

CURRENT GUIDANCE

Guidance on Referral and Marketing Arrangements for Barristers Permitted by the BSB

Referral fees

The BSB will consider a number of features when determining whether a payment to a third party making a referral, acting as an introducer or providing administrative and marketing services constitutes a prohibited referral fee. A payment for these purposes includes not only a financial payment but also any benefits in kind such as the provision of services or facilities for no cost or at a reduced rate.

Features which will indicate that the payment is a prohibited referral fee:

1. The payment is made in circumstances which amount to bribery under the Bribery Act 2010
2. The payment is made in connection with personal injury work and is prohibited by the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Features which are likely to indicate that the payment is a prohibited referral fee:

1. The payment is made to a professional person acting for the lay client who has a duty to act in the best interests of that client when making a referral
2. The payment to an introducer is linked to specific referrals
3. The payment to an introducer for services provided by the barrister is not a set fee but is linked to the number of referrals
4. In a publicly funded case, the fee paid to an instructed barrister is less than the Legal Aid Agency fee for those advocacy services
5. The payment is a condition of receiving a referral
6. A payment for marketing or related services is higher than market rates

Features which may suggest that the payment is not a referral fee:

1. The payment is made to an employee or agent of the barrister making the payment, e.g. a clerk or an outsourced clerking service, in return for the services they provide to the barrister and not for onward payment to any person who refers work to the barrister
2. The payment is made to a marketing or advertising agency and the amount does not depend on whether any instructions are received or on the value of any instructions received
3. The payment is made to an introducer who is not an authorised person or other professional person for the purpose of being included in a list of providers of legal services and the amount is not dependent on the number of referrals received from that introducer

In considering whether to take enforcement action in cases where payments have been made which may amount to referral fees, the BSB will take a purposive approach and will consider the underlying nature and purpose of the arrangements and whether or not they were in the best interests of clients, either by helping them to access legal services not otherwise readily accessible by them or by providing some benefit to them which is directly attributable to the payment made. For example, where a professional person is under a duty to act in their client's best interests when making a referral, receipt of any payment from barristers seeking to be instructed by that professional person's client creates a risk to their independence and integrity in discharging that duty to the client, without any concomitant benefit to the client in improving their access to justice. Where, on the other hand, the payment is made by the barrister to a third party whose business is to make information about choices of barrister more readily accessible by clients so that they can make an informed choice of barrister, that is in principle capable of promoting access to justice by clients.

Where on the face of it a payment appears to be related to referrals (for example where the payment varies according to whether work is received) the barrister will need to demonstrate that the payment is genuinely made in return for a service other than in return for the decision by the person who instructs the barrister to instruct that barrister. Where a payment has been made other than to an agent or employee of the barrister (such as a clerk), the BSB will also consider whether the client has been informed of the fee and had an opportunity to challenge it.

The following are examples of cases in which a payment is not likely to be a prohibited referral fee

Example 1 (outsourced clerking arrangements)

A barrister or Chambers arranges to outsource its administrative and clerking arrangements. The barrister or Chambers pay fixed fees on a contractual basis to a company providing these arrangements, which may also include marketing and advertising services. The outsourcing company acts as a barrister's agent and liaises with solicitors and other professional clients, including over billing and fees. The role of the outsourcing company, in respect of referrals of work, is to market the services of the barristers who retain them to those who are looking to instruct them, in the same way that in-house clerks would do. By competing with others to secure the work from referrers they contribute to a competitive, efficient and informed market place. The outsourcing company does not purport to make recommendations that are independent of the barristers who retain it and does not assume a duty to advise the client in the client's best interest as to selection of a barrister, so as to owe any duty to the client that would conflict with the duty they owe to those whom they represent. Rather, the outsourcing company represents the barristers. It is the barrister who has a duty to the client not to take on work that is outside his competence or which he does not have time to carry out.

