within two working days of the expiration of the 21 day period.

8.5. If the BSB has suggested amendments to the standard directions or is seeking non-standard directions and no response has been received from the respondent in the 21 day period, the CO must send a copy of the proposed directions to BTAS and request the appointment of a directions judge to endorse the proposed directions on paper (rE109).

8.6. If the respondent has provided a response to the proposed directions within the 21 day period and is suggesting amendments, the BSB then has 14 days to respond to indicate whether the directions can be agreed on the basis of the respondent's proposal (rE107). This deadline is not flexible. If necessary, the CO should obtain advice from the prosecutor (or other counsel if the prosecutor is not available) to ensure that a written response is sent within 14 days.

8.7. In all cases if the directions can be agreed, save those covered by rE111 (see paragraph 8.8 below), the BSB must serve the agreed directions on the respondent and file them with BTAS. The CO should ensure that the agreed directions are served on the President within two working days of agreement (rE110 and rE112), from which point the agreed directions will apply to the case.

8.8. Some directions may impact upon matters that should be decided by the tribunal, for example staying proceedings for a certain length of time, admissibility of evidence or a matter being heard in private. Therefore, even if agreed these need to be endorsed before they come into effect and a copy of

the proposed non-standard directions should be sent to BTAS for this purpose. (rE111).

8.9. If it has not been possible to agree the directions within the 21 day period or the 14 day period, the CO must advise the respondent in writing to confirm that the directions have not been agreed and must send to the President the following (where relevant):

- a copy of those directions that have been agreed;
- any written submissions from the BSB and/or respondent in respect of the directions that are not agreed;
- any notice from the BSB and/or respondent that they wish to make an application; and,
- the BSB's response to the respondent's submissions and/or request (rE113).

8.10. If it seems likely that the matter is one that will necessitate an oral hearing (or if either party are requesting one) then it is good practise to obtain any dates of availability for a prosecutor for the next two months and submit these with the other documentation.

8.11. Under the Regulations, the President is responsible for ensuring that the directions judge has all the necessary documentation (rE115) – in practice, the documents are provided by BTAS to the directions judge. The directions judge will first consider the issues on the papers. If necessary, the judge will decide if there needs to be an oral directions hearing. If the judge does not consider a hearing is necessary, the directions will be based on the written submissions provided by the BSB and the respondent.

8.12. Where the directions judge considers that an oral hearing is necessary, written notice will be given to the BSB and the respondent (rE118). The BSB and the respondent must then, within 7 days, provide the President (again, via BTAS) with their (and their representative's) availability over the following six weeks (rE119). The administration team are responsible for providing the CO's and the prosecutor's availability to BTAS.

8.13. The President must try to find a date convenient for both parties in the six week period and notify the parties of the date and time of the hearing (rE120). If the prosecutor is not available on the date fixed, the CO should work with the administration team to ensure that an alternative prosecutor is instructed to represent the BSB at the oral directions hearing. It should be noted that such hearings can take place by telephone or video link and can be listed at times convenient to all parties. Therefore, this should be considered if there are difficulties in the same prosecutor attending.

8.14. When sending a copy of the directions to the Tribunal (whether agreed or otherwise), the CO must ensure that the 'Draft' watermark is removed.

9. At the directions hearing

9.1. BTAS will notify the parties of the arrangements for the oral hearing. They are ordinarily arranged at the judge's convenience and may therefore be held at BTAS's Tribunal Suite. In addition to the directions judge, also present will be a clerk (who is responsible for taking a note and drawing up the directions given), the CO and the prosecutor, and the respondent and their legal representative (if any). A representative of the BMIF may also attend. If this is the first time that it is apparent that the respondent is represented, the CO must ensure that the BSB's insurers are notified immediately after the hearing.

9.2. The CO should have a good working knowledge of the file in advance of the directions hearing. The prosecutor will often turn to the CO for clarification or instruction and it is important that the CO is able to answer quickly and effectively the prosecutor's queries. The CO should also take a full note of the hearing and put their note on file after the hearing. The notes should also be scanned and added to the database.

9.3. BTAS will serve the final directions on the parties (on behalf of the President). The CO should check that the final directions made accord with the CO's notes of the hearing. If there any discrepancies between the CO's notes and the final directions, the CO should contact BTAS immediately, in writing, copying in the respondent or their representative.

9.4. The CO should ensure that all relevant timeframes in the directions are recorded on the enforcement database so that no deadlines are missed.

9.5. Whether directions have been made on paper or at an oral hearing, neither party is able to appeal against the directions order made (rE125).

9.6. **Associated proceedings:** The status of any relevant associated proceedings, such as civil proceedings, should be confirmed by the Case Officer shortly in advance of any directions hearing and also any substantive hearing. This information should be obtained directly and independently of the respondent, to avoid unnecessary adjournments.

10. Applications to the Directions Judge/ Tribunal

10.1. Aside from the directions sought, the appointed directions judge (or Chair of the Disciplinary Tribunal) has the power to make rulings upon application by either the respondent or BSB. A number of the more common types of application are contained at rE127 of the Disciplinary Tribunal Regulations. Any such application should be supported by a written submission.

10.2. It will be necessary to liaise with a prosecutor if this is to be a BSB application. Where time allows it can be prudent in a number of these applications to enquire with the respondent or their representative whether they object. In some cases, for example around time limits, they may consent meaning that the supporting submissions can be brief. Consent should be obtained in writing.

10.2. Similarly, if any such application is received this should be discussed with the prosecutor. If the BSB does not object then this can be communicated to the respondent and/or directions judge. If the BSB do not agree to the application then consideration should be given as to the need for the matter to be dealt with orally. Although ultimately this is a decision for the appointed judge, it may be a matter that can be dealt with on the papers and this should be flagged. Generally, this will allow the matter to be resolved sooner. Any written response to such applications should be served in good time so that the judge is fully aware of the BSB's position and rationale for any opposition.

