

Part V Code Amendments, draft guidance

Investigating or collecting evidence and taking witness statements

1. There is no longer a rule which prohibits a self-employed barrister from investigating or collecting evidence generally or therefore from taking statements from potential witnesses (which is treated for these purposes as investigating or collecting evidence). By taking witness statements is meant interviewing the potential witness with a view to preparing a statement or taking a proof of evidence. A barrister has always been entitled to settle a witness statement taken by another person, and this is not investigating or collecting evidence. However, rule 401(b)(iii) provides that a self-employed barrister must not in the course of his practice conduct a case in court if the barrister has previously investigated or collected evidence for that case unless the barrister reasonably believes that the investigation and collection of that evidence is unlikely to be challenged.
2. It follows that if the nature of the evidence or the circumstances in which it was investigated or collected are such that there is likely to be an issue about that in court, where the barrister might be needed to give evidence, the barrister can properly be involved in the preparations for a case but cannot accept a brief to conduct the case in court, even as the junior member of a team of barristers. Only if the barrister reasonably believes that the investigation and collection of that evidence (as distinct from the evidence itself) is unlikely to be challenged can the barrister properly conduct the case in court. Nothing in the rule is intended to apply to the case where a barrister properly accepts a brief and then, as part of his conduct of the case at court, has urgently to take a statement from his client or a potential witness (see rule 707 of the Code). The rule applies where a barrister has investigated or collected evidence before arriving at court at the start of the case.
3. In this regard, barristers should note that rule 401(b)(iii) is in one respect more restrictive in its effect than the previous Written Standards (which are being revised to reflect the new rules) relating to witnesses, which enabled barristers to take witness statements and then act as the junior barrister in the case. The Written Standards stated that it was not appropriate for a witness statement taker “to act as counsel unless he is a junior member of the team of Counsel and will not be examining the witness”. The Bar Standards Board considers that it is a key function of a junior member of a team of Counsel that s/he should be in a position to conduct the case in court if and when required, and that it is unacceptable to have briefed as junior counsel in a case someone who may not be in a position to take on the full advocacy role in that case by reason of professional embarrassment should it become necessary. The risks to the client’s interests and to the due administration of justice generally are too great to allow a barrister to conduct a case in court, even as a junior in a team of barristers, if there is a real risk that the circumstances of the taking of the evidence that barrister has collected will be challenged in the case. If a junior member of the team is called upon to conduct the case and the circumstances of his investigation and collection of evidence is an issue in the case,, the barrister might have to stand down, damaging the client’s interests (the client having then been deprived of each member of his/her chosen team) and the due administration of justice (through the inconvenience and delay in the conduct of the case).
4. When investigating or collecting evidence, barristers should bear carefully in mind the dangers of unconsciously affecting or contaminating the evidence that a witness is able to give. These are discussed in detail in the Written Standards at paragraphs 6.2.1 – 6.2.7. Barristers should also be aware of the risks of professional embarrassment as a result of becoming involved in investigating or collecting evidence, and take these risks into account when deciding:-

- a. whether to undertake such work in the first place; and
 - b. if they have done, whether or not they can properly accept a brief at a subsequent trial.
5. The rules place the onus squarely on the barrister who has investigated or collected evidence prior to accepting a brief to consider and reach a reasonable conclusion whether or not his/her involvement is likely to be challenged.
6. In assessing whether to accept a brief in these circumstances, the barrister should be mindful of the dangers of professional embarrassment where s/he has been involved in the collection or investigation of evidence. The barrister's duty is to reach a reasonable decision on the risk of embarrassment before accepting a brief. The brief can only properly be accepted if it is reasonable for the barrister to conclude that the circumstances of his investigation or collection of evidence are unlikely to be challenged. If the barrister's decision is not a reasonable one, and the trial is subsequently adjourned as a result of his professional embarrassment, the barrister risks being exposed to an order for wasted costs as well as prosecution for a breach of the Code.
7. Even where a brief is properly accepted, the question of whether the barrister is professionally embarrassed is a matter that s/he must keep under review during the case in light of any later developments.
8. Investigation or collection of evidence (save for taking proofs of evidence or preparing witness statements urgently as part of the barrister's conduct of the case at court) is not subject to the cab-rank rule: see rule 604(i). If barristers wish to concentrate on advice and advocacy services and do not wish to undertake other types of activity (especially ones which may reduce their opportunity to undertake an advocacy role), that should be their choice and it is in the public interest that they cannot be forced to accept such work.

