

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## Bar Training Professional Ethics examination during pupillage/work- based learning

### Examination misconduct policy and procedure

#### 1. Introduction

- 1.1 The assessment of Professional Ethics during pupillage is designed to test candidates' understanding of the ethical requirements and standards of behaviour which are expected of barristers. This is one of the means of assuring the BSB that pupils meet the standards required on "day one" of practice in accordance with the BSB's *Professional Statement*.
- 1.2 The Professional Ethics exam is a mandatory assessment that must be completed before pupil supervisors can sign off on a pupil's practising period. It is therefore a requirement that pupils pass the Professional Ethics exam in order to demonstrate that they have successfully completed a period of pupillage which is satisfactory to the BSB, in accordance with rQ5 of the Bar Qualification Rules<sup>1</sup>, to enable them to obtain a full practising certificate.
- 1.3 We are committed to providing supportive and fair opportunities to all candidates taking the Professional Ethics exam and it is therefore vital that the integrity of the examination process is maintained at all times so that no candidate(s) obtain an unfair or undue advantage over others.
- 1.4 Further, as members of the profession, candidates are obliged to comply with the terms of the BSB Handbook and to demonstrate that they have the qualities which are expected of barristers, which includes the ability to act with honesty and with integrity<sup>2</sup>.

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<sup>1</sup> Part 4 of the BSB Handbook.

<sup>2</sup> There may be a small number of candidates who may not be Called to the Bar at the time of sitting the Professional Ethics but who will be expected to demonstrate at the time of Call that they are a fit and proper person to become a practising barrister. Any findings of examination misconduct under this Policy will be referred to their Inn for consideration in relation to their membership and Call to the Bar.

- 1.5 This policy sets out how we will respond to reports of potential examination violations which might amount to examination misconduct, as defined in this Policy.

## 2. What is examination misconduct?

- 2.1 As members of the profession, candidates agree to comply with the terms of the BSB Handbook. This includes the requirement that they must (subject to any exemptions or waivers granted) complete a period of pupillage which is satisfactory to the BSB (as set out in the requirements prescribed in the *Bar Qualification Manual*, including those prescribed for the Professional Ethics exam).
- 2.2 The BSB has published a separate document, '*BSB Instructions and Requirements for the assessment of Professional Ethics during pupillage/work-based learning*', which sets out the requirements of candidates in relation to the exam ("**the Exam Requirements**"). A violation of those requirements (an "exam violation") may amount to examination misconduct as defined below.
- 2.3 In this policy the term "**examination misconduct**" means: any activity, in contravention of the Exam Requirements, carried out by a candidate which could have given an unfair and/or undue advantage to themselves in relation to the Professional Ethics exam regardless of whether such an advantage was attained.
- 2.4 Not all instances of an exam violation will amount to examination misconduct. Whether or not an exam violation does amount to examination misconduct will be decided in accordance with the procedure set out in this document.
- 2.5 Reports received in relation to any potential exam violations may also be referred to the BSB's Contact and Assessment Team for consideration of whether any other form of regulatory action is required, e.g. due to a potential breach of the BSB Handbook. This includes circumstances where a candidate may have assisted another candidate to obtain an unfair and undue advantage in relation to the exam.

## 3. Procedure for dealing with potential examination misconduct

### Reporting suspected exam violations

- 3.1 Exam violations can occur before, during or after an exam. They may come to the attention of the BSB by a variety of means. However, it is likely that violations will be reported by proctors, invigilators and test centre staff. Such persons will flag any suspected exam violations that they become aware of at any time and will inform the BSB's computer-based testing (CBT) supplier. The CBT supplier will then notify the BSB Examinations Team of cases of suspected exam violations.

- 3.2 Suspected exam violations may also be reported to the BSB Examinations Team by candidates or other individuals. If an individual reporting suspected exam violations wishes to remain anonymous, we may agree not to disclose their identity unless we are legally obliged to. However, this may have an impact on the conduct of any subsequent investigation and misconduct hearing.