10.3. If the matter is to be decided at an oral hearing then the procedure is the same as where an oral directions hearing is deemed necessary. Accordingly, the processes set out at paragraph 9.1 onwards should be followed.

10.4. It may be that any such application is renewed by the respondent at the final hearing. Where this is the case, any documents submitted should be checked against those with the initial application and, if there is any alteration, the BSB's position reviewed.

Types of application

Severance – rE127.1

10.5. An application to sever charges will normally be made by the respondent. It arises where there is more than one charge and the applicant wishes to have these heard by different panels on different dates. The usual reason for such an application will be the prejudice caused if the panel were to hear matters together. One example could be a misconduct charge relating to the respondent's practice being heard with a charge relating to a criminal conviction.

10.6. In considering whether it is appropriate to sever any charges, consideration should be given to the following factors, amongst others:

- The impact upon the fairness of proceedings;
- The factual nexus between the charges;
- The impact upon witnesses (if any);
- How much delay to the conclusion of all the matters, if any, will occur.

Applications may need to be considered by the Office Holders, for further information please see "*PG07 - Disciplinary action – settling, reconsidering and withdrawing charges and applications to disqualify*".

Strike Out – rE127.2

10.7. On receipt of the charges and evidence in support, the respondent might make an application to strike out the charge(s) against them. The argument most often put forward by respondents for striking out the charges, is that a properly constituted disciplinary tribunal could not find the charge(s) proved to the criminal standard based on the evidence presented by the BSB at the time of the application. Another common argument for striking out charges is that the proceedings are an abuse of process. The basis of abuse of process arguments are usually related to the manner in which the proceedings have been pursued e.g. failure by the BSB to follow the correct processes causing unfair detriment to the respondent or potential bias in the proceedings.

10.8. As with any other applications, the application will first be considered on the papers by a directions judge. A directions judge is more likely to consider that an oral hearing is necessary in these circumstances and may make directions to timetable such a hearing, including the exchange of submissions.

10.9. If the application to strike out is successful, the charge(s) will be dismissed and the proceedings brought to an end. If the application is unsuccessful or partially successful and some charges remain, the issue of directions for the future progress of the proceedings will normally be addressed at the hearing. In general, the proposed directions will be based on the original directions served with the charges subject to any amendments that were previously agreed. The CO should therefore ensure that thought is given, prior to the strike out hearing, to what directions the BSB requires if the application is unsuccessful or partially successful.

Stay of proceedings – rE127.3

10.10. A stay of proceedings is the power of a tribunal to postpone consideration of the matter either for a set time or indefinitely.

10.11. An application to stay indefinitely will often be made as part of an abuse of process argument. Such an application will be based upon the submission that there has been such an impact on the fairness to the respondent (whether because of the BSB or a third party) that the matter simply cannot continue. Any such application will require a response and advice should be sought from the prosecutor addressing the merits of the application. If the advice is that the application is more likely than not to succeed, or if the prosecutor or Case Officer thinks that the application raises issues that warrant a review of the proceedings, then the input of the PCC Office Holders and Chair should be sought. The correct process in such circumstances would be to reconsider the matter in line with rE90 of the Complaints regulations and withdraw charges. Further explanation of this can be found in "*PG07 - Disciplinary action – settling, reconsidering and withdrawing charges and applications to disqualify*".

10.12. If the application is opposed then such a hearing can be oral and also involve live evidence. Again, advice from a prosecutor as to what is necessary to respond should be sought. If there is live evidence then any dates to avoid for the witness should be obtained so that the tribunal can list the hearing taking this into account.

Admissibility of documents/ other evidence – rE127.4

10.13. An application for admissibility of evidence can be made by any party to the proceedings. The overriding principle is one of fairness but the tribunal has a wide range of scope to admit evidence. It may be that the admissibility can be agreed between the parties. Therefore, it is good practice to send the evidence to the party and to ask for any objections within the appropriate time limit (usually 14 days, although this may be more or less depending upon proximity to the hearing itself and the volume of documentation).

10.14. Where the admissibility is challenged by either side, the matter can still be decided upon papers and so written submissions will still be necessary. In seeking admissibility for any document, consideration should be given whether the information could be redacted to remove inadmissible parts rather than the document in its entirety. In most cases any suggestions for a response should be checked with the BSB prosecutor to ensure that they do not impact upon how they intend to present the case before the tribunal.

Disclosure of documents – rE127.5

10.15. Any application for disclosure of documents by the defence should be considered in light of "*PG16 - Disclosure of documents in disciplinary proceedings*". This deals with some general considerations and the BSB approach to specific documents in the process. Additionally, the guidance in *R*

(Johnson and Mags) v. Professional Conduct Committee of the Nursing and Midwifery Council [2008] EWHC 885 (Admin) should be borne in mind as to the proportionality of any steps that will need to be taken in obtaining the information sought, as there is no free-standing positive duty on a regulator regarding gathering evidence.

10.16. As with other applications, it may be that his can be dealt with on the papers and so these should be prepared, along with a written application/response upon the respondent as well as providing copies for the tribunal.

Extension or abridgement of time limits – rE127.6

10.17. These applications are usually considered on the papers and in many cases the request may be agreed. If it is deemed necessary for the BSB to make such an application it can therefore be useful to canvass the views of the respondent before applying to the tribunal. Where it becomes apparent that the BSB are not going to meet one of more the time limits set in directions it is important that an application is made as early as possible. Any such application should also copy in the respondent and set out:

- Which direction cannot be met;
- A brief summary of why this is;
- When the time limit should be extended to;
- Why this is reasonable and what is expected to be achieved in the time period of the extension;
- The impact upon any other time limits and, where appropriate, that these are also extended.

