

THEORY &

3 perspectives: one year on from its launch, COMBAR's James Leabeater,

COMBAR & BARCO

James Leabeater of 4, Pump Court, explains how BARCO is operating and its role in minimising credit risk for barristers accepting instructions



Barristers need to get used to considering and evaluating credit risk. Since January 2013 barristers and solicitors have been agreeing contracts with each other. For some, not much has changed. Under the BSB's Standard Contractual Terms, for example, the solicitor is liable to pay barristers' fees, whether or not the lay client has paid the solicitor. The solicitor takes the credit risk.

But many law firms refuse to accept credit risk. In particular, in January 2013 the Law Society issued a Practice Note proposing

amendments to the Standard Contractual Terms which would make the solicitor liable only if and when the lay client had paid the solicitor – a so-called "pay when paid" provision.

In order to mitigate the obvious potential difficulties, COMBAR and the City of London Law Society negotiated a set of terms for commercial work. The terms set out four different bases for payment. Basis A is the traditional position: the solicitor is liable whether or not in funds. Basis B is "pay when paid". Bases C and D both provide for direct payment to the barrister by the lay client – the difference is that D requires a further contract between the lay client and the barrister, whilst for C the solicitor acts as agent for the lay client.

No agreement could be reached about which basis should be the default one – so, if a barrister chooses to contract on the COMBAR/CLLS terms (and there is no obligation to do so) the basis for payment, as well

PEACE OF MIND

Rhys Taylor, a barrister at 30 Park Place, Cardiff, explains how BARCO has worked for him



Sitting on my desk early last year was a print out from Carol Harris, with 13 attachments relating to something called BARCO, the new Bar Council escrow account.

Over the summer I was instructed by a Public Access client for a one day final Financial Remedy hearing. For one reason and another, the final hearing ended up as a day's worth of negotiation, with every prospect of settlement. The case was adjourned for three months for a further final hearing. At the end of day the client said to me, "Can

you please continue to represent me?"

The problem for us both was, at that moment, I had no idea how much work I was going to be asked to do. Was it merely the drafting of letters to try and finalise settlement, was there to be a round table meeting, did I need to draft an order? Neither of us had any idea precisely how much work was going to be required to either settle the matter, or to bridge us over to the adjourned final hearing.

The 13 attachments came to mind and I explained, briefly, about barristers not being able to hold client money and the nature of an escrow account. Back at my desk, with plenty of other things to do, I started to study the detail contained within the 13 attachments...

Then a light came on: was not Carol Harris of BARCO that helpful lady who used to administer the FLBA? Having picked up the phone to Carol, I established within about 5 minutes how the account worked. In

CASE MANAGEMENT

David Barnes, former Chairman of the IBC and Chief Executive of 39 Essex Street, offers a clerk's view of BARCO



Under rules rC73, rC74 and rC75 of the new Bar Handbook, formerly known as rule 407 of the old Code of Conduct, the handling of client money is strictly prohibited for any barrister practising in England and Wales. But what does this mean to practitioners and their clerks in everyday terms? Well, simply put, whilst there are some exceptions, if the client has any rights to have any funds refunded which have been unspent, then you are handling client money. Avoiding this pitfall can be cumbersome and sometimes lead to you taking adverse credit risk or,

even worse, losing new business, something none of us can afford in this climate.

Handling client money is serious misconduct that will leave you uninsured and exposed. Chambers' accounts are not an alternative and neither are your personal business accounts. If your fees are due and you are being paid for nothing more than that in accordance with your agreement with your client for work already done or that which has been clearly scoped out in advance, then you are within the rules. But if you are unsure of your fees or wish to take advantage of the Bar's ability to conduct litigation, then the ability to have a third party take payment upfront where a refund of residual unspent funds may become due, is clearly the answer.

So if you can't handle client money, and you can't simply deposit it into your chambers account until the appropriate fee note has been raised then what options do you have? With public access instructions you can either

PRACTICE

barrister Rhys Taylor, and clerk David Barnes offer their views on BARCO

as the amount and timing of fees, must be specifically negotiated.

Where the basis for payment is B, C or D, the barrister must consider and evaluate the credit risk posed by the lay client. That can be difficult and time consuming. It may also be impractical where instructions are urgent, or the lay client is abroad.

One potential solution to an unsatisfactory credit risk is for the lay client to pay in advance. But barristers cannot take money on account.

That is where BARCO's escrow account service comes into play. The lay client lodges funds to be held in accordance with agreed terms, and BARCO disperses funds in accordance with those terms until the case concludes, for a fee of about 2% of earned fees with a cap of £250 per transaction.

In the event of a dispute, the funds are frozen pending resolution of the dispute. The lay client has the security of knowing that BARCO is regulated

by the Financial Conduct Authority and it is subject to the jurisdiction of the Financial Ombudsman. All funds held within BARCO are segregated from all other funds associated with the Company and they are insured.

For those doing international work, BARCO also offers real advantages. If you are instructed by lawyers or clients abroad, and things go wrong, it may be difficult to recover your fees whatever the terms of your agreement. Using BARCO can give you the assurance that you will be paid; and it can give your client the assurance that cash paid on account will be safe, and returned, with interest, in the event that the sum paid on account exceeds the fees chargeable.

For cases where solicitors cannot or will not take fees on account, BARCO provides a useful service to limit barristers' credit risk. And in this new contractual world, we all need to learn to think about credit risk every time we accept instructions.

short, the client funds would be securely deposited and could not be unilaterally withdrawn by the client. With the client's and my respective signatures, and two certified identification documents, an escrow account was open and ready to receive client funds. It was really easy to set up.

I agreed a further retainer with the client; she could instruct me in various matters relating to her Financial Remedy claim, up to a limit of 10 further hours, whereupon she would have to enter into a new retainer with me or cease to instruct me. 10 hours worth of fees were deposited into the account. This was far easier than having to agree a new retainer every time she asked me to do a further piece of work.

The matter was eventually contested at the adjourned final hearing. Prior to this I drew down fees incurred to date. The escrow account was then topped up and a new retainer signed to cover the final

hearing – once a BARCO account is open, all future fees in that matter must be paid via the account.

The BARCO service may also be of use to barrister mediators and arbitrators, wanting to secure funds. It may also assist members of the Bar being instructed via solicitor referral, where the parties wish to apply the 'COMBAR basis B' contractual terms (i.e. the solicitor will pay counsel if they receive funds from lay client, which the solicitor endeavours to do) and there are particular concerns about the lay client's solvency or willingness to pay. In that event that barrister may wish to secure the fee, by way of an advance deposit into BARCO, falling short of having to ask for payment of fees up front. This may be of particular relevance to barristers undertaking family instructions.

The cost of 2% of gross fees is a tax deductible expense.

scope the work out strictly beforehand for each piece of work, stopping and starting your work on a case until the appropriate remuneration has been received, you can bill in arrears (not a sound credit decision) or you can use BARCO.

BARCO allows you to secure your fees in its trusted third party account whilst ensuring that you are not handling client funds, which both eliminates your credit risk and improves your client's experience. Why does it improve your client's experience? Because it provides for smoother case management and offers them consumer protection they otherwise would not receive. For international instructions you no longer have to take a blind credit risk from a client you have never met through an overseas law firm. You can now get your fees paid into BARCO, without handling the funds until you are contractually entitled to payment, without the burden of pre-scoping the whole matter.

