

the law

Winter 2020/21



Armstrong Watson's specialist publication for the legal profession

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Avoiding the Risk of
Overtrading

Why does the health &
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Plus an interview with...

Andy Poole interviews Bill Kirby, Director at
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advisor to law firms

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Welcome

Welcome to the Winter 2020/21 edition of The LAW, the specialist publication for the legal profession from the legal sector team at Armstrong Watson.

What a strange and turbulent year 2020 has been for all of us. As we start 2021, I'd like to reach out to you all to thank you for working with Armstrong Watson. There have been lots of ups and downs in the last few months and I hope that a break over Christmas has helped you to recharge your batteries so you have a strong 2021.

In the vein of wellbeing, we include in this edition our views on **supporting your people** through these strange times with their own finances. We also include the story of a **shocking case of defrauding vulnerable people** and our involvement in bringing about justice. Other articles include:

- The risk of over-trading
- The prospect of negative interest rates on client accounts
- VAT on recharging expenses to clients
- An interview with Bill Kirby on outsourcing

Specialists are available from all of our 17 offices, to provide pro-active support and advice to lawyers in compliance and business improvement matters. This publication is designed to allow us to share our collective experience in acting for lawyers throughout the UK.

To find out more on any of the above, including how we can work with you to help you and your clients, please do get in touch with me.



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The case of David Barton – how financial abuse of vulnerable victims became a business model



A number of years ago I was approached by Merseyside Police to assist them in their investigation into the activities of David Barton, owner of Barton Park Nursing Home in Southport. At the initial meeting I had no idea I was getting involved in one of the most shocking cases of my 25 year forensic accounting career.

The nursing home targeted wealthy individuals offering top quality care, excursions in vintage and classic cars, a home furnished with antiques and was even building a spa for its residents. Unsurprisingly the fees associated with this care and the added extras were eye wateringly expensive.

The allegations against Barton were serious and included:

- Manipulating vulnerable residents into 'investing' in property and other assets
- Becoming sole power of attorney over residents' affairs
- Persuading residents to make him the sole beneficiary of their wills
- Stealing assets from residents including a watch collection which was found under his bed and later sold for around £2 million
- Liquidating residents' assets and then taking the cash
- Selling his two Rolls Royce cars to two elderly women for £500,000 each when their true value was £100,000 and £150,000
- Charging for care and services which were never delivered including excursions for bed bound residents.

One of the most disturbing aspects of the case was the manner in which David Barton manipulated the residents. He specifically targeted residents who had no children and/or little contact with any close family. If close family members were involved he used various methods to stop them visiting including telling the family that the resident had asked them not to visit. He also told residents that their existing financial advisers were stealing from them or giving them bad advice, leading them to depend upon Barton in managing their finances.

The worst case involved a couple called Katy and Gordon Willey. Gordon had Alzheimer's disease and began living at Barton Park when Katy joined him for what was supposed to be a short stay. As they were a wealthy couple with no children they immediately became a target for Barton. Katy believed in the power of crystals and psychics and so Barton employed two psychics to make spells to banish the Willey's family from the home as their niece was raising concerns about their care. Katy always intended to return to her own home but Barton was heard to tell her she would be at the mercy of her family who would declare her mentally incompetent or poison her. He even accused the Willey's gardener of being a paedophile when he raised concerns about them.

Barton charged the Willeys £1 million for just two years' care, but this was not enough for him. He devised a full life care package for them at a cost of £5.5 million. However, Katy collapsed before signing the papers and he was found desperately trying to revive her. Katy eventually died after Barton's solicitors demanded that she transfer all of the money she possessed to him. He then tried to claim £10 million from the estate.

Despite all of this, the family had to bring a case against Barton in order to have Gordon moved to another care home.

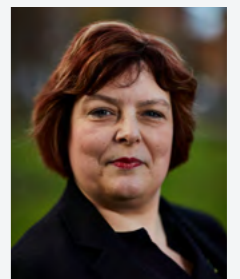
Barton was convicted of five fraud offences, three counts of theft, false accounting and transferring criminal property. I was lucky enough to be in Court for the sentencing together with all of the police officers and the families of the victims and it is an experience I will never forget. Sentencing Barton to 21 years imprisonment (later reduced to 17 years on appeal) the judge was unflinching in his comments including "I am struggling to remember anyone as dishonest as him, as morally bankrupt as him" and "You are a despicably greedy man, a hypocrite who claims you were caring for the residents". The judge also said he believed Barton had no remorse for his actions.



