The Referral Fee Ban – a True Picture

On 9th May 2013 the Gazette carried an article under the title “Referral guidance”. The article made a number of surprising claims, which we felt should not pass unchallenged, as they will undoubtedly have caused concern to some practising solicitors who are seeking to come to terms with the referral fee ban now that it is in place.

One referral fee ban, or two?

If we have understood the article correctly, its central tenet is that the Government has created a relatively narrowly defined referral fee ban, but the SRA, as the profession’s regulator, is creating a much wider, and more loosely defined ban. For instance, the authors write at various points of the article:

“The SRA definition of referral is wider than the definition in the act. The purpose, as they frankly say, being to enable them to outlaw a wider range of arrangements.”

“We are certain the SRA does not intend to penalise every form of marketing but their definition does cover every sort of marketing. By now it should be clear that we have two sorts of ban on referral fees! A statutory ban and a regulatory ban.”

“The SRA has a dilemma, whether to say the ban is penal in nature and that they will enforce it accordingly; for example strictly as defined in the statute, making it meaningless, or whether to try to make the ban meaningful by adopting a wider definition of referral. This seems to be the regulator's chosen approach.”

We respectfully - but profoundly - disagree with these assertions. The SRA has imposed long-standing rules (which date from the demise of the previous referral fee ban in March 2004) on solicitors to be open and transparent with clients and prospective clients when receiving work from introducers. The rules are now found in Chapter 9 of the 2011 Code of Conduct. They do not impose, or purport to impose, any sort of “ban” on referral fees. They simply seek to ensure that when a solicitor is receiving work from an introducer, the solicitor’s independence is retained, the clients’ best interests are safeguarded, and the clients are put properly in the picture about the introducer’s financial interest in referring the case to the solicitor. Those rules apply to all referrals, pre- and post-April 1st 2013, whether or not the subject matter involves a claim for personal injury and whether or not the arrangement is affected by the much narrower drafting in LASPO. Nobody could sensibly object to such rules, which reinforce the fiduciary nature of the relationship between solicitor and client, and which are designed to ensure that the lay client’s interests are placed above the financial interests of solicitors and introducers.

There is only one “ban” on referral fees. It is imposed by statute, and enforced by the regulators. The SRA has now made the relevant rules, which amount to no more than that solicitors should not pay or receive unlawful referral fees; in other words, that they should comply with the law, as it is now by virtue of LASPO.

There are, in short, two sets of definitions, one which is wide and covers all forms of arrangements for introduction of work of all kinds, requiring only transparency, and
the statutory prohibition, which is much narrower and about which the SRA has given positively helpful guidance, in terms of its interpretation.

**Pre-ban payments for post-ban referrals**

The authors also make the following assertion in their article:

Perhaps we should start with something entirely practical which may be worrying some people. We have heard it said that come the commencement date those firms who have prepaid for cases will not be entitled to receive them. This is nonsense. The ban is on referral fees, not referrals. Any existing contracts between law firms and referral companies have not become illegal or unenforceable. You are entitled to receive the referrals or your money back; good luck with that.

Once again, we disagree. By section 56(1)(b) of LASPO a solicitor is in breach of the section if prescribed legal business (i.e. the provision of legal services relating to a claim for death or personal injury) is referred to him and he pays or has paid for the referral (emphasis added). In order for there to be a breach of the section, two things must occur, i.e. (i) prescribed legal business must be referred to the solicitor, and (ii) the solicitor must pay or have paid for the referral. From 1st April 2013, all referrals will plainly be “post-ban”, and so the first half of the statutory test for breaching the section (prescribed legal business must be referred to the solicitor) is undoubtedly satisfied.

In order for solicitors to avoid breaching the ban in this situation, there would have to be implied into the section the words “after this section comes into force”, so that it would read “prescribed legal business is referred to the [solicitor], and the [solicitor] has paid for the referral after this section comes into force.” Would the Courts imply those words into the section on the ground that otherwise the legislation would have retrospective effect? While not impossible, we would not put very much money on it. It seems fairly clear from the statutory language that the referral has to be post-ban, but that the payment can be pre-ban or post-ban in order for the section to bite – that seems to be the statutory intention, and, if so, solicitors will be at serious risk of regulatory/disciplinary action if they have made pre-ban payments for post-ban referrals.

This of course makes perfect sense. If solicitors formerly paying a particular amount per year to introducers elected to pay the same sum in advance, for work yet to be provided, they could postpone the operation of the ban by reference only to the depth of their pockets.

The reverse– post-ban payments for pre-ban referrals - also holds good; if referrals have already taken place, before 1 April 2013, but the contractual arrangement involves a later payment, perhaps on the conclusion of the case, the payment may still properly and lawfully be made. The referral in exchange for an agreed payment, when it was made, was lawful.

**Alleged lack of SRA guidance**

The authors of the article further castigate the SRA for its asserted failure to engage adequately with the profession or give proper guidance. In their opening paragraph they write:
“Recently, the Solicitors Regulation Authority provided further guidance which it said would help. It doesn't. There is nothing new in it. It will not pre-approve any arrangement and even if you ring the ethics helpline and someone says your arrangement should be ok, they can still decide that in fact it is not; and the advice you were given will be no defence.”

We are aware that there will be a range of views amongst your readers as to the extent to which the SRA is prepared to engage constructively with the profession, and some of those readers will also know that we have been critical of the SRA in that regard in the past. However, in relation to the referral fee ban, which was foisted on the regulator just as it has been foisted on the profession, at short notice by primary legislation, the SRA has made real efforts to engage with, and provide constructive guidance to the profession. In common with all regulators, it declines to provide “safe harbour” advice, but it is within our knowledge that it has been prepared to meet and engage constructively with those who have sought its views about their proposed post-April 1st models; and the SRA’s developing thinking has been reflected in subtle but important changes between the draft guidance it produced in October 2012, and the final version of that guidance in March 2013.

For our part, while the guidance contained no surprises because it did no more than interpret the Act in a non-controversial way, it was positively helpful in explaining in particular what the SRA considered to be compliant arrangements, as well as those which were not.

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