#### Initial assessment of suspected exam violations

- 3.3 Following receipt of a report of a suspected exam violation, the Senior Examinations Officer (or their nominee) will decide, within 10 working days of a report being received, whether, upon an initial assessment of the report (and any supporting evidence):
- 3.3.1 the report discloses no credible evidence of an exam violation or that there is evidence of an exam violation but the evidence clearly indicates that the exam violation could not amount to examination misconduct and no further action is required; or
  - 3.3.2 the report discloses credible evidence of an exam violation which could amount to examination misconduct and should be investigated.
- 3.4 The Senior Examinations Officer (or their nominee) may make initial enquiries into readily available evidence (such as checking any video footage of the candidate's exam) before taking a decision under paragraph 3.3 above.
- 3.5 Where the Senior Examinations Officer (or their nominee) decides under paragraph 3.3.1 above that no further action is required under this policy, they may nevertheless refer any conduct which might constitute a potential breach of the BSB Handbook to the Contact and Assessment Team for consideration of whether any other form of regulatory action is required by the BSB.

#### Investigation

- 3.6 Where the Senior Examinations Officer (or their nominee) decides under paragraph 3.3.2 above that an investigation should be carried out, an Investigator will need to be appointed to conduct the investigation. The role of Investigator can be performed by a suitably qualified member of BSB staff or by an independent person appointed for the purpose. The Investigator will have no decision-making powers and should not be involved in any other part of the procedure under this Policy.
- 3.7 The purpose of the investigation is to gather such additional evidence as may be necessary for a Misconduct Panel to reach a decision on whether there has been examination misconduct. The extent of the need to gather further information will differ in each case and will depend on the nature of the potential violation and the evidence already received.

The further evidence may, in certain cases, include obtaining the views of an expert.

- 3.8 No investigation may be concluded without taking reasonable steps to ensure the candidate against whom a report has been made has been informed of the alleged exam violation and has been given a reasonable opportunity to respond and make any representations. When seeking comments from the candidate, the Investigator will inform the candidate what it is alleged amounts to potential examination misconduct and will set out the evidence that has prompted the investigation.
- 3.9 The Investigator will, at the same time as seeking comments from the candidate, advise the candidate that they should register to resit the exam at a future opportunity as a precautionary step pending the outcome of the investigation. The candidate's results will not be released to the candidate pending the outcome of the investigation and any subsequent referral to a misconduct panel or appeal hearing.
- 3.10 Investigations should be conducted and concluded as swiftly as is reasonably possible in all the circumstances given the potential need for further proceedings under this policy and the impact this may have on the candidate's progression in their pupillage/work-based learning.
- 3.11 At the conclusion of an investigation, once all reasonable steps have been taken to gather any further evidence, the Investigator will provide a written report of the investigation along with the evidence gathered and recommendations about what action, if any, should be taken. An Examinations Manager will then consider the Investigator's report and the evidence gathered and decide that:
  - 3.11.1 the investigation has disclosed no, or insufficient, evidence of an exam violation that would amount to examination misconduct and that no further action is required; or
  - 3.11.2 there is evidence to support a finding of examination misconduct and that the matter should be put to a Misconduct Panel to determine whether such misconduct has occurred.
- 3.12 A decision on the outcome of the investigation should be taken within five working days of receipt of the report from the Investigator. A written record of the decision under 3.11 and the reasons must be made by the Examinations Manager and the candidate must be notified of this decision within three working days of the decision being made.
- 3.13 Where the Examinations Manager decides under paragraph 3.11.1 above that no further action is required under this policy, they may nevertheless refer any conduct which might constitute a potential breach of the BSB Handbook to the Contact and Assessment Team for consideration of whether any other form of regulatory action is required by the BSB.

