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THE REFERRAL FEES BAN - AND THE CHANGES TO THE SRA HANDBOOK

As any firm involved with claimant personal injury work will be all too painfully aware, the much heralded referrals ban will shortly take effect under the terms of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The SRA has recently published its proposals for the amendments that will be required to the Code of Conduct to give effect to the changes that will be imposed.

With effect from 1 April 2013, the payment of referral fees in relation to "prescribed legal business" will be banned. At present, "prescribed legal services" will encompass personal injury claims. LASPO also requires "the relevant regulator" to monitor and enforce the ban. The SRA agreed the following changes to the SRA Handbook at its Board meeting on 23 January 2013 to help it meet its obligation in this regard:

- The introduction of additional outcomes in the SRA Code of Conduct 2011, so that in Chapter 6 of the Code (your client and third parties) the outcome which must be achieved is that *you are not paid a prohibited referral fee* and in chapter 9 (fee sharing and referrals) the outcome is that *you do not pay a prohibited referral fee*; and
- A new definition to be added to the SRA Handbook Glossary 2012 to describe a "prohibited referral fee" and to explain the meaning of "paid" in the context of the payment of a prohibited referral fee.

A "prohibited referral fee" will be defined as a payment prohibited by section 56 of LASPO; or pursuant to section 57(8) of LASPO, a payment made to or by you which appears to the SRA to be a referral fee for the purposes of section 57(7) of LASPO, unless you show that the payment was made as consideration for the provision of services or for another reason and not as a referral fee. Meanwhile, a number of indicative behaviours will also be added to the Code to illustrate the kinds of conduct that will tend to show whether

or not the outcomes have been achieved. For the most part these seem likely to be fairly anodyne, mostly talking of the need for having "effective systems" for assessing the validity of any referral arrangements and keeping compliance records but not, it would seem, illustrating the sorts of marketing arrangements that it will regard as being permissible. There is bound to be disappointment that, in the continuing spirit of 'outcomes-focused regulation' that the SRA seems likely put the onus on the practitioner to know and comply with the law.

A further complication for firms therefore is the wide interpretation given by the Act to the term "payment", going beyond the payment of money to any other benefit received. Section 56 (8) of LASPO contains the following definition: "Payment includes any form of consideration whether any benefit is received by the regulated person or by a third party (but does not include the provision of hospitality which is reasonable in the circumstances)".

In summary, therefore, referral fees will still be permissible in relation to other sources of work other than PI work, provided the firm otherwise complies with chapters 6 and 9 of the Code. In relation to PI work it will still be permissible to make a payment as consideration for another service and not the referral, such as a valid joint marketing scheme.

Many will see a hint of "back to the future" on this. The prevalence of marketing schemes was key to the reasoning of the Law Society to lift the former referrals fee ban back in 2004. Looking at the implications of a mistaken interpretation of this term now, and the role of the SRA in enforcing it, we will have to hope for more detailed guidance on this critical point. ■

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