



The Law Society

**SRA Consultation on the ban on referral fees in personal  
injury cases**

**Law Society response**

**December 2012**



## **Consultation on the ban on referral fees in personal injury cases**

This response has been prepared by the Law Society, the representative body for more than 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession, and lobbies regulators, Government and others.

The Law Society welcomes the opportunity to comment on the Solicitors Regulation Authority's (SRA) consultation on the ban on referral fees in personal injury cases under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

While the Society supports the principle of a ban on the payment of referral fees, as we have made clear, we have reservations about the way in which the prohibition is drafted in LASPO and believe that it will potentially capture activities which are not problematic and which have been identified as non problematic by the Society, its members and by others. Nevertheless, we accept that the SRA's job is to implement the law as it stands.. We think that the SRA's approach is along the right lines, though we have a number of areas of concern and suggestions that we believe would improve the start that has been made.

As the SRA notes, referral fees play an important part in the business models of many firms which undertake Personal Injury work. Such firms find that paying referral fees is an efficient way of sourcing work. They will need to find alternative ways of doing so following implementation of the Act and it is particularly important to them that they do so in a way which complies with LASPO.

As we have explained before, there is a fine line between perfectly appropriate and legitimate advertising and the payment of an illegal referral fee. Most advertising will involve an element of payment by results and it may therefore be difficult to ascertain precisely where the boundary is crossed. Similarly, it is clear that a firm operating as an ABS that took a marketing function in-house, for example by merging with a claims management firm, would probably not infringe the ban. Given that there are potentially a number of business models that are possible in respect of joint ventures firms will need to be clear how far they can go with insurers or claims managers in such arrangements. Firms will expect with some justification a degree of certainty about what is and what is not permitted under the new regime.

We are pleased that the SRA has taken a positive approach by providing guidance and giving examples for solicitors who will need to comply with the ban under LASPO. However, we maintain that LASPO is ambiguous and difficult to interpret. A strict interpretation is likely to go wider than was intended by Government and may well prohibit perfectly legitimate arrangements. We recognise that the SRA cannot provide a definitive ruling. However, as the body enforcing the Act, it is important that it should be clear about what it regards as breaching the provisions and consistent as to how and where it will use its enforcement powers. We remain concerned that the SRA's approach does not go far enough and that there is scope for additional detail. We recognise that the SRA cannot provide guidance to cover every situation but we think that it could provide more than is provided in the draft and could commit to providing ongoing information to the profession. We are heartened by the SRA's proposals on enforcement, which appear to us to take a proportionate approach that we can support. The proposals recognise the element of uncertainty that will exist. The SRA can reduce that uncertainty

further and the application of a consistent approach is vital to the credibility and reputation of the profession.

## **1. Proposed changes to the Handbook**

1.1 We agree that it is broadly right for the SRA to reproduce the LASPO provisions and that it is inappropriate to seek to expand or narrow them. The fact remains, however, that those provisions are broad and do not demarcate well the distinction between advertising with an element of payment by results and a referral fee. If the former is to be completely prohibited then there needs to be guidance which makes that clear.

1.2 We are glad that the rules will enable solicitors to demonstrate that some types of fee arrangement do not amount to referral fees. We assume that this would cover, for example, answering services where there is a payment per call taken and, incidental to that details of potential claimants are passed on. There may well be others where the referral element is more remote and we believe that guidance or indicative behaviours should make that clear.

1.3 The indicative behaviours proposed by the SRA appear to us to be broadly appropriate. It is notable that they concentrate on having “systems” for assessing whether arrangements comply. In our view, these could be more helpful. For example, they could elaborate on some of the obvious elements that might disguise referral arrangements. For example, one behaviour might read:

- “Payments are not made to claims handlers or insurers for services, such as screening or IT programmes, which are compulsory if work is to be received.”

1.4 We doubt that the reference to the “current market rate” is helpful. Many services that may legitimately be paid for may be bespoke, or there will be a wide range of rates depending on the quality of the service chosen. A firm may well decide to pay a premium for a particularly successful method of marketing without that necessarily amounting to an improper referral element. Moreover, we doubt that the SRA is equipped to judge an appropriate market rate and should not seek to inhibit the workings of the market. In our view an alternative wording might read:

- “Payments for advertising services, where the advertiser passes the information directly to the firm, are not directly related to the number of cases received from the advertiser.”

