



The Bar Council

## **Direct access and conduct of litigation**

<b>Purpose:</b>	To consider issues arising in cases when barristers are not instructed by a solicitor or other professional client
<b>Scope of application:</b>	Self-employed barristers and barristers employed by BSB entities undertaking work on a Public Access or Licensed Access basis and/or conducting litigation
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<b>Status and effect</b>	<b>Please see the notice at end of this document. This is not 'guidance' for the purposes of the BSB Handbook I6.4.</b>

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### Introduction and scope

1. As a self-employed barrister, you may accept instructions provided you are:<sup>1</sup>
  - appointed or instructed by the court;
  - instructed by a solicitor or other professional client. The definition of professional client includes members of authorised bodies (such as the Law Society and CILEx), the employed Bar and foreign lawyers;
  - instructed by a Public Access client;
  - instructed by a Licensed Access client; or

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<sup>1</sup> BSB Handbook, rule S24.

- (in the case of the conduct of litigation) authorised to conduct litigation and instructed by a client to do so.
2. As a barrister employed by a BSB entity you are permitted to undertake public access work by virtue of the following rS28 in the BSB Handbook provided that:
    - (a) at least one manager or employee is suitably qualified and experienced to undertake public access work; and
    - (b) you have notified the Bar Standards Board that you are willing to accept instructions from lay clients.
  3. This document sets out the understanding of the Bar Council about aspects of the role of barristers when instructed on a public or licensed access basis or to conduct litigation.
  4. The cab rank rule only applies when instructed by a professional client: see rC29.1. It does not apply to the types of work covered by this document. That means, for example, if a public access client wishes to instruct you, you are not obliged to accept those instructions (provided your reason for not doing so is not a discriminatory one), unless you already have a contract which obliges you to do so. This applies whether or not that client has previously instructed you in respect of the same matter.

## **Public Access**

5. In order to undertake public access instructions, you must have undertaken Bar Standards Board (BSB) approved training and be registered with the Bar Council as accepting such instructions: rC120. Details of BSB approved training courses are on the BSB's website<sup>2</sup>. In carrying out such work, you must comply with the Public Access Rules, which are set out in section D2.1 of the BSB Handbook. Those rules require you (see rC124) to have regard to the guidance published from time to time by the BSB. Accordingly, if you practise in this area, you must ensure you are familiar with both the Public Access Rules and the BSB guidance entitled 'Public Access Guidance for Barristers'<sup>3</sup>.

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<sup>2</sup> [www.barstandardsboard.org.uk/for-barristers/public-and-licensed-access/public-access-trainingand-guidance.html](http://www.barstandardsboard.org.uk/for-barristers/public-and-licensed-access/public-access-trainingand-guidance.html)

<sup>3</sup> [Bar Standards Board Public Access Guidance for Barristers, October 2019](#)

Furthermore, you must comply with the Transparency Rules, which are set out in section D6 of the BSB Handbook, and the BSB's associated guidance, including the guidance entitled 'Additional transparency rules for those undertaking Public Access work'.

6. Public access work does not put you on a par with solicitors. The type of work you can do on a public access basis is the same as the type of work you could do if instructed by a solicitor or other professional client. The main difference is that in public access work, you are engaged by your lay client directly (either personally, or through an intermediary) to carry out certain pieces of work, such as advocacy or drafting. This is to be contrasted with the more conventional arrangement under which you are engaged by a solicitor who is acting for your lay client<sup>4</sup>.
7. An important difference between you and a solicitor is that you must not do anything that would amount to the conduct of litigation, unless you have specific authorisation from the BSB to conduct litigation. Accordingly, if you are doing public access work then you need to have a good understanding of what does and does not fall within the definition of conducting litigation. As this is relevant to all areas of work covered by this document, it is considered under a separate heading below (see 'What does and does not amount to the conduct of litigation').
8. Confusion can arise as to the role a public access barrister plays in a case, particularly where others are not familiar with the public access regime or the technical concept of 'conducting litigation'. The steps suggested below should help to avoid such confusion.

