LSB CONSULTATION RESPONSE

REFERRAL FEES

Background

I advise law firms and claims management companies on their referral arrangements and have done so for a number of years, I also represent law firms under investigation by the SRA.

I present specific seminars on referral arrangements for a number of law societies and professional training organisations (MBL Seminars, CLT, etc) around the country and have been told that these seminars are normally the ones that attract the most attendees. I recently did seminars for MBL in London and Manchester which attracted over 50 firms to each, and I am due to speak in Birmingham, Leeds and Bristol in January with bookings already showing in excess of 50 firms attending each; I am due to do London and Manchester again in April.

I liaise with the SRA and CMR and consult with them regularly on issues relating to referral problems; I met Kevin Rousell to discuss a number of concerns and we now keep in touch on an ongoing basis.

Through my work I have been made aware of numerous problems with referral arrangements and CMCs and I outline these below.

I was involved in the longest running SRA investigation and SDT hearing involving the firm that vetted files for the Accident Group, and through this saw first-hand the difficulties with interpreting and enforcing the referral rules, not only from a practitioner's perspective but also from a regulator's position! It only became apparent that a referral fee was involved when the costs judge ruled as such, until that time the regulator and counsel had advised that no referral fees were involved!

Discussion

As a consequence of the Accident Group test cases the then Chief Executive of the Law Society said in 2004, "We welcome the fact that such a complex situation *[referrals]* has been clarified and solicitors now know the position"; this could not be further from the truth as can be seen by the number of SRA investigations and SDT prosecutions (including those related to the coal miners' cases) relating to breaches of the referral rules! I have also received numerous enquiries about the rules and how they should be interpreted and these enquiries clearly show a lack of understanding of the position.

The previous SRA Chairman, Peter Williamson, said in 2009, "We felt that a ban was impracticable - the commercial imperative to use referral arrangements is too intense and their use too widespread… the challenge facing the SRA is to make the system work – to safeguard the interests of clients, and to improve compliance"; this is all well and good but the main problems appear not to be with solicitors but with CMCs/introducers not meeting the requirements of rule 9, which are not then rectified by the law firms involved because they do not feel they have the power to make a CMC/introducer change. It is easy to say that law firms should walk away from non-compliant CMC/introducer arrangements but in the current economic climate that is not a decision anyone can take lightly.

I have had access to numerous referral arrangements and have spoken to many law firms, CMCs and regulators about them, I have also had valuable feedback from law firms about the problems encountered with CMCs/introducers (both small and large).

The general view from law firms is that to compete they need to take referrals and although they will do what they can to comply with rule 9 they see their continuing existence and ability to help clients as their main priority, rather than 'box ticking' in relation to Rule 9, and ensuring CMCs/introducers do what is required of them. The majority of law firms want to do the best for their clients and do not necessarily set out to breach their professional rules, but they feel powerless to stand up to large CMCs/introducers that are beaching the rules, in most cases this is in relation to notifying clients about the arrangement prior to referring the client to the law firm.

It cannot be right for law firms to have to take the place of the regulators, especially when they are potentially conflicted by their duty to act in the interest of clients and their need to remain in business and compete.

It has recently become apparent that some breaches that have been notified to both the CMR and SRA are being 'ignored' on the basis that it would not be in the public interest to pursue them, for example, some CMCs are using the words 'Lawyer' and 'Solicitor' in their titles when they are not allowed to under the Solicitors Act and/or Legal Services Act. These examples show clear breaches of Rule 7 and are misleading the public into believing they are dealing with lawyers/solicitors; law firms would be expected to query and remedy such breaches or face disciplinary action. The regulatory regime appears to fail where regulators quite rightly look at the public interest but retain the right to pursue law firms for breaching these rules because they did not carry out sufficient due diligence. It is hoped that Outcomes Focused Regulation and the new approach being taken by the SRA will resolve matters but as things stand firms are exposed.

Another example of a breach that appears to be overlooked is that of notifying clients using web sites where CMCs use very generic details in their terms and conditions rather than agreement specific details (law firm name and fee amount).

It is clear from my research and evidence that CMCs/introducers know that law firms are not in a position to pressurize them into changing where breaches occur and that they have no real choice but to source work from them if they wish to trade profitably, many CMCs/introducers abuse their positions knowing that the CMR is unlikely or unable to take action on rule 9 breaches and that the SRA will concentrate on law firms only. As one CMC said when I challenged them over breaches "Our work is just too good to refuse"!

In my view the current regulatory regime, where law firms are expected to police CMCs/introducers, does not work and regulators must use the powers they have to ensure compliance. Pursuing law firms does not in itself resolve the problem of a non-compliant scheme; dealing with the non-compliant CMCs/introducers also has to be a priority. It must follow that where a law firm is found in breach of rule 9 for not ensuring a CMC has complied that the CMC faces sanctions as well for breaching rule 8 of the Claims Regulations.

I have numerous other examples of breaches and anomalies and would happily share these with you should it be of assistance.

Recommendations
I would recommend that:

1. The regulation of referrals is consistent across the range of regulators;
2. Regulators ensure CMC/introducer compliance, not law firms;

3. The SRA and CMR should introduce a standard referral agreement, which should be separate from any service level agreements between the CMC/introducer and law firm;
4. The SRA and MoJ should 'approve' referral schemes as part of the initial MoJ authorisation process, and a 'stamp of approval' issued so that law firms can clearly see during their due diligence processes that a CMC/introducer is compliant

Conclusion

Regulation in relation to referrals must become more consistent, the rules and their enforcement should not conflict with the public interest, and law firms should not be placed in difficult positions where they have to choose between accepting bulk work from non-compliant CMCs/introducers and their obligation to comply. Reality shows that firms will look at the commercial imperative over tackling non-compliant CMCs/introducers and will take the risk they won't get caught, or if they are, that they will be given time to rectify problems when found; this approach cannot be in the interest of anyone and must be resolved quickly.

Transparency is said to be at the heart of this issue, but unless the regulatory approach is fair, consistent and clear it will not be achieved.