One of the most worrying parts of this case is the fact that complaints had been made against Barton for years with a number of families of living and deceased residents bringing legal actions against him for his financial abuse. Barton had groomed the residents to the point where they were convinced he was their best friend. One individual who was clearly a victim of Barton's frauds refused to believe Barton had done anything wrong and would not co-operate with the police.

As a result of this case there have been calls for the establishment of a regulator or supervisor to whom relatives can turn if they suspect relatives are being financially abused by those caring for them. There are also calls to stop care home staff from holding power of attorney over residents' affairs and for greater supervision in cases where residents change their wills in favour of carers. As far as I am aware, none of these proposals have been taken forward to date, leaving care home residents at the mercy of those who set out to benefit rather than care for them.

My role in this matter included providing a report and evidence in relation to the laundering of the funds arising from the sale of a number of very expensive cars by Barton. I also provided a report in relation to the financial affairs of one of the care home staff, Rosemary Booth, who was also convicted of fraud and sentenced to 6 years imprisonment. I remain proud to have been a part of such an important and heart breaking case, it is certainly one I will never forget.



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Negative interest rates?

In December 2020 the Bank of England MPC voted unanimously to maintain the bank interest rate at 0.1% and noted that the future of the UK's economy is unusually uncertain. Given the fragile nature of the economy, there is the possibility that at some point in the future the MPC may vote for negative interest rates in order to stimulate economic activity.

A number of central banks around the world are starting to experiment with negative interest rates, including Japan, Denmark, Sweden and Switzerland, and so there is precedent which the Bank of England will no doubt be closely monitoring.

If interest rates do become negative, what are the implications for law firms, particularly in relation to the client money held?

Long gone are the days when the high interest rates earned on client money meant such interest was the source of the greatest profits for some law firms! Firms have now got used to not profiting from holding client money, and have accepted that there is in fact a cost of doing so, given the need to employ cashiers and ensure compliance with the SRA Accounts Rules and the requirements of the COFA's role.

Now minds are turning to a different picture entirely though – what would happen if there were direct costs to a law firm of holding client money, in the form of interest payments to the financial institutions? At present there is no definitive answer from the SRA or guidance from the Law Society, and of course even if the central bank rate was negative the banks may not actually charge interest on law firms, but would what happen if they did is not clear.

Although the SRA Accounts Rules are flexible, do allow bespoke arrangements to be agreed with individual clients and do permit interest policies to be applied for a 'fair amount', the SRA has cast doubt on whether law firms could pass on the cost to clients.

Let's look at the detail:

1. Rule 7.1 of the SRA Accounts Rules notes that – "You account to clients or third parties for a fair sum of interest on any client money held by you on their behalf"
2. Rule 7.2 of the SRA Accounts Rules notes that – "You may by a written agreement come to a different arrangement with the client or the third party for whom the money is held as to the payment of interest, but you must provide sufficient information to enable them to give informed consent".

Rule 7.1 above provides flexibility, but is written assuming that the payments are to be made from the law firm to the client. This is most probably why, during a recent Institute of Chartered Accountants in England & Wales Solicitors Group virtual conference, an SRA policy officer cast doubt on whether law firms will be able to charge clients for holding client money.

On the basis of the above, and in accordance with Rule 7.1, it would appear that law firms will struggle to apply blanket charges for holding client money. However, Rule 7.2 does provide more flexibility and will permit a law firm to agree, on a case by case basis, how interest rates should be applied in the particular circumstances of the matter and the client. The law firm would need to provide sufficient information for the client to make an informed decision on whether to agree to re-imburse the law firm for interest costs the law firm incurs for holding their money on their behalf, and any agreement would need to be in writing. This will create additional work for law firms, who will need to consider commercially and strategically whether they want to take such steps.

