

CURRENT GUIDANCE

Investigating and Collecting Evidence and Taking Witness Statements Guidance

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

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

potential witness. It applies where a barrister has investigated or collected evidence before arriving at court at the start of the case).

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

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

- a. whether to undertake such work in the first place; and
- b. if they have done, whether or not they can properly accept a brief at a subsequent trial.

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

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

7. Even where a brief is properly accepted, the question of whether the barrister should continue to act is a matter that they must keep under review during the case in light of any later developments. However, Guidance C73 states 'if you are planning to withdraw from a case because it appears that you are likely to be a witness on a material question of fact, you should only withdraw if you can do so without jeopardising the client's interests'.

Bar Standards Board

October 2019