



Outsourcing and use of litigation assistants

Purpose:	To assist barristers regarding the rules and their ethical obligations relating to outsourcing and the use of litigation assistants
Overview:	Meaning of 'outsourcing' - obligations arising - interpretation of 'support services' - when 'critical' to delivery - clerking services - what is not 'outsourcing' - the effect of rC86 - contracts with third parties - other considerations arising (incl contractual terms, confidentiality, data protection, and client consent) - disclosure to client - agreement on terms - good practice - due diligence - financial and taxation issues - insurance - conflicts of interest
Scope of application:	All self-employed barristers
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Introduction

1. ‘Outsourcing’ is the term used in the BSB Handbook to refer to situations in which you engage a third party to supply support services. It includes, for example, the engagement of a paralegal, a litigation or research assistant, and external clerking or administration services, to assist you to carry out your work. It does not apply where your client enters into a separate agreement with a third party to supply such services: gC129.

‘Outsourcing’ under the Code of Conduct

2. Rule C86 in the Handbook reads as follows:

‘Where you outsource to a third party any support services that are critical to the delivery of any legal services in respect of which you are instructed:

.1 any outsourcing does not alter your obligations to your client;

.2 you remain responsible for compliance with your obligations under this Handbook in respect of the legal services;

.3 you must ensure that such outsourcing is subject to contractual arrangements which ensure that such third party:

.a is subject to confidentiality obligations similar to the confidentiality obligations placed on you in accordance with this Handbook;

.b complies with any other obligations set out in this Code of Conduct which may be relevant to or affected by such outsourcing;

.c processes any personal data in accordance with your instructions and, for the avoidance of doubt, as though it were a data controller under the Data Protection Act; and

.d is required to allow the Bar Standards Board or its agent to obtain information from, inspect the records (including electronic records) of, or enter the premises of such third party in relation to the outsourced activities or functions.'

3. It is important to note two things about outsourcing under rC86 at the outset, however:

(a) Rule C86 applies only if and when outsourcing is otherwise permissible, both in law and under the Code of Conduct.

(b) Compliance with rC86 in relation to any outsourcing does not mean in itself that you have complied with your duties under the Code, or with your obligations (both under the Code and in law) in relation to confidential information and data protection. These other duties are considered in later sections below.

Meaning of 'support services' and 'critical to delivery'

4. There is no guidance in the Handbook as to what is meant by "support services", or as to when such services will be "critical to the delivery of any legal services in respect of which you are instructed". It is suggested that "support services" will generally be services which are not a core part of the "legal services", but which support you in providing those services, and are aspects of what you would need to do, and could properly do, yourself (either personally or with the involvement of your clerks) in order to provide legal services. On that basis, it is suggested that the word "critical" relates to the need for and/or importance of the support service in the

delivery of particular legal services in respect of which you have been instructed, or in enabling you to provide legal services generally.

5. “Legal services” are non-exhaustively defined in the following terms:

““legal services” includes legal advice representation and drafting or settling any statement of case witness statement affidavit or other legal document but does not include:

(a) sitting as a judge or arbitrator or acting as a mediator;

(b) lecturing in or teaching law or writing or editing law books articles or reports;

(c) examining newspapers, periodicals, books, scripts and other publications for libel, breach of copyright, contempt of court and the like;

(d) communicating to or in the press or other media;

(e) exercising the powers of a commissioner for oaths;

(f) giving advice on legal matters free to a friend or relative or acting as unpaid or honorary legal adviser to any charitable benevolent or philanthropic institution;

(g) in relation to a barrister who is a non-executive director of a company or a trustee or governor of a charitable benevolent or philanthropic institution or a trustee of any private trust, giving to the other directors trustees or governors the benefit of his learning and experience on matters of general legal principle applicable to the affairs of the company institution or trust;”

Examples

6. The following examples have been considered by the Bar Council’s Ethics Committee, and may assist you in considering the application of rC86:

- (a) You may be instructed to prepare the trial bundles. After you have prepared a master copy, you might then wish to outsource the photocopying rather than do it yourself. If you have been instructed to produce the trial bundles, rather than simply the master copy for duplication by the client, then the copying of the trial bundles will be critical to the legal services which you have been instructed to provide. Outsourcing the copying would be permissible under the rules provided you comply with rC86. Most professional companies operating in this field ought to be able to provide terms and conditions which comply with the requirements of rC86; but if not, then you will need to agree such terms at the outset (see paragraph 14 below).

