

# Pioneering work

What started out as a quiet revolution is, one decade on, fast becoming an important resource for litigants in person who need quality and affordable representation. Here some of the Bar's direct access pioneers explore the challenges, the opportunities and the impact on relationships with solicitors

## The same... but different

**Andrew Granville Stafford** considers the attractions, the pitfalls and the mechanics of public access work

**A**mong my first public access clients were an African prince, a 70s prog rock star and the former managing clerk of a large solicitor's firm whose preferred method of payment was an envelope containing £50 notes. I was hooked. This was 2006 and, although public access had already been around for two years, take up amongst barristers was still low. Of course, in those days, criminal, family and immigration work were all excluded. But most civil barristers were still sceptical if not positively anti. I remember one member of chambers asking me why on earth I would want to do it. I pointed out that in the first three days of that particular week I had done cases in the High Court, the county court and the Court of Appeal. All were public access instructions and all the fees were already in my account. He got the picture.



I tell [the solicitors] that if they stop doing advocacy, we'll stop doing public access

A senior clerk

I joined the Public Access Bar Association when Marc Beaumont set it up in 2007 and two years ago I became its Chairman. In January 2011 Chris Bryden, a fellow member of chambers, and I were approved by the Bar Standards Board (BSB) to provide public access training as Barristers Direct. We have noticed over the years we have been doing the training that barristers now come on the courses with a greater level of starting knowledge, picked up from colleagues in chambers already doing this type of work. No longer do we get asked whether we can actually speak to our client on the 'phone or is it really true that we can insist on payment up front. Nowadays it is more likely to be whether we would recommend BARCO (see p16) and whether you can accept intermediary instructions from a paralegal.

The work we do in a public access case is no different from what we do when instructed by a solicitor. We still go to court; we still draft documents and we still give advice. It is just that the way we do it is slightly different. In my view, those who embrace the differences are more likely to be successful. Don't expect a beautifully presented set of instructions. Don't necessarily even expect to get all the relevant documents. Do expect that a degree of handholding will be required. Despite these hurdles, your client still needs help from someone. You can provide that, and probably for significantly less money than he would have paid a solicitor.

One of the things we emphasise in our courses is the importance of a good client care letter. It is your contract with the client. Many barristers simply use the BSB's model letter without giving the matter more thought. In my view, the model letter is deficient in the way it deals with terms for payment, the Consumer Contract Regulations, alternative (eg legal expenses insurance "LEI") funding and return of client documents. Provided the letter covers the regulatory requirements set out in rule C125 of the Public Access Rules (see box, right), we are allowed to add sections and make sections "more robust" (in the words of the Bar Council's Access to the Bar (ABC) first quarterly newsletter).

Until 2013 barristers under three years' call were not allowed to do public access work. That prohibition has now been removed and the junior Bar make up a significant proportion of those that we train. They rightly see direct instruction as a way to build up their practice. As Alistair MacDonald QC said in his inaugural address as Chairman of the Bar, why would a litigant want to engage the services of a paid McKenzie Friend, some of whom charge £100 per hour, when they could get a fully qualified and regulated junior tenant for a similar rate?

In his address, Alistair MacDonald said he was mindful of concerns that some have about the effect on chambers' solicitors. In my experience of teaching, this tends not to be an issue for those working in the larger legal centres, such as London, Birmingham and Leeds. However, in other smaller centres I have heard of solicitors making veiled threats about not instructing barristers

### BSB PUBLIC ACCESS RULES: A SUMMARY

Before you can accept public access instructions as a self-employed barrister, you must:

1. Hold a full practising certificate.  
If you have less than three years' practising experience, you must have a public access "qualified person" readily available to you to provide guidance;
2. Have undertaken and satisfactorily completed a BSB approved training course.  
If you were registered to undertake public access work prior to October 2013, you must also complete a top-up training course by 4 October 2015 or cease to undertake public access work. Details of such courses can be obtained from the BSB's website;
3. Notify the Bar Council's Records Office of your intention to undertake such work; and
4. Have insurance cover as required by the BSB Handbook. Bar Mutual Indemnity Fund cover satisfies this requirement.

