



## **Refusal of Work by Members of the Bar on Grounds relating to the Adequacy of Fees, including Legal Aid Fees**

<b>Purpose:</b>	To draw barristers' attention to issues relating to this topic.
<b>Scope of application:</b>	All self-employed barristers.
<b>Issued by:</b>	The Ethics Committee
<b>Originally issued:</b>	September 2005, reissued January 2014
<b>Last reviewed:</b>	November 2021
<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>

### **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; or a BSB entity and the instructions seek the services of a named authorised individual working for you, then the 'cab rank rule' (Rule 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 Rule rC30.
2. Accordingly, unless one of the exceptions in Rule rC30 applies, you must accept instructions if Rule rC29 requires you to do so.
3. Similarly, Rule rC28 – the 'requirement not to discriminate' - requires you not to withhold services or permit your services to be withheld (e.g. by your clerk) on grounds relating to the nature of the case, the conduct, opinions or beliefs of the prospective client, or the source of any financial support. As regards the last of those grounds, Rule rC28.3 prohibits you from withholding your services 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 Guidance at gC88 makes clear that this includes a refusal to act on the ground that support may be given to the prospective client by way of Criminal Legal Aid or Civil Legal Aid.

4. An exception to the cab rank rule is where you have not been offered a proper fee for the required services (Rule 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 therefore necessary.
5. Guidance at gC90 indicates that, in determining whether or not a fee is proper for the purposes of Rule 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 6<sup>th</sup> January 2014, the BSB Handbook no longer deems any fee to be, or not to be, a proper fee.<sup>1</sup>
7. In deciding in any particular case whether a fee offered 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.
8. Whether a fee is proper will vary from case to case:
9. If your practice is entirely privately funded and you are offered a case at legal aid rates, which are far below your normal rates, you would be justified in refusing to accept the instructions under rC30.8.

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<sup>1</sup> 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 fees in criminal defence GFS cases should be excluded from the provision deeming them to be proper fees with immediate effect. There was 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 criminal Very High Cost Case (VHCC) contract work would not be covered by the deeming provision under the former Code of Conduct (following the introduction on 2 December 2013 of secondary legislation setting fees under VHCC cases). The Code of Conduct has never contained any provision deeming criminal prosecution work to be offered at a proper fee.

10. If you undertake legal aid work and are considering refusing instructions in a type of case for which the fees payable have been reduced since you last accepted a case of that type, you are unlikely to be vulnerable to an allegation that you are in breach of the BSB Handbook in declining work of that type after that date. But you will need to consider whether the reduced fees are proper fees.
11. 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 be less easy to demonstrate that the 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**

12. 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 Rules 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 also need to focus on Core Duty 1 (your duty to the court in the administration of justice), Core Duty 3 (your duty to act with honesty and integrity) and Core Duty 5 (your duty not to behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession).
13. 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 Guidance at gC87 will be of particular relevance. This advises 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."**

The Guidance goes on to explain that you must then judge the offer of the 'new' instructions afresh in accordance with the BSB Handbook. Thus, if the newly offered fee is not a proper fee for the purposes of the Rule rC30.8 (as explained above), you may decline to accept the 'new' instructions, subject to the qualification identified in paragraphs 15 to 18 below.

14. The Guidance at gC87.4 also states that in declining to accept the 'new' instructions in those circumstances, you will not be regarded as returning the instructions, or

as withdrawing from the case, or as ceasing to act, for the purposes of Rules rC25 and rC26 (the rules ordinarily governing such matters). It explains that the proper analysis is that 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 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 (Rule rC89.4). The steps required by each member of Chambers will depend on the circumstances, including the internal arrangements within Chambers (Rule rC90). You should also note that one of the Outcomes intended by the Code is that all pupils should 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.

### **Important Notice**

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