- (b) You may decide to engage a research assistant to assist you in advising your client on the law, or in preparing a skeleton argument. It is not clear whether this would be a ‘support service’.
- (i) If this *is* a ‘support service’, then the research will be reflected in your final advice, or your final argument, so would be critical to the legal services you are providing to your client. This would be permissible under rC86 provided the appropriate contractual arrangements are put in place. [Please note, though, that devilling work to another barrister, or asking a pupil to do work on a case, do not amount to outsourcing for the purposes of these rules – see gC129. For further assistance on this, you may wish to refer to the Bar Council’s document on devilling.¹]
- (ii) If legal research is *not* a ‘support service’, then what is involved will be a delegation of part of the legal services which you have been instructed to provide. If this is permissible under the terms of your contract and as a matter of law (issues considered in the Bar Council’s document on devilling²), then you are likely in practice to have to comply with the requirements of rC86 as a *minimum*, and your duties under the Code may require you to go further (e.g. as regards explaining to your client who will actually carry out that part of the legal services covered by your instructions).
- (c) Secretarial services engaged in order to produce type-written versions of opinions or court documents drafted or dictated by you will be caught by rC86.
- (d) By way of contrast, it is thought unlikely that the mere provision of conference facilities (and/or any refreshment services during a conference) by a third party would be regarded as being “critical to the delivery of any legal services”. On the other hand, the position may be otherwise if the conference facility providers are responsible for the transmission or temporary safe-keeping of case documents which are necessary for the purposes of delivering your advice or discussing the matter with the client or witness at such conference.
- (e) Many clerking services, and other administrative services which are critical to enabling you to provide legal services to clients, will be caught by rC86 if they are not provided ‘in-house’: see the next paragraph.

¹ <https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Devilling-Feb-20.pdf>

² *ibid*

Clerking services

7. The guidance says that rC86 applies to the outsourcing of clerking services (gC127). By implication, it does not apply to clerking services provided in-house by clerks who are employees of yours or of your Chambers (though it may well apply where clerks are self-employed and contract with Chambers on the basis that they are not employees). Clerking services are not defined in the Handbook but in the context of 'outsourcing' (where what are involved are "support services that are critical to the delivery of" your legal services) are likely to include administrative support such as taking bookings, liaising on a barrister's behalf with clients, courts and opponents and negotiating fees and contract terms. They may well also include fee collection. These are only examples of the sort of administrative services that are likely to be caught. Therefore if you or your Chambers engage an administration assistant who is not an employee, the arrangement must comply with rule C86. [N.B. You will be responsible in any event for any services provided 'in-house': see gC66, which provides that "You are responsible for the service provided by all those who represent you in your dealings with your client, including your clerks or any other employees or agents".]

What is not 'outsourcing'

8. Guidance gC128 makes it clear that these rules only apply when you engage the third party. If your client enters a separate agreement with the third party then rC86 does not apply. You may, however, have responsibilities to your client if you recommend the third party or if you have a financial interest in the arrangement. These are considered below under the heading 'Conflicts of Interest'.

9. Devilling work out to another barrister and asking a pupil to do work on a case do not amount to outsourcing for the purposes of these rules: see gC129. Devilling is dealt with in a different way: see, in particular the Bar Council's document on devilling³. It should also be noted that the duty of confidentiality (CD6) applies to a pupil or self-employed barrister who undertakes devilling work as if the ultimate client was their own client: see rC15.

The effect of rC86

10. As already noted above, rC86 does not of itself permit outsourcing – it merely lays down requirements which apply if it takes place. When considering whether it is appropriate to engage in outsourcing, you will have to consider the best interests of your client (CD2). In the above examples it may be more cost effective or necessary for exigencies of time for photocopying to be done by a printing firm or research done by a law graduate than for you to do it yourself. However, the outsourcing rules do not permit you to delegate to others work you should be doing yourself. This might

³ <https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Devilling-Feb-20.pdf>

most obviously be the case where your contract expressly prohibits outsourcing of any part of the work you have been instructed to do, but there may be other situations in which your legal and/or ethical obligations require you to do the work personally or 'in-house' in any event.