10.18. When receiving a request from a respondent for an extension consideration should be given to whether it is the first request, the length of time that is requested and whether this, along with any reasons given are reasonable. If this is the case and the extension sought is unlikely to have a significant impact upon the progression of the case to tribunal then it will usually be appropriate to agree.

The hearing to be heard in private – rE127.7

10.19. As a starting point, all hearings should be held in public. This is to ensure that there is transparency in the hearing process and to uphold public confidence in it. However, there may be times when it is appropriate for a part, or all, of a hearing to be held in public. This will mean that only the panel, clerk, respondent, BSB and their representatives will be in the hearing and although a transcript can be made available to the parties, the public cannot obtain one. The effect of the order also means that the media cannot report on the parts of the hearing which are held in private. It will be extremely rare that it is

appropriate to hold a hearing in private solely on the ground that the media needs to be excluded. Examples where it may be appropriate to seek a direction include:

- Where evidence is put forward in relation to health;
- Where there is evidence that could impact upon a criminal prosecution (or similar);
- Where there is evidence to be adduced that would be a breach of court direction if placed in the public domain (for example family proceedings involving minors).

Joinder of one or more respondents – rE127.8

10.20. In some cases it may be appropriate for one or more respondents to have their cases heard together by the same panel. The main reason for this will be the factual basis and evidence is the same. It may also arise where parties contend that another respondent to proceedings was responsible for the alleged breach. There is a particular need to consider this application where the respondents are related to an entity and those within it.

10.21. In determining if there is a need for matters to be joined consideration should be given to, amongst other factors:

- The degree of cross over in the evidence between the cases;
- If there is a real risk of inconsistent judgements on fact and/or sentence if the matters were not heard together;
- Whether the same lay witnesses will be required;
- The impact upon joinder of the overall length of the case;
- Impact upon the date that the tribunal will take place;
- The impact upon the fairness of proceedings for any or all the respondents.

10.22. Although not expressly set out in the regulations, the judge also has a power to join different matters involving the same respondent. Granting such an application can be particularly useful where a respondent indicates that they intend to admit the charges in all the proceedings, allowing a panel to sentence for all matters together. Alternatively, there may be a similar factual link between a number of charges where it demonstrates a pattern of misconduct.

10.23. Where only some charges are admitted it may not be as appropriate to join charges in this way. This is because of the impact upon the fairness of the proceedings if the panel are made aware of admitted conduct before deciding on whether some other form of a different nature took place. Another example which may not be appropriate is where one matter is relatively straightforward and/or serious. Joining a more complex, lengthier hearing with one that could

be concluded quicker will be likely to lengthen the time it will take for both matters to be determined.

10.24. **Cross Service of Documents:** Where an order is made for joinder of one or more respondents the Tribunal should set a timetable for parties to disclose documents to one another.

Special measures for a witness (rE176 -182)

10.25. Particular consideration should be given to whether any witnesses will require special **measures**. A list of the most common types of special measures can be found at rE179. These may be appropriate in cases involving intimidation or sexual allegations, for instance.

10.26. While certain categories of witness are automatically classed as vulnerable, the Tribunal or Directions Judge will still need to make a decision whether the measures requested are desirable in each case. Accordingly, the Tribunal will need to be told why the measures sought will assist the witness in giving best evidence. This information should be provided in the form of a witness statement, unless there is a good reason not to provide it in this form. The statement should identify whether the witness falls within one of the categories in rE176. Such statements should be served with other evidence or as soon as practicable, informing the respondent that the BSB is applying for the appropriate measure(s).

10.27. If the need for special measures is contested, a formal application will need to be made to the Tribunal so that a determination can be made. Should the matter be contested at an oral hearing the CO should liaise with counsel regarding the need for a skeleton argument. Any decision on special measures should be communicated to the witness as soon as possible. If a need for special measures appears to arise, reference should be made to '*PG27 – Guidance on Working with Witnesses*'.

11. Compliance with the directions

11.1 The CO is responsible for engaging with the respondent to ensure that timeframes and deadlines are met in accordance with the directions made. If either party is not able to comply with the directions, an application should be made to the directions judge to amend the directions. If such an application is being made, the CO must inform BTAS, who will make the necessary arrangements.

11.2 The CO should pay particular attention to the deadlines for the respondent to provide evidence (whether as individual statements or by way of a separate defence bundle), deadlines for the respondent to give notice of any witnesses required to give evidence, and deadlines for the BSB to give notice of any defence witnesses to give evidence.

11.3 Directions in respect of witnesses are particularly important as witnesses will often require as much notice as possible to arrange attendance at the tribunal hearing. Wherever possible dates should be sought from witnesses prior to final listing by BTAS. The CO should liaise with the administration team about those witnesses required to attend the tribunal as early as possible to allow the administration team to make the necessary arrangements with witnesses for travel, hotels and other expenses as appropriate. The administration team should keep a record of witness expenses for the CO to use in any claim for witness expenses as part of any application for costs.

11.4 The Case Officer should ensure that any reasonable adjustments required at the hearing for the respondent or any BSB witnesses are established and communicated in advance of the tribunal. For more information on reasonable adjustments, please see the BTAS 'Reasonable Adjustments Policy' (http://www.tbtas.org.uk/wp-content/uploads/2015/04/Reasonable-Adjustment-Policy.pdf). Reasonable adjustments for defence witnesses should be communicated by the defence. However, if the CO is aware of any such requirements they should still highlight the point with BTAS. For more information, refer to "*PG27 – Guidance on Working with Witnesses"*. COs need to be aware that the considerations outlined in this policy, particularly in relation to working with vulnerable witnesses, also apply to dealings with the defence where relevant.

11.5 When the defence bundle is received, the CO should ensure that the prosecutor is provided with a copy. The CO should liaise with the prosecutor to seek confirmation as to whether, in the light of the material provided, the charges can be proved to the requisite standard, whether an application needs to be made to amend any charges, whether notice should be given to require the attendance of any defence witnesses to be cross-examined and/or any further enquiries need to be made. Included in such enquiries is whether further witnesses will be needed and/or their live attendance. On receipt of the defence documents the CO should update the insurers.