### **Lay clients**

9. In your dealings with your lay client you should explain clearly, as the circumstances of the case require, the ambit of your role; and you should not give the impression that you are running or managing the case. Guidance C58 says that if you carry out public access work but are not authorised to conduct litigation, you would breach Rule C19 if you caused or permitted your client to be misled into believing that you are entitled to, or will, provide services that

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<sup>4</sup> You can be instructed to carry out public access work by an intermediary who does not satisfy the definition of a 'professional client', in which case the public access rules will apply: see paragraph 13 below.

include the conduct of litigation on behalf of your client. For this purpose, the BSB model client care letter includes the following passages:

*'Barristers do not handle client money or [if not authorised to conduct litigation] undertake the organisation or management of a case proceeding through a court.'*

*'[If not authorised to conduct litigation] I cannot go on the court record or provide my address to the court as the 'address for service' of documents. . . You will be listed on the court record as a litigant in person. You will need to provide your own address as the 'address for service' of documents sent to you by the court and other parties.'*

10. In many if not most cases sending a client care letter which includes these terms will be sufficient to make the ambit of your role clear to your client. However, the circumstances of a particular case may require you to explain in greater detail what you can and cannot do.

## **The court**

11. Courts and judges are becoming more familiar with public access, but there are still those who do not fully understand the role of a barrister in these cases. If you encounter difficulties, then the following points may assist.

- 11.1 A litigant can still be conducting their own litigation even though they have appointed a representative to act for them<sup>5</sup>. The definition of legal representative under the Civil Procedure Rules includes barristers<sup>6</sup>, but a barrister instructed on a public access basis can be a legal representative for the purposes of the rules without having conduct of the litigation in the technical sense.

- 11.2 The same can apply to a solicitor engaged on a limited retainer. The Law Society has issued guidance on what it describes as 'unbundling', which is where a solicitor is instructed on a discrete basis, such as to advise or act as an advocate, without going on the court record<sup>7</sup>. The guidance says that it is understood the judiciary is supportive of such arrangements. As with public access, it can give litigants with limited means access to legal help. However, the Law Society's guidance points

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<sup>5</sup> See *Agassi v Robinson* [2005] EWCA Civ 1507 at [22] to [27].

<sup>6</sup> CPR r.2.3.

<sup>7</sup> The practice note is available here:

<http://lawsociety.org.uk/supportservices/advice/practicenotes/unbundling/>

out, the court should not be able to impose those additional duties which would arise from the conduct of litigation on a solicitor who is providing 'unbundled' services. The same is true of barristers instructed on a public access basis, and you should be in a position if necessary to explain to the court the ambit and limits of your role.

11.3 A particular problem in multi-track civil cases has been that some judges have expected litigants who have instructed counsel on a public access basis to prepare a costs budget in accordance with CPR Part 3. CPR r.3.13 makes it clear that litigants in person do not have to file costs budgets. Where appropriate, you should direct the court to the Court of Appeal's judgment in *Agassi v Robinson*<sup>8</sup> and the BSB's 'Public Access Guidance for Barristers', both of which make clear that a client who instructs a barrister on a public access basis remains a litigant in person and has the conduct of their own litigation. In *Avanti Building Contractors Ltd v Gerald-Webb & Anr*<sup>9</sup> HH Judge Walden-Smith, sitting in Central London County Court on an appeal from a District Judge, found that although the Defendant had a public access barrister representing her she did not need to file a costs budget.

11.4 The BSB's Guidance makes it clear that a public access barrister may discharge a duty or courtesy to the court without becoming engaged in the conduct of litigation. There is nothing wrong, for example, with you informing a court or tribunal in advance that you will be attending to represent your client (in particular, where this is relevant to the listing of the case), provided you make the basis of your engagement clear. Similarly, if you draft a document which will go before the court bearing your name (such as a statement of case, skeleton argument or defence statement) you ought to make it clear that your instructions are under the public access scheme.

### **Third parties**

12. Just as you may have to make the limits of your role clear to your client and the court, the same may apply to your opponents. Some solicitors will treat your involvement as a public access barrister as good reason to direct communications to you rather than to your lay client. Unless your client had specifically instructed you to deal with all correspondence and phone calls, this could lead to problems. In most cases, you will be instructed only to deal with

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<sup>8</sup> See footnote 5 above.