11. Rules C86.1 and C86.2 make it clear that outsourcing does not alter your obligations to your client and you remain responsible for complying with your obligations under the Handbook. Similarly, rC20 provides that you are personally responsible for your own conduct and for your professional work; and gC65 explains that this is not intended to prevent you delegating or outsourcing discrete tasks which someone else is well-equipped to perform, but that if you do so, you remain responsible personally for that work. In addition, Core Duty 7 requires you to provide a competent standard of work and service to each client: see, too, gC38. The effect of these obligations is not entirely clear. You would be well advised to proceed on the basis that you are likely to remain responsible for all aspects of the work done or produced by anyone to whom you outsource that work. This will include, for example, its content and quality, the timing and manner of its delivery, and the quality of service provided; and you should assume that the standard of work and service provided will need to be the standard which your client could reasonably expect of *you* if you had done the work yourself. This will also include any ethical obligations which may be engaged (e.g. confidentiality), so the more care you take in selecting the person to whom to outsource support services, in imposing contractual obligations on that person, and in managing the relationship with that person, the stronger your position is likely to be if something goes wrong.

12. Subject to any relevant terms of your contract with your client, any wrongful act or omission by the third party to whom you have outsourced work involving 'legal services' is also likely to give grounds for a claim by your client against you personally. Such work is, by definition, part of the work which you have been instructed to perform for your client, and the rules require you to retain personal responsibility for that professional work. This does not mean that you cannot limit your liability in lawful and appropriate ways, but it will ordinarily mean that you cannot simply exclude your own liability for that part of your work which you outsource to the third party. The same may or may not apply to other support services: this will depend on their nature and their effect on your delivery of legal services to your client.

13. The rules do not permit you to outsource work that you would not be allowed to do yourself. For example, if you are not authorised to conduct litigation, then you cannot engage a third party to do anything that involves the conduct of litigation (for example, the issuing or service of proceedings). Further guidance on what the 'conduct of litigation' involves can be found in the [BSB Guidance to Barristers on the](#)

[Public Access Scheme](#), and also in the Bar Council's document entitled, "[Role of barristers in non-solicitor cases](#)".

14. It is clear from rC86.3 that you must have a contract with the third party, and that your contract must satisfy the requirements of that rule regarding confidentiality (rC86.3.a), data protection (rC86.3.c), and allowing BSB access to information or premises (rC86.3.d).

15. Rule C86.3.b also requires the contract to ensure that the third party will comply with any relevant obligations in the Code of Conduct. This is a potentially very wide obligation and it may be difficult to predict in advance whether, and if so which, obligations might be engaged in any particular case. It is considered that in most cases it will be sufficient to include a clause in the contract requiring the third party to comply with any obligations in the Code that are relevant to or affected by the work which the third party is instructed to carry out. It would also be prudent to include a copy of the Code or a web link to it in the contract.

Other considerations, including contractual terms, confidentiality, data protection, and client consent

Duties

16. In order to decide whether outsourcing is permissible and appropriate, there are several duties you will need to bear in mind:

- (a) You must act in the best interests of each client (CD2).
- (b) You must act with honesty and integrity (CD3).
- (c) You must not mislead, or cause or permit to be misled, any person to whom you supply, or offer to supply, legal services about any of the matters set out in rC19. These include who is legally responsible for the legal services (rC19.3), who will actually carry out the work involved (rC19.2), and the basis of charging for that work (rC19.2).
- (d) You must keep the affairs of each client confidential (CD6). This means that you must protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law, or to which your client gives informed consent (rC15.5).
- (e) You will owe a legal duty of confidence to your client.
- (f) You will owe legal duties to your client as a data controller for the purposes of the Data Protection Act 1998. You may also owe such duties

to others, e.g. other parties to litigation or to a transaction, and potential witnesses.

- (g) You must comply with the terms on which you have accepted instructions, which may include provisions which bear on whether you are entitled to outsource support services and/or on whether client consent is needed to any particular outsourcing of support services. For examples, the terms may prohibit you from outsourcing any part of the legal services, or may require you to seek consent before doing so.