Conduct of correspondence

9. The extent to which self-employed barristers are permitted to conduct correspondence is addressed in rule 401A of the Code. These provisions are separate from the provisions under the Public Access Rules and apply generally. Conducting correspondence under rule 401A does not extend to the conduct of litigation, as explained by the Court of Appeal in [Agassi v Robinson \(Inspector of Taxes\) \(Bar Council intervening\) \[2005\] EWCA Civ 1507, \[2006\] 1 All ER 900](#). Barristers should be mindful of the inherent risks (including of negligence claims) involved in the conduct of correspondence on behalf of lay clients.
10. It will not always be in the best interests of the client for barristers to conduct correspondence. It may be better for the barrister to draft a letter for the solicitor or other professional client to send. There is a danger of confusion where some letters are written by a barrister and some by a solicitor.
11. If the barrister is instructed to write a letter, addressees of letters written by the barrister must be made aware to whom any response should be addressed (and, for example, that it is unnecessary to reply to both the barrister and any solicitor or other professional who is also instructed). The barrister must keep the client and any professional client apprised promptly of any response, and seek further instructions at that juncture.
12. Barristers who become involved in the conduct of correspondence on behalf of lay clients will need to institute appropriate systems to deal promptly with responses and to keep records of the correspondence. Such systems should make provision to

cover periods when the barrister is on holiday, or conducting a trial elsewhere, or otherwise unavailable to receive letters.

13. Barristers should consider whether it would be appropriate for them to undertake training in the conduct of inter-partes correspondence before agreeing to enter into any such correspondence.
14. It is also important for barristers embarking on the conduct of correspondence to ensure that, so far as possible, their actions do not create any threat to either their actual or their perceived independence, or any risk of subsequent professional embarrassment. For example, they should not appear personally to endorse statements by clients or witnesses, since that might appear to conflict with arguments or evidence which they subsequently present to the Court.
15. The conduct of correspondence with other parties (save where reasonably necessary as part of the barrister's conduct of the case at court) is not subject to the cab-rank rule: see rule 604(i).

Sharing premises

16. Rule 403.2 permits self-employed barristers to share office facilities and other premises with any person provided that certain conditions are met.
17. The rule relaxes a previous prohibition on the sharing of office facilities and premises with persons other than those specified in rule 403.1. The relaxation is intended to:-
 - a. allow barristers to make use of any surplus space and to reduce administrative costs; and
 - b. enable a wider range of services to be provided from the same premises, and provide opportunities for reducing costs.
18. The five conditions in rule 403.2 have been imposed to address and manage risks thought to be engendered by the relaxation of the rule.
19. The first two conditions (that there must be complete separation between the provision of services by the barrister and the services provided by any other person with whom the barrister shares the premises or facilities, and that nothing be done that might reasonably create the impression that there is any sharing of work, income or profits of the businesses) are imposed to prevent informal business sharing arrangements that are not transparently regulated as such in the public interest, to address the concern that the sharing of facilities might create confusion for the public, and to mitigate the risk of a perception developing that barristers lack independence. These rules are intended to ensure that chambers and individual barristers do not allow clients to be misled into thinking that the barristers have some responsibility for, or endorse, the services provided by others (or vice versa). Barristers must operate independently and must be seen to be operating independently.
20. Thus, whilst barristers might share premises (including conference or meeting rooms), neither the signage at the premises, nor the headed paper used by any of the businesses sharing those premises, nor the marketing or promotional material (including headed paper and website pages) must convey the impression of conducting business in concert or coordination with those with whom the premises are shared.
21. Further, whilst businesses might jointly employ a telephonist, they must have separate telephone numbers, and the greeting deployed by the telephonist must be specific to the business to which any given call is made.