## The Misconduct Panel

- 3.14 It is the role of a Misconduct Panel to (i) examine the facts of the case; (ii) determine the strength and integrity of the evidence; and (iii) make a decision, on the balance of probabilities, as to whether there has been a case of examination misconduct.
- 3.15 A Misconduct Panel will consist of a Chair and two other members. The Chair will normally be the Head of Authorisation and the other members will include an external barrister and normally one of either the Director of Regulatory Operations or the Director General of the BSB. In the event that any of the BSB members of the panel are unavailable to attend a meeting within the timescales set out below, or it is not appropriate for them to sit on a panel (e.g. because of a potential conflict), another senior member of the BSB Executive or an external person may be appointed in their place.
- 3.16 A Misconduct Panel should be convened and meet within 10 working days of the decision under 3.11.2 above or as soon as possible thereafter depending on the availability of panel members.
- 3.17 Misconduct Panel decisions will be taken on the papers only and the candidate will not attend the Misconduct Panel meeting.
- 3.18 A member of the Examinations Team will attend the panel meeting in an advisory capacity only.
- 3.19 The possible outcomes of the Misconduct Panel are:
- 3.19.1 A finding that examination misconduct has occurred, the exam result should be treated as void and the candidate should not be able to resit the exam;
  - 3.19.2 A finding that examination misconduct has occurred, the exam result should be treated as void but the candidate should be given opportunity to resit the exam; or
  - 3.19.3 A finding that examination misconduct has not occurred or that there is insufficient evidence of examination misconduct on the balance of probabilities.
- 3.20 A finding under 3.19.2 that allows the candidate to resit the exam is likely to arise where, although the candidate could have obtained an unfair or undue advantage and therefore their behaviour amounts to examination misconduct, the evidence shows that the candidate did not do so.
- 3.21 The Misconduct Panel must provide written reasons for its decision. The candidate will be provided with the Misconduct Panel's written decision

and reasons for it within three working days of its final decision<sup>3</sup> but this may be subject to extension if the case is complex and the written reasons for the decision cannot be finalised within that time.

- 3.22 Where the Misconduct Panel finds that examination misconduct has not occurred, or that there is insufficient evidence of examination misconduct, the results of the candidate's sitting of the exam will be released to them.
- 3.23 The BSB will report a finding of examination misconduct to the candidate's Chambers or employer and, where the candidate has not yet been called to the Bar, their Inn of Court.
- 3.24 Whatever the decision of the Misconduct Panel, the Head of Authorisation (whether on the recommendation of the Panel or not), should consider if a referral to the BSB's Contact and Assessment Team is required for the purpose of conducting an initial assessment into whether any further regulatory action is required (e.g. enforcement action for a potential breach of the BSB Handbook).

#### **4. Appeals**

- 4.1 Candidates have a right to appeal the decision of the Misconduct Panel. That appeal is to a three-person Appeal Panel convened by an Examinations Manager in accordance with the terms of this Policy as set out below.
- 4.2 An appeal must be made in writing within 20 working days of the date on which the decision of the Misconduct Panel is sent to the candidate by the BSB.
- 4.3 An appeal is made when a candidate completes and sends an appeal notice (in the form prescribed by the BSB) identifying the decision to be appealed against, the reasons why the candidate thinks the decision of the Misconduct Panel is wrong and an indication of whether the candidate is content for the appeal to be dealt with on the papers or an oral appeal hearing is required. An appeal will not be validly made unless this information is provided.
- 4.4 Examples of reasons for an appeal could include (but are not limited to):
  - 4.4.1 Evidence of a failure in the decision-making process (e.g. the Misconduct Panel not taking into account all the relevant evidence available to it) or an irrational or biased decision being made.
  - 4.4.2 The provision of additional evidence of new material circumstances, which was not previously available or there was

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<sup>3</sup> It may be that a Misconduct Panel needs to meet more than once, for example, where the Panel considers it needs further information/evidence before making a decision.

good reason for it not being submitted before the decision of the Misconduct Panel was made.

#### The Appeal Panel

- 4.5 An Examinations Manager will aim to convene a meeting of an Appeal Panel within 20 working days of receipt of a valid appeal, or as soon as possible thereafter depending on the availability of panel members.
- 4.6 An Appeal Panel will consist of a Chair and two other members, one of which will be a barrister. The Appeal Panel members will be suitably experienced people who have knowledge of exams processes.
- 4.7 The Examinations Manager will ensure that those selected for the Appeal Panel have no current or previous connection to the candidate and were not previously involved in the decision which is the subject of the appeal.

