



The Bar Council

## Use of the Crown Court Digital Case System & the Common Platform

<b>Purpose:</b>	To advise barristers on use of the DCS & the Common Platform and avoiding the conduct of litigation
<b>Overview:</b>	The DCS & the Common Platform – Pupils’ access to the DCS & the Common Platform – The conduct of litigation – BSB guidance – The use of the DCS & the Common Platform 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>Last Reviewed:</b>	January 2024
<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>

### The DCS & the Common Platform

1. The Crown Court Digital Case System (“CCDCS”, commonly shortened to “DCS”) is a web-based platform that allows users to upload, view and print case documents. 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, unused material etc. 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. The Common Platform system is a case-management system covering cases in the Magistrates', Youth and Crown Courts. The rollout of the Common Platform to all Courts has now been completed.

5. In the Crown Court, the Common Platform will initially be used simply for administrative case management (e.g. for advocates signing in to Court), with the DCS continuing to run in parallel for case materials<sup>1</sup>. Furthermore, it is not currently intended to migrate current cases onto the Common Platform. Accordingly, the majority of Crown Courts will continue to require the use of the DCS for some years.

6. In the Magistrates' and Youth Courts, the Common Platform is used both for administrative case management and for accessing and uploading case materials.

7. However, the Bar Council's understanding is that the Common Platform, unlike the DCS, is not currently being used to upload case documents and materials. Therefore the guidance in this paper principally relates to the DCS and, in particular, covers circumstances where uploading documents to the DCS might amount to the conduct of litigation.

### **Pupils' Access to the DCS & Common Platform**

7. His Majesty's Court and Tribunal Service (HMCTS) have confirmed that there is no issue with accounts on the DCS being created for pupils (including first six pupils). There is no similar confirmation in relation to pupils' access to the Common Platform, but it is assumed that the position there will be the same. Pupils can therefore, where appropriate, be granted access to their pupil supervisor's case files.

8. It remains a pre-requisite to obtaining a DCS or Common Platform account to have a working CJSM address.

9. As would be expected, pupils are required to agree to the terms and conditions of the DCS, the Common Platform and CJSM when opening accounts. This is, of course, in addition to the usual professional conduct requirements.

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<sup>1</sup> It is anticipated that the Common Platform will eventually replace the DCS, but the DCS will remain in parallel for the foreseeable future.

## The conduct of litigation – BSB Guidance

10. This short note addresses the concern that criminal barristers who use the DCS may be considered to be ‘conducting litigation’.

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

12. The Legal Services Act 2007 provides<sup>2</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>3</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.

13. The definition of the ‘conduct of litigation’ is contained in Schedule 2 para 4(1) of the Legal Services Act 2007. It is:

- 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).

Paragraphs 4(1)(a) of the definition is tolerably clear. The leading case on paragraph 4(1)(c) is *Agassi v Robinson* [2005] EWCA Civ 1507. The Court of Appeal held that ‘ancillary functions’ were confined to ‘formal steps required in the conduct of

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

<sup>3</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)

litigation’. The Court of Appeal did not, however, consider it necessary to give a list of which steps in a case would or would not fall into this category. It also commented that ‘this is a difficult area, and it is unfortunate that this important definition is so unclear’.

14. The scope of paragraph 4(1)(b), and its effect on the meaning of ‘ancillary functions’ in paragraph 4(1)(c) has now been considered by Cavanagh J in *Baxter v Doble* [2023] EWHC 486 (KB). The words ‘*the commencement, prosecution and defence of such proceedings*’ were not included in the statutory definition prior to the 2007 Act and were not, therefore, considered by the Court of Appeal in *Agassi*. Cavanagh J took the view that, in light of the changed language, the question of whether litigation was being conducted should be viewed in the round. 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.

15. The decision is unhelpful inasmuch as it has muddied a previously relatively clear line between which actions do, and which actions do not, amount to the conduct of litigation. Its correctness in this regard may be doubted; but for the time being the Ethics Committee considers that, if the totality of the services that a barrister will or may provide to a client could, taken “in the round”, be considered broadly as the conduct of litigation, they would be well-advised to get a conduct-of-litigation extension to their practising certificate. However, where a barrister is acting on the instructions of a solicitor, it is very unlikely that the barrister will be regarded as conducting the litigation in addition to or in replacement of the solicitor. In those circumstances, the Guidance previously given by the BSB as to what constitutes the conduct of litigation still provides a relatively safe guide. (The BSB Guidance is said to be under review in light of *Baxter v Doble*, and barristers should consult it, and guidance given by the Ethics Committee on “Direct Access and the Conduct of Litigation”, in their latest versions.)

16. The BSB’s Guidance on Conducting Litigation (‘the BSB Guidance’) sets out its view as to what amounts to the conduct of litigation. It states that it includes<sup>4</sup>:

- **issuing proceedings or applications;**
- filing an acknowledgment of proceedings;
- giving your address as the address for service;

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<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 5.

- **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.

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>5</sup>.) Barristers who lack authorisation to conduct litigation should therefore proceed with caution.

