



The Bar Council

## Using a Third Party Payment (or Escrow) Service

<b>Purpose:</b>	To assist barristers in understanding their BSB Handbook obligations when using third party payment service providers
<b>Overview:</b>	Summarises reasons why an escrow service may be useful, relevant BSB Handbook rules and some of the essential factors to consider when choosing a third party payment service provider
<b>Scope of application:</b>	Self-employed barristers acting on a public access basis
<b>Issued by:</b>	The Direct Access Panel
<b>Originally issued:</b>	August 2021
<b>Last reviewed:</b>	N/A
<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>

### Introduction & Background

1. Direct access practitioners face a range of professional and commercial challenges in servicing their clients whilst remaining fully compliant with the BSB Handbook rules on fees and the prohibition on holding client money.
2. In August 2018 and after 5 years of operation, the Bar Council closed down its Barco escrow facility and is unlikely to launch an alternative in the foreseeable future. Whilst there are other third party payment, or “escrow”, service providers, many practitioners remain understandably cautious about which provider, if any, to turn to.

3. This document sets out some of the reasons why an escrow service may be useful and some of the essential factors to consider when choosing an escrow provider. It does not, however, make any specific recommendations as to which provider to engage.

### **The BSB Handbook prohibition on holding client money**

4. rC73 in the BSB Handbook provides:

“Except where you are acting in your capacity as a manager or employee of an authorised (non-BSB) body, you must not receive, control or handle client money apart from what the client pays you for your services.” [Emphasis added.]

5. In short, payment of fees already due to the barrister or a fixed fee in advance is not client money for the purposes of the Handbook (gC106 and gC107).

6. Further information on client money is provided by the Bar Council in the guidance document ‘Client money and payments in advance’<sup>1</sup>.

7. Non-compliance with rC73 has patently serious consequences that may lead to disciplinary action by the regulator, the Bar Standards Board. However, the prohibition on handling *any* client money other than fees (in advance or in arrears) can cause practical difficulties, for example:

- a. Receiving prompt/regular payment for work done on an hourly rate and/or reassurance that the client has the funds available for the work;
- b. Paying court issue, application, allocation or hearing fees, as well as other litigation-related disbursements ;
- c. Paying experts’ fees; and
- d. Assisting with sending/receiving settlement funds.

8. Your duty under rC73 includes you and anyone acting on your behalf, including any “ProcureCo”, which includes your chambers’ bank account or and monies paid to or held by a ‘ProcureCo’ (gC103).

9. Please note in relation to b), paying court fees, the Bar Council guidance document titled ‘Direct access and conduct of litigation’<sup>2</sup> suggests at paragraphs 23.1 and 23.2 that this can be done in a manner compliant with rC73 by either you handing a cheque written by your client payable to HMCTS to the court or by paying the fee yourself and then seeking reimbursement from the client.

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<sup>1</sup> [www.barcouncilethics.co.uk/documents/client-money-payments-advance/](http://www.barcouncilethics.co.uk/documents/client-money-payments-advance/)

<sup>2</sup> [www.barcouncilethics.co.uk/documents/direct-access-work/](http://www.barcouncilethics.co.uk/documents/direct-access-work/)

## Third Party Providers

10. A solution to the above issues is to use a third-party payment provider (such as an escrow provider). The way this arrangement typically works is as follows. A direct access client opens an account with an escrow service and deposits funds into the account. The barrister will have no control over the money in that account, which is controlled by the escrow provider. When the barrister's fees fall due for payment, an application is made to the escrow provider to release funds from the client's account to the barrister. Money in the client's account can also be used to pay disbursements, such as court fees or payments of damages and costs.

11. The escrow account acts in a similar way to a client account operated by a solicitor's firm. However, there is a crucial difference. The barrister does not exercise any control over the account. Thus, the barrister is not in breach of the prohibition in rC73 on handling client money.

12. If a barrister engages in an arrangement with a direct access client which involves the use of a third party payment (or escrow) service, the barrister must ensure it complies with the relevant provisions of the Handbook. The relevant rule is rC74 and the guidance is gC110 and gC111.