It is not absolutely clear how such charges would work from a VAT perspective. Interest is exempt from VAT and so one may assume that there would be no additional VAT to pay for the client, but if the law firm is viewed as charging interest to the client then it may conceivably be subject to the partial exemption rules. If the law firm is not viewed as charging interest to the client, but merely passing the cost on, then consideration may need to be given as to whether that meets HMRC's criteria to class as a VAT disbursement. If it does then no VAT would be charged, but if it does not then the law firm may need to add VAT to the charge it is passing on to the client. If the client is VAT registered, they will be able to reclaim it, but if they are not VAT registered, this will increase the costs they need to meet still further. This is not a clear cut area and HMRC's manuals do not cover such eventualities. If negative interest rates do become a reality, it is likely that HMRC will publish further guidance at the time.

An alternative may be to reflect the cost of holding the client money as part of the cost of doing business and so in the headline costs of the service the law firm is providing. There is nothing that prevents a law firm from charging what they feel is the right amount for the particular service, and although they are required to publish prices, they do not need to break down the prices in the detail of how they are reached. Generally for any increase in the costs of running a business, that business needs to determine whether they will pass on those costs to their customers or absorb them – there is no difference to a law firm.

Of course firms will need to have mind for market rates and perceived value for money, but I would never encourage the crowd to be followed – instead it is far better to make pricing decisions based on the firm's strategy, the type of work and clients they want to be involved with and the service levels that are provided. Under this option VAT would need to be charged to the client as it is part of the supply of services from the law firm.

A further alternative may be the use of Third Party Managed Accounts (TPMAs), which are now permitted under the SRA Accounts Rules. Care is needed here as Rule 11.2 of the SRA Accounts Rules states that "You obtain regular statements from the provider of the third party managed account and ensure that these accurately reflect all transactions on the account". There is further guidance on the SRA website on the use of TPMAs, which downplays the fears of some law firms over compliance with Rule 11.2, but still the take-up of TPMAs has been low. If negative interest rates are introduced, perhaps TPMAs will become more attractive – although there is a cost that needs to be paid to the TPMA, and firms will then still have the same dilemma as to whether to pass on such costs to clients. In this case, rules 7.1 and 7.2 would not apply and firms would only be left with the headline rates for the particular service to amend should they wish to.

Whether to turn to negative interest rates will be a difficult decision for the Bank of England, as is what law firms will do as a result. There are steps that can be taken, but firms should take care in making changes to their standard terms and conditions that apply blanket charges for holding client money.



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Avoiding the Risk of Overtrading

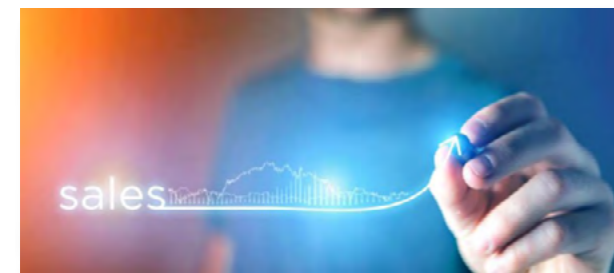
After the initial shocks created by the COVID-19 pandemic, many law firms are now extremely busy and demand is high. Some of that demand has been caused by time limited factors and there is a risk of a slow-down in 2021. What your firm looked like before the COVID-19 pandemic may not be what you are looking at as we (hopefully) move to a post Coronavirus world. For business owners in such a position of peaks and troughs, overtrading will be a key risk, here we look at it in more detail.

What is "overtrading"?

Overtrading occurs when a business expands too quickly without having the resources in place to support that expansion. It is a common cause of failure of start-up businesses and those which are growing, as it usually happens when work is taken on but without the business owners necessarily thinking through how they will be able to deliver that work. In particular, it can happen where you take on a project but purchases and costs are required by the business before the invoice is raised and paid, meaning that there is a cash "ask" for the business before it gets to the point where the cash is paid over. Cash flow is often stretched beyond breaking point at these times, and the company begins a decline before they are paid by their customer.

Managing growth can be quite challenging

At a minimum, a business needs to be able to generate sufficient cash flow to keep trading but it also needs to grow in order to be able to earn an economic return. Many business owners are extremely passionate about their businesses, especially in SMEs, and it can be difficult for them to evaluate accurately whether their rate of growth is sustainable. Ordinarily, this is when there is the highest risk of overtrading.



What are the warning signs?