When you accept public access instructions, you must notify your client in writing of:

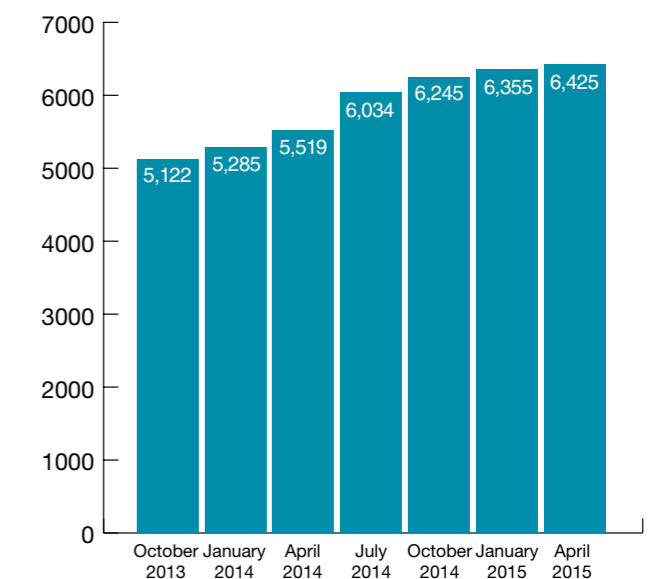
1. The work you have agreed to perform;
2. The fact that you are not authorised to conduct litigation by the BSB (unless you are);
3. What they can expect from you if you are prevented from completing the work by professional duties or conflicting professional obligations;
4. The fees you propose to charge, and the basis on which your fees will be calculated;

5. Your contact arrangements; and

6. Information about your complaints procedure.

The full Public Access Rules are Rules C119 – C131 of the BSB Handbook. The BSB has also produced *Public Access Guidance for Barristers* and a model client care letter for public access work. These can be obtained at [www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/public-access/](http://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/public-access/).

Number of barristers registered to undertake public access work by quarter, since the new training regime came into force in October 2013:



Source: Bar Standards Board

who take on public access clients. I do not think such threats need be taken seriously – soon there will be so many of us that have the public access qualification that they will be doing well to find a barrister who only accepts solicitor instructions. In any event, as one senior clerk told me, the answer is simple. "I tell them," he said "that if they stop doing advocacy, we'll stop doing public access."

I also find that the attitude of solicitors to us varies depending on whether or not they are still in practice. I have been instructed

on a number of occasions by solicitors who have ceased practising, not always through freedom of choice. Whilst it is undoubtedly true that some current solicitors are not keen on the scheme, former solicitors recognise it for what it is: a cost effective way of accessing good quality advice and representation.



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## The post-LASPO landscape

### Simon Sugar explains how, post-LASPO, one of the challenges for the Bar is how to devise a cost-effective structure for the provision of public access services to meet the increasing demand from both “public” and “commercial” litigants-in-person

“Our remedies oft in ourselves do lie”

*All's Well That Ends Well*

**W**e are standing at a pivotal moment in history for the independent Bar. The last great evolution of working practice for the Bar took place in the late 19<sup>th</sup> century when the Bar became firmly established as a referral profession following the Judicature Acts. We are now at a point in time when the tectonic plates of the legal landscape are on the move once more. Not so very long ago, many barristers would neither have contemplated, nor even countenanced the prospect of public access work becoming a material part of their practice. Understandably we didn't wish to compete with our instructing solicitors for work, we were not set up to market our services to the public and we were reticent about taking direct instructions from our lay clients without the filter of a solicitor.

Post-LASPO, the Bar has had to respond to the increasing number of litigants in person who do not have sufficient resources to fund both solicitor and counsel and who would go unrepresented were it not for the availability of public access. The Bar has also had to react to the growth in the numbers of litigants who choose to take advantage of the cost benefits of public access. We may not have sought these changes to the fundamental nature of our practice but we are living in times of change and we need to adapt.

Individually and collectively, one of the challenges for the Bar is to devise a cost-effective structure for the provision of public access services which enables us to meet efficiently the ever-increasing demand that we are facing.

Unaffordable or excessively expensive public access fees can be explained in part by the absence of appropriate litigation support. If instructed on a public access basis, a barrister will charge for the provision of services that one expects a barrister to provide normally at a barrister's hourly rate. However in many cases there is an inevitable risk that a barrister will also be asked to perform services that are not traditionally performed by a barrister with the consequence that a barrister ends up charging for the provision of paralegal or junior solicitor services at a barrister's hourly rate. The cost-inefficiency to a lay client is obvious. At the heart of this problem is the self-employed status of the barrister and the understandable reticence of chambers to invest extensive fixed costs in the employment of in-house paralegal and junior solicitor support.

Of course not all public access instructions are borne out of the withdrawal of state funding. There are increasing numbers of litigants in person who actively choose to instruct the Bar directly in order to achieve a significant discount from the binary cost of instructing both solicitor and counsel. Greater efficiency and costs savings for “commercial” litigants in person could be achieved if barristers did not have to charge their normal hourly rates for tasks more efficiently performed by paralegals or junior solicitors. Whilst unaffordability of public access barristers is not an issue for these clients, the unnecessary exposure to avoidable legal fees will be.



“We are now at a point in time when the tectonic plates of the legal landscape are on the move once more”

#### Outsourcing support services

How then can the Bar provide economically efficient and more affordable public access services? The answer to the question posed is to provide public access barristers with outsourced support services that have traditionally been provided by firms of instructing solicitors, but at a fraction of an instructing solicitor's cost. The litigant in person contracts with the provider of the support services and the barrister is provided with the support needed to supply all the benefits of public access at an economic price.

