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January 2014

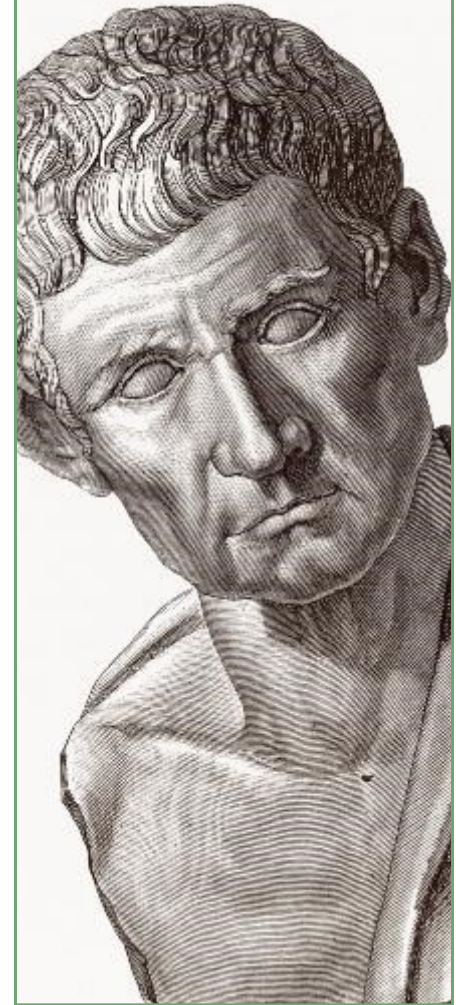
Guide to Professional Conduct & Ethics

INTRODUCTION

In 2010 the practising Bar numbered 12,420, of whom 32 per cent were women, 500 from the Indian sub-continent, 100 'other Asian' and 130 African.¹ This compares with a practising Bar of less than 2,000 in 1961.² The increase has led to continuous updating and elaboration of the rules of professional conduct to which the Bar is subject.

Until relatively recently, every member of the Bar had to have a clerk and practise from premises dedicated as professional chambers. Those rules have been relaxed and the Bar Council and Bar Standards Board now permit counsel to practise from their homes, without a clerk, and to negotiate their own fees. Increasingly large numbers of barristers take advantage of these privileges. Further, the rule forbidding barristers from accepting instructions from anyone other than a solicitor has been relaxed, although not repealed *in toto*.

It is also worth noting that the Benchers of the Inns continued to exercise jurisdiction over the conduct of their members until 1967.



¹ Bar Council website - statistics

² See R.E. Megarry 'Lawyer and Litigant in England'.

THE MACHINERY OF PROFESSIONAL DISCIPLINE

By virtue of the Legal Services Act 2007, what might be described as the trades union functions of the Bar remain the responsibility of the Bar Council.³ Discipline is now in the hands of the Bar Standards Board (hereafter BSB), which consists partly of barristers and partly of laymen, chaired for the moment by an academic lawyer. The BSB brings proceedings against allegedly erring barristers. Resolution is entrusted to the Council of the Inns of Court, which appoints Disciplinary Tribunals consisting of three, or in more serious cases five, members, none of whom is a member of the Bar Council or the BSB. Tribunals are made up of barristers and laymen, and there must always be at least one lay member of

“Admission to an Inn is vouchsafed only to a person of ‘good character’”



any tribunal.⁴ From the Tribunals there is a right of appeal to the Visitors of the Inns of Court, who are the Judges of the High Court. Tribunals generally consist of three members with a Judge or QC as chairman, one lay and one barrister member. In more serious cases they sit in fives, almost invariably with a judge as chairman.⁵

THE GENERAL PRINCIPLES

From the day he or she (hereafter the masculine includes the feminine, unless otherwise expressly stated) applies to join an Inn of Court, the fledgling barrister finds himself the object of scrutiny. Admission to an Inn is vouchsafed only to a person of ‘good character’ and while a criminal conviction will not of itself be a disqualification, one for dishonesty almost certainly will, and in any case will be closely investigated. Once he has achieved call and started in practice, the barrister is confronted by a daunting catalogue of Do’s and Don’ts.