<sup>9</sup> 12 October 2015, unreported. Claim No A0QZ4185.

discrete pieces of correspondence, such as drafting a letter before action or a without prejudice offer, and you may in any event be unwilling to accept wider instructions in relation to correspondence. A letter that you draft might be sent by you or by your client. If you send it, then it will probably be sensible to make clear in the letter (i) that you are instructed under the Bar public access scheme; (ii) whether or not the reply should be addressed to you or directly to your lay client; and (iii) that you are not allowed or instructed to accept formal service of any litigation documents (assuming you are not allowed or instructed to do so).

### **Intermediaries**

13. You can accept instructions from an intermediary to act on behalf of a public access client. In these cases, your duty to act in the best interests of your client is owed directly to the lay client and not to the intermediary. You may enter into a contract with the intermediary, instead of the lay client (which will usually mean that the intermediary is liable to pay the fees), but the intermediary will be regarded as acting as an agent of your lay client. For further guidance on being instructed by an intermediary, see paragraphs 54 to 64 of the BSB's Public Access Guidance for Barristers.

### **Litigation friends**

14. In a civil case, a person lacking capacity due to age or mental incapacity will act through a litigation friend. The litigation friend has the court's authority to conduct the proceedings on that person's behalf,<sup>10</sup> and that authority extends to instructing a lawyer. The public access rules do not currently cater entirely satisfactorily for litigation friends instructing barristers, but the Bar Council reads the Handbook as permitting litigation friends to instruct barristers under the public access rules, and the BSB has confirmed that it agrees with this. If a litigation friend instructs you on a public access basis then the Bar Council suggests the right analysis is probably that both the litigation friend and the litigant are your clients. If that is right, then you could not continue to act if there were to be a conflict of interest between them.

### **Licensed Access**

15. In contrast to public access, you do not have to have any special training or authorisation to accept licensed access instructions. However, the person

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<sup>10</sup> *Gregory v Turner* [2003] EWCA Civ 183, paras 63 and 64.

instructing you under the licensed access scheme must (as the name suggests) be licensed to do so under the Licensed Access Recognition Regulations.<sup>11</sup>

16. The BSB will grant a licence only if it is satisfied, in pursuance of these Regulations, that the applicant is a proper person to hold such a licence. Members of certain professional bodies, including accountants, architects and engineers, are automatically deemed to be licensed, but only for certain types of work that they may ask you to do, as set out in the Regulations. Others wishing to be licensed, and members of those professions who wish to be able to instruct barristers to do additional types of work, need a specific licence. In order to obtain a licence, they must complete an application form and supply such information as the BSB may require. A list of licence holders, which also details the scope of the licence granted to each of them, is available on the BSB website.<sup>12</sup>
17. When instructed on this basis, you must comply with the requirements of the Licensed Access Rules in section D2.2 of the Handbook. This includes ensuring your client has been granted a licence authorising them to instruct you under these rules (rC134.2). The need to check the terms of a licence was hitherto important as some licences were issued subject to restrictions. However, the BSB now only imposes limitations and conditions only in exceptional circumstances.
18. Further guidance on the licensed access scheme and a template agreement for accepting licensed access instructions are available on the Bar Council's Ethics Hub: <https://www.barcouncilethics.co.uk/documents/licensed-access/>

### **Barristers conducting litigation**

19. Since 22 January 2014, all self-employed barristers have been able to apply for authorisation to conduct litigation. If you obtain authorisation, then your right to conduct litigation will be endorsed on your practising certificate as an extension to your existing practising rights.
20. Applications can be made by email or post. Applicants are required to fill in a self-assessment questionnaire and pay a one-off fee (currently £90). The application is considered by the BSB, which decides on behalf of the Bar Council

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<sup>11</sup> Available on the BSB website: [www.barstandardsboard.org.uk/for-barristers/public-and-licensedaccess/licensed-access-recognition-regulations.html](http://www.barstandardsboard.org.uk/for-barristers/public-and-licensedaccess/licensed-access-recognition-regulations.html)

<sup>12</sup> [www.barstandardsboard.org.uk/resources/licensed-access-approvals-sep2019.html](http://www.barstandardsboard.org.uk/resources/licensed-access-approvals-sep2019.html)



whether authorisation should be granted or refused. If refused, there is a right of appeal.

