



## Use of the Crown Court Digital Case System

<b>Purpose:</b>	To advise barristers on use of the DCS and avoiding the conduct of litigation
<b>Overview:</b>	The DCS – The conduct of litigation – BSB guidance -- The use of the DCS to lodge, file or serve documents
<b>Scope of application:</b>	All practising criminal barristers
<b>Issued by:</b>	The Ethics Committee
<b>Issued:</b>	March 2018
<b>Status and effect:</b>	Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

### The DCS

1. The Crown Court Digital Case System (“CCDCS”, commonly shortened to “DCS”) is a web-based platform that allows users to view and print off case documents that have been uploaded to it. Each Crown Court case has its own digital file.
2. Users of the system must be registered to gain access to it. Registration requires a secure CJSM email address (which almost all barristers and solicitors practising in crime will have). Access to an individual case file is by invitation of anyone with existing access.
3. Each DCS case file has sections for up-loaded documents: including indictments, witness statements, exhibits, applications, etc. (Unused material is not uploaded to the DCS. The CPS will send paper copies of unused material to defence solicitors.) Once a user has access to the DCS case file, he or she can upload new documents to the relevant sections. Each document is dated by the system, so that it can be seen at a glance when it was uploaded.
4. There are now very few Crown Court cases that do not require the use of the DCS. Judges can allow cases to opt out of the use of the DCS, but, for reasons of case

management efficiency, they are usually reluctant to do so. Ordinarily they will expect or require that the legal representatives of all parties upload their relevant documents to the system by way of filing, service or lodging of those documents.

### **The conduct of litigation – BSB Guidance**

5. This short note addresses concerns that have been expressed by criminal barristers attending Public Access training courses as to whether their use of the DCS system runs the risk of "conducting litigation".

6. A barrister who is not authorised to conduct litigation commits a criminal offence if he or she does conduct litigation.

7. The Legal Services Act 2007 provides<sup>1</sup> that the following categories of persons can conduct litigation:

- a. Those who have the right to conduct litigation granted by an authorised body, such as the Law Society or Bar Council;
- b. Those on whom the right to conduct particular litigation is conferred by enactment<sup>2</sup>;
- c. Those to whom the right to conduct litigation in relation to particular proceedings has been granted by a court; and
- d. Litigants in person.

8. The definition of the "conduct of litigation" in Schedule 2 para 4(1) of the Legal Services Act 2007 is not, however, a particularly helpful one. It is said to mean:

- (a) the issuing of proceedings before any court in England and Wales;
- (b) the commencement, prosecution and defence of such proceedings; and
- (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

---

<sup>1</sup> Sections 18, 19, and Schedule 3 para 2

<sup>2</sup> Barristers employed by the CPS, the Treasury Solicitor, government departments and any public body which performs functions on behalf of the Crown may conduct litigation while acting within the scope of their employment:  
[https://www.barstandardsboard.org.uk/media/1849621/guidance\\_on\\_conducting\\_litigation.pdf](https://www.barstandardsboard.org.uk/media/1849621/guidance_on_conducting_litigation.pdf)

The leading case is Agassi v Robinson [2005] EWCA Civ 1507, where the Court of Appeal held that the 'ancillary functions' referred to in Schedule 2 para 4(1)(c) were confined to '*formal steps required in the conduct of litigation*'; but did not consider it necessary to decide the precise parameters of the phrase – '*this is a difficult area, and it is unfortunate that this important definition is so unclear*'.

9. The BSB has set out in its own "Guidance on Conducting Litigation" ("the Guidance") its view as to what amounts to the conduct of litigation. It states that it includes:

- **issuing proceedings or applications;**
- filing an acknowledgment of proceedings;
- giving your address as the address for service;
- **filing documents at court or serving documents on another party;**
- issuing notices of appeal;
- signing off on a list of disclosure; and
- laying of an information in a Magistrates' court.<sup>3</sup>

The BSB acknowledges however that this list is not exhaustive. (It has separately clarified that while instruction of an expert does not amount to the conduct of litigation, the filing of an expert report and/or serving the report on another party will fall within the definition.<sup>4</sup>) Barristers who lack authorisation to conduct litigation should therefore proceed with caution, and should consider the Guidance with care.

10. The Guidance makes clear that where the client is a litigant in person, a barrister can assist the client by advising him or her on what steps to take by way of his or her own conduct of the litigation.

11. The Guidance also suggests that certain activities undertaken by barristers or their clerks which look like they might fall within the "conduct of litigation" do not in fact do so: see the Guidance at para 9. The activities identified, so far as concerned with lodging or filing documents at Court or serving documents on another party, include the following:

- Conducting correspondence on behalf of clients (subject to the requirements set out in the first bullet point of para 9).

