the barrister

The "conduct of litigation": defining the parameters

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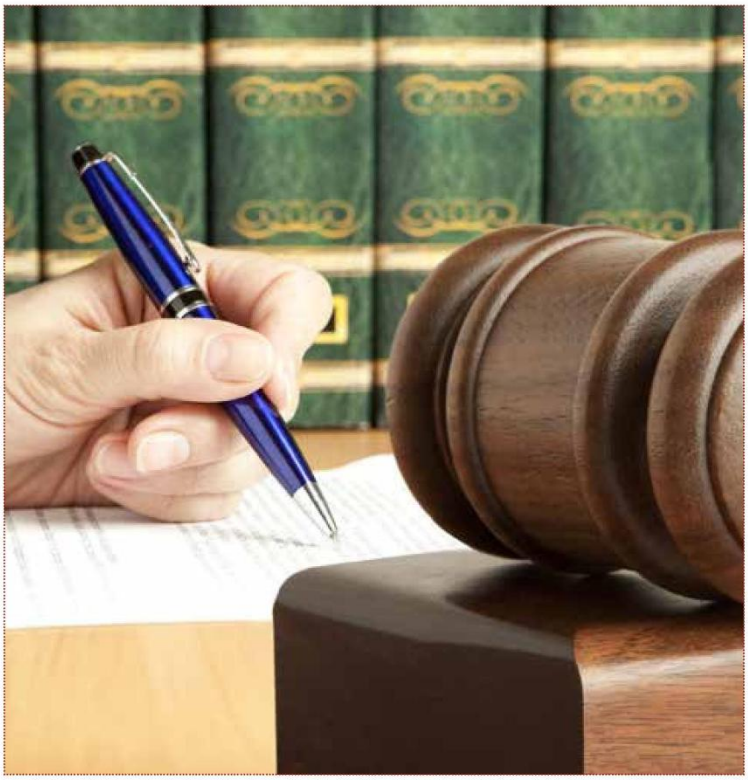
By Tom Bradford, Russell-Cooke LLP

The blurred definition of the *"conduct of litigation"* has long presented risks for self-employed barristers as flexible litigation arrangements have developed over recent years. A self-employed barrister who trespassed on the solicitor's traditional role by taking a step for a client amounting to the *"conduct of litigation"* (such as commencing proceedings) would commit not only a disciplinary but also a criminal offence under the Legal Services Act 2007. The entitlement to exercise rights of audience did not allow him or her to conduct litigation. Besides a self-employed barrister's core functions of advocacy, advice and drafting, exchanging skeleton arguments and liaising with an opponent regarding court orders were not considered to amount to the conduct of litigation and were permitted, but beyond this there was significant uncertainty as to where the boundary lay.

The source of uncertainty was the obscure statutory definition in the LSA 2007 and its predecessor provisions. It stated that the *"conduct of litigation"* was not only *"the issuing of proceedings"* and *"the commencement, prosecution and defence"* of such proceedings but also "ancillary functions" in relation to proceedings. In O'Connor v Bar Standards Board [2012] All ER (D) 108 (Aug), Sir Andrew Collins criticised this as being *"singularly unhelpful"* in determining which activities were covered. Lord Justice Dyson (as he then was) commented in Agassi v Robinson [2005] EWCA Civ 1507 *"it is unfortunate that this important definition is so unclear"*.

Amid the raft of changes brought in last year by the new BSB Handbook and revised Code of Conduct, self-employed barristers are now able to apply for an extension to their practising certificate to conduct litigation. The conduct of litigation is a 'reserved legal activity' in the terms of the LSA 2007. It can only be undertaken legally by an authorised person. Barristers had been instructed directly by litigants in person without solicitors since the Lord Chancellor approved the Bar's public access arrangements in 2004, but this had not put barristers on an equal footing with solicitors. Unlike a solicitor, a barrister acting for a lay client under the public



access scheme was expected to have the lay client, as litigant in person, carry out the formal steps in the litigation. Without a solicitor involved, there was greater potential for a barrister, as sole representative, to inadvertently overstep a poorly defined divide.

Was it permitted, for example, for a self-employed barrister to sign a statement of truth on behalf of a client accompanying a statement of case? The Civil Procedure Rules had permitted this for many years. CPR 22.1 had provided that the *"legal representative"* may provide a statement of truth accompanying a statement of case. This was defined in CPR 2.3 as including a barrister. However, the Guidance for Barristers issued for public access work in June 2004 took a different view. According to that guidance, it was purportedly "clear" that signing a statement of truth on behalf of a client amounted to the *"conduct of litigation";* in O'Connor, a barrister was prosecuted by the BSB for doing precisely that. The Tribunal at first instance accepted the BSB's submission that the barrister should have appreciated that, in light of the guidance, signing the statement of truth on behalf of the client was not permitted. However, given that the guidance itself was out of step with the provisions of the CPR, Sir Andrew Collins found upon appeal that the rationale for this approach was *"singularly unimpressive"*. The defendant barrister was completely exonerated.

What about writing to a firm of solicitors enclosing a defence and counterclaim, which had been filed with the court? Paragraph 401 of the old Bar Code of Conduct had specifically prohibited a self-employed barrister from *"the conduct of correspondence with an opposite party"*. By contrast, Agassi, decided in 2005, had made it clear that the conduct of correspondence with an opposite party was not necessarily to be regarded as the conduct of litigation.

This point was also tested in O'Connor. The BSB brought misconduct charge against the public access barrister for sending a copy of the defence and counterclaim, which had been filed in the case, directly to the solicitors on the other side. The BSB's rationale for the charge was that there was little to distinguish filing a statement of case with the Court (which did amount to conduct of litigation), from sending a copy to an opponent solicitor. By sending the correspondence, the barrister had overstepped the line, committed the offence, and as a consequence had engaged in *"discreditable"* conduct. This proposition was thoroughly rejected upon appeal, Sir Andrew Collins finding it "somewhat absurd". There was a clear difference between the act of lodging/ issuing with the Court, and courtesy to an opponent through notifying them in correspondence of what was coming.

The Bar Council's 'Working Lives' survey in 2014 indicated that about one in seven barristers had firm plans to apply for authorisation to litigate. A further quarter of those surveyed were considering it. The addition of authorisation to litigate means that there are now four main models of conducting litigation involving a self-employed barrister: (i) full representation by solicitor and barrister (ii) lay client as litigator, with licensed access professional instructing barrister as advocate (iii) lay client as litigant in person instructing barrister as advocate under the public access scheme and (iv) representation by barrister as authorised litigator and advocate. Those applying for authorisation to conduct litigation will have to be satisfied that they have procedures in place to conduct the more involved steps in proceedings. Disclosure, costs schedules, taking proofs, case management and many of the other resource intensive exercises are likely to require greater administrative resources than typically seen in a traditional Chambers.

Some barristers acting for litigants in person under the public access scheme found the restriction on conducting litigation unnecessary and artificial, particularly where the formal steps concerned were straightforward and administrative in nature. It is easier to see how the issue of the scope of the "conduct of litigation" has arisen in cases involving public access (O'Connor) and licensed access (Agassi) than in the traditional model of representation, where solicitors undertake these activities without the issue arising. To those self-employed barristers who have navigated these issues, the availability of authorisation to litigate is a welcome development.

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