21. If you decide to apply for authorisation to conduct litigation, you will need to satisfy the BSB that:
  - 21.1 you have the requisite skills and knowledge of litigation procedure to enable you to provide a competent service to clients;
  - 21.2 you have appropriate systems in your place of practice to enable you to conduct litigation;
  - 21.3 you are public access qualified; and
  - 21.4 you have adequate insurance. BMIF confirmed in 2014 that members will be automatically covered by Bar Mutual for claims arising from the conduct of litigation. At present, Bar Mutual does not require Members who obtain this accreditation to pay an additional premium, but this is being kept under review.
22. Further information, including Guidance for Applications, is available on the BSB website<sup>13</sup>.
23. Authorisation to conduct litigation does not permit you to undertake any other activities that are prohibited by the Handbook. In particular, you will still not be permitted to hold client money (rC73). A solicitor who has conduct of a case may take a payment on account to cover future fees and disbursements: you may not.
24. Your inability to hold client money may cause difficulty if you are instructed to take steps, such as issuing proceedings or applications, which require the payment of a court fee. The prohibition prevents you from taking money from your client for the purpose of using it to pay court fees. One way to deal with this is for you to issue the application and your lay client to pay the fee at the same time, but this may not be practicable. You might prefer instead to adopt one of the following solutions:
  - 24.1 You pay the court fee *without being put in funds for this purpose by your client beforehand*. The Handbook does not prohibit you making a payment

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<sup>13</sup> [Conducting litigation: Guidance and applications \(barstandardsboard.org.uk\)](http://barstandardsboard.org.uk)

of this sort out of your own funds. You may do so with the intention of asking the client to reimburse you afterwards, but you would not be obliged to seek reimbursement.

24.2 Your client may give you a cheque to cover a court fee. Rule C73 prohibits you from controlling or handling client money; and client money is defined in the Handbook as including securities or other assets beneficially owned by the client; but the Bar Council understands that the BSB accepts that (at least if you are permitted to conduct litigation) it is permissible for your client to provide you with a cheque made payable to the Courts and Tribunals Service in the amount of a required court fee and for you simply to deliver that cheque to the court together with an application that you have been instructed to issue.

24.3 You might use an escrow service. Under a contractual arrangement made between you and your client, your client may pay money into an escrow account before you incur court fees. This would allow you to pay court fees, knowing that funds are already available from which you can recoup what you have paid out. Alternatively, the payment can be made by the escrow service to the court. You should ensure that any escrow service you use complies with the provisions of rules C74 and C75 in the BSB Handbook.

### **What does and does not amount to the conduct of litigation**

25. If you conduct litigation without authorisation, you will breach your professional obligations under the BSB Handbook, may commit a criminal offence under the Legal Services Act 2007 ('the 2007 Act') and will potentially be in contempt of court<sup>14</sup>. In order to be authorised to conduct litigation, you need an extension to your practising certificate to allow you to do so (see paragraphs 19 to 22 above). In addition, you can only conduct litigation if you have been instructed by your client to do so.

26. As a result, it is important to understand what does and does not amount to the 'conduct of litigation' for this purpose.

27. The conduct of litigation is defined in the 2007 Act as:<sup>15</sup>

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<sup>14</sup> See Section 14, Legal Services Act 2007.

<sup>15</sup> Schedule 2, paragraph 4(1).

- (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).
28. The 2007 Act defines the conduct of litigation and the exercise of a right of audience as ‘reserved legal activities’.<sup>16</sup> Such activities may only be carried out by an ‘authorised person’<sup>17</sup> or an ‘exempt person’.<sup>18</sup> Any unauthorised and non-exempt person who carries them out may commit an offence and may be found in contempt of court. Solicitors are authorised persons, as indeed are members of the self-employed and employed Bar who have been granted authorisation by the Bar Council to conduct litigation.
29. Litigants are exempt persons and may, accordingly, conduct their own litigation as a litigant in person.<sup>19</sup> It is this which enables barristers to accept public access instructions without needing to be authorised to conduct litigation: everything in a public access case that involves the conduct of litigation may – and, indeed, must unless you have that authorisation – be done by the lay client as a litigant in person.
30. Similarly, a person who has been authorised by the court to conduct litigation in relation to a particular set of proceedings will be an exempt person, although the circumstances in which this will happen will be relatively rare.
31. The statutory definition of ‘the conduct of litigation’ has been judicially described as ‘unclear’<sup>20</sup> and ‘singularly unhelpful’<sup>21</sup>. In particular, the scope of the phrase ‘any ancillary functions’ is not clear. In *O’Connor v BSB* it was pointed out that many of the things a barrister is permitted to do – such as advocacy, signing pleadings and advising on a case – would be regarded by most people as ‘ancillary functions’ in relation to proceedings, but it is clear that these are things that barristers may lawfully do. In *Agassi*<sup>22</sup>, the Court of Appeal