11.6 The Case Officer should be mindful of the power in rE168. This allows the Tribunal, at its discretion, to take potentially very prejudicial action against a party who fails to comply with directions or timeframes. The Tribunal is permitted to draw an adverse inference against such a defaulting party, or to exclude evidence that is submitted late. In practice, the Tribunal is more likely

to apply this power against the Bar Standards Board than the respondent, so it is important that all directions and timeframes are strictly adhered to by the Case Officer. Any decision to apply for the tribunal to exercise this power against the respondent will be dependent upon the circumstances of the case and should be discussed with the prosecutor and Investigations and Hearings Team Manager.

12. Setting a tribunal hearing date

12.1 The standard directions require that the parties provide the President with their availability to attend the tribunal hearing by a specified date. If the parties do not provide their availability, BTAS is able to fix the hearing without reference to their availability. The administration team is responsible for checking with the prosecutor's clerk as to when they are available and providing availability to BTAS within the required timescale.

12.2 The CO and the administration team should be mindful of the availability of BSB witnesses when providing availability to BTAS. The respondent may also have a legal representative and witnesses whose availability will need to be taken into account by BTAS.

12.3 If the instructed prosecutor is not available for several months or on the dates that the defence team is available and this will unnecessarily delay the progress of the case, consideration should be given to instructing another prosecutor.

13. Applications to adduce new evidence

13.1 Where evidence has been obtained after the charges have been served, but before the tribunal hearing, this should be sent to the respondent in accordance with the ongoing duty of disclosure (see "*PG16 - Disclosure of Documents in Disciplinary Proceedings*"). Where the BSB seeks to rely upon the new evidence, the CO should take the following action:

a. An application to adduce the new evidence must be made – this can be considered by a directions judge or by the tribunal itself (if appointed).

b. The CO should write to the respondent at the earliest opportunity to inform them of the application to adduce new evidence and inviting them to agree to the application. The letter should outline the application, enclose copies of the new evidence and request a response within a set period (for example, five working days).

c. If the new evidence is available prior to service of the convening order, any application to admit new evidence should be made to BTAS with a request that the application is placed before a directions judge for consideration. The Chair of the Disciplinary Tribunal Service has delegated authority to sit as a directions judge. If the convening order has been served, the CO should write to BTAS to apply to the tribunal for the evidence to be admitted in accordance with rE166.1.

d. Where the new evidence is obtained shortly before the hearing and the prosecutor is content to make an oral application at the tribunal hearing to admit the new evidence, the CO should write to the tribunal chair (by way of BTAS) and the respondent with a copy of the evidence to put them on notice of the BSB's intention to make an oral application.

13.2 If sufficient time is available, any additional evidence relied on by the BSB should be added to the substantive bundle. The CO should ensure that the pagination is continuous and the index of the bundle is appropriately updated. The new evidence and index should be served on the respondent(s) with a covering letter clearly listing what is enclosed, where it is to be included in the bundle and clarifying that the index is to be replaced.

13.3 Where there is insufficient time available, sufficient copies of both the new evidence and any revised index should be made for the panel and respondent and taken to the hearing. Where time allows, this should also be distributed to BTAS and the respondent electronically so that at the very least the parties are aware.

14. Provision of papers to the prosecutor

14.1 It is the CO's responsibility to ensure the prosecutor has all the relevant papers prior to the hearing. Those papers will include the charge sheet, an up to date bundle of evidence, service bundle relevant authorities, a costs schedule (for example, where witness expenses have been incurred) and a copy of the respondent's previous disciplinary findings (if any). In relevant cases, the CO should also provide up to date evidence from Records or the Education and Training Department. The relevant papers should be sent to the prosecutor well in advance, at least 14 days, of the hearing date.

14.2 Prior to the hearing, the CO should provide the prosecutor with details of any costs to be claimed, previous findings and any relevant information that has not previously been sent to the prosecutor. When collating any previous disciplinary findings, the CO should not only check for the barrister but also any findings against entities where they were registered at the time of the conduct that led to the finding. For entity-related cases, where the respondent

has worked in a previous entity or there are any findings against an entity in which the respondent has worked previously and in which the respondent was implicated, staff can hand up any disciplinary findings about those individuals, subject to considerations of relevance. COs need to ensure that findings are available. COs should also be aware of the position as to the disclosure of relevant administrative sanctions, set out in paragraphs 6.9-6.12 above.

14.3 In some cases, the prosecutor will prepare an opening note or skeleton argument in advance of the hearing. The CO should discuss with the prosecutor in advance whether any other documents would assist, such as an opening note, skeleton argument, organisational structure chart/list of any individuals (entity), case summary and/or chronology. The CO is responsible for ensuring that the panel members (via BTAS) and the respondent have a copy of all relevant documents in advance of the hearing, and no later than 48 hours before, particularly in relation to skeleton arguments which are required under the terms of the standard directions to be served within this timescale.

15. Convening Order

15.1 Not less than 14 days before the substantive hearing, the President (via BTAS) is required to serve the disciplinary tribunal convening order on the respondent and send copies to the disciplinary tribunal panel members, the clerk and the BSB representative (rE132). The regulations set out what information must be contained in the convening order. When a convening order is received, the CO should check that it has been received within the required timescale and is compliant with the requirements. In particular the CO should check if there any issues of conflict or potential bias in relation to the panel members Questions or concerns should be raised with BTAS immediately and copied to the respondent. It is recommended that, where possible, staff confirm service of the convening order with the respondent by telephone in advance of the disciplinary tribunal, particularly where it is considered likely that the respondent will not attend and there has been no response. A file note should be kept of any attempt and resulting conversation.

