

CURRENT GUIDANCE

Conducting Litigation Guidance

Introduction

1. This guidance document is for barristers, users of barristers' services and others who wish to understand:
 - the BSB's view on the activities that amount to the reserved legal activity of 'conduct of litigation';
 - how barristers can become authorised to conduct litigation; and
 - how to determine whether a barrister is authorised to conduct litigation.
2. The conduct of litigation is a reserved legal activity under the Legal Services Act 2007 (LSA). Barristers do not have the right to conduct litigation unless they are authorised by the BSB to do so or are otherwise entitled to conduct litigation by virtue of other legislation. If a barrister conducts litigation without authorisation, they are not only breaching the BSB Handbook, but also committing a criminal offence under the Legal Services Act 2007.

Section 1: What activities amount to 'conducting litigation'?

3. The LSA defines the conduct of litigation as:
 - a. the issuing of proceedings before any court in England and Wales¹;
 - b. the commencement, prosecution and defence of such proceedings; and

¹ The LSA defines 'court' in s207(1) as including some tribunals:
<http://www.legislation.gov.uk/ukpga/2007/29/section/207>

- c. the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).
 4. The term 'ancillary functions' has been defined further in relation to civil litigation by *Agassi v Robinson* [2005] EWCA Civ 1507. The definition of ancillary functions is construed narrowly and limited to the formal steps required in the conduct of litigation.
 5. The BSB's view is that the following fall within the definition of the conduct of litigation, and therefore **a barrister should refuse to do them if they are not authorised to conduct litigation:**
 - issuing proceedings or applications or otherwise delivering such documents to the court for issue (beginning court proceedings by filing details of the claim, such as the Claim Form and Particulars of Claim, at court, or making an application for a court order);
 - filing an acknowledgement of proceedings;
 - giving their address as the address for service of documents;
 - filing documents at court or serving documents on another party;
 - issuing notices of appeal (informing the court and the other side that the unsuccessful party seeks a review of the case);
 - signing off on a list of disclosure (so that all parties know of all documents which have a bearing on the case);
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- laying of an information in a Magistrates' court;² and
 - service of an indictment on an officer of a Crown Court.³
6. This list is not exhaustive. Given that the interpretation of 'ancillary functions' in the case law is somewhat of a grey area, the boundaries of what does and does not fall within 'conducting litigation' are somewhat unclear. Barristers should therefore carefully consider this guidance and relevant authorities before determining whether an activity constitutes the conduct of litigation. For example, the right to conduct litigation can only be delegated to an agent who has been properly authorised (*Gregory v Turner* [2003] EWCA Civ 183). Therefore litigants in person cannot conduct their litigation through an agent other than an authorised legal representative, such as a barrister authorised to conduct litigation.
7. If a barrister is authorised to conduct litigation:
- They must within an agreed timescale, or within a reasonable period of time, comply with any undertaking they give in the course of conducting litigation (Rule C11 in the BSB Handbook);
 - This does not affect the prohibition on receiving or handling clients' money, except as payment for fees (Rule C73 – C75). The prohibition means that a barrister cannot make disbursements on behalf of a client; for example, by paying court fees or witnesses' expenses;
 - They must, if they are of less than three years' standing, have a 'qualified person' for conducting litigation at their principal place of practice or, if they are practising in a dual capacity, at each of their principal places of practice (Rule

² *Media Protection Services Ltd v Crawford* [2012] EWHC 2373 (Admin)

³ *R (City of York Council) v AUH & Ors* [2023] EWCA Crim 6.

S20.2). However, if an employed barrister in a non-authorised body is only conducting litigation for their employer, they only need to have a 'qualified person' for conducting litigation if they are of less than one year's standing. The purpose of a 'qualified person' is to be readily available to provide guidance to the barrister. The definition of a 'qualified person' for conducting litigation can be found at Rule S22.3;

- This does not affect the prohibition on undertaking the general management, administration or conduct of a client's affairs (Rule S25); and
- They may act as a 'professional client' i.e. instruct another barrister on behalf of a client. The definition of 'professional client' in the BSB Handbook states that 'any BSB authorised person who is authorised to conduct litigation' may give instructions to a barrister.