### rC74

*If you make use of a third party payment service for making payments to or from or on behalf of your client you must:*

*.1 Ensure that the service you use will not result in your receiving, controlling or handling client money; and*

*.2 Only use the service for payments to or from or on behalf of your client that are made in respect of legal services, such as fees, disbursements or settlement monies; and*

*.3 Take reasonable steps to check that making use of the service is consistent with your duty to act competently and in your client's best interests.*

### gC110

*Considering whether your client will be safe in using the third party payment service as a means of transmitting or receiving funds. The steps you should take in order to satisfy yourself will depend on what would be expected in all the circumstances of a reasonably competent legal adviser acting in their client's best interests. However, you are unlikely to demonstrate that you have acted competently and in your client's best interests if you have not:*

*.1 ensured that the payment service is authorised or regulated as a payment service by the Financial Conduct Authority (FCA) and taken reasonable steps to satisfy yourself that it is in good standing with the FCA;*

*.2 if the payment service is classified as a small payment institution, ensured that it has arrangements to safeguard clients' funds or adequate insurance arrangements;*

*.3 ensured that the payment service segregates client money from its own funds;*

*.4 satisfied yourself that the terms of the service are such as to ensure that any money paid in by or on behalf of the client can only be paid out with the client's consent;*

*.5 informed your client that moneys held by the payment service provider are not covered by the Financial Services Compensation Scheme.*

### **gC111**

*Unless you are reasonably satisfied that it is safe for your client to use the third party payment service (see rC74.3, gC109 and gC110 above), advising your client against using the third party payment service and not making use of it yourself.*

13. It is clear that the rule and guidance are designed to ensure two things. First, that the barrister cannot exercise control over the client's funds. Second, that those funds are reasonably safe. There are obvious risks to both the client and the barrister if the third-party payment provider becomes insolvent or misappropriates client funds. It is therefore essential that the barrister undertakes suitable checks to justify the risk of the client depositing funds with the provider.

14. It is therefore suggested that it would be prudent to carry out the following checks before entering into an arrangement with a lay client which makes use of a third party payment service. For simplicity, such a provider is referred to below as EscrowCo.

a) Have I obtained a copy of EscrowCo's terms and conditions?

Without having considered the terms and conditions, it would not be possible to be satisfied that money can only be paid out with the client's consent (see gC110.4). The guidance also says you should ensure that the client's funds are segregated (gC110.3). This might be apparent from the terms and conditions, but might necessitate further checks being made with EscrowCo.

b) Have I checked whether EscrowCo is FCA regulated?

The FCA register is available on the FCA's website at <https://register.fca.org.uk/s/>.

- c) Have I obtained my lay client's agreement to use EscrowCo and have I informed my client whether or not the provider is covered by the Financial Services Compensation Scheme?

Rule C22 requires to confirm in writing the terms and/or basis on which you will be acting, including the basis of charging. It seems likely, therefore, that if you are asking your lay client to enter in to an escrow arrangement to pay your fees this should be set out in writing. In a public access case, you are likely to do this by including the relevant information in your client care letter. A suggested form of wording is:

*"We have discussed and agreed to use a third party payment or "escrow" facility provided by [EscrowCo] to hold your funds. EscrowCo [is/is not] registered with the FCA [registration number xxx]. You understand that I have undertaken checks that can be expected of a reasonably competent legal adviser to satisfy myself that [EscrowCo] provides a safe facility; however, I cannot guarantee that your funds will be safe. By using [EscrowCo] you understand that you will have a direct contractual relationship with [EscrowCo] and, accordingly, you accept the associated risks when using the facility notwithstanding the checks that I have carried out.*

*Please note that any funds held by EscrowCo [are/are not] protected by the Financial Services Compensation Scheme."*

15. Note that rule C75 says the BSB may give notice that only third party payment services approved by the BSB may be used. As at the date of this guidance document, no such notice has been given.

### **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](#).