Example 2 (marketing services)

Members of a Chambers appoint a marketing or advertising business to promote their services. Clients who contact chambers in answer to the advert are asked to identify this at the point of instruction in order to measure the effectiveness of the advertising campaign. Members pay a fee for these services which is reviewed quarterly based on the number of

instructions identified as being referable to the marketing campaign or adverts. The marketing techniques used do not mislead clients into believing they are receiving independent advice as to their choice of barrister and are clearly identifiable as advertising. The members are able to demonstrate that the payment was genuinely made for the purpose of receiving the marketing services. (See general guidance above.)

Example 3 (barrister owned referral company)

Members of a Chambers establish, own and manage a limited company in order to advertise and market their services more effectively. The company provides no legal services itself but operates a website or 'shop front' which advertises to potential clients how to instruct barristers on a direct access basis. It is comparable in nature to other limited companies owned by barristers in Chambers which provide administrative and accommodation services to them. Members of the public get in touch by telephone, email or by visiting in person. Clients who are introduced in this way then instruct individual barristers in Chambers via the clerks in the traditional way, paying fees directly to them. Members of Chambers pay regular fixed fees to the company which reflect the costs of the advertising services provided and are not linked to individual referrals. The company acts as agent for Members of Chambers, not as agent for potential clients. The role of the company is analogous to that in example 1 and the analysis is therefore the same.

Example 4 (third party introducer)

A company sets up a service which introduces direct access clients to barristers. The introducer operates a commercial website and a call centre for consumers to phone and outline their legal problems. The introducer provides no legal advice or services itself and is not an authorised body under the LSA 2007. It trades on its offer to put consumers in touch with individual self-employed barristers who have the relevant expertise to meet their needs and who are able to be instructed on a direct access basis. The introducer introduces potential clients to barristers who are on a national panel, pre-selected by the introducer. The introducer undertakes the costs of advertising, operating the website and call centre, setting up the panels and vetting potential clients and recoups these costs from its fees. Barristers on the panel may also be charged a one off or annual fixed fee to the agency but this does not vary depending on the number of referrals received.

Example 5 (third party introducer)

The facts are as in example 4 but the introducer's fee does vary with the number of referrals received. However, the barrister is able to demonstrate (see general guidance above) that the introducer makes its own independent judgment as to which barrister best meets the client's needs for the given case and advises the client accordingly, and that the percentage the introducer receives is the same regardless of which of the barristers on its panel is instructed, rather than it auctioning cases to the highest bidder. The fact that payment varies with success in attracting instructions is then a fair commercial reflection of the value of the service provided to the barrister in vetting the barrister and maintaining the barrister on the

panel and does not adversely affect the client's interests. (Note, however, that quite independently of whether or not the arrangements involve any referral fee, barristers need to ensure they do not enter into any terms with an introducer that would interfere with their ability act independently and in their client's best interests.)

Example 6 (membership subscriptions)

Barristers pay individual membership subscriptions to a body which maintains a panel of accredited barristers from which it proposes barristers to those who contact the body requiring those with particular expertise (for example an alternative dispute resolution (ADR) body, which appoints or recommends persons to provide mediation, arbitration or adjudication services from a list of barristers who pay to maintain their membership of the ADR body). The membership subscriptions paid by barristers are on an annual or regular, fixed basis and are not per referral made or otherwise linked to the number of referrals.

Example 7 (membership subscription)

If the facts are as in example 6 but, instead, fees were paid to the ADR body as a percentage of the fees received for acting, it would be necessary to consider whether the situation was truly analogous to example 1 or example 5, in which case it would not be a referral fee.

By way of contrast, an arrangement such as that in examples 6 or 7 is likely to be a referral fee where the facts are such that clients are likely to be under a mistaken impression that the introducer or ADR body was acting independently in selecting the barrister, when in reality their recommendation was procured by the highest bid, for example, because the percentage to be paid is not fixed in advance or the same for all.

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