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<sup>16</sup> LSA 2007, s.12. A ‘right of audience’ is defined (in Schedule 2, paragraph 3) as the right to appear before and address a court, including the right to call and examine witnesses.

<sup>17</sup> LSA 2007, ss.13-18.

<sup>18</sup> LSA 2007, s.19 and Schedule 3.

<sup>19</sup> LSA 2007, s.19 and Schedule 3 para.2(4).

<sup>20</sup> *Agassi v Robinson* [2005] EWCA Civ 1507.

<sup>21</sup> *O’Connor v BSB* [2012] All ER(D) 108 (Aug).

<sup>22</sup> [2005] EWCA Civ 1507; [2006] 1 All ER 900, para.56.

held that ‘ancillary functions’ was confined to ‘formal steps required in the conduct of litigation’, but considered it was not necessary for it to decide the precise scope of the phrase beyond this.

32. The *Agassi* decision must now be read in light of Cavanagh J’s judgment in *Baxter v Doble*<sup>23</sup> which considered, in particular, what was meant by ‘*the commencement, prosecution and defence*’ of proceedings. These words were not included in the statutory definition prior to the 2007 Act and, therefore, not considered by the Court of Appeal in *Agassi*.
33. Cavanagh J’s view was that the question of whether litigation was being conducted should be viewed in the round. Therefore, individual actions which might not in themselves amount to the taking of formal steps in the proceedings could, viewed in conjunction with other activities, lead to a finding that the person in question had been conducting litigation. In the *Baxter v Doble* case itself, it was found that the Defendant gave ‘full-service’ assistance to a litigant-in-person and did ‘*everything ... in relation to the proceedings that a solicitor or other authorised person would have done*’ (see [211]). Accordingly, she was conducting litigation. It is not clear to what extent this decision will impact the work of public access barristers; and its correctness may be doubted. But the view of the Ethics Committee is that direct access barristers should proceed with caution. If the totality of the services that they will or may provide to a client in relation to a particular matter could, taken “in the round”, be considered broadly as the conduct of litigation, they would be well-advised to get the conduct-of-litigation extension to their practising certificate, as set out in paragraphs 19 to 22 above. Reference should be made to the latest version of BSB’s ‘Guidance on Conducting Litigation’<sup>24</sup> as well as the Bar Council guidance referred to above, for the latest advice on the matter.

The first issue to consider in deciding whether a particular step involves the conduct of litigation is to consider whether the court or tribunal which is seized of the litigation is within the scope of that term for the purposes of the Act. The definition of ‘the conduct of litigation’ applies only to cases which are ‘in any court in England and Wales’. This includes courts such as the Crown Court, the Magistrates’ Court, the High Court and the county court. It also includes<sup>25</sup> the Upper and First Tier Tribunals, courts martial and ecclesiastical courts. Other

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<sup>23</sup> [2023] EWHC 486 (KB).

<sup>24</sup> Referred to in fn 13 above. The Guidance is said to be under review in light of ***Baxter v Doble*** [2023] EWHC 486 (KB).

<sup>25</sup> See section 207 of the Legal Services Act 2007.

important tribunals, such as the Employment Tribunal<sup>26</sup> or appeals to the Planning Inspectorate, and statutory regulators such as the Medical Practitioners Tribunal Service and the Nursing and Midwifery Council, are not included. So long as (a) you have the necessary systems, expertise and resources to be able to do so, (b) you are insured against any loss that your client might suffer as a result, and (c) it is in the best interests of your client for you to do so, then you may accept instructions to conduct or manage a case before a tribunal or other body which is not within the definition of a 'court' without breaching the prohibition on the conduct of litigation.