If you have high instructions but are struggling for cash, then you may be at risk of overtrading. Usually, this manifests itself by the business becoming increasingly reliant on support from its bank or funder (such as using an overdraft facility more often than previously or, where you have an invoice discounting facility, needing additional drawdowns on an increasingly frequent basis). However, difficulties managing cash flow do not mean that the business is in financial trouble. Often, the business owners are not disciplined enough with managing their cash collection and payments out but as we move forward, this will likely prove to be a key skill.

Why will it be an issue with the pandemic?

Many law firms will be at risk of overtrading as pent up demand or other short-term factor led demand means that firms need to rapidly ramp up service volumes. This may be the case even if merely building back to the pre-pandemic levels; however in some cases there will be short-term peaks above pre-pandemic levels potentially interspersed with deep troughs. Conscious of lost revenue either during the early COVID period or during subsequent troughs, law firms will be keen to make up for lost time and may look to take on additional fee earners to deliver during peaks. However, working capital is likely to have been reduced significantly during early COVID, survival mode, or the troughs. Having the resources to manage peaks, especially when you have to take into account the social distancing measures that are now in force, may be unachievable

You may also be at risk of overtrading if you are struggling to convert work in progress into debtors and then cash. Outside of the legal sector, we have seen a number of high-profile retail businesses enter into formal insolvency processes during the past few months (Debenhams, Oasis, Warehouse, Laura Ashley, etc) and the inability to derive any benefit from the stock in hand due to the pandemic would have likely been a contributory factor to these failures. There are unfortunately likely to be similar stories in 2021 for the legal sector.

Continue to monitor your cash

Cash management will continue to be a vital tool. Maintaining a short term cashflow forecast on a rolling 13-week basis will assist you in monitoring what collections are due in, what invoices can be paid and when and where your focus on managing costs should be. Whilst you may now wish to pay all of the liabilities outstanding from early Covid, you will still need to manage payments anticipating future limitations in cash reserves. Preparing longer term projections will help you to establish what the position looks like over the medium term and this will help with identifying areas which might need some costs management or reduction.

Keep looking ahead, but don't forget the past

Your business plan and projections should be focused on the next few months and how you intend to get your business to a point where it is returning to a greater degree of stability. This may take time but by plotting out how you intend to achieve your aims, it will help to keep you and your business on the right track. However, many businesses will have deferred payment obligations (including VAT and loan repayments) and you will need to ensure that these payments are factored into any forecasts once you have to restart trading. If you have taken advantage of the Government's loan offerings, you will need to include the payment dates for those loans in your projections too.

In summary

The current trading conditions (both positive and negative) raise many challenges for business owners, not least the risk of overtrading, which is a common cause of business failure. Taking measured steps, accepting that it might take a while for your business to return to pre-pandemic stability, and managing costs with that in mind will set you on the right path. The exit from Covid will be a marathon, not a sprint, and any plan you have will need to be written on that basis otherwise you may find your business becomes another victim to the pandemic. If you are struggling to manage your cashflow, having someone independent to look at it objectively can be a real benefit, especially where working capital is lacking.

For advice on managing your cashflow during and after the pandemic, please call Heather Bamforth on 07900 263 235 or email heather.bamforth@armstrongwatson.co.uk



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Why does the health & wellbeing of employees matter?

Research carried out by the Office for National Statistics (ONS) found that, since the outbreak of COVID-19, almost half the population have experienced 'high' levels of anxiety.

It's well known that emotional and financial wellbeing are connected to each other. By being in a poor financial situation, people are much more likely to experience feelings of stress and worry, causing sleepless nights, which can lead to poorer performance at work and with relationships with colleagues. Ultimately, this can also lead to greater levels of absenteeism in the workplace which then places extra stress on other staff and so the cycle goes on.

It is a common misconception that financial wellbeing is purely about pay. Whilst money worries tend to become less as income rises, those earning £100,000pa are just as likely to have as many financial worries as someone on much lower income if they have little savings and a lot of debt. Financial worry is not necessarily directly linked to pay.

There are many causes of financial stress. Debt is an obvious one but in recent surveys and webinars we have carried out, one of the most popular questions that employees wanted to have more information on was around "how to budget?"

On the Financial Capability website - www.fincap.org.uk - it states that 23 million working age adults do not feel confident planning for their financial future. Research by the Neyber (The DNA of Financial Wellbeing) estimates that money worries cost the UK economy £120bn and 17.5 million lost hours of work. In the research it discusses the evidence for why employers should be developing and supporting their employees financial wellbeing.