## **2. Guidance**

2.1 We are pleased that the SRA intends to provide guidance for the profession. However, it is not clear what its status will be as it will not form part of the SRA Handbook, and nor will it be mandatory. The consultation paper states that the SRA “may have regard to it when exercising its regulatory functions”. We hope that it would also follow that solicitors can be sure that the SRA will act consistently with this guidance until any further guidance is issued to replace it.

2.2 The guidance provided in the draft is useful, as far as it goes, but there are clearly going to be a number of areas which the guidance does not cover. We accept

that it is impossible for the guidance to cover every situation, but there are a number of situations which are foreseeable or which are happening already, where it is not clear what the SRA's approach will be. We set out some of these below:

### **What is a referral?**

#### **2.3     Outsourced tele-services**

We have referred above to schemes whereby a firm outsources its telephone answering service on a pay-per-message basis, and where claimants' details are communicated by the outsourced firm to the outsourcing firm. We assume that this would be covered, as suggested above by the "services" provision, but we believe that this should be made clear.

#### **2.4     Web-based advertising**

It is not clear to us whether a web-based system whereby information keyed in by a potential claimant is passed from the advertiser's server to the firm would amount to a referral for these purposes. It would be helpful if this could be made clear.

### **What is a payment?**

2.5     The guidance appears to address business structures rather than the question of what amounts to a payment. There are a number of possible models that need to be considered:

- Quid pro quo arrangements whereby a Trade Union or other such body refers personal injury work to a firm in return for pro bono advice on other matters. There are a number of possible scenarios, ranging from "a case for a case" to looser models. The arrangements may be informal "understandings" or more formal documented agreements. We doubt that a firm providing occasional pro bono advice to employees of a good client would fall foul of the ban, but there are more formal arrangements which might, and guidance on this would be helpful.
- Discounts or rebates applied to normal levels of costs might be thought to fall foul of the ban. In our view it is unlikely that a discounted rate in return for bulk work would do so, but the wording of LASPO is wide and solicitors should be able to deal with such matters with certainty.
- Panel membership fees ought to be considered. Many insurers operate panels of firms to whom they pass their PI work. It is conceivable that insurers, like lenders, might charge a fee for membership of the panel. Without membership, firms would not receive the work, but there is an equal argument that there are some administrative arrangements which it might be appropriate for solicitors to contribute towards. The SRA ought at least to provide guidance as to what it would consider appropriate here.

### **When is there a payment for a referral?**

2.6     There are a number of areas where it is likely that there will be uncertainty as to whether there is a payment for a referral, and we do not find the guidance helpful in dealing with many of these areas. This is partly because there are a number of different elements in the examples and it is not clear enough which elements are

likely to be crucial in deciding whether a scheme complies with the law. Examples are as follows:

- Paragraphs 15 and 16 provide clear cases, but suppose, in the case of paragraph 16, the website passed the client's details directly to a firm but there were no payment per case, and instead the solicitor only paid an annual fee?
- Paragraphs 21 and 22 provide examples with a number of different features without indicating which parts are likely to cause problems. How crucial is it, in the example at paragraph 21 that all the firms are regulated by the SRA? Or that the arrangement is not for profit? In the Law Society's view, the crucial difference is that payment is based on the volume of cases. If it is legitimate for solicitors to pay a flat fee for an uncertain but equal number of cases, we do not see why it matters whether or not the firm was set up to make a profit or involves either wholly or in part unregulated individuals.
- We agree with the analysis of the example in paragraph 24 but we wonder whether the answer would be different if the CMC, instead of charging per client, charged a fixed fee. Would it, indeed, be problematic if there were stepped fees so that a firm might be charged a set amount for up to, say, 500 cases, with a higher amount for up to the next 500 etc?

2.7 Our point is that these are all readily identifiable situations and the SRA needs to be clear about how it will approach the various permutations and consistent with other regulators. The SRA has gone some way towards providing some overarching guidance at paragraph 26 but we do not think this goes far enough. In particular, firms would welcome guidance on:

- How far payments that are not linked, or only partially linked to numbers of cases are permissible;
- How far solicitors can involve themselves in profit-making marketing schemes;
- How far a solicitor needs to go to establish whether a charge is so high that it would cause the SRA to assume that there is a referral fee.

