

PROFESSIONAL REGULATION BRIEFING NOTE

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Topic: *Latest additions to BSB Handbook (Version 4.9)*

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The Bar Standards Board has recently made significant additions to its guidance to the profession regarding disclosure and expert evidence.

What changes have been made?

In updating the BSB Handbook from version 4.8 to 4.9, with effect from 5 May 2026, the BSB have made two changes, both to the ‘guidance’ sections of the Handbook.

Firstly, in respect of gC5, which reads “*Your duty under Rule rC3.4 [duty to take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions] includes drawing to the attention of the court any decision or provision which may be adverse to the interests of your client. It is particularly important where you are appearing against a litigant who is not legally represented*”, that passage has now had the following paragraph added:

“In addition, you must ensure compliance with any disclosure requirements in proceedings before the court. In relation to the disclosure regime contained in the Criminal Procedure and Investigation Act 1996 Code of Practice Order 2020, you should have regard to the Attorney General’s Guidelines on Disclosure. When acting as a prosecutor, your duties in relation to disclosure continue to apply after the conclusion of the proceedings, should material come to light which might reasonably be considered capable of casting doubt upon the safety of the conviction.”

Secondly, in respect of gC23, which reads “*Rule rC9 sets out some specific aspects of your duty under Core Duty 3 to act with honesty and also with integrity*”, that passage has had the following paragraph added:

“rC9.3 [duty not to encourage a witness to give evidence which is misleading or untruthful] means that you must ensure that an expert witness is aware of their role and obligations to assist the court on matters within their expertise, and that you do not influence the independence or objectivity of the expert evidence (although you may assist the expert witness to address the issues comprehensively and with clarity).”

What is the background to these changes?

These additions to the Handbook seem to reflect growing concerns about compliance with professional ethical duties that have arisen perhaps most starkly in the matters dealt with by Post Office Horizon IT Inquiry. Although the Inquiry Chair, Sir Wyn Williams, has not yet expressed a final view on this topic, the expert report for the Inquiry by Duncan Atkinson KC¹ identified how Post Office lawyers failed to apply the CPIA, CPIA Code and AG Disclosure Guidelines. In particular, Mr Atkinson KC emphasised how there was inadequate prosecutorial supervision of disclosure, a failure to oversee compliance with the CPIA Code requirement to pursue ‘all reasonable lines of enquiry’ and a disclosure process which was *“heavily defence request led, rather than proactive”* (Vol 2, paragraph 11-16).

Mr Atkinson KC also explained how the failure to properly instruct the Post Office’s key expert witness contributed to the non-disclosure of material which undermined the reliability of the Horizon system. He noted that he had seen no evidence which showed that the witness *“was informed at any point about his duties as an expert, and compliance with the disclosure duties of an expert”* (Vol 2, paragraph 20).

These latest amendments to the Handbook therefore appear to form part of a broader effort to strengthen ethical safeguards, particularly in relation to criminal practitioners.

What was the position before these changes?

Prior to the introduction of the BSB Handbook in 2014, barristers operated under the Code of Conduct of the Bar of England and Wales (8th edition in force from October 2004 to January 2014). The Code of Conduct itself did not contain standalone rules or guidance dealing specifically with the disclosure regime, rather it contained general prohibitions on engaging in conduct which was *“dishonest or otherwise discreditable”*, *“prejudicial to the administration of justice”*, or *“likely to diminish public confidence in the legal profession or the administration of justice”* (paragraph 301(a)), and requirements to maintain *“absolute independence, integrity and freedom from external pressures”* and not *“compromise”* professional standards to please a client, the court or a third party (paragraph 307(a)-(c)).

Accompanying the Code of Conduct were Written Standards for the Conduct of Professional Work, which were intended as guidance on good practice to be read in conjunction with the Code of Conduct. The Written Standards did contain specific passages about the conduct of criminal cases and highlighted the disclosure obligations of prosecution counsel. For example, the Written Standards stated that *“prosecuting counsel should bear in mind at all times whilst instructed... that he should use his best endeavours to ensure that all evidence or material that ought properly to be made available is either presented by the prosecution or disclosed to the defence”*

¹ Available at <https://www.postofficehorizoninquiry.org.uk/evidence/expg0000002-duncan-atkinson-kc-expert-report-volume-1> and <https://www.postofficehorizoninquiry.org.uk/evidence/expg0000004r-duncan-atkinson-kc-expert-report-volume-2>

(paragraph 10.2(ii)). They also required counsel in Crown Court cases to consider whether witness statements had been properly served “*in accordance with the Attorney-General’s Guidelines*” (paragraph 10.4(d)).