15.2 The CO should check the charges to make sure that they accord with the latest version in the bundle. If there has been an application to amend the charge sheet prior to the hearing and it has been granted, the bundle should have been updated to include this. It is vitally important to check that the both the convening order and the bundle contain the same charge sheet and that charge sheet is the most up to date version. Failure to do so may result in the wrong charges being put to the respondent.

15.3 At the hearing, the clerk to the tribunal will have in their file a copy of the convening order and evidence from the Royal Mail's "Track and Trace" website that the convening order was properly served on the respondent.

15.4 The CO should be familiar with the regulations at rE133-rE135, which deals with the respondent's rights to object to one or more proposed members of the disciplinary tribunal panel.

16. Attendance of prosecution witnesses

16.1 Where the BSB intends to call witnesses, it will be the CO's responsibility (in conjunction with the administration team) to co-ordinate their attendance. The CO ensure they meet the witness in good time before the hearing and show the tribunal room to the witness to help calm any nerves and familiarise them with the procedure as well as explain what to do if there is a fire alarm. The CO may offer any BSB witnesses the chance to visit the tribunal venue prior to the hearing if possible.

16.2 The administration team should ensure that the witness is provided with a copy of the document entitled "Notes for witnesses" ahead of the hearing and the CO should ensure that a paper copy is also available on the day of the hearing. The CO should ensure the witness has a paper copy of their statement to review before the start of the tribunal and should explain that the witness will be asked to swear an oath or affirm before they give their evidence. Any witnesses should remain outside the tribunal room before giving evidence.

17. Prior to the hearing

17.1 The CO should ensure prior to the hearing that they have undertaken all the actions on the 'Disciplinary Tribunals Checklist' (which can be found at Annex 1). The preliminary tasks required will differ from case to case and from prosecutor to prosecutor.

17.2 **Proceeding in absence:** Where it is unlikely that the respondent will attend the hearing, the CO should liaise with the prosecutor to ensure that the service documents are available for the panel, along with a clear summary and any written submissions and the relevant authorities are prepared. This serves to clarify the considerations of the panel and assists in their decision on whether they should proceed in absence.

17.3 The service documents and authorities will need to be filed with BTAS and served on the respondent, any submissions on our reasons for proceeding in absence should be sent either by post or electronically depending on time. BTAS are responsible for circulating documents to the panel.

18. At the hearing

18.1 The CO should generally attend the tribunal venue no less than 30 minutes prior to the scheduled start time for the hearing.

18.2 Often counsel for both parties will be directed to exchange opening notes or skeleton arguments before the tribunal hearing begins. The CO should ensure that sufficient copies of any documents that have not yet been sent to the Panel are available at the hearing. This is the case even if the documents are finalised on the day before or morning of any hearing. It is the respondent BSB regulated person(s) BSB regulated person(s) (or their representative's) responsibility to bring sufficient copies of their note.

18.3 Any previous findings identified as part of the process in 14.2 should be available. If the panel identify other individuals they deem relevant to their sentencing considerations. Where necessary, the BSB should consider asking for a short adjournment to allow time to obtain the relevant findings.

18.4 At the hearing, the CO should introduce the witness to the Tribunal clerk who will ask the witness whether they wish to affirm or swear on a holy book. If possible, the CO should give the witness an estimate as to what time they will be required to give evidence. The CO should explain to the witness that they cannot discuss any aspects of the evidence with the witness. If the witness's evidence is part heard over lunch/tea, the Chair of the Tribunal will remind the witness that they remain under oath and cannot discuss the case with anyone until they have finished giving their evidence.

18.5 The CO should speak to the tribunal clerk to ensure that they have everything required for the case to proceed, including evidence that the convening order was properly served on the respondent and that they have the most up-to-date charge sheet (if any amendments have been made).

18.6 Case Officers should be aware of the impact of rE225-rE227. In particular, in the case of a respondent who is to be disbarred, or to be suspended, or to be prohibited from accepting or carrying out any public access work or instructions for more than twelve months, the Disciplinary Tribunal must seek representations from the respondent and from the Bar Standards Board on the appropriateness or otherwise of taking action under rE227, that is,

requiring the BSB to immediately suspend the respondent's practicing certificate (or to not issue one to them).

18.7 The Case Officer may need to bring these rules to the attention of the Tribunal where they apply. It may also be appropriate for submissions to be provided in advance of the hearing, potentially alongside another small bundle of documents relating to the rE226 representations. Where this is considered appropriate, the respondent should be put on notice that the BSB will be making such submissions so that they can prepare their own submissions as to this point.

18.8 As at a directions hearing, the CO should also take a full note of the hearing and put their note on file after the hearing. The notes should also be scanned and added to the database. It is important to clearly and separately identify handwritten notes of discussions with counsel, which are privileged, from other notes that may not be. To that end, COs should use separate a fresh sheet of paper for notes of privileged discussions, which should be clearly labelled as such.

19. Referrals back from Tribunals for consideration of imposition of Administrative Sanction

19.1 Under rE209 of the Disciplinary Tribunal Regulations, a disciplinary tribunal panel have the power to refer a matter to the PCC to consider whether to impose an administrative sanction. In order to do so, they must have decided that:

- professional misconduct has not been proved to the criminal standard of proof;
- that there is evidence, on the balance of probabilities of a breach of the BSB Handbook and;
- that it is in the public interest for the matter to be referred.

19.2 In such circumstances, the PCC can only impose an administrative sanction or dismiss the matter. The DT decision is to refer for consideration and therefore it is not pre-determined that a sanction will inevitably follow such a referral.

19.3 The PCC will need to have sufficient documentation to consider the matter fairly. They should have before them:

- the written decision of the DT;
- the original fact sheet that was before the PCC when the complaint was first considered;

- if it is thought it would assist the PCC, a transcript of some or all of the tribunal proceedings; and
- where appropriate, any advice from the prosecutor that may assist the PCC in determining the appropriateness or otherwise of imposing an administrative sanction.