---

<sup>3</sup> [https://www.barstandardsboard.org.uk/media/1849621/guidance\\_on\\_conducting\\_litigation.pdf](https://www.barstandardsboard.org.uk/media/1849621/guidance_on_conducting_litigation.pdf) - para 5.

<sup>4</sup> [https://www.barstandardsboard.org.uk/media/1849621/guidance\\_on\\_conducting\\_litigation.pdf](https://www.barstandardsboard.org.uk/media/1849621/guidance_on_conducting_litigation.pdf) - para 9, final bullet point.

- Lodging certain 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."*
- Serving and lodging 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."*
- Liaising with the other side or the court over the preparation of an order. Further, *"[c]lerks 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";*

The logic here is that these "exceptions" are traditional barristers' work: barristers and their clerks have traditionally done them when instructed by solicitors and therefore (unless many barristers have inadvertently been committing criminal offences for many years) should not fall within the definition.

### **The use of the DCS to lodge, file or serve documents**

12. A potential difficulty arises when particular documents are communicated to other parties, or to the Court, **for the first time** by uploading them to the DCS. The uploading (and/or receipt) of documents required to be filed or served will amount to the filing or service of those documents within the meaning of the Criminal Procedure Rules 2015 Part 4. There is a concern that the way in which the DCS has been implemented may not have taken fully into consideration the risk of a barrister inadvertently conducting litigation by uploading documents required to be filed or served.

13. This is a particular risk where the barrister is acting under the Public Access regime (and cannot therefore ask an instructing solicitor to upload the documents). As noted above, Crown Court judges now generally expect or require case documents to be lodged, filed or served by uploading to the system; but a Public Access barrister's client will not have access to the system. The barrister may therefore come under pressure from a judge to upload documents which the client would otherwise lodge, file or serve, and which the barrister himself or herself (if he or she lacks authorisation to conduct litigation) ought not to lodge, file or serve.

14. The Ethics Committee has compiled the following table of documents indicating which documents a barrister, lacking authorisation to conduct litigation, is permitted to lodge, file or serve using the DCS; and which he or she may not.

<b>Document</b>	<b>Permitted</b>	<b>Not permitted</b>
Indictments		•
Defence Statements <sup>5</sup>	•	
Formal Admissions <sup>6</sup>	•	
Applications and Notices		•
Formal responses to Applications and Notices		•
Witness Statements (and exhibits)		•
Expert Reports (and attachments)		•
"Batting Orders" i.e. orders of witnesses	•	
Case Summaries	•	
Chronologies	•	
Opening Notes	•	
Skeleton Arguments	•	
Sentencing Notes	•	
Character references		•
(Bundles of) Authorities	•	

---

<sup>5</sup> The BSB Guidance takes the view that service and filing of a Defence Statement does not amount to the conduct of litigation: see para 11 (third bullet point) above.

<sup>6</sup> CJA 1967 s. 10(2) specifies that an admission under that section, if made out of court, must be made in writing; if made in writing by an individual, shall purport to be signed by the person making it, and if made on behalf of a defendant who is an individual, shall be made by his counsel or solicitor. It appears therefore that an out of court admission made in writing on behalf of an individual defendant may be made and signed by counsel; and it is probable that the communication of such an admission to the court and to other parties may also be effected by counsel using the DCS, even if he or she lacks authorisation to conduct litigation.

15. Where a barrister is instructed by a solicitor (and therefore is not conducting the relevant litigation), he or she should not upload to the DCS those documents that he or she is not permitted to file/ lodge or serve in the capacity of an advocate; but should invite the instructing solicitor to do so. A barrister acting under the Public Access regime should invite his client to file/ lodge or serve such documents in another way.

16. If the Court, or a judge, seeks to persuade a barrister to use his or her access to the DCS system to file or serve documents that he or she is not permitted to file/ lodge or serve (in that or any other way), it will be necessary to point out that this risks involving the barrister in criminal conduct.

17. But a solution to the problem may well be to invite the relevant Court to grant the barrister the right, **in that limited respect**, to conduct litigation in relation to the proceedings in question; thereby constituting the barrister, for the purpose of lodging/ filing or serving documents via the DCS, an "exempt person" under Schedule 3 para 2(2) of the Legal Services Act 2017. The grant of that right should be recorded by an Order to that effect.

18. It seems unlikely that there is any objection to a barrister, lacking authorisation to conduct litigation, uploading to the DCS documents which have **already** been lodged/ filed and/or served by others who are entitled to conduct litigation (i.e. by instructing solicitors, or the client).

### **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).