



The Bar Council

## The Prohibition of Referral Fees

<b>Purpose:</b>	To draw barristers' attention to issues relating to payment for professional instructions
<b>Scope of application:</b>	All practising barristers
<b>Issued by:</b>	The Ethics Committee
<b>Originally issued:</b>	October 2012
<b>Last reviewed:</b>	October 2020
<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.</b>

### General approach

1. There has been a proliferation in recent years of the payment of, or requests for payment of, referral fees in connection with the provision of legal services.
2. In the Final Report of his Costs Review,<sup>1</sup> Jackson L.J. recommended that they should be prohibited in relation to personal injury cases. This recommendation was enacted in ss. 56-60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and the prohibition may yet be extended to other areas of work.
3. Further, the payment or receipt by a barrister of any referral fee for the purpose of procuring professional instructions is expressly forbidden by the Code of Conduct set out in the BSB Handbook. The Bar Council has consistently opposed the payment or receipt of referral fees, for the reasons set out in the Annex below.
4. Note also that the payment (or receipt) of a referral fee (whether or not it is disclosed to the lay client) is potentially both a civil wrong and a criminal offence, regardless of whether it is also prohibited in connection with personal injury work by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

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<sup>1</sup> Civil Litigation Costs Review: Final Report by Lord Justice Jackson (21 December 2009).

5. The BSB Handbook rC10 prohibits both the payment and receipt of referral fees. The term "referral fee" is defined as follows:

"any payment or other consideration made in return for the referral of professional *instructions* by an *intermediary*"

6. The definition goes on to clarify that a payment is not a referral fee if it is a payment either (1) for the provision of a particular service, or (2) for some other reason, and not for the provision or referral of professional instructions.

7. "Intermediary" is defined for this purpose as any person by whom a self-employed barrister or authorised body is instructed on behalf of a client and (in the context of referral fees) "intermediary" includes but is not limited to a professional client.

8. It would thus be a breach of the BSB Handbook for you:

8.1. to make or receive any payment or other consideration,

8.2. to or from any intermediary (as defined),

8.3. in return for the referral of professional instructions.

9. The guidance to rC10, at BSB Handbook gC29 to gC31, is also relevant. This provides as follows:

"gC29 Making or receiving payments in order to procure or reward the referral to you by an intermediary of professional *instructions* is inconsistent with your obligations under CD2 and/or CD3 and/or CD4 and may also breach CD5.

gC30 Moreover:

.1 where public funding is in place, the *Legal Aid Agency's* Unified Contract Standard Terms explicitly prohibit contract-holders from making or receiving any payment (or any other benefit) for the referral or introduction of a *client*, whether or not the lay *client* knows of, and consents to, the payment;

.2 whether in a private or publicly funded case, a *referral fee* to which the client has not consented may constitute a bribe and therefore a *criminal offence* under the Bribery Act 2010.

gC31 *Referral fees* and inducements (as defined in the Criminal Justice and Courts Act 2015) are prohibited where they relate to a claim or potential claim for damages for personal injury or death or arise out of circumstances involving personal injury or death: section 56 Legal Aid, Sentencing and Punishment of Offenders Act 2012 and section 58

Criminal Justice and Courts Act 2015. Rule rC10 does not prohibit proper expenses that are not a reward for referring work, such as genuine and reasonable payments for:

- .1 clerking and administrative services (including where these are outsourced);
- .2 membership subscriptions to ADR bodies that appoint or recommend a person to provide mediation, arbitration or adjudication services; or
- .3 advertising and publicity, which are payable whether or not any work is referred. However, the fact that a fee varies with the amount of work received does not necessarily mean that it is a referral fee, if it is genuinely for a marketing service from someone who is not directing work to one provider rather than another, depending on who pays more."

10. Rules rC8 and rC9 (honesty, integrity and independence), and the accompanying guidance at gC18-gC21 and gC25, also explain how Core Duties 3, 4 and 5 may be engaged:

10.1. rC8 provides as follows:

"You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4)."

10.2. rC9 provides as follows:

"Your duty to act with honesty and integrity under CD3 includes the following requirements:

...

.7 you must only propose, or accept, fee arrangements which are legal."