17. In the light of those various duties, whether or not it is appropriate and permissible for you to engage in outsourcing, whether your client's express consent will have to be obtained to any particular outsourcing, and whether or not your client must be told the details of the arrangement (including what fee is payable to the third party), will depend on the nature of the services being outsourced, the extent to which information will be disclosed to the third party, and all the circumstances. These will vary from case to case.

18. The practical considerations to which those duties give rise are similar to those which may arise in relation to devilling, except that outsourcing of support services will not necessarily involve you in outsourcing work to another lawyer or which involves any 'legal services'. With that qualification, you may find practical assistance in addressing these duties in paragraphs 10 to 14 and 18 to 34 of the Bar Council's document on devilling.⁴

19. In addition:

- (a) You must not enter into any outsourcing arrangement which has or is intended to have the effect of circumventing any of your professional or regulatory obligations to your client.
- (b) You must not discriminate in your choices of third parties to whom to outsource work on any unlawful or improper basis.

Good practice

20. The following would also be good practice:

- (a) The possibility of outsourcing is a point to consider when you are first offered instructions. If you do intend to outsource some tasks, or wish to have the option to do so, then you should be open about this and discuss any concerns that your clients (lay or professional) may have

⁴ <https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Devilling-Feb-20.pdf>

about it. You should then include appropriate provisions in the terms on which you accept the instructions.

- (b) If you wish to outsource certain work at a later stage, then even if you do not need your client's consent to this, you should consider whether it would in any event be appropriate to give your client is given the opportunity to object to or question the outsourcing of that work, the identity of the third party, and the proposed terms. Whether this would be appropriate the case will depend on the circumstances, including the nature of the proposed outsourcing, the terms on which you accepted instructions and any discussions that you may have had about this with your clients at the outset.
- (c) When considering those matters, you should bear in mind the advice below under the heading 'conflicts of interest'.
- (d) You should not engage a third party to whom your client has reasonable objections.
- (e) In deciding whether and to whom to outsource work, you should take appropriate steps to enable you to be confident that the third party is suitable, competent and reputable. In other words, you should consider carrying out some due diligence. Depending on the nature of the service in question, this might include some or all of the following, by way of example:
 - (i) Investigations into the background of the service provider.
 - (ii) Obtaining references.
 - (iii) Identifying any applicable ethical standards or codes of conduct/practice to which the provider should adhere.
 - (iv) Identifying any relevant qualifications.
 - (v) Looking for quality assurance systems or certification.
 - (vi) Reviewing the provider's systems for identifying, resolving and managing conflicts, and for protecting confidentiality.
- (f) You should consider whether the outsourcing involves any particular risks which you ought to explain to your client.
- (g) If you are considering outsourcing to a provider outside the UK, and even more so outside the EU, then you should consider what additional risks might apply, what laws and ethical standards may apply to the relationship (which may be different from those which would apply

within the UK or EU), the practicalities of enforcement against the provider, and the effect of these issues on your duties under rC86.3.

- (h) You should ensure that the terms you agree with the service provider, and any systems that you and they have in place, enable you:
 - (i) to manage the relationship effectively;
 - (ii) to supervise the work as and where necessary;
 - (iii) to ensure that the provider does not put you in breach of your ethical obligations;
 - (iv) to ensure that you know how problems will be resolved; and
 - (v) to protect your client's interests if the provider fails to perform.
- (i) You should keep records of the work outsourced and the terms on which it was outsourced. It might also be wise to record the reasons for the outsourcing, including the reasons for choosing the particular third party, particularly where the work involves 'legal services' or you have a close connection with the third party.

Payments, referral fees, tax and insurance

21. Given that outsourcing involves you engaging the third party, it must be assumed that you are also going to be responsible for that party's fees or charges. As a result, you should ensure that what you want the third party to do and what you are going to pay for it is clearly set out in your contract with the third party.

22. You are also prohibited from paying or receiving a 'referral fee' as defined in the Handbook (rC10). You are also prohibited more generally from offering, promising or receiving commissions, referral fees and gifts which might reasonably be seen as compromising your independence (gC18). Underpinning these prohibitions are the Core Duties to act with honesty and integrity (CD3), to maintain your independence (CD4), and not to behave in a way that is likely to diminish the trust and confidence which the public places in you or in the profession (CD5). Where you are outsourcing work to a third party, it would be a breach of those Core Duties for you to ask for or accept any payment for outsourcing the work to that third party (irrespective of whether the technical definition of a 'referral fee' in the Handbook would catch such payments). This does not, though, prohibit the third party, for commercial reasons, offering his services to you at less than would be his normal rate if the entire benefit of that lower rate is passed on to your lay client (e.g. where you charge your client separately for the outsourced services, and you charge your client the reduced fee for those services which you have negotiated with the third party).

