

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

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1. Introduction

1.1. In order to make a finding that there has been a breach of the BSB Handbook, a decision maker first has to be sufficiently satisfied that the necessary facts alleged took place. The level of certainty the decision maker needs to have to make this determination depends on which standard of proof applies to the decision. There are only two recognised standards: these are known as the civil standard of proof and the criminal standard of proof.

1.2. On 1 April 2019, an amendment to **rE164** of the Disciplinary Tribunal Regulations in the BSB Handbook came into force that changed the standard of proof in professional misconduct and disqualification proceedings from the criminal standard to the civil standard:

rE164 The *Disciplinary Tribunal* must apply the civil ~~criminal~~ standard of proof when deciding charges of *professional misconduct* and in deciding whether the *disqualification condition* has been established.

1.3. This guidance is written to assist those within the BSB who may be involved in applying or considering this standard of proof. The different standards of proof are discussed in more detail below, along with transitional provisions and several other consequential amendments to the BSB Handbook.

2. Criminal standard of proof - applicable to conduct that occurred or began before 1 April 2019

2.1. This standard of proof requires that the decision maker is satisfied “so as to be sure” (also referred to as being satisfied “beyond reasonable doubt”) that conduct amounting to professional misconduct or meeting the disqualification condition did in fact occur.

3. Civil standard of proof – applicable in relation to conduct that occurred or began after 31 March 2019

3.1. A fact is proved to the civil standard if it is proved on “the balance of probabilities”. The test for this is whether it is more likely than not that the events in question happened.

3.2. The standard of proof is the same regardless of the seriousness of the allegation. There is no “sliding scale” that requires charges to be proved to a higher degree of probability in more serious cases.

3.3. Nevertheless, it should be borne in mind that some events are by their nature more unlikely than others¹. Where an allegation is serious, the event it relates to is likely to be outside the ordinary, and the decision maker might need more convincing evidence than normal in order to be persuaded that it occurred. Even so, the decision maker must still be satisfied on the balance of probabilities that the events occurred.

3.4. This point was considered by the House of Lords in the case of *Secretary of State for the Home Department v Rehman*, dealing with an appeal against deportation. Lord Hoffman stated:

“...some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature walking in Regent's Park was

¹ See *Re B (Children)* [2008] UKHL 35 at [15].

more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian.²”

4. Determining which standard applies

4.1. The civil standard of proof only applies to conduct that takes place entirely on or after 1 April 2019. This is reflected in the terms of rE261A of the Handbook which reads:

rE261A Notwithstanding the provisions in rE164 and rE261, the *Disciplinary Tribunal* must apply the criminal standard of proof when deciding:

1. charges of *professional misconduct* where the conduct alleged within that charge occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019 and forms the basis of a single charge of *professional misconduct*, and
2. whether the *disqualification condition* has been established, in relation to an applicable person’s alleged breach of duty or other conduct which occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019.

Conduct that spans both time frames

4.2. In the case of a course of conduct that begins before 1 April 2019 and continues after 31 March 2019, the criminal standard will apply to the entire course of conduct.

4.3. Whether or not facts amount to a course of conduct may not always be a straightforward question to resolve. For example, consider the case of a barrister who allegedly misled the court in a two day hearing that took place on 31 March 2019 and 1 April 2019. It would be artificial and inappropriate to prosecute two charges covering each period solely in order to obtain the benefit of the lower standard of proof.

4.4. However, if the alleged misleading on 31 March 2019 was substantially different and unrelated to the misleading alleged to have occurred on 1 April 2019, it may well be appropriate for two separate charges to be brought. This approach should generally be the exception, rather than the rule, in the context of a continuing course of conduct.

² *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, at 55.

- 4.5. With the exception of the above consideration relating to a single continuing course of conduct, there is no issue with a Disciplinary Tribunal being asked to consider multiple charges with different applicable standards of proof. However, care will be required to ensure that the Tribunal is clear about the correct standard of proof to apply to each charge. It will normally be appropriate to set this out in any skeleton argument to assist the Tribunal.

5. Impact on decision making

- 5.1. The two standards of proof are only relevant when deciding whether facts have been, or are likely to be, proved. They are not applied to deciding whether a certain sanction should be imposed, for instance, or whether an administrative sanction is not appropriate. They are also not applied to decisions taken at the assessment stage, that is, whether or not to investigate a complaint.

Referring to disciplinary proceedings – the ‘realistic prospect test’

- 5.2. Before the Professional Conduct Committee (PCC)³ can refer a complaint to a Disciplinary Tribunal, it must be satisfied that there is a realistic prospect of a finding of professional misconduct being made (rE38.2). In order to properly make this assessment, the PCC has to determine and then consider the correct standard of proof that will be applied by the Tribunal. For example, in the case of conduct occurring solely on or after 1 April 2019, the PCC must be satisfied that there is realistic prospect of the Tribunal reaching a finding of misconduct on the balance of probabilities before it can refer the complaint to the Tribunal.
- 5.3. Similarly, when deciding whether to make a complaint subject to the determination by consent (DBC) procedure, the PCC can again only do so if it considers there is a realistic prospect of a finding of professional misconduct being made in respect of the complaint (rE69.2(a)). Again, this will require the PCC to first determine the appropriate standard or standards of proof that would apply at DBC stage.
- 5.4. In either case, having considered the reasonable prospect test, the decision maker(s) still need to go on to consider whether it is also in the public interest to refer matters to the Tribunal or DBC.

³ Or, in the case of a category 1 complaint, a Professional Conduct Department Case Officer.

Disciplinary Tribunals

- 5.5. For professional misconduct to be found proved by a Disciplinary Tribunal, the BSB has to prove that the conduct alleged occurred to the appropriate standard of proof, as set out above.
- 5.6. In the course of proceedings before a Disciplinary Tribunal, applications may be made to strike out some or all of the charges in advance of the hearing, or ‘no case to answer’ submissions may be made during the hearing, where the barrister considers there is not enough credible evidence to prove the BSB’s case⁴. When considering the tests for a strike out application or submissions of ‘no case to answer’, it is important to ensure that the correct standard of proof is being considered.

DBC

- 5.7. In determining whether a charge of professional misconduct has been proved under the DBC procedure, the PCC⁵ uses the same standard of proof as the Disciplinary Tribunal. For transparency and clarity, there is now an explicit provision to that effect in the Handbook:

rE70A Where a matter is to be considered under the *determination by consent procedure* as per rE67, the standard of proof to be applied is the civil standard of proof.

- 5.8. Again, this is modified by a new provision which mirrors rE261A:

rE100A In considering matters under the *determination by consent procedure*, the PCC must apply the criminal standard of proof when deciding charges of *professional misconduct* where the conduct alleged within that charge occurred prior to 1 April 2019, including where the same alleged conduct continued beyond 31 March 2019 and forms the basis of a single charge of *professional misconduct*.

Applying for a disqualification order

- 5.9. Under rE38, the same considerations apply to the decision to apply for a disqualification order, as to the decision to refer to disciplinary proceedings. Accordingly, before referring the complaint to the Tribunal, the PCC must be satisfied that there is a realistic prospect of the disqualification condition being satisfied. As before, this requires the PCC to bear in mind the standard of proof that will be applied by the Tribunal (that is, the same standards that apply for charges of misconduct).

⁴ See *R v Galbraith* [1981] 1 WLR 1039 and *R.(on the Application of Sharaf) v The General Medical Council* [2013] EWHC 3332 (Admin).

⁵ Or again, in some cases, a Case Officer.