



The Bar Council

## **Advocates called as witnesses**

**Purpose:** To assist barristers to comply with their professional obligations in circumstances where they may be called as witnesses

**Scope of application:** All practising barristers

**Issued by:** The Ethics Committee

**First issued:** January 2016

**Last reviewed:** June 2021

**Status and effect:** **Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.**

1. This Guidance outlines relevant considerations of professional and ethical conduct in circumstances where you may become a witness whose evidence may be relevant in proceedings in which you may be or may have been instructed as an advocate.

### **Core Duties Engaged**

CD1 You must observe your duty to the court in the administration of justice [CD1].

CD2 You must act in the best interests of each client [CD2].

CD4 You must maintain your independence [CD4].

CD5 You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession [CD5].

## **Rules of Conduct Engaged**

rC3 You owe a duty to the court to act with independence in the interests of justice [rC3].

rC4 Your duty to act in the best interests of each client is subject to your duty to the court [rC4].

rC21.10 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 [rC21.10].

rC25 Where you have accepted instructions to act but [the circumstances set out in rC21.10] then arises, you must cease to act and return your instructions promptly.

### **Your duty as counsel to maintain your independence from your client**

1. You are under a duty to maintain your independence [CD4]. You cannot act or continue to act as a barrister where to do so would threaten your independence, or the appearance of your independence.

2. As part of that core obligation, you owe a specific duty to the court to act with independence in the interests of justice [rC3]. In addition, where you are instructed as an advocate (or are otherwise involved in the conduct of litigation), this duty to the court specifically obliges you to ensure that your ability to act independently is not compromised [rC3.5].

3. Your duty to act in the best of interest of each client [CD2] is subordinate to and subject to the obligation to maintain your independence [gC1.2, rC16]. Similarly, your duty to act in the best interests of each client is subject to your duty to the court [rC4]. A failure to maintain your independence may also diminish the trust and confidence which the public places in you or in the profession, causing you to breach CD5, and may cause you to fail to observe your duty to the court in the administration of justice [CD1].

### **Accepting instructions**

4. You cannot ordinarily accept instructions to act as an advocate in any case where there is a real prospect of your being unable to maintain your independence [rC21.10]. Where appearing as a witness while acting as an advocate would threaten

your independence, or the appearance of it, you cannot do both. You should not therefore, as a general rule, accept instructions to act as an advocate in any case where there is an appreciable risk that you will be called as a witness, by any party in any proceeding, on a matter relevant to that case. Especially where your evidence would assist your client, the obligation to maintain your independence would, normally, preclude you from acting as the client's advocate. If you are liable to be summoned by an opposing party, that will usually also require you to refuse the instructions (even if your client wishes you to act).

5. If you are required to decline instructions on this basis you may need to consider carefully the reason that is given for declining the instructions, as your potential role as witness may not yet have been disclosed at that stage.

6. Exceptionally, there may be circumstances where it can safely be concluded that your giving evidence will **not** threaten your independence as a barrister. The guidance to rC21 indicates that where the matter on which you are, or are likely, to be called as a witness is peripheral or minor in the context of the litigation in which you are professionally instructed as a whole and is unlikely to lead to your involvement in the matter being challenged at a later date, you may be able to act [gC73]. But, at the stage of accepting instructions, you should proceed with great caution and circumspection. It may be very difficult to predict at that stage whether the relevant matter will ultimately be peripheral or minor, or whether your professional involvement may later be challenged (whether by opposing parties, or the court, or – in the event of an unfavourable outcome – by your client). If you are in any doubt as to whether your evidence will be of that character or have that result, you should decline the instructions.

## **Withdrawing**

7. If, having been instructed in a case, matters develop in such a way that there is now a real prospect of your having to give evidence in relation to any matter of substance in issue in it, such that there has become a real prospect of your being unable to maintain your independence, you must withdraw **promptly** [rC25, rC21.10]. You will have to consider whether exceptional circumstances – as indicated in paragraph 6 above – exist, such that your giving evidence will not, in the event, threaten your independence in the case in which you have been instructed. But if those exceptional circumstances do not exist, you will be obliged to return your instructions as soon as

possible. If you do decide that you must return your instructions, you must comply with rC27: i.e. you must obtain your client's consent, or explain to your client your reasons for returning the instructions [gC73]. (You may not transfer your instructions to another advocate without the consent of your client or professional client [rC27.2].)

8. rC25 obliges you to return instructions where there is a real prospect of your being unable to maintain your independence. The view of the Ethics Committee is that as rC25 is mandatory in its terms, its requirements prevail, even where the fact of your withdrawal will not be beneficial to your client's interests. The Ethics Committee takes this view not least because continuing to represent your client in circumstances where there is such a prospect is itself likely to jeopardise the client's interests, and may also put you in breach of other Rules. As gC73 acknowledges, "*[y]our ability to perform your duty to the court (CD1) and act in the best interests of your client (CD2) may be put at risk if you act in circumstances where your independence is compromised*".

9. It is however possible to conceive of unusual circumstances in which some balancing of the potential harms to the client's interests might have to be undertaken: for example, where a hearing in the case is imminent, and it has only just become apparent to you that you are likely to be required to give evidence in relation to a material matter. The view of the Ethics Committee is that, in such circumstances, you should not by yourself attempt to weigh the jeopardy to your client of your withdrawing from the case against the jeopardy of continuing with the hearing. You should discuss the matter with your client, and where appropriate with opposing counsel and with the court, with a view to deciding whether you can properly complete the imminent hearing before withdrawing. But that course is unlikely to be appropriate where you may have to give evidence actually at the imminent hearing. In that event, the view of the Committee is that you should withdraw at once. It will then be for the court to determine whether the imminent hearing should be adjourned.

10. If, exceptionally, you do decide that you can continue to act, because the evidence you are likely to have to give falls within the exception outlined in paragraph 6 above, then you must keep that decision under review, so as to guard against the possibility that the matter on which you would give evidence may have become less peripheral or minor, or more likely to result in your continuing to act being challenged.

## An example

**Q. I am instructed in a contested childcare case on behalf of the mother. At a hearing outside court, the father attacked my client's ex-husband. I was present. The judge heard about this and has ordered a contempt hearing against the father. He has ordered that I supply a witness statement. Can I continue with the original case?**

A. Possibly; but it is unlikely. rC25 indicates that it will depend upon whether continuing to act would compromise your independence in the childcare case. gC73 indicates that – unless the matter on which you are likely to be called as a witness is peripheral or minor in the context of that litigation as a whole and is unlikely to lead to your involvement in the matter being challenged at a later date – you may not be able to maintain your independence and must return the instructions in the original case.

You should therefore consider whether there is likely to be any dispute about your evidence in the contempt matter, and whether any evidence in respect of the attack might be relevant to the childcare case. The contempt action and the childcare case are, of course, different proceedings; and in principle you could act as a witness in one and an advocate in the other. However, if there may be any issues in the contempt action about the accuracy or impartiality of your evidence, your ability to maintain independence in the childcare case will be at risk. Also, if, in the interests of the mother, you might have to cross-examine in the childcare case on the basis of your witness statement in the contempt case, or by reference to any other facts of which you would yourself be able to give evidence, your independence will be compromised. In either case, you will to be obliged to withdraw at once from the original childcare case.

### **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](#).