10.3. The guidance provides as follows:

"Examples of how you may be seen as compromising your independence

gC18 The following may reasonably be seen as compromising your independence in breach of Rule [C8] (whether or not the circumstances are such that Rule C10 is also breached):

- .1 offering, promising or giving:
  - .a any commission or referral fee (of whatever size) – note that these are in any case prohibited by Rule C10 and associated guidance; or
  - .b a gift (apart from items of modest value),  
to any *client, professional client* or other *intermediary*; or
- .2 lending money to any such *client, professional client* or other *intermediary*; or
- .3 accepting any money (whether as a loan or otherwise) from any *client, professional client* or other *intermediary*, unless it is a payment for your professional services or reimbursement of expenses or of disbursements made on behalf of the *client*.

gC19 If you are offered a gift by a current, prospective or former *client, professional client* or other *intermediary*, you should consider carefully whether the circumstances and size of the gift would reasonably lead others to think that your independence had been compromised. If this would be the case, you should refuse to accept the gift.

gC20 The giving or receiving of entertainment at a disproportionate level may also give rise to a similar issue and so should not be offered or accepted if it would lead others reasonably to think that your independence had been compromised.

gC21 Guidance gC18 to gC20 above is likely to be more relevant where you are a *self-employed barrister, a BSB entity, an authorised (non-BSB) individual, an employed barrister (BSB entity)* or a *manager of a BSB entity*. If you are a *BSB authorised individual* who is an *employee or manager of an authorised (non-BSB) body* or you are an *employed barrister (non-authorised body)* and your *approved regulator or employer* (as appropriate) permits the payments to which Rule C10 applies, you may make or receive such payments only in your capacity as such and as permitted by the rules of your *approved regulator or employer* (as appropriate). For further information on referral fees, see the guidance at gC32."

"Other possible breaches of CD3 and/or CD5

gC25 A breach of Rule C9 may also constitute a breach of CD3 and/or CD5. Other conduct which is likely to be treated as a breach of CD3 and/or CD5 includes (but is not limited to):

- .1 ... breaches of Rule C8;
- .2 breaches of Rule C10 ....

11. See also the BSB's [Guidance on referral and marketing arrangements for barristers permitted by the BSB](#).

12. The Bar Council also takes the following views:

#### The position of clerks and other staff

12.1. In the light of CD10, oC24, rC89 and rC90, you will be responsible for the conduct of your staff, and must take steps to ensure that members of your staff are not paying commissions or giving other consideration on their own account in respect of professional instructions for members of chambers.

#### Publicly Funded Cases

12.2. Where public funding is in place, the Legal Aid Agency's Contract Standard Terms explicitly prohibit contract-holders from making or receiving any payment (or any other benefit) for the referral or introduction of a client, whether or not the lay client knows of, and consents to, the payment.<sup>2</sup>

12.3. In relation to criminal cases specifically, the Bar Council takes the view that the payment or acceptance of a referral fee by a barrister engaged through legal aid as a representative is also contrary to the *Criminal Legal Aid (Remuneration) Regulations 2013*.<sup>3</sup>

12.4. The Bar Council took the view that the acceptance by a barrister of an improperly low proportion of the advocacy fee paid under the Advocates Graduated Fee Scheme in a case where the solicitor was the "instructed advocate" amounted to the payment of a referral fee by a barrister, and is thus prohibited.<sup>4</sup> Following the changes to that Scheme effected by the *Criminal*

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<sup>2</sup> LAA Crime Contract 2017 Standard Terms, paragraphs 6.8 and 6.9. LAA Civil Contract 2018 Standard Terms paragraphs 6.8 and 6.9.

<sup>3</sup> Paragraph 9 - "must not receive or be a party to the making of a payment for work done in connection with those proceedings" – although note exceptions for payments via lead trial advocate under schedule 1 paragraph 26 and fn5 below.

