



The Bar Council

Clash of cases and conducting two cases in court simultaneously

Purpose:	To assist barristers to avoid and deal with cases in which hearings clash
Overview:	Your duties – BSB guidance – Good practice suggestions – Diary bookings
Scope of application:	All practising barristers
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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.

Your duties

1. There are occasions when you may be involved in two cases with overlapping hearings. For example:
 - (a) A case listed first may have overrun.
 - (b) You may be involved in a long trial which only requires attendance in respect of certain aspects of the trial, leaving you free at other times in the course of the trial to be involved with other cases.
 - (c) The court may fix a hearing in a case in which you are instructed at a time when another hearing is already in your diary, despite efforts to avoid this.
2. Such scenarios have the potential to engage the BSB Handbook Core Duties to: observe your duty to the court in the administration of justice; act in the best interests of each client; not behave in a way which is likely to diminish the trust and confidence

of the public; and provide a competent standard of work and service to each client (Core Duties 1, 2, 5 and 7 respectively).

3. In addition, BSB Handbook rC17 provides that the duty to act in the best interests of each client includes a duty to consider whether the client's best interests are served by different legal representation, and if so, to advise the client to that effect: see gC49. Rule C18 also provides that the duty to provide a competent standard of work includes a duty to inform the professional client or client as far as reasonably possible in sufficient time to enable appropriate steps to be taken to protect the client's interests, if there is an appreciable risk that the barrister may not be able to undertake the instructions.

4. As regards returning a brief, rC26.3 provides that you may cease to act on a matter and return your instructions (which will include a brief) if despite all reasonable efforts to prevent it, a hearing becomes fixed for a date on which you have already entered in your professional diary that you will not be available. BSB guidance states at paragraph 3 that *"this may include a prior arranged hearing relating to another case"*. This rule makes clear, however, that you are obliged to make *"all reasonable efforts"* to prevent this.

5. Rule C27 sets out your duties if you do have to return a brief. BSB guidance also states at paragraphs 9 and 10 that you should at all times take reasonable steps to keep all parties concerned informed of any clash of hearing dates; you should ensure that your clients are informed of any clash as soon as possible; and you should take all reasonable steps to assist clients to find alternative representation where you are unable to attend a hearing date.

BSB Guidance

6. Before considering the suggestions below, you should first consider the BSB's separate [guidance](#) on this topic. What appears below builds on that guidance, and is intended to set out what the Bar Council believes to be good practice.

Good practice suggestions

7. The situations referred to in paragraph 1 above are not, *per se*, contrary to your duties under the BSB Handbook, so long as you have the agreement of both your lay and professional clients where any overlap can be anticipated and, as appropriate, you have made all reasonable efforts to prevent this. It is impossible to assess with accuracy the length of any but the shortest of trials, and the overrunning of a trial may lead to a client not being represented by the client's barrister of choice, even where that barrister has acted responsibly in relation to the acceptance of the brief. Furthermore, as leading counsel, you should consider at each stage of a trial whether your presence is required or whether costs could reasonably be saved by your not

attending. A court may also fix a hearing date irrespective of the availability of the advocates.

8. However, the following points need to be borne in mind.

9. You should be very cautious about accepting work which you know has been fixed for hearing at the same time as a case previously accepted, or which will overlap with the first case. You should also be cautious where there is a realistic risk of this happening. The BSB Handbook rC21 provides that you must not accept instructions to act if, due to any existing or previous instructions, you are not able to fulfil your obligation to act in the best interests of a prospective client, or if you do not have enough time to deal with the particular matter (unless the circumstances are such that it would still be in the client's best interests to accept).

10. Where you are offered a brief in a case ("case B") which you know will clash with a hearing in another case for which you have already accepted a brief (or which is already in your diary – see paragraph 15 below) ("case A") and the cases are both listed to be heard in the near future, then it is very unlikely that it would be in the best interests of the prospective client to accept the brief in case B. The situation may be similar if there is a real risk of a clash.

11. Where the listing is sufficiently far into the future for there to be a reasonable prospect that the expected clash will not materialise, you ought to consider at least the following matters before deciding whether or not to accept the brief in case B:

(a) The professional and lay client in case B must be told about the clash to allow them to make an informed decision as to whether to brief you or not. In order for a decision to be informed, you will need to assist in providing a timetable to allow for a sensible review of your availability as the trial date approaches.