34. If the litigation is in a relevant 'court', then in deciding whether a particular step in that litigation involves 'the conduct of litigation', you may be assisted by the following consideration of a number of common situations. References below to 'the BSB Guidance' are references to 'Guidance on Conducting Litigation' issued by the BSB and available in the Code Guidance section of the BSB's website.<sup>27</sup> You must have regard to the BSB Guidance when carrying out public access work: see rC124.

### **Issuing and filing formal court documents**

35. The statutory definition makes it clear that both issuing and commencing proceedings amounts to the conduct of litigation. Clearly this would include issuing a claim form in a civil case, filing a divorce application or laying an information in a criminal case.<sup>28</sup> Given that taking a formal step in the proceedings is likely to amount to conducting litigation, it is also clear that issuing or serving formal process during the course of a case – such as an application notice or notice of appeal – would also fall within the definition. It may also be that the formal filing of some other types of document at court would involve the conduct of litigation, but this is less clear.
36. It is not currently clear to what extent a distinction can be drawn between delivery and issue/filing, and you would be wise to err on the side of caution. If a litigant prepares his own application notice and signs it but asks his neighbour to deliver it to the court office together with a covering letter from the litigant and the litigant's own cheque for the issue fee, then it is unlikely that the neighbour would be considered to be conducting litigation. By way of contrast, if you were asked to send or deliver an application notice to court

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<sup>26</sup> Though the Employment Appeal Tribunal is a court for the purposes of this definition.

<sup>27</sup> <https://www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-codeguidance.html>

<sup>28</sup> *Media Protection Services Ltd v Crawford and another* [2012] EWHC 2373 (Admin).

together with your client's cheque for the issue fee then that is likely to involve the conduct of litigation (see *Heron Bros Ltd v Central Bedfordshire Council (No.2)* where Edwards-Stuart J said it was reasonably clear that the act of an unregistered representative sending a claim form to court for sealing and issue amounted to the conduct of litigation)<sup>29</sup>. Therefore, unless you have litigation authorisation, you would be best advised not to send documents to court for issue or service.

37. Filing skeleton arguments, chronologies, and other documents of the sort conventionally prepared by barristers (particularly in connection with hearings) does not involve the conduct of litigation – see 'Service of documents' below.

### **Service of documents**

38. The BSB Guidance makes clear that (in the BSB's view) acknowledging service, giving your Chambers' address as the address for service, and serving documents on another party, all fall within the definition of 'the conduct of litigation'. The distinction between serving and merely delivering on behalf of the party who is serving is explained in *Ndole Assets Ltd v Designer M&E Services UK Ltd*<sup>28</sup>. That decision indicates that an agent who carries out a purely administrative or mechanical function in relation to the delivery of a document, such as a Post Office employee or a process server, is not to be regarded as conducting litigation. However, those who undertake or assume legal responsibility for service in accordance with the relevant rules are in a different category<sup>30</sup>. If, therefore, you are not authorised to conduct litigation, you should not serve formal court documents such as defences and disclosure statements on the opposing party.
39. The BSB Guidance makes it clear that the prohibition does not apply to documents which are ancillary to role of an advocate: e.g. skeleton arguments, case summaries, position statements, chronologies and lists of issues. Given that these documents may be served on an opponent, they may also be lodged with the court. The same would apply to a list or bundle of authorities.

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<sup>29</sup> [2015] EWHC 1009 (TCC) at [27].

<sup>30</sup> See *Ndole* at [67-68].

40. The Bar Council considers that filing document bundles for hearings, including trial bundles, does not amount to conducting litigation, but this point has yet to be determined definitively.
41. Barristers appearing in the Crown Court are required to upload documents to the Digital Case System (DCS). This gives rise to particular issues which are addressed in 'Use of Crown Court Digital Case System'<sup>31</sup>.