Why should employers provide financial wellbeing support? There is clear evidence from these and other sources of research that many employees believe there is a role to play for employers to support their personal financial wellbeing. The Money Advice Service (MAS) website also comments that 46% of employees say they would appreciate their employer providing access to financial awareness programmes. MAS also provide impartial guidance across all areas of financial matters.

Employers are uniquely positioned to deliver money guidance around life changing events such as for examples changing roles, locations, starting a family and retirement.



Understanding employee needs and feedback through a colleague survey can provide valuable insight for an employer and helps them to understand the information and support their employees value the most. A survey of this nature will help an employer to decide the type of financial wellbeing programme to run and if you need specialist support and guidance, for example, if the feedback is around pension or retirement planning. You may need to bring in specialists who can give regulated advice in areas such as this.

For employees, financial wellbeing is becoming more important, especially in this current crisis, but this has been building for a while. For employers having a workforce that is engaged, informed, supported and efficient will improve productivity, it can also help to improve staff retention, and thereby also reduce costs and provide benefits in other ways. If employees can see their employers supporting them outside of their pay and immediate other benefits structure they clearly feel more valued, it's no wonder they go hand in hand. By understanding these issues employers will go a long way towards building trust with their employees.

Financial Education and Employee Wellbeing Program

Find out more about our Financial Education and Wellbeing Program for employers and employees and download our guide [here](#)



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Recharging Expenses subject to VAT

Following on from previous articles on reclaiming VAT on expenses and on the correct treatment of disbursements, we thought it might be a good idea to cover recharges in a bit more depth and examine the correct way to treat them from a VAT perspective.

Having got our heads around disbursements and the eight rules specified, we have established that we have incurred an expense in the course of our professional services, it is not a disbursement but we need to recover the expense from our client.

In many instances there is no VAT on such costs; train and air fares are good examples, and these normally have to be identified separately on an invoice and VAT added where the cost is passed on to the client. You as a professional services firm incurred the train or airfare to provide services to your client so the cost forms part of the overall service to the client.

It is then likely that your client may query the bill, adamantly asserting that there is no VAT on train fare and you have to explain that it is part of your overall service, and therefore subject to VAT.

But what if you were charged VAT on an expense? A hotel bill for example?

If we go back to the legislation on VAT, the definition of VAT is contained in VATA 1994, s4, where it is described as a tax "on any supply of goods or services made in the UK where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him".

So if we charge customers for items such as travel or photocopying paid on behalf of a client, are these charges part of our own "supply" of goods or services and therefore, subject to the same rate of VAT as our own supplies, or are they subject to a different VAT treatment? Unless they qualify as 'VAT disbursements' then they form part of the service to clients.

Let's consider an example:

A law firm based in London is engaged to visit a client's premises in Newcastle to provide legal services. The fees are £3,000, the train fare £250 and the hotel bill is £150 excluding VAT – totalling £3,400.

VAT is chargeable on £3,400 and so £680 is to be included in Box 1 of the law firm's next VAT return. Input tax of £30 is recoverable on the hotel bill as it is a standard rated supply and the portion of output tax related to the hotel is also £30.

Everyone is or should be happy, but this scenario has the capacity to cause great confusion.

If the law firm takes the VAT inclusive cost of the hotel bill of £180 and recharges that to the client, then VAT of £36 is due on the £180, rather than £30 on the £150, but still only £30 is recoverable as that is all that has been charged by the hotel.

The law firm, by including the VAT in the cost recharged has effectively given themselves a 20% mark up on the recharge. This is fine provided the client accepts that and any argument on this score is commercial rather than one determinable by VAT legislation.

What also often happens is the £180 is treated as a disbursement and input tax is neither reclaimed nor charged. You might follow the logic through and think "well that's ok because the VAT has just missed a step and the VAT charged has stuck with the person it was intended to". That is, the hotel accounts for VAT it charged to the law firm on its return, the law firm then recharges the gross amount and the client ultimately pays the VAT that has already been accounted for by the hotel.

HMRC unfortunately would not see it that way and if we go back to the legislation (VAT Act 1994 section 4) we have already established that the cost forms part of the law firm's services to the client and the line of supply is from the hotel to the law firm. There are no concessions for eliminating VAT between VAT registered businesses so it must account for VAT where it is due. If the law firm were to receive an inspection, HMRC would not consider how the law firm's client may have dealt with a particular supply, but would simply focus on how the law firm receiving the inspection dealt with it.