<sup>4</sup> A practice developed among some solicitors of using the "one-case one-fee" rules in Schedule 1 para. 26 to the *Criminal Legal Aid (Remuneration) Regulations 2013* to the solicitors' own financial advantage. Under those Regulations, all fees in the case were paid by the Legal Aid Agency to the "Instructed Advocate" for him to distribute to other advocates who also appeared to represent the defendant. The "Instructed Advocate" was supposed to be the advocate with primary responsibility for the case (see the definitions of "instructed advocate", "leading instructed advocate" and "led instructed advocate" in Regulation 2(1)). But some solicitors with higher court rights of audience sought to take improper advantage of the deeming provision (in Schedule 1 para. 25(2) of the Regulations) by which the advocate who attended the PCMH was deemed to be the instructed advocate. By appearing at the PCMH the solicitor advocate was deemed to be the instructed

*Legal Aid (Remuneration) (Amendment) Regulations 2015*, where the barrister is the “trial advocate”, a disproportionately high fee paid by the barrister to a solicitor designated as “substitute advocate” for any hearing, will similarly amount to a payment of a referral fee and is thus prohibited.<sup>5</sup>

### Civil and Criminal Law

12.5. Where the lay client does not know of and consent to the payment of the referral fee:

12.5.1. it constitutes a bribe, and will be recoverable by the lay client from the solicitor or other intermediary, or from the advocate, and

12.5.2. the offer, promise or giving or the request, agreement to receive or acceptance of a referral fee may amount to a criminal offence under the *Bribery Act 2010*,

12.5.3. and this applies to both private and publicly funded cases.

12.6. Even where you believe that the solicitor or other intermediary would/will tell or has told the lay client of the fee, you may be treated in civil law as a party to the solicitor’s or other intermediary’s breach of duty if the client is not told about the payment, and does not give consent to it.

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advocate, and thereby gained control over the distribution of the advocacy fee for the case, while having no intention himself of conducting the trial. Instead, the solicitors would exploit their position as fund-holders to retain as much of the fee as possible, seeking to negotiate down the payments made to any advocate (typically counsel) instructed by them to appear at the trial.

The Bar Council considered this to be an abuse of the system and one which involved a breach of Schedule 1 para 25(10) of the Regulations, and of section IV.41.8 of the *Consolidated Criminal Practice Direction* (2017).

In such a scenario, the solicitor advocate attending the PCMH was not in a position to make decisions and give the court the assistance which the trial advocate could be expected to give; and neither the client nor the LAA as the paymaster benefited from the payment of lower fees to counsel subsequently instructed; the only effect was to inflate the solicitor’s profit margin. This was not in the public interest.

<sup>5</sup> On 5 May 2015 the *Criminal Legal Aid (Remuneration) (Amendment) Regulations 2015* came into force whereby claims for fees by advocates must be made by and paid to the “trial advocate” who is the advocate who attends the main hearing and, in relation to trials, the advocate who attends on the first day. The “trial advocate” is then responsible for paying “substitute advocates” who work on the case. The Bar Council produces a [Graduated Fee Payment Protocol](#) to help barristers to calculate the level of fee that should be paid to a substitute advocate. The fees in the Protocol are based on the regulations. For example, under Schedule 1 paragraph 24 of the *Criminal Legal Aid (Remuneration) Regulations 2013* the fee for a Led Junior or Junior Alone for a standard appearance is £91 as at October 2020. Therefore, if a solicitor advocate from the instructing firm has undertaken a standard appearance, that is the fee that the trial advocate should pay out of the fee for the case. A payment in excess of that or a percentage share of the fee arrangement is likely to amount to a referral fee.

## **Provision of the services of Junior Barristers at Discounted Fee Rates**

13. As already explained, disguised commission payments are prohibited as much as apparent commission payments.

14. In this context, the Bar Council takes the view that the provision of junior barristers to carry out work for a fee clearly below the market rate, or below that prescribed by regulation or subject to an applicable protocol, may in certain circumstances amount to a disguised commission payment to the solicitor or other intermediary. See further the Bar Council's guidance note on [Discounted Fixed Fees](#).

15. Moreover, the Bar Council also takes the view that the provision of junior barristers at discounted fees (or even for no fee at all) in return for securing instructions for other members of chambers, particularly more senior members, is also prohibited. Not only does this involve a disguised referral fee, but it also involves a serious abuse of the most vulnerable members of the profession in breach of inter alia rC8 and rC89.

### **Advice**

16. If you are uncertain whether a particular arrangement is consistent with the BSB Handbook, you are encouraged to seek advice by contacting the [Ethical Enquiries Service](#).

### **Important Notice**

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## Annex: Explanatory Note

1. The Bar Council is firmly of the view that the payment of referral fees in the legal market, and in the provision of advocacy services in particular, operate against the public interest.