2.8 We believe that the latter point is particularly difficult and would urge the SRA to reconsider its view of this. The concept of a "market rate" will be difficult and may even operate to artificially inflate prices. A high charge may reflect a number of different things: inefficiency by the provider, an expensive, high quality bespoke service, or a highly successful and sought-after service that can command a premium. In the latter case, it is likely that the fact that a firm will gain substantial business as a result of using the service is built into the price. But it does not seem to follow to us that it is possible to identify from this that the firm is paying a particular identifiable price for the referral of an individual case.

## **Business Models**

2.9 The SRA has indicated that an ABS which does its own marketing will not, of itself, fall foul of the ban. It has also indicated that there may be a number of joint venture arrangements which might be acceptable.

2.10 We believe that the guidance needs to provide more information about the approach that the SRA will be taking when asked to approve such arrangements. At the seminar on 19<sup>th</sup> November, it was clear that the SRA would be asking a number of questions about such ventures and would be looking, quite rightly, at a range of

other potential problems, not necessarily related to the referral question. Many of the points raised there are no different from those faced and managed by individual firms currently. However, we believe that the SRA ought to set out its likely concerns in respect of:

- ABSs where solicitors and claims managers work together in a single firm;
- Joint venture agreements between solicitors, CMCs or insurers where there is a separate business involved.

2.11 Gaining approval for an ABS is an expensive and time-consuming exercise and firms are entitled to be assured that they are not wasting their time on business models which are unlikely to be approved

### **For the Future**

2.12 We think that it is also likely that there will be a number of schemes which the SRA will decide are legitimate. We believe that the SRA ought to publish details of those schemes so that firms are aware of what is available to them.

2.13 Finally, we recognise that a number of unforeseen situations will arise. The SRA should ensure that the guidance is a living document and encompasses new arrangements and decisions.

## **3. Enforcement**

3.1 We broadly support the proposed enforcement strategy and the factors set out at paragraph 17. However, we believe that:

- The SRA may well need to do some investigation itself to avoid hidden referral arrangements being entered into and firms that are compliant being placed at a disadvantage through activity by firms which does not comply;
- The SRA needs to be clear about what does and does not breach the Act – one of our concerns with OFR is that enables the SRA to superimpose its judgement over that of firms who have been acting in good faith. This has the potential to damage firms.

3.2 We reiterate our concerns about the “current market rate”. It is likely to be difficult to establish what that rate would amount to in different contexts, or how the SRA will be placed to adjudicate.

3.3 For example, if a service is charged for under a “price per lead” scheme, would a firm avoid being penalised if it could show that the price reflects the fair cost of marketing, advertising, administration and profit for generating that lead? The SRA would need to understand how internet marketing works in order to enforce this.

## **4. Definitions**

4.1 The full extent of the ban is unclear in the absence of a clear definition of ‘personal injury work’. Damages arising from an accident are very different to clinical negligence cases. If it is to be an all-encompassing ban, the SRA should commit to that;

4.2 'Independent' intermediary should be defined; while 'independent' means working alone in commercial terms, for solicitors it refers to parties that have not been influenced by third parties and inducements;

4.3 Use of the terms 'received' and 'provided' in the flow chart on the last page of the consultation document is misleading. The SRA should specify what it is referring to, as well as to and from whom.

## **5. Transfer of information**

5.1 We believe that for clarity, the SRA should place instructive focus on what the payment is for in any given arrangement. The SRA should therefore firmly state in its guidance that if a client receives information about a firm, rather than the converse, that would be permitted. Where there is real ambiguity with regards to information passed between intermediary and consumer, this should be explored and the approach fed back to the profession.

## **6. Transition period**

6.1 We remain concerned about the short timeframe for firms to adjust to the ban and new guidelines issued by the SRA. It was disturbing that both the SRA and the Claims Management Regulator indicated that the first few months would, essentially be "transition", meaning, we suspect, that they will turn a blind eye to non-compliance. This is not satisfactory. We have already asked the Government to extend the timetable. It is also noteworthy that the pending Competition Commission's investigation of the motor insurance industry might impact on timing, and might have bearing on Government's perception of the extent to which insurance premiums are affected by referral fees.