17. The BSB 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.

18. The BSB 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 BSB Guidance at para 8. 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 (provided that the correspondence in itself does not amount to the conduct of litigation as is likely to be the case, for example, if the purpose of the letter was to effect formal service).
- Lodging certain documents for hearings. The BSB Guidance states *"It is proper for barristers or clerks to lodge certain types of documents 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. The BSB Guidance states *"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"*.

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<sup>5</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.

- Covering applications to fix trial dates. The BSB Guidance states *"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.
- Discharging a duty or a courtesy to the court. The BSB Guidance states *"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.

19. Because the Common Platform system will apply in the Magistrates' and Youth Courts as well as the Crown Court, particular issues may arise in respect of the use of the Common Platform by barristers instructed in the Magistrates' and Youth Courts, where they will often be instructed as agents under the solicitor's legal aid order rather than under a representation order for counsel.

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

20. 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.

21. 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.

Document	Permitted	Not permitted
Indictments		•

Defence Statements <sup>6</sup>	•	
Formal Admissions <sup>7</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	•	
PET forms (in the Magistrates' & Youth Courts)	•	

22. 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

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<sup>6</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 **Error! Reference source not found.** (third bullet point) above.

<sup>7</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.

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.

23. Any argument that a barrister, when uploading a document, is merely acting as an agent of their Instructing Solicitor, and that it is the solicitor who should be considered to be doing the act amounting to the conduct of litigation, has now been rejected in *Ndole Assets Ltd v Designer M&E Services UK Ltd* [2018] EWCA Civ 2865. It would be unsafe to assume that a barrister doing any of the “not permitted” acts indicated above on the instructions of their Instructing Solicitor will not be conducting litigation.

24. If the Court, or a judge, seeks to persuade a barrister to use his or her access to the DCS 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.

25. 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. If such a right is granted, it is considered prudent for the barrister to ensure it is recorded in a formal order or direction given by the court.

26. 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<sup>8</sup> (i.e. by instructing solicitors, or the client).

### **Public access and use of the DCS**

27. Lay clients are not permitted to use the DCS or the Common Platform. Following lobbying by the Bar Council’s Direct Access Panel, HMCTS amended its guidance to provide barristers who are instructed on a public access basis with access to the DCS, whether or not they have authorisation to conduct litigation.

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<sup>8</sup> In *O’Connor v BSB* (2012), High Court of Justice, unreported, the Visitors of the Inns of Court found that filing a Defence and Counterclaim at court would amount to the conduct of litigation, but sending a copy to the other side for information purposes would not.



28. The DCS Guidance<sup>9</sup> states:

*Direct Access Barristers (DABs) may have access to the Crown Court Digital Case System (DCS) and the XHIBIT Portal if they confirm they are acting for a client. It is important for DABs to be able to show that they are the instructed legal representative either by being named as a party's representative:*

- (i) in any legal aid representation order made under section 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;*
- (ii) in any notice for the time being given under rule 46.2 (Notice of appointment, etc. of legal representative: general rules), provided that person is entitled to conduct litigation in the court under section 13 of the Legal Services Act 2007; or*
- (iii) in writing or electronically by that party, provided the representative is entitled to exercise a right of audience under section 13 Legal Services Act 2007.*

*Please see Criminal Procedure Rules and Practice Directions 2020 for further information.*

#### ***Access to Digital Case System (DCS)***

*Courts will require confirmation of a representation order, or a confirmation of appointment in writing or electronically, which will be uploaded to DCS Section U: Representation.*

*New or first time applications for access by DABs will also have registration confirmed through a search of the Barristers' Register.*

There is currently no equivalent HMCTS guidance in relation to the use of the Common Platform by barristers instructed on a public access basis, but it is believed that the DCS Guidance will be equally applicable in that context.

29. Thus a public access barrister who has litigation rights falls under paragraph (ii) of the DCS Guidance above, and one who is simply exercising a right of audience falls under paragraph (iii). In both cases, they will be allowed access to the DCS, and presumably the Common Platform also, provided their lay client gives the appropriate notice to the court.

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<sup>9</sup> HM Courts & Tribunals Service [Access the Digital Case System and XHIBIT portal – direct access barristers](#)

30. It should be noted, however, that in terms of conducting litigation a barrister who is instructed on a public access basis is in the same position as one instructed by a solicitor. If the barrister does not have authorisation to conduct litigation they should not do those things that the table in paragraph 19 indicates are ‘Not permitted.’ The lay client will have to serve or lodge those documents themselves, for example by sending hard copies to the court or the prosecution.

### **Gaining the right to conduct litigation**

31. Since 2014, self-employed barristers have been able to apply for an extension to their practising certificate to allow them to conduct litigation. Though that right is granted by the Bar Council as an authorised body (see paragraph 12(a) above), the application process is managed by the Bar Standards Board.
32. The application form is available on the BSB’s website.<sup>10</sup>
33. The application fee is £90. If the information provided satisfies the ‘Outcomes’ listed in the form, the BSB will grant the applicant authorisation to conduct litigation. If the application is refused the barrister can apply to the Independent Decisionmaking Body for a review.

### **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](#).

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<sup>10</sup> [Conducting litigation: Guidance and applications \(barstandardsboard.org.uk\)](http://barstandardsboard.org.uk)