

Statement on refusing instructions and deliberately not attending court

Barristers who are not already instructed to appear at a hearing and who wish to declare themselves unavailable to work on a particular day or for a particular period are in general free to do so. Therefore, in principle, barristers can book a day in their professional diary as unavailable because they wish to participate in a protest on that day.

In deciding whether to refuse instructions, barristers should consider their duties under the cab rank rule (rC29 and 30 of the BSB Handbook.) That rule may oblige them to act unless a relevant exemption from the cab rank rule applies, which might include:

- Where accepting instructions would require them to do something other than in the course of their normal working time; or
- Where they have not been offered what they regard as being a “proper fee”.

Barristers who are already instructed in a matter will always want to consider carefully any duties that are owed to the court or the client before making themselves unavailable. If a barrister wishes to return instructions the circumstances in which this may be done are outlined at rC26 in the BSB Handbook. The BSB takes the view that none of these is likely to apply in circumstances where a barrister deliberately chooses not to attend a hearing at which they are due to represent a client. Any barrister seeking to rely on a client consenting to their absence from a hearing should be prepared to demonstrate that the client gave the consent on a fully informed basis and was made aware of the potential consequences of doing so. Any failure to attend court might have serious consequences for clients, the administration of justice or the interests of third parties which a barrister will need to consider.

If a barrister has indicated in their diary that they will be unavailable on a particular day and a hearing is subsequently listed for an ongoing case on that day (for example, an urgent hearing at short notice) rC26.3.a envisages that the barrister will make “all reasonable efforts” to avoid the clash. In these exceptional circumstances, the barrister should consider whether such efforts oblige them to be available, to avoid detriment to the client.

Barristers who deliberately fail to attend a hearing at which they are due to represent a client may face regulatory action. In deciding whether to take action, the BSB will consider all the circumstances, but will have particular regard to any harm caused by the barrister’s actions.

Relevant Handbook rules

Relevant core duties:

CD1 - You must observe your duty to the court in the administration of justice

CD2 - You must act in the best interests of each client

CD5 - You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession

CD7 - You must provide a competent standard of work and service to each client

The 'cab rank rule':

rC29 - If you receive instructions from a professional client, and you are:

- .1 - a self-employed barrister instructed by a professional client; or
- .2 - an authorised individual working within a BSB authorised body ; or
- .3 - a BSB authorised body and the instructions seek the services of a named authorised individual working for you,

and the instructions are appropriate taking into account the experience, seniority or and field of practice of yourself or (as appropriate) of the named authorised individual you must, subject to Rule C30 below, accept the instructions addressed specifically to you, irrespective of:

- .a - the identity of the client ;
- .b - the nature of the case to which the instructions relate;
- .c - whether the client is paying privately or is publicly funded; and
- .d - any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client .

rC30 - The cab rank rule C29 does not apply if:

- .1 - you are required to refuse to accept the instructions pursuant to Rule C21; or
- .2 - accepting the instructions would require you or the named authorised individual to do something other than in the course of their ordinary working time or to cancel a commitment already in their diary; or
- .3 - the potential liability for professional negligence in respect of the particular matter could exceed the level of professional indemnity insurance which is reasonably available and likely to be available in the market for you to accept; or
- .4 - you are a Queen's Counsel, and the acceptance of the instructions would require you to act without a junior in circumstances where you reasonably consider that the interests of the client require that a junior should also be instructed; or
- .5 - accepting the instructions would require you to do any foreign work ; or
- .6 - accepting the instructions would require you to act for a foreign lawyer (other than a European lawyer, a lawyer from a country that is a member of EFTA, a solicitor or barrister of Northern Ireland or a solicitor or advocate under the law of Scotland); or

- .7 - the professional client:
 - .a - is not accepting liability for your fees; or
 - .b - represents, in your reasonable opinion, an unacceptable credit risk; or
 - .c - is instructing you as a lay client and not in their capacity as a professional client; or
- .8 - you have not been offered a proper fee for your services (except that you shall not be entitled to refuse to accept instructions on this ground if you have not made or responded to any fee proposal within a reasonable time after receiving the instructions); or
- .9 - except where you are to be paid directly by (i) the Legal Aid Agency as part of the Community Legal Service or the Criminal Defence Service or (ii) the Crown Prosecution Service:
 - .a - your fees have not been agreed (except that you shall not be entitled to refuse to accept instructions on this ground if you have not taken reasonable steps to agree fees within a reasonable time after receiving the instructions;
 - .b - having required your fees to be paid before you accept the instructions, those fees have not been paid.
 - .c - accepting the instructions would require you to act other than on (A) the Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 as published on the Bar Council's website; or (B) if you publish standard terms of work, on those standard terms of work

Returning instructions:

rC26 - You may cease to act on a matter on which you are instructed and return your instructions if:

- .1 - your professional conduct is being called into question; or
- .2 - the client consents; or
- .3 - you are a self-employed barrister and:
 - .a - 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; or
 - .b - illness, injury, pregnancy, childbirth, a bereavement or a similar matter makes you unable reasonably to perform the services required in the instructions ; or
 - .c - you are unavoidably required to attend on jury service;

- .4 - you are a BSB authorised body and the only appropriate authorised individual(s) are unable to continue acting on the particular matter due to one or more of the grounds referred to at Rules C26.3.a to C26.3.c above occurring;
- .5 - you do not receive payment when due in accordance with terms agreed, subject to Rule C26.7 (if you are conducting litigation) and in any other case subject to your giving reasonable notice requiring the non-payment to be remedied and making it clear to the client in that notice that failure to remedy the non-payment may result in you ceasing to act and returning your instructions in respect of the particular matter; or
- .6 - you become aware of confidential or privileged information or documents of another person which relate to the matter on which you are instructed; or
- .7 - if you are conducting litigation, and your client does not consent to your ceasing to act, your application to come off the record has been granted; or
- .8 - there is some other substantial reason for doing so (subject to Rules C27 to C29 below).