Further, the Written Standards also reminded prosecution Counsel to “*at all times have regard to the recommendations of the Farquharson Committee*” (paragraph 10.6). This was a reference to the Attorney-General and Director of Public Prosecutions’ Guidelines on “*The Role and Responsibilities of the Prosecution Advocate*”.² (The Farquharson Guidelines were so named because they adopted and adapted the recommendations of a report on the topic produced in 1986 by a committee chaired by Mr Justice Farquharson, as he then was).

The Farquharson Guidelines (which are still extant) provide more specific directions about disclosure responsibilities and in particular state: “*Until the conclusion of the trial the prosecution advocate and CPS have a continuing duty to keep under review decisions regarding disclosure. The prosecution advocate should in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected.*” The Farquharson Guidelines are, however, explicitly stated not to be legally binding save for those parts which have been expressly approved by the Court of Appeal. The guidelines only appear to apply directly to advocates acting on behalf of the Crown Prosecution Service; not to those conducting private prosecutions (such as those brought by Post Office).

In 2014, the BSB Handbook replaced the Code of Conduct. The Handbook moved to a risk-based approach focused on core duties and outcomes, with rules and guidance designed to ‘supplement’ the core duties. It did not contain anything specific governing the conduct of criminal cases, still less anything specifically aimed at those who prosecute. The Written Standards were replaced by the Professional Statement (current version dated August 2019).³ The Professional Statement also does not contain anything explicit in respect of the conduct of criminal cases or about disclosure.

What does the new guidance do?

The introduction of the new ‘clarification’ in gC5 regarding the duties of disclosure appears an attempt to address the lack of specific guidance on the topic in the current Handbook and Professional Statement, particularly insofar as it may relate to private prosecutions, and to make it more explicit, akin to how it was in the old Written Standards.

² Still in force today (as amended) and available at <https://www.cps.gov.uk/prosecution-guidance/farquharson-guidelines-role-prosecuting-advocates>

³ Available at <https://www.barstandardsboard.org.uk/training-qualification/the-professional-statement.html>

The new guidance arguably though goes further than the previous iterations contained in the Written Standards or the Farquarson Guidelines, as gC5 requires that barristers ‘*must ensure*’ compliance with disclosure responsibilities, rather than to ‘*use best endeavours to ensure*’ or to ‘*consider whether he or she can satisfactorily discharge*’ the duty of continuing disclosure.

gC5 also makes specific reference to the post-conviction duty of disclosure, which arises under common law and was set out by the High Court in *Nunn v Chief Constable of Suffolk Constabulary & CPS* [2012] EWHC 1186 (Admin). The guidance in this regard is somewhat unusually worded, referring as it does to barristers acting ‘*as*’ a prosecutor – the prosecutor normally being the entity bringing the prosecution (whether that be e.g. the CPS, SFO or a private body) which the barrister represents (by analogy, it would be strange to refer to counsel ‘*acting as a defendant*’). There may be issues in future, e.g. where counsel has withdrawn for professional reasons. Nevertheless, those acting for the prosecution in criminal proceedings will need to be careful to proactively consider, and where appropriate advise, on this topic at any point where it may arise.

In respect of expert witnesses, barristers have for a long time been under duties not to rehearse, practise with or coach a witness in respect of their evidence, and not to encourage witnesses to give evidence which is untruthful or misleading. There has never been though (whether under the Code of Conduct or the Handbook) any *explicit* mention of a duty to ensure that a witness (still less an expert witness) is aware of the witness’s own duties to the court. Indeed, outside of any litigation authorisation under the Direct/Public Access Rules, barristers are normally prohibited from instructing experts. In that sense, the addition to gC23 represents an extension of the negative duty under rC9.3 (not to encourage a witness to be misleading) by imposing a clear positive obligation to ‘*ensure*’ that an expert is aware of their own duties and obligations to the court. That is something which barristers acting on behalf of any party instructing an expert witness will now have to bear in mind, regardless of the area of law concerned.

This briefing note was produced by [Philip Stott](#) and [Charlotte Gamble](#). This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at www.qebholliswhiteman.co.uk.