22. The requirement that the barrister has effective arrangements in place to protect the confidentiality of the clients' affairs is regarded as of particular importance where sharing of premises or other facilities is occurring. Those intending to share office space should give careful consideration to the need for separate telephone and computer systems, coded door locks and lockable storage cupboards, and to the identity of those supplied with keys.
23. The prohibition of any general referral arrangement or understanding between the barrister and the person/people with whom they are sharing is intended to ensure that any referrals that do take place must be made at arm's length and in the best interests of the client on a case by case basis. The prohibition is intended to address the concern that barristers might refer work (or might unfairly be perceived as referring work) to others with whom they are sharing for reasons of convenience or financial advantage, rather than because the referral is in the client's best interest. Correspondingly, the sharer might refer clients to the barrister with whom they are sharing for the same reasons. The prohibition of a general referral arrangement or understanding is intended to ensure that referrals are only made on an individual basis, when it is in the client's best interest. A 'general referral arrangement or understanding' means an arrangement or understanding that, as and when the barrister has cause to refer work or certain categories of work to someone in the profession(s) of the person(s) with whom the barrister shares office facilities and other premises, or vice versa, s/he will refer that work (or some of that work) to those with whom s/he shares facilities. What the Code requires is that, on each occasion that it becomes necessary to refer work, careful consideration must be given to the needs of the individual client in question. The barrister must in each case assess the suitability of the person to whom the referral will be made.
24. Rule 403.4 imposes a record keeping requirement which is intended to ensure that the Bar Standards Board is able to monitor the referrals which are made, to ensure that the prohibition is being observed and that it is effective to control the regulatory risks to which sharing gives rise. Records should be kept for at least 6 years. Barristers availing themselves of the opportunity to share office facilities or other premises who make referrals to those with whom they share should note that they may be required to demonstrate the basis on which any particular referral was made, and that the records maintained should, therefore, include the reasons for the decision to refer a client to the sharer
25. Before a barrister can embark upon a sharing arrangement permitted by rule 403.2, prior notification in writing of the sharing must have been given to the Bar Standards Board. No approval from the Bar Standards Board is required, but the fact that premises and office facilities are being shared will be taken into account by the Bar Standards Board in ascertaining appropriate monitoring programmes to ensure that those sharing facilities abide by the terms of the rule.

Attendance at police stations

26. The previous rules prevented barristers from attending on clients at police stations. That absolute bar has now been removed. Rule 401(b)(iv) provides that a self-employed barrister must not (except as permitted by the Public Access Rules) attend at a police station without the presence of a solicitor to advise a suspect or interviewee as to the handling and conduct of police interviews unless the barrister has complied with such training requirements as may be imposed by the Bar Standards Board in respect of such work. Advising at police stations is specialist work; any barrister who performs such work must complete any relevant training imposed by the Bar Standards Board.

27. Rule 401(b)(vi) provides that a self-employed barrister must not (except as permitted by the Public Access Rules) conduct in court any criminal proceedings in which the barrister has attended at a police station for any defendant in connection with those proceedings or any associated proceedings unless the barrister reasonably believes that nothing said, done, heard or seen by the barrister at the police station might require him/her to give evidence in those proceedings.
28. A particular difficulty facing a barrister who attends at a police station to advise suspects and interviewees or to take part in identification procedures is that the barrister may have to advise the client whether or not to answer police questions or to volunteer a statement, or may see or hear something that is material to the evidence that will be presented in court. The client's decision whether or not to answer questions, and if so which, is very likely to be a significant matter in any subsequent court hearing. So might compliance with PACE Codes of interviews or identification procedures that the barrister sees or hears. If these are significant evidential matters at trial, the barrister in question may find him or herself in serious professional difficulties if acting as advocate in the case.
29. Advising a suspect at the police station or attending on his behalf at an interview or identification procedure always gives rise to the risk that you may become a witness at the trial or at a Newton hearing or pre-trial admissibility hearing. The fact of advising a suspect or being present in those circumstances does not of itself prevent you from appearing as an advocate for that defendant in all circumstances. If the defendant you have advised is going to enter a guilty plea which you know to be acceptable to the Crown, or has given a full comment interview which remains as his account, then the degree of risk may be relatively low. But if the defendant declined, on your advice or not, to answer all or any questions in interview (whether or not there was a prepared statement) then the risk of becoming a witness will, inevitably, be too great to allow you to deal with the case at trial or at a Newton hearing or pre-trial admissibility hearing. This guidance applies equally whether you were to appear as an advocate alone or being led or leading (see paragraph 3 above).
30. Given the possibility that you may be required to give evidence of events at the police station, you should keep detailed, contemporaneous notes of those events.
31. For the reasons already discussed in relation to collecting evidence (as to which, see paragraph 8 above), attending at police stations is not subject to the cab rank rule: see rule 604(i).