## Correspondence

42. The Court of Appeal made it clear in *Agassi v Robinson* that corresponding during the course of litigation does not fall within the definition of 'the conduct of litigation', and the same approach was taken to the sending of documents otherwise than by way of service in *O'Connor v BSB* (and, indeed, in *Heron Bros*<sup>32</sup>). You may engage in correspondence without needing to be authorised to conduct litigation. However, you should be aware that in light of *Baxter v Doble* (referred to in paragraphs 32 and 33 above), engaging in correspondence which does not in itself amount to a formal step in the proceedings might contribute to an overall picture that you are conducting your client's litigation.
43. In order for you to be able to accept instructions to conduct correspondence with other parties, however, you will need to ensure that (a) you have the necessary systems, experience and resources to be able to manage such correspondence, (b) you are insured for any loss suffered by your client as a result of your conduct of that correspondence, and (c) it is in the best interests of your client for you to accept such instructions. If not, your core duties and rC21 will require you to decline the instructions to conduct correspondence (see gC70.3).
44. If you are not authorised to conduct litigation, then you will need to be careful to ensure that letters written on behalf of a client do not amount to a formal step in the proceedings. An example that is likely to cross the line is a letter under cover of which a formal document (e.g. a statement of case) is served on another party to litigation.
45. Barristers in public access cases are often asked to draft and send letters before action or without prejudice offers on behalf of their clients. This does not in and of itself involve 'the conduct of litigation'.

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<sup>31</sup> <https://www.barcouncilethics.co.uk/documents/use-crown-court-digital-case-system/>

<sup>32</sup> Fn 29 above.

46. Similarly, in a criminal case, writing on your client's instructions to a prosecuting authority in order to discuss possible pleas would not involve 'the conduct of litigation'.
47. In a civil case, sending a pre-action protocol letter would not amount to 'the conduct of litigation', not least because it has been held that activities which take place before litigation commences and which do not involve any contact with the court cannot involve 'the conduct of litigation': see *Heron Bros*<sup>33</sup>. It is less clear whether making a formal Part 36 offer after litigation has been started amounts to 'the conduct of litigation'. The safer course, if you are not authorised to conduct litigation, would be for your client to send any Part 36 offers, though you may of course draft them.
48. Guidance gC24 makes clear that if another party is legally represented then you should correspond at all times with that representative and not their client.

## **Evidence**

49. The collection of evidence for a case is not 'the conduct of litigation'. Accordingly, subject to what is said about this in the BSB's 'Investigating and Collecting Evidence and Taking Witness Statements Guidance'<sup>34</sup>, you may investigate or collect evidence, and may take statements from potential witnesses.

## **Instructing an expert**

50. The BSB Guidance says that instructing an expert does not amount to 'the conduct of litigation'<sup>35</sup>. The BSB does however consider that filing an expert report with the court and/or serving it on another party will amount to the conduct of litigation. Even those who are authorised to conduct litigation might in any event prefer the contractual relationship and liability for fees to be directly between the expert and the lay client for practical and commercial reasons.

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<sup>33</sup> Footnote 26 above. However, this should be seen in the light of the decision in *Baxter v Doble* – see paragraphs 32, 33 and 41.

<sup>34</sup> [Investigating and Collecting Evidence and Taking Witness Statements \(barstandardsboard.org.uk\)](https://www.barstandardsboard.org.uk/investigating-and-collecting-evidence-and-taking-witness-statements-guidance/)

<sup>35</sup> However, this should be seen in the light of the decision in *Baxter v Doble* – see paragraphs 32, 33 and 41



### **Express authorisation by the court**

51. As mentioned in paragraph 30 above, the court can authorise any person to conduct litigation in respect of particular proceedings. A court will rarely do this, but there may be exceptional circumstances which justify such an order in a particular case.
52. On occasion, judges may ask advocates to undertake activities which amount to 'the conduct of litigation'. For example, in a criminal case a judge may be prepared to grant bail on the basis that an appeal notice is lodged immediately, but there may be no other lawyer present who is able to do that. You cannot do it if you are not authorised to 'the conduct of litigation' and you will need to explain this to the court. However, you may take the view that it would be consistent with your duties to the court and to your client for you to be authorised to take this step; and if so, then you might invite the court to grant the necessary authorisation, limited to that step.
53. If you are granted any authorisation to conduct litigation, then you should ensure that this is done in the form of an order which is made or recorded in writing.

### **Barristers under three years' standing**

54. All barristers of less than three years' standing are subject to the 'qualified person' requirements in the Handbook: see rS20-rS22.
55. If your authorisation extends to public access work, then the qualified person must also be entitled to carry out public access work: rC121. If your authorisation extends to conducting litigation, then the qualified person must also be entitled to conduct litigation: rS22.3. A qualified person must not act as a qualified person in relation to more than two other people, and each qualified person must be 'readily available' to provide guidance.

### **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](#).**