#### Bundles of evidence

- 4.8 Following receipt of a valid appeal (see paragraph 4.3 above), the Examinations Manager will prepare a paginated bundle of the evidence in the case, including relevant correspondence. At a minimum this will include a copy of the original report/allegation, the supporting evidence presented to the Misconduct Panel and the written decision of the Misconduct Panel.
- 4.9 The bundle will not contain any correspondence which is purely administrative in nature and which has no material bearing on the appeal.
- 4.10 The bundle will be made available to the candidate and the Appeal Panel no later than 10 working days before the date on which the Appeal Panel is due to meet to consider the appeal.
- 4.11 If the candidate wishes to file any additional evidence and/or further representations to support their appeal they may do so in a separate bundle, which must be submitted no later than five working days before the date of the Appeal Panel meeting/hearing.

#### The meeting of the Appeal Panel

- 4.12 The appeal is a review of the original decision of the Misconduct Panel and is not a re-hearing.
- 4.13 Unless the candidate has expressly requested an oral hearing, the appeal will be dealt with on the papers. Where an oral hearing has been requested, both the candidate and the BSB may be represented at the hearing.

- 4.14 The Appeal Panel does not have the power to award costs in favour of or against a party. Each party will therefore bear its own costs of both the preparation for the appeal and any representation, regardless of the outcome.
- 4.15 A secretary to the Panel will be appointed. The secretary's role will be to provide administrative assistance to the panel, including assistance with drawing up the written reasons for the Panel's decision and providing guidance on process, but the secretary will otherwise not be involved in the Panel's discussions or decision. A member of the Examinations Team may also attend in an advisory capacity.

#### The decision of the Appeal Panel

- 4.16 The Appeal Panel, taking all relevant evidence and factors into account (including the candidate's grounds of appeal and any further representations), will review the decision of the Misconduct Panel to determine whether the original finding of examination misconduct was:
  - 4.16.1 wrong; and/or
  - 4.16.2 unjust because of a serious procedural or other irregularity.
- 4.17 A decision may be wrong and/or unjust if it is manifestly unreasonable and/or irrational.
- 4.18 Appeals will not be allowed solely because:
  - 4.18.1 The candidate merely disagrees with the decision and no substantive reasons for why the decision may be wrong have been identified; and/or
  - 4.18.2 The appeal is based on a lack of awareness, or understanding, of any of the Exam Requirements.
- 4.19 The possible outcomes of the Appeal Panel are:
  - 4.19.1 the appeal is **allowed in full**, whether on all or part of the grounds put forward by the candidate, and the decision that examinations misconduct has occurred is overturned;
  - 4.19.2 the appeal is **allowed in part** on the basis that the Appeal Panel is satisfied that the original decision that examinations misconduct occurred should stand but a decision not to allow the candidate to resit the exam is overturned; or
  - 4.19.3 the appeal is **dismissed** and the original decision that exams misconduct occurred stands, as well as the decision on whether the candidate can or cannot resit the exam.

- 4.20 If an appeal is allowed and the decision of the Misconduct Panel that there has been examination misconduct is set aside, then the Appeal Panel will order that the candidate's exam result is released to the candidate. The Appeal Panel does not have the power to change the result of the exam, thus any failing result will stand.
- 4.21 The Appeal Panel will notify the candidate of the outcome of the appeal, and its reasons, in writing within three working days of the meeting/hearing, unless the complexity of the case requires a longer period to finalise the written reasons.
- 4.22 The outcome of the appeal will be communicated to the candidate's chambers or employer and, where the candidate is not called to the Bar, to the candidate's Inn of Court. If a referral has been made to the BSB's Contact and Assessment Team under paragraph 3.24 above, that team will also be informed of the appeal outcome.
- 4.23 The decision of the Appeal Panel is not subject to any further appeal or reconsideration under this policy. A right of appeal to the High Court will be available to a candidate (pursuant to rQ40 of the Bar Qualification Rules) where the decision of the Appeal Panel is that examination misconduct has occurred and the candidate is not allowed to resit the examination.