REFERRAL FEES UNDER THE SRA SPOTLIGHT AGAIN

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The referral fee ban for personal injury work came into effect on 1 April 2013 under the terms of the Legal Aid, Sentencing and Punishment of Offenders Act ("LASPO"). The provisions contained in Part 2 of LASPO have been the cause of much analysis and debate, and in the view of many specialists in the field do not achieve their intended purpose. The SRA is responsible for enforcing the ban upon those that it regulates and accordingly added to the Code an additional Outcome at 9.8 that firms must not pay a prohibited referral fee.

It was always to be expected that with so many people dependent upon referral fees for their livelihoods they would not go quietly. Many hours of creative thought have therefore been applied to preserving the commercial relationships between introducers and law firms so as to circumvent the provisions.

Against this backdrop it is not surprising that just six months into the new regime the SRA has issued its first Warning Notice to the profession about the way personal injury firms are dealing with the ban. Their main concern is that in setting up arrangements that do not breach LASPO firms are failing to consider their wider duties to their clients. In particular, firms are urged not to allow their independence to be compromised by their arrangements with third party introducers (Principle 3) and to ensure that they are always acting in the best interests of their clients (Principle 4).

Five areas of concern are listed in the Warning Notice. The first is **deductions from clients' damages**. Some claims management companies ("CMC") are seeking to charge clients a fee for referring them to a suitable law firm. Firms are then being asked, as a term of their agreement with the CMC, to deduct this fee from the clients' damages and in some instances to forward the damages in their entirety to the CMC.

The SRA questions whether sending a client's damages to a third party introducer can ever be in best interests of the client. It also alerts firms to the risk that their relationship with the introducer impairs their ability to provide independent advice to clients upon such agreements.

Outsourcing services to an introducer is the second example. Payment for a genuine service may not breach LASPO but the SRA has focused on an introducer advising a client upon whether a conditional fee agreement or a damages based agreement is a more appropriate means of funding a claim. The SRA's view is that the solicitor has a duty to explain these options to the client, as opposed to a third party. What the SRA fails to recognise in this example is that as the solicitor is a party to the funding agreement and receives a share of the damages he cannot be described as being truly independent in giving advice on the different funding agreements in any event. So, ironically, a client may be better off with an independent third party adviser.

The third area of concern is **inappropriate referrals**. It has been suggested that firms and introducers are arranging for clients to purchase insurance, medical reports or other services or products at inflated prices so that the firm or the introducer will receive a higher commission. Apart from the duty to account to clients for any financial benefits received as a result of their instructions, firms are also reminded of the SRA's view that even if clients have been sold such products or services prior to instructing the firm they should be careful to ensure that they are not facilitating arrangements that are detrimental to the clients' interests.

It has also been suggested that in considering **funding and fee arrangements** firms are not exploring whether clients have legal expenses insurance in order that firms can charge success fees.

The SRA has highlighted **transparency** as the final issue. Firms must ensure that it is the client, rather than the third party introducer, who provides information to the firm about a potential claim. Care needs to be taken to confirm that the client is not misled about who they are dealing with and who is providing particular services.

From the tone of the Warning Notice it appears that firms have been given a period of grace by the SRA to become accustomed to the new arrangements, but that a tougher approach can be expected in the future. Firms flagrantly breaching the rules and unwilling to change will face action. Watch this space. ■

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