I acted for a law firm a couple of years ago where this issue arose. HMRC identified a number of recharges that the law firm had passed on without VAT as a gross figure. There were also non-VAT recharges such as train fares.

An assessment was raised for in excess of £30,000. Most of the recharges were subject to VAT but the officer in this case only raised the assessment on the VAT underpaid and did not give the law firm any credit for the VAT they had not claimed in passing the amount on gross. In that case I was able to reduce the assessment significantly by asking the VAT officer to give credit for the input tax.

As ever in VAT it is always important to fully understand who is supplying what to whom!



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An interview with...

Andy Poole interviews Bill Kirby, Director at Professional Choice Consultancy, strategic advisor to law firms

With Covid-19 continuing to change the way in which law firms operate, many are asking whether a reliance on fixed overheads should be shelved and instead replaced with increased flexibility that outsourcing can achieve. Andy Poole interviews Bill Kirby to explore why he is an advocate of the concept of outsourcing.

1. Before we turn to outsourcing, could you summarise your background and your involvement in the legal sector?

For the past 15 years, I have provided consultancy advice to law firms on strategy, business management, IT and business development.

I also provide advice to law firms on selecting suppliers and am a non-executive director for law firms and suppliers to the sector.

Prior to that for 10 years I was a Director at a UK leading software house for law firms covering Practice Management Software and Case Management Software.

My experience in accounting, sales, marketing, general management/directorship in IT and general commerce (UK and International) and BA Hons in Business Finance, really helps me to deliver well-rounded commercially effective advice to law firms.

2. Why are you an advocate of outsourcing? What are the specific benefits that outsourcing might bring?

Law firms need to meet increased client demands. To do that, they need to have the necessary skills and resource availability and need to be business-savvy re delivering on their strategic objectives and their profitability and working capital targets. They therefore need flexibility, particularly in times of potential peaks and troughs.

Outsourcing can provide the opportunity to meet varying demand in terms of timing, location and of skill-set/experience. In some cases skills and processes may be needed 24 hours a day for 7 days a week, and in other cases only for say 2 days a month. Outsourcing means that heavy overheads can be avoided when not needed all of the time.



3. What can be outsourced in a law firm?

Just about everything. Either 100% or in line with the business needs. Developments in technology now enables it far more than was previously the case. Examples include:

- IT and telephony infrastructure to meet the demands of 24x7, flexible and remote working, security. Plus limited capital outlay, extended life for PCs and predictable costs per user per month.
- Telephone answering – either all of it or to cover peaks and out of hours demands from clients – firms can no longer operate 9am to 5pm with an hour for lunch.
- Document production – transcription and things like Excel/Powerpoint to meet client demands and expectations with faster turnaround. This can be a big time and cost saver.
- Legal skills that do not exist sufficiently in the practice to enable a full service offering to clients.
- Legal and support skills that are needed for peak work – this enables the firm to meet demands but also not over commit its own resources.
- Part time Finance Directors can help to enable all firms to have sufficient strategic and financial skills - but without the full overhead.
- Accounting and bookkeeping (all or part).
- Non-Executive management skills for commercial strategy and management guidance - but without the full overhead.
- Business development and marketing activities – all or part of the role but sufficient to produce and enact marketing plans for maximum effect on existing client development and new business generation.

- Image and website content generation.
- Inbound enquiry management and resourcing - meeting the need of clients and prospects when they want it and by willing and skilled participants, leaving fee earners to earn fees.
- Website chat boxes – this is a newer craze and is fast growing.

4. What tips have you got for law firms looking to outsource?

- Have a very open review between the business owners to consider the skills, resources and momentum within the firm to meet the strategic objectives and business demands.
- Recognise the necessary shift in working practice and get people on board.
- Recognise the significant benefits of paying for what you really need as you need it – shift as many fixed overheads into direct variable costs related to activity and revenue, thus protecting profit and cash flow.
- Be careful when selecting suppliers – perform due diligence and check they have a legal track record and that they provide quality services in a compliant and secure manner.



Bill Kirby - Director
Professional Choice Consultancy

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- Greater confidence and expertise when dealing with financial matters with clients

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