Outsourcing support services not only enables a public access barrister to provide cost efficient services; it also enables the barrister to take on work that he or she may not previously have been able to accept. Public access instructions cannot be accepted if a barrister forms the view that it is either in the best interests of the client or in the interests of justice for the client to instruct a solicitor: rC120.3, BSB Handbook.

When making best interest assessments the barrister will focus on the tasks that his or her public access client will be required to perform. If the client is unable to perform the tasks, or the case is too complex or voluminous for them to perform those tasks, then the barrister would ordinarily be required to refuse to act. But if support services were available so that tasks too complicated for the client could be outsourced, then there is no reason in theory for the barrister to refuse to act. Information about issuing proceedings could be provided, witness statements taken, evidence collected, documents managed, trial bundles produced and/or photocopied and assistance provided during longer hearings.

If a range of support services traditionally supplied by a solicitor were available to assist a public access barrister but at a fraction of the cost, the barrister could take on more public access work and the client would benefit from cost efficient legal services. With these aims in mind, along with a solicitor and a senior HR executive, I set up PASSlegal ([www.PASSlegal.co.uk](http://www.PASSlegal.co.uk)).



**Contributor Simon Sugar**

is a practising barrister and a director and shareholder in PASSlegal

#### CASE STUDY: ON THE HIGH STREET

*Amanda de Winter explains her route to setting up a high-street direct access practice and argues that a full litigation practice offers the junior Bar a viable future*

Is direct access a real alternative to traditional methods of practice? My answer is a resounding yes, if you are able to offer a full litigation service to your client.

I opened my “high-street” direct access practice two years ago after a fall-out with my chambers over promoting the service. I was asked to consider my position, which I did, and decided to leave chambers.

Starting from scratch, the business has been very organic and shaped by the expectations of my clients. Perhaps the most surprising aspect of all that I have learned since starting to practise in this way is that the client largely expects you to be able to do the same job as a solicitor – but better.

Fortunately, my background as a solicitor has helped. What this has enabled me to do is to see where the weak points are in terms of the ability of the average barrister to deal with a direct access client – accurate record keeping and dealing with client files, rather than just handing the papers back to the solicitor, to name just a couple of examples. I am not sure that the direct access courses around at the moment sufficiently cover the direct access litigation process and this may need addressing by the various providers if the Bar is to fully embrace the opportunity.

There are many advertisements encouraging barristers to join one web-based direct access service or another. But I would argue that if it is expected that the only way you will win work is by joining a web-based site, where the client has no real access to you, then direct access will remain in the shadows. This is not the bulk of direct access work available. Clients want a full service and yes, you will have to do more of the things that a solicitor does in terms of client handling and talking money, but I am now at the stage where I am turning work away and need further to recruit.

I run my business with a group of barristers, with administrative and paralegal staff as support for the litigation side. The lucrative litigation work (family and civil) now makes up 80% of my business. The opportunities for like-minded barristers to grow this type of business, and to offer every town and city a real alternative legal service, are enormous. Franchising/licensing will be the next step for Barristers & Co.

We are also currently working on an offering to chambers by way of litigation support for their direct access clients. We would appreciate any input from clerks to discuss how this might best work.

I have heard of solicitors' firms who have threatened to withdraw all instructions, right across chambers, if they found out that anyone was accepting direct access instructions. Unfortunately, too many see it as biting the hand that feeds you. What the answer to that is I don't know for

those chambers, because barristers, largely, will not make the stand. We exist in an unusual state of self-employment where we work together, in competition with each other.

Some of the larger sets, who have ventured into the corporate world of CEOs and NEDs, have more and more excellent mouths to feed without changing the way they do business. It will very soon not be enough to be excellent at banging your head against the same brick wall and there may well be some large implosions before too long.

I am a great champion of tradition and believe that the independent Bar, and all it stands for, is one of the jewels in the British constitution. The wig and gown are synonymous with independence, justice and fearless representation. We should not lose this.

But the Bar is battered and bruised by the fee cuts and the Higher Rights of Audience now being exercised by many solicitors. That is apparently OK, say some solicitors, whilst direct access, however, is not.

The reality is that if a barrister already has a very busy practice he/she will not be interested in this article. The bulk of direct access work, in my experience, is a full litigation service. Barristers & Co does get calls just to attend at a hearing and increasingly solicitors are sending their clients to find their own direct access barrister. But direct access is so much more. This is the future of legal services in my opinion, whether that be entirely barrister-led offerings or the “F” word... fusion. I now have several firms of solicitors with whom I work closely. We share the clients, each having different parts of the case. More solicitors will accept this in time and it will bring new ways of doing business.