23. In addition, you also need to consider the effect of outsourcing on your own charges. The considerations will be similar to those which arise in relation to devilling – see paragraphs 15 to 17 of the Bar Council document on devilling⁵ – but with the qualification that the costs incurred by you in relation to support services may be less likely in practice to affect the amount of your fees, because such costs are usually included in your agreed fees (whether those are fixed fees or based on an hourly rate). One thing that you cannot do (see the advice concerning devilling) is simply charge for work at your hourly rate if you have paid someone else to do that work.

24. You would not ordinarily be required to explain in detail what expenses you may incur in providing your services. This applies to in-house costs (such as staff costs), to commonly incurred expenses (such as travel and hotel expenses), and to other incidental expenses (e.g. photocopying charges that you incur), *unless* you intend to make an additional or separate charge for any of these. On the other hand, if you are asked about such costs, or volunteer information about them in the course of negotiating your fees (e.g. as part of the justification for asking for a particular sum for a brief fee or other fixed fee), then you must give accurate information and not mislead the person with whom you are negotiating.

25. The Bar Council’s current understanding is that a third party’s fees or charges incurred by you personally for support services relating to legal services which you are providing may be treated for tax purposes in the same way as other outgoings, such as Chambers’ rent or travel expenses. This assumes, however, that the third party is an independent contractor, engaged under a genuine arm’s-length relationship. If that is not the case (most obviously, if the third party is an employee), then the tax implications are likely to be more complex. You should take whatever advice you need so as to ensure that you comply with all relevant tax legislation.

26. BMIF insurance covers you for the provision of legal services. There seems to be no reason in principle why BMIF cover would not apply to a claim made against you where an error made by the third-party results in a failure properly to perform your services for which you bear a legal liability.

Conflicts of interest

27. The potential for a conflict of interest will arise when (a) you outsource work to someone with whom you have a close professional or personal relationship, or (b) you outsource work to someone with whom you have a financial relationship, such as a service company in which you or your Chambers has an interest. The same will be true if you do not engage that third party yourself, but you suggest or recommend a particular third party to your lay client.

⁵ <https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Devilling-Feb-20.pdf>

28. There is no prohibition on using the services of a third party in these circumstances. Indeed, your client may well be relying on your experience to identify someone whom you know personally to be well-equipped to provide the necessary service. In order to avoid any conflict of interest, however, you must ensure that your client is not misled as to any interest or relationship you have in or with the third party, and the following would at least be good practice:

- (a) You should only engage such a third party in good faith and if it would be in the best interests of your client to do so.
- (b) The arrangement should be transparent.
- (c) Your relationship with or interest in the third party may be a factor relevant to whether it is appropriate to disclose your intentions and that relationship or interest to your client, and to give your client the opportunity to object to or question the outsourcing of that work, the identity of the third party, and the proposed terms: see paragraph 20 above. In some situations, you may be *obliged* to do this (legally or ethically).
- (d) You should keep a record of any communications or discussions with your client about those matters.

29. It would be good practice to take a similar approach if you recommend that your client use or engage a particular third party, such as a service company or paralegal, directly. In addition, you should also ensure that you comply with the following provisions in the Code of Conduct:

rC81 -

If you have a material commercial interest in an organisation to which you plan to refer a client, you must:

- .1 - tell the client in writing about your interest in that organisation before you refer the client; and*
- .2 - keep a record of your referrals to any such organisation for review by the Bar Standards Board on request.*

rC83 -

If you refer a client to a third party which is not a BSB authorised person or an authorised (non-BSB) person, you must take reasonable steps to ensure that the client is not wrongly led to believe that the third party is subject to regulation by the Bar Standards Board or by another approved regulator.

30. Where you make a recommendation in a situation covered by paragraph 27 above, you may also have legal obligations along similar lines.

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 refer to the professional practice and ethics section of the Bar Council’s website [here](#).