A self-employed barrister may not undertake the general conduct of a client’s affairs or conduct litigation or correspondence with other parties.⁶ In short he may not do the work undertaken by a solicitor. This used to include taking evidence or proofs of evidence for use in court, but the rule has been relaxed to allow for this.



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The Code of Conduct (hereafter ‘CoC’) is both prescriptive and restrictive of the way in which a barrister may receive instructions. In general, he may act only if instructed by a solicitor or member of an approved profession. The latter are limited to professions such as accountants, engineers, architects, town planners and the like (‘direct professional access’).⁷ Recently this rule has been relaxed to permit ‘direct public access’. This permits the acceptance of instructions direct from members of the public, subject to requirements as to negotiating fees and the keeping of records and retention of documents which would otherwise be the responsibility of the instructing professional. These ‘Public Access Rules’ leave it to the discretion of the individual whether to accept instructions direct from the public, and whether given the circumstances of the case he should cease to act and insist that the client go to a solicitor. By paragraph 301 of the CoC, a barrister must not:

- (a) engage in conduct whether in pursuit of his profession or otherwise which is:
 - (i) dishonest or otherwise discreditable to a barrister;
 - (ii) prejudicial to the administration of justice; or
 - (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.

³ See, Constitution of the General Council of the Bar

⁴ Constitution of the Council of the Inns of Court (2008); CoC, Annexe L

⁵ CoC Annexe M (The Hearings before the Visitors Rules)

⁶ CoC paragraph 401

⁷ CoC paragraph 104



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THE GENERAL PRINCIPLES

On one view, those prohibitions are all-encompassing. Yet it might be supposed that a barrister’s private life should remain private, and that, short of criminal behaviour, he should be allowed to do what he likes without interference from the BSB. This view is not universally shared, especially by the BSB itself, and the CoC demands more. By paragraph 302:

A barrister has an overriding duty to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

And by paragraph 303:

A barrister:

(a) must prosecute and protect fearlessly and by all proper and lawful means the lay client’s best interests and do so without regard to his own interests or to any consequences to himself or to any other person

Finally, by paragraph 307:

A barrister must not:

(a) permit his absolute independence integrity and freedom from external pressures to be compromised

A barrister must put the interests of justice, and his duty to the Court above all else. This means that he must not in any way attempt to mislead the Court, or engage in any sort of subterfuge. For example, actively concealing the fact that a police officer who was a party to proceedings for wrongful arrest and false imprisonment had been demoted for interfering with the course of justice would almost certainly be a breach of the CoC.⁸

ENFORCING PROFESSIONAL STANDARDS

Questions of professional conduct and behaviour come to be decided by a number of different routes. First, there is the straightforward disciplinary charge of breach of the CoC following a complaint made to the BSB by a third party, or brought by the Board of its own motion. The complaint, once made, will be investigated by the Complaints Commissioner, a full-time lay employee of the Board. If it is thought that the barrister has a case to answer he is brought before a three or five person Disciplinary Tribunal, as already described. Second,

⁸ See *Meek v Fleming* [1963] 2 QB 366

⁹ See, for example, *Medcalf v Mardell* [2002] 2 AC 120; [2002] UKHL 27

he may be the defendant in an action for professional negligence brought by an aggrieved lay client claiming to have suffered loss by reason of the barrister's incompetence. Finally, he may be the subject of a 'wasted costs order' made by a Court on application by a party, not necessarily the barrister's client, or occasionally of the Court's own motion, on the ground that his conduct has occasioned unnecessary expense to a litigant or the public. An order is made only where unreasonable expense has been inflicted, which ought not to have been incurred, and was incurred because of the unreasonable conduct of the lawyer in question. The three jurisdictions, while apparently distinct, can frequently overlap to a great extent.

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The barrister's duty to the Court does not end with the duty not actively to mislead. Paragraph 704 of CoC provides:

A barrister must not devise facts which will assist in advancing the lay client's case and must not draft any statement of case, witness statement, affidavit, notice of appeal or other document containing:

...

