



## Acting as an Expert Witness in Foreign Jurisdictions

<b>Purpose:</b>	To draw Counsel’s attention to obligations when acting as expert witnesses in foreign jurisdictions.
<b>Overview:</b>	The role of Counsel instructed as an expert witness – application of the Code of Conduct – key obligations – relevance of law and codes of the jurisdiction where evidence sought or given – form and content of expert reports – useful links
<b>Scope of Application:</b>	Counsel instructed to give expert evidence before a court or tribunal in a foreign jurisdiction.
<b>Issued by:</b>	Ethics Committee and International Committee
<b>Issued:</b>	February 2017
<b>Last reviewed:</b>	April 2019
<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.</b>

### Introduction

1. You may sometimes appear, or be instructed to appear, in the courts or tribunals of a foreign jurisdiction as an expert witness.<sup>1</sup> Your opinion as an expert witness is likely to be sought on questions of law other than that governing the jurisdiction of the foreign court or tribunal in question. Such questions are likely in many, but not all cases, to relate to the law of England and Wales.
2. Your professional conduct obligations are outlined below, along with practical suggestions as to how to go about fulfilling those obligations.

---

<sup>1</sup> Frequently such “appearances” take the form of submission of a written report. However, they may also involve attendance at trial.

## **Role of a barrister instructed as an expert witness**

3. A barrister acting as an expert witness in a foreign jurisdiction will be undertaking a different role to that of advocate. Rather than putting forward a client's case, the role of an expert witness is to provide opinions on relevant matters falling within their expertise.
4. Whilst they will not directly apply, the provisions of the Civil Procedure Rules 1998 ("CPR") Part 35 and Practice Direction 35 ("PD35") represent a helpful model of the standards which you need to meet when acting as an expert witness.<sup>2</sup> In particular:
  - You should not assume the role of an advocate: PD35 para.2.2.
  - Rather, you should help the court on matters within your expertise: CPR r.35.3.
  - Your expert evidence should assist the court by providing objective unbiased opinions: PD35 para.2.2.
  - You should consider all material facts, including those which detract from your opinions: PD35 para.2.3.
  - It should be made clear where a matter falls outside your expertise or you are unable to reach a definite opinion (for example, because of insufficient information): PD35 para.2.4.

## **Application of the Code of Conduct**

5. The Code of Conduct in the BSB Handbook will apply in respect of your conduct if instructed to appear or appearing as an expert witness before a foreign court or tribunal.
6. You should bear in mind the following points in this regard:
  - Rule C2 states that if a barrister is practising or otherwise providing legal services, then the Code of Conduct will apply.
  - This will be so where the barrister is practising or otherwise providing legal services in a foreign jurisdiction outside of England and Wales.

---

<sup>2</sup> See also the Family Procedure Rules 2010 Part 25 and the Criminal Procedure Rules 2015 Part 19.

- In the Bar Council’s view, a barrister acting, or preparing to act, as an expert witness on questions of law will be practising or otherwise providing legal services.<sup>3</sup>

### **Key obligations under the Code**

7. The key obligation of a barrister acting as an expert witness is the overriding one under CD1 to observe your duty to the court<sup>4</sup> in the administration of justice.
8. Other core duties which are of particular importance in this context include:
  - the duty under CD3 to act with honesty and integrity;
  - the duty under CD4 to maintain independence;
  - the duty under CD5 not to behave in a manner which is likely to diminish trust and confidence which the public places in you or the profession.
9. To discharge the duties under CD1, CD3, CD4 and CD5, a barrister acting as an expert witness in a foreign jurisdiction should conduct themselves in the manner set out at paras.3 and 4 above.
10. The duty under CD2 to act in the best interests of each the client and the duty under CD7 to provide a competent standard of work are also important. In the event of any conflict between the core duties, CD1 overrides the other duties; namely, you must prioritise your duty to the Court and the administration of justice.
11. The “*cab rank*” rule under rC29 will not apply to instructions to act as an expert witness, as it is disapplied in the case of instructions to do foreign work:<sup>5</sup> rC30.5.

### **The rules of the foreign jurisdiction**

12. The foreign jurisdiction in which expert evidence is given or contemplated may have its own rules regarding the provision of expert evidence. These “*local rules*” may be prescribed by the law of that jurisdiction or they may be laid down by the

---

<sup>3</sup> “*Legal services*” is stated in Part 6 of the BSB Handbook to include legal advice, representation and drafting or settling any statement of case, witness statement, affidavit or other legal document.

<sup>4</sup> “*Court*” is defined in Part 6 of the BSB Handbook to include any court or tribunal. This will include the courts or tribunals of foreign jurisdictions.

<sup>5</sup> “*Foreign work*” is defined in Part 6 of the BSB Handbook to include legal services of whatsoever nature relating to court or other legal proceedings taking place or contemplated to take place outside of England and Wales. This will include barristers acting as expert witnesses in foreign jurisdictions.

local or national bar of the jurisdiction (so far as the matters laid down cover the provision of expert evidence).

13. You are required by rC13 to comply with any applicable local rule in connection with foreign work,<sup>6</sup> unless it is inconsistent with the core duties in the Code of Conduct.
14. Rule C14 also stipulates that barristers who solicit for work in a foreign jurisdiction must not do so in a manner which would be prohibited if they were a member of a local bar. Such rules may apply to soliciting for work giving expert evidence.
15. It is your responsibility to inform yourself as to any applicable local rules of conduct: gC35. That may require you to contact the relevant local or national bar association. In the case of giving evidence as an expert witness, it may also extend to you informing yourself as to the position under the procedural law applicable to the jurisdiction in question.<sup>7</sup>

#### **Form and content of expert reports**

16. As well as complying with the general standards outlined at paras.7 to 11 above and any local rules caught by paras.12 to 15 above, it would be advisable for any expert report prepared by you for a foreign court or tribunal to:
  - be addressed to the court or tribunal in which the report is to be used, rather than your client;
  - give details of your qualifications and explain that you are regulated by the Bar Council of England and Wales (through the Bar Standards Board which promulgates the BSB Handbook);
  - be verified by a statement to the effect that the opinions expressed in the report represent your true and complete professional opinions on the matters to which they refer; and
  - contain any declaration or statement of truth required by local rules.

---

<sup>6</sup> See footnote 5 above.

<sup>7</sup> This may be covered by instructions received from the person instructing the barrister.

## **Useful links**

[Ethics Committee, Barristers' Duties in relation to foreign work including European Cross-Border Work](#)

[International Committee, International Information Practice Pack](#)

[International Bar Association, International Principles for the Conduct of the Legal Profession](#)

[Civil Procedure Rules 1998 Part 35](#) and [Practice Direction 35](#)

[Family Procedure Rules 2010 Part 25](#)

[Criminal Procedure Rules 2015 Part 19](#)

## **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).