Section 2: What is not 'conducting litigation'?

8. Certain activities look like they might fall within the definition of conducting litigation, but in fact do not. This is generally because it is work that barristers have traditionally done when instructed by solicitors. The BSB's view is that the following activities are therefore **permissible if a barrister is not authorised to conduct litigation**:

- *conducting correspondence on behalf of clients*. Barristers may send letters on their chambers' letterhead or faxes or e-mails. However, they must only conduct correspondence if they are satisfied it is in their client's best interests to do so, and they have adequate systems, experience and resources for managing the correspondence. They must also have adequate insurance in place which covers, amongst other things, any loss suffered by the client as a result of conducting correspondence. Finally, where the other

side is legally represented and barristers are conducting correspondence in respect of the particular matter, they are expected to correspond at all times with that other party's legal representative;

- *lodging documents for hearings.* It is proper for barristers or clerks to lodge certain types of document for hearings, provided that they are secondary to the barrister's role as an advocate. Barristers often draft the case summary, chronology, list of issues or position statement. There is nothing wrong with barristers or clerks lodging these sorts of document;
- *skeleton arguments.* Exchanging skeletons with an opponent or sending skeletons and bundles of authorities to the court is allowed. In a criminal case, defence barristers often hand a defence case statement to the Crown or the court;
- *covering applications to fix trial dates.* Clerks regularly fix trial dates to ensure that the date is convenient for the barrister instructed. It is also permissible for clerks to make representations to the Masters in relation to hearing dates;
- *court orders.* Liaising with the other side or the court over the preparation of an order is something barristers often do and is allowed. Clerks regularly deal with the sealing of court orders and so this, too, is permitted;
- *discharging a duty or a courtesy to the court.* For example, a letter or e-mail to a judge explaining an absence from court, or providing dates to avoid or corrections to a draft judgment;
- *signing a statement of truth.* A statement of truth may be signed by a legal representative, which is defined as including a barrister (Civil Procedure Rules Part 2.3). Therefore a barrister may sign a statement of truth on behalf

of their client (*O'Connor v BSB* (2012)). However, a barrister should ensure that the provisions of the Civil Procedure Rules are complied with before they do so, in particular Part 22 PD paragraph 3.8; and

- *instructing expert witnesses on behalf of a lay client*. While the instruction of an expert does not fall within the definition of the conduct of litigation, the filing of an expert report and serving the report on another party does fall within the definition. Part 35 of the Civil Procedure Rules also places duties on experts.
9. While the above activities may not, in isolation, be considered to be activities that amount to the conduct of litigation, barristers should, as per the relevant authorities, carefully consider the totality of the activities they are undertaking, rather than looking at particular actions taken in isolation. It will be a question of fact and degree, and an acknowledgement of the whole course of events and the wider context in which activities are undertaken that will determine whether or not – taken in the round – such activities amount to the conduct of litigation (*Baxter v Doble & Anor* [2023] EWHC 486 (KB); *Ndole Assets Ltd v Designer M&E Services UK Ltd* [2018] EWCA Civ 2865).

Section 3: Authorisation to conduct litigation

10. There are three ways in which barristers are able to conduct litigation:
- self-employed and employed barristers can apply to the BSB for an extension to their practising certificate, authorising them to conduct litigation;
 - employed barristers previously authorised to conduct litigation under Annex I of the Bar Code of Conduct (8th Edn.) will retain their authorisation, provided that they remain in employed practice. If they enter self-employed or dual

capacity practice, they will need to apply to the BSB for authorisation to conduct litigation; or

- by being entitled to conduct litigation under primary legislation.