19.4 Where possible, the matter should go to a different team to the one which considered it initially; regardless, the original Case Examiner should not vote.

19.5 In all cases, the Case Officer should liaise with the Operational Support Team who should aim for the case to be considered by the next PCC meeting taking place after written judgement has been provided by the Bar Tribunal Adjudication Service. At the PCC, save for the limitation upon what the powers of disposal are, the same procedure is followed as if considering other matters.

20. Costs

20.1 Regulations rE244-rE218 set out the tribunal's powers in relation to costs. The BSB no longer seeks costs as a matter of routine because all costs of the Tribunal are paid by BTAS. However, the BSB is entitled to claim any costs it occurs arising from the hearing. This is usually limited to witness expenses, interpreter fees and any expert witness expenses. Where such expenses have been incurred, the CO should prepare a schedule of costs for the tribunal and send it to the respondent or his representative prior to the hearing. There is a requirement that a schedule of costs be served on the other party and filed with BTAS no later than 24 hours before the commencement of a hearing – rE245.

20.2 The letter to the respondent regarding any potential costs claim should put the respondent on notice that the BSB intends to claim costs if the charges are proved and a copy of the costs schedule should be provided. The letter should explain that if the respondent would like to provide financial information to show why a claim for costs should not be made, they should have it ready to refer to at the hearing and provide the BSB with a copy.

PART 2: Disciplinary Tribunals dealing with disqualification orders

21. General

21.1 The procedure to be followed in relation to disqualification orders is exactly the same as that set out in Part 1. However, there are two main differences:

a) A disqualification order is made via an "application" (as opposed to the preferring of charges); and

b) In order to secure a disqualification order, the "disqualification condition" must be satisfied (as opposed to proving professional misconduct) – see Section 23.

21.2 A disqualification order can be imposed on all those defined as "relevant persons" (see paragraph 1.5 above) which, in practice, means it can be imposed on a barrister[4] working in an entity as well as employees of an entity and of a chambers. In the case of non-authorised individuals who are employees they can still be subject to an order, even though a finding of professional misconduct cannot be made against them, where they have contributed to a breach.

21.3 However, in the case of a chambers, only those employees who are employed directly by the barristers in chambers are covered by the disqualification condition. It should therefore be noted that where an employee of a chambers is employed by a separate management company and not direct by the barristers in chambers, the disqualification condition does not apply and they cannot be subject to a disqualification order. It is therefore important to check who is the formal employer of a person working in a chambers before deciding whether to make an application for a disqualification order.

21.4 In light of the above, it is possible for an application for a disqualification order to be included in a "charge sheet" that includes charges of professional misconduct against the same person due to the person's status as both a barrister and an employee of an entity. In theory is also possible for the entire proceedings to relate only to an application for a disqualification order against an employee and not involve a barrister or any other regulated person. However, in practice it is unlikely this will be the case. In most cases, an application for a disqualification order against an employee will involve, or be linked to, proceedings against a practising barrister and the cases will be heard together. In such circumstances, an application for joinder will need to be made, following the process in paragraph 10.20 above.

22. The disqualification condition

22.1 When considering applications for a disqualification order, the tribunal has to consider whether the "disqualification condition" ("the condition") and the underlying facts, are proved to the criminal standard in the same way as

[4] This could in theory also include someone who is registered European Lawyer, an authorised (non-BSB) individual, or a BSB regulated manager in an entity. However, in nearly all cases it will be a barrister.

professional misconduct. The terms of the "condition" are set out at Definition 70 of Part 6 of the Handbook which are:

a. that the relevant person has (either intentionally or through neglect):
b. in the case of a regulated person breached a relevant duty under the Handbook or applicable rules of another approved regulator;
c. in the case of a regulated person or employee caused or substantially contributed to such a breach by a regulated person; and
d. it is undesirable that they should engage in the relevant activity in respect of which the order is made.

23. Breach of duty by a regulated person

23.1 In the case of a regulated person having breached the duty themselves (as opposed to having caused or contributed to someone else breaching the Handbook – see paragraph 24.1 below), the procedure will be much the same as that set out above, with consideration being given as to any additional evidence required in the bundle to prove that it is undesirable that the person engages in relevant activity (effectively continuing to be able to be employed either by their current employee or by as an employee of any other regulated person)

23.2 At the hearing, the parts of the condition will be considered by the panel together and therefore both the underlying facts and desirability for disqualification will have to be proved to the criminal standard. At the sentencing stage the panel will need to decide on the length and/or terms of any order.

23.3 Although there are different elements that have to be proved, the procedure for the hearings is the same. The BSB will put their case and then the respondent responds. There is no difference to the procedure and as a result, the same steps set out in Part 1 should be followed.

24. Causing or contributing to a breach

24.1 In order to satisfy the disqualification condition in this instance there needs to be proof of a breach by a regulated person, proof of causation and then consideration of the question of desirability to disqualify. Therefore, careful consideration will need to be given to how these elements are proved.

25. Joint hearings

25.1 Because there is a need for a breach by an authorised individual, where the respondent is a non-authorised individual it is likely that the application will need to be heard at the same time as a professional misconduct charge against an authorised individual. Where this is the case, the following points apply.

I. Any directions will need to include one that the matters are to be heard together; This may include an application for joinder (see para 10.20 above);
II. When considering the evidence to serve the BSB will need to give careful thought as to what evidence is relied upon so that causation can be proved; and
III. Any documentation will need to be served on all parties to the proceedings (for example Barrister, Entity and employee) so that they are fully aware of all documentation that is, or may be, before the tribunal.

25.2 Should any charges against the regulated person(s) be struck out or overturned on appeal, careful consideration will need to be given as to the continuation of the order or application as, without evidence of a breach, the condition is not made out.