(b) It is your responsibility to keep the position under review and, if there is an appreciable risk that you will be unable to do both cases, then the professional client or the client need to be informed as far as reasonably possible in sufficient time to enable appropriate steps to be taken to protect the client's interests, such as the instruction of a new barrister in sufficient time to avoid prejudice to the lay client: see the BSB Handbook rC18. You must be careful to guard against an over-optimistic professional or lay client who wants to "hang on" long past a time which would be found by a reasonable person to be safe, and make sure you advise the client in good time if their best interests would be served by different legal representation: rC17.

(c) In choosing which case to retain, you must determine which case it is most important to attend. You must exercise your professional judgment in making that decision.

(d) The BSB's guidance states at paragraph 6 that some types of hearing may have to take precedence as a matter of law or procedure, and that you "*should take direction from the Court and have regard to any relevant case management rules*".

(e) Where applicable, and without detracting from that general guidance, the Bar Council suggests that the following may often be the right approach: (1) criminal cases are likely to take precedence over civil; (2) a part-heard case is likely to take precedence over a new matter; and (3) a case for which a fixed date has been obtained may take precedence over a "floater".

(f) The BSB's guidance reminds you at paragraph 7 that where there is no clear order of precedence, you should consider the impact of your duty to act in the best interests of each of your clients, and, in particular, which of your clients is likely to be prejudiced to a greater degree. You should take particular care to consider the needs of vulnerable clients and the impact of your decision on access to justice.

(g) Paragraph 8 of the BSB's guidance identifies some other circumstances that may be relevant.

12. Subject to the points made in paragraphs 9 to 11 above, you should ensure that you have allowed a realistic gap between cases fixed for trial so as to allow for a case overrunning. This may be impractical in respect of short cases which have been assigned to a warned list without a fixed date. However, even in these circumstances, you should remain vigilant to avoid a clash and should ensure that the clerks remain in regular contact with the Listing Office as to the progress of cases in the warned list. As with all matters of listing, without the cooperation of the courts, especially the Listing Office, it is very difficult for you to ensure that there are not clashes between cases.

13. Even in circumstances where you feel able to leave a hearing in the hands of junior or leading counsel instructed with you during a time when the evidence does not directly affect your client, you should consider very carefully whether it is in the best interests of the client to leave the case to do other work. In publicly funded cases you should give proper weight to the consideration that a funding certificate has been given for two counsel because the case is thought to merit the services of two counsel. If you have your lay and professional client's permission to absent yourself to conduct other work, you must still be satisfied that you will have time to prepare for that other work without undermining the service provided to your client, and have reached your own professional judgment that this will be in the best interests of all of the affected clients.

14. You would lay yourself open to serious allegations if you charged for attendance in two cases at the same time. There may be exceptional circumstances where your active attendance is required in two different courts on the same day. In

these circumstances you could not be criticised for obtaining a fee for attendance at both hearings, so long as the time attended in each court is correctly recorded and provided such payments are permitted by regulation.

Diary bookings

15. Those good practice suggestions are likely also to apply to making firm diary bookings which do not, in themselves, involve you in accepting a particular brief or instructions.

16. So, for example, if you are asked if you are available for a hearing which clashes with a hearing which is already booked in your diary, then the good practice guidance is likely to apply to your decision whether to accept a diary booking in the second case. In most situations of this sort, only paragraphs 11(a) and (b) will apply: the remainder of paragraph 11 will not apply before any brief is accepted in the second case, and the second booking will be made expressly on the basis that the first takes precedence (and that any brief in the second case will have to be declined if offered whilst the prior booking remains in place). It is believed to be commonplace for barristers to accept a second diary booking on the basis that they are currently not available, and will not become available unless an existing commitment falls away, often with another barrister booked to cover if the first barrister is unable to attend the hearing. So long as the decision as to the first barrister's availability is made at a time which ensures that the client's best interests are served and the hearing can be prepared properly (see paragraph 11(b) above), there ought to be no difficulty with this.

17. The 'cab rank' rule does not interfere with this approach in relation to firm, prior diary bookings, because it does not apply if accepting instructions would require you "*to cancel a commitment already in [your] diary*" (even if this does not involve an accepted brief or instructions): rC30.2.

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](#).