Authorisation to conduct litigation by the BSB

11. Barristers who apply for authorisation to conduct litigation will need to satisfy the BSB that they have:

- appropriate systems in their place of practice to enable them to conduct litigation;
- the requisite skills and knowledge of litigation procedure to enable them to provide a competent service to clients; and
- adequate insurance. Members of the Bar Mutual Indemnity Fund are covered.

12. More information on the application process for authorisation to conduct litigation can be found on the BSB's website.

13. In addition, the LSA states that in order for reserved legal activities (including the conduct of litigation) to be delivered through an entity, both the entity and the individuals providing services must be authorised to do so. Employed barristers in entities who are conducting litigation must therefore ensure that the entity in which they are working is also authorised to conduct litigation.

14. BSB regulated entities which apply for authorisation to conduct litigation will need to satisfy the BSB that they have at least one employee who is authorised to conduct

litigation, and the necessary systems in place to be able to manage cases appropriately.

15. More information on the application process for entity authorisation can be found on the BSB's website.

Entitlement to conduct litigation under primary legislation

16. Barristers employed in central government roles (including Crown Prosecutors) may be entitled to conduct litigation without the need for authorisation from the BSB. The exemption from the requirement to seek authorisation from the BSB is by virtue of primary legislation.
17. All barristers employed by the Crown Prosecution Service (CPS) who have been appointed as Crown Prosecutors do not need further authorisation from the BSB to conduct litigation within that role. The exemption applies because barristers employed in this capacity act under the authority of the Director of Public Prosecutions in accordance with the Prosecution of Offences Act 1985. Crown Prosecutors are not entitled to conduct litigation outside of their role with the CPS without first securing BSB authorisation to do so.
18. Employed government barristers also have a right to conduct litigation as part of their employment by Treasury Solicitors, any government department, or any public body which performs functions on behalf of the Crown. This exemption applies because of historical and current legislation.
19. By virtue of section 223(1) of the Local Government Act 1972, barristers employed by local authorities to prosecute, defend or appear on their behalf in proceedings before a magistrates' court shall be entitled to prosecute or defend or to appear in any such proceedings, and to conduct any such proceedings without further

authorisation from the BSB. However, this statutory exemption is limited to conducting litigation in a magistrates' court and does not extend to any other court including a crown court. A barrister employed by a local authority will also not be deemed to be a "party to the proceedings", thus the exemption under paragraph 2(4)(a) of schedule 3 of the LSA 2007 will not apply. A barrister employed by a local authority must therefore secure authorisation by the BSB if their role requires them to conduct litigation in any court other than a magistrates' court (*R (City of York Council) v AUH & Ors* [2023] EWCA Crim 6.)

20. It is important to note that the right to conduct litigation, unless otherwise specified by primary legislation, is restricted to the barrister's employment. Therefore:
- if an employed barrister wishes to conduct litigation outside of their employment (for example, on a pro bono basis or for a law centre) they must seek authorisation from the BSB to do so;
 - if an employed barrister leaves their post, their entitlement to conduct litigation will cease; and
 - if an employed barrister changes their post and wishes to continue conducting litigation, they must either ensure that they are still entitled to do so, or seek authorisation from the BSB.

Section 4: Determining whether a barrister is authorised to conduct litigation

21. If a barrister is authorised by the BSB to conduct litigation, this will be listed on their entry on the BSB's Barristers' Register. The Barristers' Register can be found on the BSB's website.

22. Employed barristers in entities who are conducting litigation must ensure that the entity in which they are working is also authorised to conduct litigation. If a BSB regulated entity is authorised by the BSB to conduct litigation, this will be listed on its entry on the BSB's Entities' Register. The Entities' Register can also be found on the BSB's website.

23. If a barrister is entitled to conduct litigation under primary legislation, this will not be listed on their entry on the BSB's Barristers' Register. This is because their right to conduct litigation is by virtue of primary legislation, and not authorisation from the BSB (see the 'Entitlement to conduct litigation under primary legislation' section above).

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Bar Standards Board