25.3 Alternatively, there may be circumstances where an authorised individual is subject to both charges of professional misconduct and an application to disqualify. In this instance the case follows the same procedures as those in Part 1 of the guidance, with the additional considerations at paragraphs 23.1 also being borne in mind.

25.4 The other time when an application will be made to disqualify is where there is already a finding of a breach by the regulated person. This is most likely to happen where the matter concerning the regulated person has been disposed of by DBC or where a DT involved a finding against a regulated person and, in the course of the tribunal, evidence comes to light that would indicate that another has caused or contributed to this. In theory it is possible, but unlikely, that it can also attach to an administrative warning.

25.5 In such cases, the evidence bundle will need to include evidence of the breach. This will usually be through the formal decision or decision letter. Further evidence will need to be relied upon to prove the causation or contribution.

25.6 When the findings against the regulated person no longer be capable of proof or overturned on appeal careful consideration will need to be given as to the validity of the disqualification proceedings as there will be no evidence of a breach.

26. Procedural considerations

26.1 In terms of steps that are taken when dealing with an application, the Disciplinary Tribunal Regulations still apply and so the same considerations and procedures should be followed as those set out in Part 1.

PART 3: Post hearing procedure

27. General

27.1 **Informing relevant people of the outcome:** after the conclusion of the hearing (or at the end of any part heard days), in all cases, the CO must send, as soon as possible, a short update email to the Director General of the BSB, the Director of Professional Conduct, the I&H Manager and the Communications/Press Officer (a group email in Outlook titled "disciplinary outcomes" is available for this purpose). The email should provide a brief background to the case, outline the charges and the decision on each as well as, where applicable, the sentences. It should also include any comments made in reaching a decision that may be of relevance to the managers or the Communications Team. The email should normally be sent immediately after the hearing and on the same day as the decision is reached although it is acceptable to send it first thing the next morning if the hearing runs particularly late. However, where the matter is high profile, or the press were in attendance at the hearing, it is essential that something brief be sent to those listed above whatever time the hearing finishes. This is to avoid details of the outcome being published in the press before it is made known to the BSB senior managers and our press office. If necessary fuller details can be provided the next day.

27.2 It is the CO's responsibility, on returning to the office after the hearing, to update the enforcement database with the outcome of the hearing. This will include recording on the database that the charges were proved or dismissed and updating the progress section. The CO's note of the hearing (including any judgment or reasons given) should be placed on the file. The CO must give the file to the administration team within 48 hours to prepare a website template for the CO to check. Once finalised the template should be passed to OST to update the BSB's website, for inclusion in the papers for the next PCC

meeting and to update the Core Database and the Bar Register (informing the records department), as well as provide the basis for monitoring sentencing patterns.

27.3 In accordance with the BTAS's policy on publication of disciplinary findings[5], the judgment of the tribunal must be published on the website of BTAS. This will be undertaken by BTAS and BTAS will also be responsible, where the charges are not proved at the tribunal, for any reference to the tribunal to be removed from their website immediately. A respondent may request that the details of any dismissal are made public and BTAS will be responsible for ensuring this is done.

27.4 If there was an amendment to the charge sheet at the hearing, it is the responsibility of the CO to forward a copy of the amended charge sheet to BTAS, so this can be sent out to the parties. The CO must put the amended charge sheet on the file as well attach it to the database. The CO should notify the administration team of any amendments to ensure that the correct information is included in the template.

27.5 If all charges were dismissed by the tribunal, or there is a need for specific feedback to the PCC where lessons can be learned (for example if the tribunal made specific criticisms or comments), the CO must prepare a report for the PCC containing a short summary of the issues, the reasons for dismissal and setting out any lessons to be learnt. A standard report template is available and should be used. Such reports should be prepared and included in the papers for the next PCC meeting but where time is too tight to meet the deadline papers for the next meeting, the report should be included in the papers for the meeting after that.

27.6 In addition to informing those within the BSB, any complainant and witnesses should be informed of the outcome within 1 working day, where practicable.

27.7 **Post hearing reviews:** these reviews should take place as soon as is practical (no later than 14 days) after the receipt of the Chair's report. If there are significant lessons to be learned or issues arise that may impact on the way we deal with other live cases, it may be necessary to hold the meetings as soon as possible, even before the Chair's report is published. These reviews should not normally be postponed due to any appeal being lodged. Reviews should also take place after an appeal, including administrative sanction appeals, or after any significant events such as a successful strike out application or panel/judicial criticism of the BSB.

[5] BTAS's publications policy can be found on their website here: http://www.tbtas.org.uk/wp-content/uploads/2013/07/Publication-Policy.pdf.

27.8 These meetings should take place between the Case Officer, their line manager and, if it is considered that there may be lessons to be learned, the Professional Support Lawyer and/or the Head of Investigations and Hearings. The purpose of the meeting is to discuss the life of the case, and particular points to be considered include:

- Any alteration to charges or issues with wording.
- Whether evidence obtained was proportionate or sufficient,
- Any delays in the progression of the case,
- What went well in the life of the case,
- What did not go as well in the life of the case.

27.9 Following the review meeting, the Case Officer should note the review meeting's occurrence on the file, and summarise any lessons to be learned from the case. These lessons should also be added to the lessons to learn register by the Case Officer.

28. Appealing against the decision of the Tribunal

28.1 A respondent may appeal against the finding and/or sentence of the disciplinary tribunal. Appeals are made to the High Court. Details of the appeal process can be found in "*GE13 –Guidance on Appeals against decisions of Disciplinary Tribunals and the Qualifications Committee of the Bar Standards Board"*.

