



Refusal of Work by Members of the Criminal Bar on Grounds relating to Fees

Purpose:	To draw barristers' attention to issues relating to this topic.
Scope of application:	All self-employed criminal barristers instructed by a professional client; authorised individuals working within a BSB entity practising in criminal law receiving instructions from a professional client; or a BSB entity receiving instructions from a professional client and the instructions seek the services of a named authorised individual working for you as a criminal advocate.
Issued by:	The Ethics Committee
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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.

General approach

1. If you receive instructions from a professional client and you are: a self-employed barrister instructed by a professional client; or an authorised individual working within a BSB entity practising in criminal law; or a BSB entity and the instructions seek the services of a named authorised individual working for you as a criminal advocate, then the 'Cab-rank' rule (BSB Handbook rC29) obliges you to accept instructions if they are appropriate taking into account your experience, seniority and/or field of practice of yourself or (as appropriate) of the named authorised individual, subject to the exceptions in the BSB Handbook rC30.
2. Accordingly, unless one of the exceptions in the BSB Handbook rC30 applies, you must accept instructions if the BSB Handbook rC29 requires you to do so.

3. Similarly, the BSB Handbook rC28 requires you not to withhold services or permit your services to be withheld (e.g. by your clerk) on various grounds relating to the nature of the case, the client or the source of financial support. As regards the last of those grounds, the BSB Handbook rC28.3 prohibits you from doing this on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question, and the BSB Handbook gC88 makes clear that this includes a refusal on the ground that support may be given to the prospective client as part of the Community Legal Service or Criminal Defence Service.
4. One of the exceptions to the Cab Rank rule is where you have not been offered a proper fee for the required services (BSB Handbook rC30.8), although this exception does not apply if you have not made or responded to any fee proposal within a reasonable time after receiving the instructions. A prompt decision is necessary.
5. The BSB Handbook gC90 provides that, in determining whether or not a fee is proper for the purposes of the BSB Handbook rC30.8, regard shall be had to the following:
 - a. the complexity, length and difficulty of the case,
 - b. your ability, experience and seniority, and
 - c. the expenses which you will incur.
6. With effect from 6th January 2014, the BSB Handbook no longer deems any fee to be, or not to be, a proper fee.¹
7. In deciding in any particular case whether a fee is 'proper', you must consider two questions:
 - a. Whether you in good faith regard the fee as proper; and
 - b. If in good faith you do not regard the fee as proper, whether you are acting reasonably and justifiably in reaching that decision.

¹ Until 15 November 2003, legally aided criminal defence work was deemed by the then Code of Conduct to be at a proper fee, but on that date, the Bar Council decided that criminal defence GFS cases should be excluded from the provision deeming them to be proper fees with immediate effect. There was also a similar exclusion for family graduated fees with effect from 1 May 2001. The BSB issued a policy statement and guidance on 25 November 2013 confirming that VHCC contract work would not become covered by the deeming provision under the former Code of Conduct as a result of the introduction on 2 December 2013 of secondary legislation setting fees under VHCC cases. The Code of Conduct has never contained a provision deeming criminal prosecution work to be at a proper fee.

8. Whether a fee is proper will vary from case to case.
9. If you are considering refusing instructions in a type of case for which the fees payable have actually been reduced since you last accepted a case of that type, then you are unlikely to be vulnerable without more to an allegation that you are in breach of the BSB Handbook in declining affected work after that date. But you will need to consider whether the reduced fees are proper fees.
10. On the other hand, if you are considering refusing instructions in a type of case for which the fees payable have not been reduced since you last accepted a case of that type, then it will obviously be less easy to demonstrate that an unreduced fee is not a proper fee. The tests set out above must be applied carefully in each case before you make a decision to refuse such work in any particular case.

Return of instructions/brief that you have already accepted where fees are later reduced

11. Where you have already accepted a brief or instructions, and the fee rates payable to you are reduced subsequently, then you will need to consider BSB Handbook rC26 to rC28. These lay down when you can, and when you cannot, return instructions which have already been accepted. More widely, in deciding what approach to take, you will need to focus on the BSB Handbook CD1 (duty to the court in the administration of justice), CD3 (to act with honesty and integrity) and CD5 (not behaving in a way which is likely to diminish the trust and confidence which the public places in you or in the profession).
12. If what has happened is that the basis on which you are to be paid has been changed fundamentally since you accepted the instructions, then the BSB Handbook gC87 will be of particular relevance. This provides as follows:

"If a fundamental change is made to the basis of your remuneration, you should treat such a change as though your original instructions have been withdrawn by the client and replaced by an offer of new instructions on different terms."
13. The BSB Handbook gC87.1-87.3 goes on to explain that you must then judge the offer of new instructions afresh in accordance with the BSB Handbook. Thus, if the fee is not a proper fee for the purposes of the BSB Handbook rC30.8 (as explained above), then you may decline to accept the brief, subject to the qualification identified in paragraphs 15 to 18 below.
14. The BSB Handbook gC87.4 also states that in declining to accept the 'new' instructions in those circumstances, you will not be regarded as returning the instructions, as withdrawing from the case, or as ceasing to act, for the purposes of

the BSB Handbook rC25 and rC26 (the rules ordinarily governing such matters). It explains that this is because the previous instructions have been withdrawn by the client.

The position of pupils and pupil supervisors

15. In the context of the above guidance, you are reminded that:

- a. A barrister who is a pupil supervisor with a pupil must not allow any decisions with regard to the acceptance of new instructions to affect or disrupt the pupillage training which the pupil supervisor is obliged to give.
- b. Whatever decisions may be taken, the pupil supervisor remains under an obligation to ensure that the pupil receives the required training so that the pupil can in turn apply themselves diligently to the pupillage and properly complete the checklist and of course the pupillage.
- c. Similarly, all members of Chambers will be obliged to ensure that, if any pupil supervisor in chambers makes a decision to refuse work, arrangements are in place which allow pupils to be properly trained. This flows from the obligation on all members of Chambers to take reasonable steps to ensure that proper arrangements are made in their Chambers for dealing with pupils and pupillage (BSB Handbook rC89.4). The steps required by each member of Chambers will depend on the circumstances, including the internal arrangements within Chambers (BSB Handbook rC90). You should also note that one of the outcomes provided for under the Code is that all pupils must be treated fairly (oC29).
- d. Pupils have a legitimate right to proper training irrespective of any such decisions which a pupil supervisor may take, and that right should be fully recognised and respected, regardless of any steps which may be taken over the acceptance or refusal of work.

16. The respective duties of pupils and pupil supervisors are set out in the BSB Handbook rQ38 and rQ54 respectively.

Important Notice

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