(c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud

That does not entitle a barrister who makes an allegation of fraud in a pleading, for example, to hide behind his client's instructions. He must use his own independent judgment to assess whether there is, on the face of the documents or other sources, enough evidence to present a reasonable argument that fraud has occurred. This can present difficult questions, involving delicate judgments on which genuine disagreements may occur.⁹

There are other areas of interest arising from the duty to further the administration of justice. It is important to ensure that the



ENFORCING PROFESSIONAL STANDARDS

Court shall not fall into error through ignorance of the law once it has found the facts. For this reason, among others, it is a prerequisite to the obtaining of a practising certificate from the BSB that a barrister undertakes 12 hours of continuing professional development in each calendar year. This should at least reduce the chances of the court being misled through counsel's ignorance of the law. Failure to complete the necessary hours renders the defaulter liable to a financial penalty. Failure to pay is a breach of the CoC, which will ordinarily attract a complaint by the BSB of its own motion, leading to disciplinary proceedings.¹⁰

“The barrister must advance his client's interests by all legitimate means.”

PROSECUTING COUNSEL

It has long been established that prosecuting counsel in a criminal case should not strain for a conviction. His function is to see that the evidence is laid before a jury fairly, and that the defendant's case is properly tested, no more but no less.

What is said above does not attempt to be an exhaustive survey of the consequences of the advocate's duty to assist in the administration of justice. Many of the others might seem to be self-evident. For instance, cases must be conducted courteously and there are sumptuary rules regulating court dress. Until relatively recently, for instance, ladies could not wear trousers in court and male juniors were expected to wear waistcoats. Next, while the CoC permits discussion of the evidence between witness and counsel, and encourages helping witnesses to become familiar with court layout and procedures, coaching a witness is strictly forbidden. The inexperienced should also bear in mind at all times that an advocate makes submissions, and does not advance his own opinions.

DUTY TO THE CLIENT

At the same time as he carries out his primary duty of assisting in the administration of justice, the barrister must advance his





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client’s interests by all legitimate means. This can involve a series of delicate balancing acts.

The ‘cab rank’ rule obliges a barrister to make himself available to any lay client where the case is within the area of his competence and where an appropriate fee is offered. He is taken to be in the same position as a taxi on a rank with its light on.¹¹ This is a protection for the Bar, since it should absolve from blame a barrister who has to act for a disagreeable or disreputable client or to make unpleasant or offensive suggestions on instructions.

This leads to another related but separate facet of the duty to the client. The obverse of the cab-rank rule is that a barrister may not accept instructions if to do so would cause him to be ‘professionally embarrassed’.¹² The Code gives eight specific examples of such embarrassment, ranging from lack of competence, lack of time to prepare the case, instructions which seek to limit his discretion as to how the case shall be conducted, and the existence of conflicts of interest. These latter may be conflicts between two or more parties to the case, or between the barrister and someone involved in the matter. An example of the former is the ‘cut-throat defence’, where two or more co-defendants blame each other for the act complained of, each maintaining his own innocence. In those circumstances

¹⁰ CoC paragraph 901.1, 901.2

¹¹ CoC paragraph 602

¹² CoC paragraph 603

DUTY TO THE CLIENT

one advocate cannot appear for both. Another example is raised by a solicitor who has been 'blacklisted', that is, in the formal language of the CoC, placed on the register of solicitors whose credit has been withdrawn by the Bar Council. This will happen when a solicitor fails to pay counsel's fees after a specified number of requests for payment, followed by a formal letter from the Chairman of the Bar. It is professionally improper for a barrister to accept instructions from such a solicitor, and it is his personal responsibility, delegated to his clerk if he has one, to decline instructions.

Professional embarrassment can come from other directions. Other than the examples given above, confidential information about a party to litigation must stay confidential. Therefore it would be wrong to accept instructions if to do so would involve disclosure, or even the risk of disclosure, of information about someone or their affairs acquired in earlier litigation.¹³

CONCLUSION

Taking into account the scrutiny new barristers will be placed under, and the continuously changing rules of professional conduct to which the Bar is subject, it is clear that every barrister must concern himself with understanding and maintaining appropriate professional conduct and ethics.

For further information ask to see The Code of Conduct at the library enquiry desk, or see the electronic version on the Bar Standards Board website:

<https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/the-handbook-publication>

¹³ *R v Batty* [1996] Crim. LR 910

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