28.2 The BSB may also appeal against the finding and/or sentence of the disciplinary tribunal, but this is rare. There are no specific grounds which limit the BSB's grounds of appeal. However, in all cases, the CO should carry out an assessment of whether an appeal would be appropriate and record the outcome of the assessment on the standard form. Factors that should be considered in deciding whether it is appropriate to lodge an appeal include:

- Whether the tribunal have made a serious error in law that has impacted upon the decision;
- Whether any sentence passed is unduly lenient, rather than merely lenient;
- The public interest in appealing a decision;
- The impact upon the reputation of the BSB as a regulator or the profession as a whole if the decision of the Tribunal is not challenged;
- The proportionality of appealing a decision (for example where a successful appeal will make little or no practical difference to the situation;
- The impact of any such decision upon the regulatory objectives and/or specific risks identified though the BSB's regulatory risk framework.

28.3 Where the CO considers that such factors may mean an appeal is appropriate, the CO should discuss their concerns with the prosecutor at the end of the hearing and raise the matter immediately with their line manager or the I&H Manager. If applicable, the prosecutor should be asked to prepare a written advice on the merits of an appeal. If it appears appropriate to consider lodging an appeal, it is necessary to obtain the permission of the PCC Chair - speed is of the essence. This consent must be obtained within 7 days of the date of the hearing. Under the Civil Procedure Rules, any appeal must be lodged within 21 days.

28.4 At the appeal hearing, the bundle should include any relevant extracts from the BSB Handbook, Sentencing Guidelines and the Disciplinary Tribunal Regulations. In addition, the Case Officer should ensure that a full, unmarked copy of both the BSB Handbook and Sentencing Guidelines are available at the hearing should they be required by the court.

28.5 When appealing on the basis of an unduly lenient sanction, it is important to assist the court by advising what we would consider to be an appropriate range of sanctions on the facts.

28.6 When costs are awarded at an appeal hearing, they are payable within 14 days in line with CPR 44.7.

29. Enforcement database

29.1 It is essential that all COs, administration staff or any other members of PCD staff who carry out work on a disciplinary file, update the enforcement database with every action taken.

ANNEX 1 - Hearing Preparation Checklist

No later than 2 weeks before the hearing

1. Contact Counsel before the hearing to discuss the case and to ensure the BSB is hearing ready.
2. Check that any additional evidence is served.
3. Check that the charges are the correct ones.
4. Previous findings – from database. Find out if the respondent is going to attend.
5. Service bundle has been completed and sent out.
6. Ensure that you have complied with the ongoing duty of disclosure.

The week of the hearing

7. For breaches of the practising requirements up to date evidence on the charge(s) – e.g. CPD has the BSB regulated person(s) complied, paid BMIF? Check if there are any other outstanding compliance issues e.g. outstanding CPD.
8. Ask Admin to provide details of any witness expenses so we can prepare a costs claim. Prepare a costs schedule where appropriate.
9. Where the respondent is not going to attend ensure that the chronology and submissions are prepared for proceeding in absence.
10. Inform Communications Team if there is likely to a disbarment, suspension or any media interest.
11. Check with BTAS that they are aware of any special measures that have been directed and that procedures are in place for them.
12. Make sure you tell witnesses that matter might last the whole day (or longer)
13. Make sure the witness has the office mobile number and BTAS number so they can contact you/BTAS if they get lost
14. Confirm service of the convening order with the respondent by telephone, particularly where it is considered likely that the respondent will not attend and there has been no response. A file note should be kept of any attempt and resulting conversation.
15. A blank copy of the evidence bundle is available for any live witnesses.

The day of the hearing

16. Office mobile if needed
17. Take Code and Sentencing guidance (remember the old code and new code where applicable)

18. Update Insurers (if represented).
19. Take relevant case law – e.g. *Baxendale v Walker*; that relating to proceeding in absence.
20. Take bank account details in case of fine.
21. Ensure that you have complied with the ongoing duty of disclosure.
22. Check the witness has a copy of their statement to read whilst they are waiting.
23. Explain the process to the witness –e.g. they will be asked to swear or affirm, roughly what time they will be expected to attend and explain we cannot discuss the evidence. Also point out that if there is a break in the middle of their evidence we will not be able to talk to them.
24. Bear in mind that in the case of 12 month suspensions (including prohibitions on public access work) and disqualifications as well as disbarments or revocation of authorisations for an authorised body, panels need to consider an immediate suspension. (The start point is that they must suspend the practising certificate unless there are good reasons not to).

After a Hearing (Immediately)

25. Update Director of Professional Conduct, I&HM, cc the Communications Team on the outcome, where possible, using the "disciplinary outcome" group email.
26. Update Bar Council Records section where an immediate suspension has been ordered.

After a Hearing (within two days of the hearing)

27. Update Flosuite to confirm the decision and a brief note of what happened at the hearing and put your handwritten notes on file
28. Liaise with Admin to complete the website template to make sure the finding goes onto the website
29. Update the complainant and any witnesses of the outcome
30. Update the Insurers
31. If the Case Examiner was particularly interested send them an email to update on the finding.
32. Update witnesses on the outcome of the hearing and thank them for their attendance
33. Email the prosecutor to say thank you
34. If the BSB regulated person(s) is disbarred or suspended or there are any restrictions on practise update the Bar Council Records section and any other relevant departments e.g. pupillage.

Within a week of the hearing

35. If charges are dismissed or there are lessons to be learned for the future, complete a Committee “feedback” report.
36. If the Case Examiner was particularly interested send them an email to update on the finding.

37. If charges are dismissed or there are lessons to be learned for the future, complete a Committee “feedback” report.
38. Make sure the paper file is in order and everything is attached to the database
39. If there is an appeal, ask OST to update website with outcome of appeal. Website should have already been updated with “appeal pending”. This should be done as soon as anything is received.
40. Where the BSB are considering an appeal, obtain permission from the chair of the PCC.

After receipt of judgment

41. If a fine is ordered, email the BSB regulated person(s)/representative with the bank details and tell them they can pay by cheque or make payment via the Bar Bank account (when final report comes in).
42. Ensure that a post case discussion has been booked with the CO’s line manager (and the PSL if necessary) to discuss lessons to learn