

Public access

Marc Beaumont's direct advisory access proposal was put into practice by the Bar Council in 2004. He explains the principles

THERE ARE PERHAPS FEW, IF ANY, EXAMPLES of a policy resoundingly rejected by the Bar Council, which ever went on to see the light of day. Public access is a startling exception.

As an elected member of the Bar Council and a civil practitioner it struck me in the late 1990s, that the government's wholesale evisceration of civil legal aid as we all knew it would be devastating for many civil juniors. It seemed to me that a scheme which I christened 'DAA' (direct advisory access) would salvage much lost work for the civil Bar, enabling members of the public to instruct the Bar directly and to save cost.

So one Saturday morning several years ago, I found myself standing up nervously in front of the assembled Bar Council, moving the Bar equivalent of a Private Member's motion advocating DAA. The experience was akin to addressing a brick wall. The great and the good were unmoved. I was defeated. Yet there were some powerful supporting speeches, which, albeit in the minority, made it clear that some barristers would welcome such reform.

OFT's scheme

Unbeknown to any of us, the OFT had been working on its own scheme. Within a month it published a paper advocating something far more radical than DAA. It supported full access by the public to the Bar. Facing *de facto* fusion of the professions, the Bar Council panicked. The then chairman of the Bar took me to one side and told me that, on reflection, the great and the good rather liked my idea of DAA after all as it was somewhat less radical than the model being proposed by the OFT.

The rest is history. Cajoled and coerced by the OFT, the Bar Council designed its own model of direct access, now known as public access. Whilst the Bar Council's inability to take a fresh and unilateral stance on this topic is regrettable, the end product is nevertheless a scheme of which those who were responsible for its design can be quite proud.

Since 6 July 2004, we have had public

access (PA). Since that seminal date, the public have been able to instruct the Bar directly in many instances of civil and commercial work.

The first key point to appreciate is that there is no change of barrister function. The service most often sought by a PA client will be legal advice, whether written or oral. It is also possible for the PA barrister to be deployed as a behind-the-scenes legal and tactical adviser, drafting correspondence for the client to send him or herself, drafting pleadings, perhaps negotiating a settlement with the other side, or perhaps organising and attending a mediation.

The next key point is that not every case will qualify for PA. Immigration and most family work are prohibited areas for PA. Apart from some pre-proceeding and other specific exceptions, most criminal work is excluded from the scheme. But the whole range of civil and commercial work may be conducted by a PA barrister.

The rules require – and thankfully trust – the PA barrister to verify at the outset whether the client is capable of providing coherent instructions, organising papers and acting on the advice recommended by the PA barrister. If not, the case should not be accepted at all by the PA barrister. The client will then need to instruct through a solicitor. Yet for motivated and organised individuals and businesses tied to a budget, the scheme is a godsend. It means that they can take expert advice, quite often at a fixed fee and gain a rapid insight into the pros and cons of their problem or dispute.

Loss for solicitors?

Does this mean that solicitors will lose work to the Bar? Not at all. There is much the PA barrister cannot do. He cannot issue or serve proceedings. He cannot send out letters on his letterhead, interview witnesses or instruct experts. He must not handle client money (apart from his own agreed fees). This means that such key functions must be performed either by the instructing client alone,

or more usually by a solicitor. In many cases the PA barrister, having started off with some advice-giving, will have to recommend that the client instructs a solicitor. So solicitors will come into PA cases at a slightly later stage, rather than being denied work altogether.

PA barristers therefore tend to develop their own panels of solicitors to whom they recommend PA clients. That can only be fruitful for the solicitors so recommended. It also reverses the traditional dynamic of the barrister-solicitor working relationship. The PA barrister will offer work to solicitors as well as taking it.

What of teething problems with PA? The first problem with PA is the blank page syndrome. Having spent my entire working life being spoilt by solicitors providing at least an outline of the background facts, it was educational to have to begin with a blank page when taking instructions. Perhaps only momentarily, there was a disguised sensation of mild alarm in my first PA conference when I realised that I would have to formulate and give an oral opinion there and then, since I did not have any facts in advance. The need to fact-find in conference necessarily tests and develops one's ability rapidly to form accurate opinions and to give clear and accurate advice.

Fees

Then there is money and how to handle it. I was bashful at first. Yet it is essential that there is scrupulous transparency about fees. So I agree fees by email or on the telephone and require payment in advance of conferences or other work. The fees are agreed and paid before each tranche of work. In order to offer a speedy service, payment by cheque is discouraged. One does not have eight days in which to await clearance. Many of my clients seem to like electronic payment. Internet banking is both efficient and immediately verifiable.

The next issue is the management of a dispute. It is all very well doing one's work by

stages or tranches and being paid for it, but there will always be a letter, fax or email to read, a quick decision to take, a response to draft. It is unfair to expect clients to agree and pay fees for such small, urgent items of work. It makes one seem petty. Invariably, I find that I do not charge for such small items. Yet it has to be accepted that being closer to the barrister and without anyone else to turn to, the PA client will email and telephone the PA barrister with some frequency. This management of events as they unfold is part and parcel of the PA barrister's life. Yet it can be taken in one's stride if one is organised, polite and punctilious.

Benefits

There are unexpected benefits for all. You cannot do PA work and maintain any kind of pompous, professorial or eccentric persona. Across a table and on your own, people will see straight through you.

And you do get closer to the client. Some of them will become your friends. You tend to interact on a fairly informal basis, assisted by the beauty of email. Being a little closer (but not too close) is motivational. You do try that bit harder for people you like.

The discipline of costing an item of work in order to sort out payment in advance tends to have a downward impact on fees. One is compelled to charge a fixed fee. The client thereby enjoys certainty and a fee ceiling. The barrister need not subsequently waste time and resources chasing many modest fees for months on end.

Functions become simplified and truncated. In one two-hour conference, I took a note of the facts and then typed a defence and counterclaim while the client waited. He was on a budget. The pleading forced the other side's hand and the case settled. He saved thousands by coming to me.

Mediation

PA and mediation is a marriage made in heaven. I tend to promote my interest – and faith – in mediation with all PA clients. Most PA disputes can be mediated. Most PA clients do not know anything about mediation. It is a revelation to them. They can receive technical advice on the merits, have their letters drafted in a way which holds a dispute in abeyance and have someone to help them to set up a mediation, all on a modest budget. In many PA cases, the process of taking a PA barrister's advice, engaging in mediation and settling the case may be achieved in a matter of weeks.

Is this scheme a good reform? Traditional-

ists may dislike it. They will say that it is not the Bar that they know and love. Those who opposed my Bar Council motion were probably thinking along such lines. Yet I recall a time when I started out when there were no PCs, fax machines, mobile telephones, the internet or email. Can it seriously be argued that that was a better time?

Whether or not the scheme is popular, it is certainly a mark of progress. It provides cost-effective access to expertise. It can expedite the process of dispute resolution. It will help barristers to discover sources of work denied to them by the abolition of civil legal aid - and all this without offending the learned readers of this journal too much at all!

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