2. The Bar Council views referral fees as:

(1) threatening the quality of the service the lay client receives, since:

(a) willingness and ability to pay a referral fee may have more influence upon the choice of advocate by the instructing solicitor than the ability of the advocate in question, and

(b) advocates are no longer forced to rely upon the quality of their advocacy to attract work;

(2) limiting client choice, by reducing the pool of advocates from which the solicitor will make a selection; and

(3) compromising the independence of the advocate.

3. The Bar Council agrees with the views expressed by Jackson L.J. in *“Civil Litigation Costs Review: Final Report by Lord Justice Jackson”* (21 December 2009):

(1) Jackson L.J. highlighted the negative effects of non-advocacy referral fees upon personal injury cases and came to the conclusion that they should be prohibited. He found that referral fees in personal injury cases,

*“...add to the costs of litigation, without adding any real value to it.”*

(2) Jackson L.J. found that referral fees there were of no benefit to the lay client:

*“...the effect of referral fees can only be to drive up legal costs (since the referee must recoup its outlay) and/or to depress quality of service.”*

(3) The fact that referral fees were paid as a matter of routine was found to be one of the factors that contributed to the high costs of personal injuries litigation. The lifting of the ban on referral fees in 2004 by solicitors had not proved to be of benefit either to claimants or to the providers of legal services:

*“The only winners are the recipients of referral fees.”*

4. The very high standards of conduct which the Bar sets and maintains are given regulatory force in Core Duties 2, 3, 4 and 5, and by the specific obligations on barristers in rC15:

*“.1 you must promote fearlessly and by all proper and lawful means the client’s best interests;*

*.2 you must do so without regard to your own interests or to any consequences to you ...*

*.3 you must do so without regard to the consequences to any other person (whether to your professional client, employer or any other person)”.*

5. Members of the Bar also compete in an open market with other members of the profession who practise in the same field and are of similar experience. The strength of a barrister’s reputation for providing a high-quality service for his client is, or should be, the main reason why a barrister attracts instructions. This need to compete creates the climate at the Bar which has consistently produced the highest standards in both advocacy and legal representation throughout the profession.

6. The payment of referral fees undermines those standards and the public’s confidence that the profession is maintaining them. It risks corrupting the Bar’s integrity, the service provided to lay clients (who are often from the most vulnerable sectors in society) and the professional relationship between the solicitor and the advocate.

7. The payment of referral fees within the legal market is also having a damaging effect upon the viability of practice for younger members of the Bar, particularly where representation is publicly funded. In the long run this can only damage the whole of the Bar.

8. Since the *Access to Justice Act 1999*, there has been a steady increase in the number of solicitors practising advocacy, whether as solicitor advocates or “higher court advocates” (“HCAs”), particularly in family and in criminal law. The payment of referral fees between solicitors’ firms and freelance HCAs is now commonplace, particularly in criminal practice, where cross-referrals between solicitors happen regularly.

9. Economic pressure upon publicly funded solicitors’ practices, and particularly criminal practices, will continue to intensify as a result of the further reduction of litigator legal aid fees.

10. These pressures will increase the drive towards the request for referral fees. Thus solicitors will be incentivized to brief advocates based on economic criteria rather than on which advocate would provide the best representation for the lay client. The Bar Council is aware of the increasing pressure being put upon members of the Bar by certain solicitors to enter into referral fee agreements.

11. The payment between solicitors of referral fees and the consequent increased use of solicitor advocates has diverted work away from young practitioners at the family and criminal Bars. As a result, young barristers are losing valuable experience at an important stage in their career, are suffering financial hardship and, in crime, are finding difficulty in establishing a crown court practice. This has affected not only those barristers who are currently at the Bar, but is likely to discourage the brightest and best applicants from coming to the Bar.

12. Pupils typically begin their career at the Bar many thousands of pounds in debt. An effect of referral fees is ultimately likely to be to dissuade those from less privileged backgrounds from a career at the Bar. The junior Bar will not only see the quality of its new members diminish, but also its diversity. In time, this will have a detrimental effect upon the quality and diversity of the senior Bar and the judiciary.

13. Accordingly, for the reasons set out above, the Bar Council takes the view that referral fees have a negative rather than a positive impact for clients, and operate against the public interest. They threaten to compromise the integrity of those who receive them. At best they limit the client's choice of advocate: at worst, they can result in the lay client receiving a substandard service.

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