Sticking to our principles

Preface
Examine the LSB’s commitment to standards and to quality; the LSB decision to continue to permit referral fees; and a meeting with the new Chief Executive of the Legal Services Commission

In his address to the Russell Cooke Forum on Quality and Standards in a Liberalised Market, David Edmonds, the Chair of the Legal Services Board (LSB) gave the unremitting commitment of the LSB to standards, to quality and to upholding the rule of law. Easily said, but a little less easy to discern, I suggest.

Where are the commitments to standards, and to quality? Take referral fees, by way of example. A referral fee is nothing more than the price paid by one person for the referral of work to him by another, the purchase price paid by him to obtain the work. Where a barrister pays a referral fee to a solicitor, or another, “for the purpose of procuring professional instructions”, that is to obtain work from the solicitor’s client, the barrister commits a regulatory offence, and arguably a criminal offence. That is so, whether or not the client is aware of the arrangement. Putting it bluntly, referral fees are bribes.

The client when seeking a recommendation from, or acting upon the advice of, the solicitor as to the identity of the appropriate counsel for his matter, is entitled to that recommendation or advice on the basis of the suitability of the counsel, not upon the basis of any pre-existing arrangement between the counsel and the solicitor nor upon the price which the counsel is willing to pay to get the work.

The Bar competes daily in the market place for work, and in which those who provide the required services obtain the greater share of the work available. Not only does the payment of referral fees distort the operation of the market so far as the purchaser of the services is concerned, but in publicly funded work it also results in an inappropriate allocation of very scarce and ever diminishing resources.

Whilst the requirement of the Ministry of Justice to have evidence of this practice of paying, or demanding, referral fees, which practice we all believe is going on, before dealing with them, may be understandable, the stance adopted by the LSB is less so. Its review into referral fees is said to have found that there was “relatively little evidence of actual or potential harm to consumers or the public interest”, prompting Mr Edmonds to comment in the LSB’s press release issued upon completion of the review that “we are persuaded that the interests of consumers are best served by continuing to permit referral fees, but managing their impact through shining the light of transparency on them”.

Has the LSB taken the trouble to ask any clients (sorry, consumers) if they are happy, or even content, to pay £100 for £75 worth of services, with the balance being paid back to, or retained by, the solicitor referring the work, solely as the price of that referral?
The Bar Council has no intention of letting the matter rest there, as evidenced by the observations eloquently made at that same Russell Cooke Forum by Maura McGowan QC, next year’s Chairman of the Bar.

Call us “old fashioned” about these, and other such, things (and I know that is the view of some), but on this issue there is no ground to be given. Our principled approach ensures the independence of the Bar, the primacy of our duty to the Court, not to the client who pays us, or to the solicitor who refers work to us, and the integrity of the system within which we operate.

The Bar is considered by some to be “living in the past”, “old fashioned”, “behind the times” in relation to its attitude towards Alternative Business Structures (ABSs). But that is not because we are suffering from Bleak House syndrome. It is because we are able to provide high quality services with little overhead cost to “the consumer” of those services, because it enables us to maintain our independence from interests and duties other than, and which may conflict with, those to the Court and to our clients, for example to solicitors or to any financiers, and even one another. Subject to our duties to the Court, it enables us to fight fearlessly for the interests of the client, however unpopular or unsavoury may be the client or his cause. And it enables us to provide the highest quality legal services, with little overhead cost to ourselves or to our clients. You will have been interested to learn of the rejection by the New York State Bar of a proposal to allow for the delivery of legal services through ABSs. I was. But perhaps the US is not sufficiently “consumer facing”.

The Bar is ever changing, as is the landscape for the provision of legal services. Only last month, I met with Matthew Coats, the new Chief Executive of the Legal Services Commission (LSC) (soon to be an executive agency of the MoJ). We covered a range of different issues from late payment of counsels’ fees, to improvements in casework and the need to reduce error rates further and his desire to develop better partnerships with stakeholders. He said that he felt that there could, and should, be more dialogue between the LSC and the Bar, and that he would welcome further involvement in relation to the use by the Bar of vehicles for contracting with the LSC. I detected no preconception or predisposition on his part to decry the willingness or ability of the Bar to make the necessary changes to the way in which it delivers legal services, in the public interest.

The Bar is ever changing in what it does, how it does it, in its attitudes, and in its practices. And it will continue to effect change when to do so is in the interests of Justice and those of its clients. The Bar has been around for centuries, and will be around for many more. The manner in which it delivers its services may change, but its core values will not.