The Bar must fight, it must not be found at the end of its days limping along on the tail coats of a legal services world that no longer exists. It is a terrible shame that those halcyon days have gone but we have to move forward. The senior Bar, who have seen those better times, can be more resistant and reluctant to accept change but we are facing the reality that there may be no junior Bar if new ways are not found.

I believe that the BPTC providers should now be offering extra training to prospective pupils in the rules of direct access, litigation and how to offer a direct access service and I am making representations to both the Bar Standards Board and teaching providers in this regard. We must never lose the excellence and the experience of the Bar and the incomparable training and support gained in chambers, but there needs to be an element of re-structuring and re-training in order to accomplish a Bar fit for the brave new legal services world.

The Bar is its own best USP and has the best ready-made brand which is recognised worldwide. Let's use it...

*Amanda de Winter, Barristers & Co*

## Capturing the market's imagination

### Entrepreneurship and collaboration: Stephen Ward explains why “innovative” thinking around public access isn't the real starting point

**I** have been to far too many conferences lately that urge legal professionals – particularly the Bar – to be “innovative” in order to survive in the modern legal world. In reality, you need two things (at least) to create a sustainable business: firstly, entrepreneurial thinking – the ability to spot opportunities and vision and the character to take advantage of them; and then engagement – both internally and externally, to capture the imagination of your marketplace. Too often, the pressure to be “innovative” is the starting point, rather than recognising that you need to address the requirements of your marketplace and plan from there.

Pandora's box, I believe, is finally open and has released the

concept of public access to the marketplace. The corporate world (including “marketing partners” – anyone who can introduce or generate a case) and increasingly savvy consumers are aware that they can save money and time and are confident in working directly with barristers on their case. Public access, especially in the B2B world, is now a valid alternative to accessing legal support and can provide a wealth of opportunities.

What is preventing public access from taking off is that many chambers do not want to run the risk of “upsetting” instructing solicitors. This is a very black and white interpretation of the opportunities from public access. Unless there is a fundamental

Public access

business model and investment in the process to build something that customers want, can use easily and can trust, then public access is only ever going to be a side-line business and benefit individual barristers (thus upsetting solicitors).

We launched Clerksroom Direct in January 2015 as a direct result of enquiries from our corporate contacts (with whom we have always tendered for advocacy work). We knew the work was there and, thanks to our commercial business structure and 15 years of lessons learned, we assessed whether we could fit the bill, devised a solution and then invested significantly into creating a bespoke and now award-winning platform to process the work, service the clients and generate the marketing support to achieve it. We have never viewed public access as an additional income stream for barristers, but as a means to meet and enhance the needs of the emerging consumer and corporate market – one that is available to us as well as solicitors.

We could have fallen foul of traditional accusations by solicitors of “biting the hand that feeds us”. Yes, solicitors should be nervous. Over the last 12 months, a rising tide of marketing partners and customers have approached us (even we have been surprised). They do so because they are looking for a new way to access legal services and come from places you wouldn’t expect – including what were claims management companies.

Our use of technology to build an online instruction and case management portal for clients (a bespoke creation that was created as a means to an end – innovation wasn’t the driver here, delivery was) offers accessibility to legal services which will rival many law firms. On paper, this could fuel the flames of claims that we are in competition with solicitors. This couldn’t be further from the truth.

Our experience is that the type of customer seeking our service was looking for an alternative. We haven’t had to sell it to them.

That is what solicitors need to understand. In fact, those that do understand have done very well with us. For example, we have instructed top 100 commercial law firm Jeffrey Green Russell with £50,000 of work over the last 12 months. As Nigel Frost, Director of the firm says: “Times are changing and whilst I see many solicitors complaining, I look for new opportunities where others see defeat.”

While some chambers have professed “innovation” in public access, they haven’t been able to forge ahead as, crucially, they either haven’t invested in creating a service that meets the needs of the marketplace or haven’t been bold enough to collaborate. Collaboration isn’t something the Bar is historically good at. It is working for many law firms and ABSs but the Bar is very territorial. However, we’ve managed to attract 130 chambers into our network, offering public access clients the choice of over 1000 experienced barristers – the largest barrister network in the UK. We charge the client for a quality service and because it has been designed around them, they have total faith in our service and we are generating repeat instructions that would be the envy of many a law firm.

Ultimately, barristers are the product but not the only tool we use to meet customers’ needs; we are able to satisfy our long-term instructing solicitors and also work closely with marketing partners who help to feed in more work. We also cherry pick our collaborators and advisers, ensuring we gain the trust of, and work with, leading minds in technology, marketing and legal expertise. I don’t think that’s innovation; that’s what any entrepreneur would do to ensure a successful and sustainable business and we need more of it at the Bar. ●

 **Contributor Stephen Ward**  
Managing Director, Clerksroom & Clerksroom Direct



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