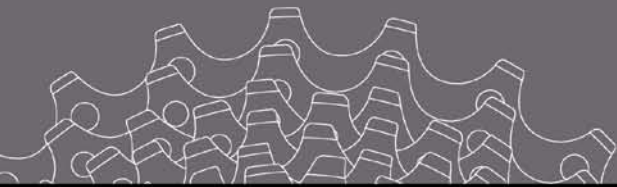


Cost benefit analysis of the impact of referral fees in legal services



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LSB, 24th May 2010

Agenda

- Project objectives and approach
- Conveyancing
- Criminal advocacy
- Personal injury
- Conclusions

Objectives and approach

- Charles River Associates (CRA) was asked by the LSB to undertake:
 - Assessment of the impact of referral fees
 - Analysis of various policy options
- Approach
 - Review existing research (Jackson, OFT)
 - Consumer Panel discussion and initial interviews to identify areas of focus
 - Over 40 interviews with solicitors, barristers, introducers, trade associations, regulators and judiciary
 - Claims Management Regulator workshop
 - Survey of estate agents
 - Policy assessment

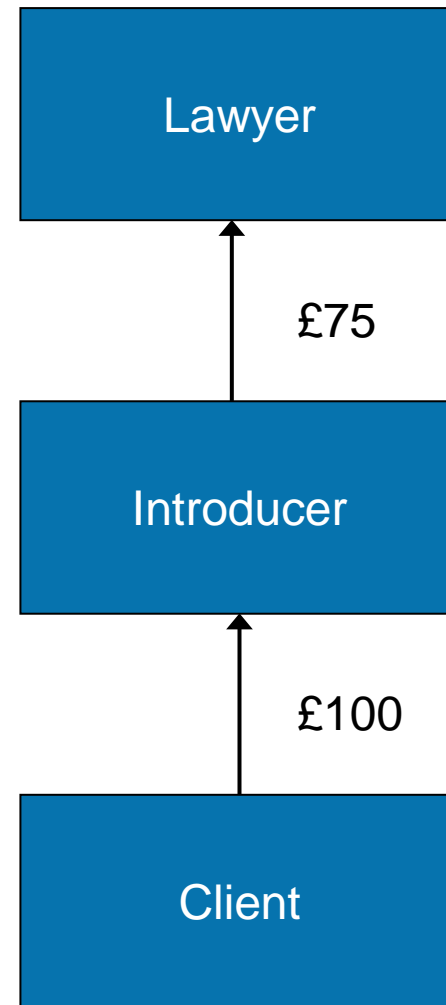
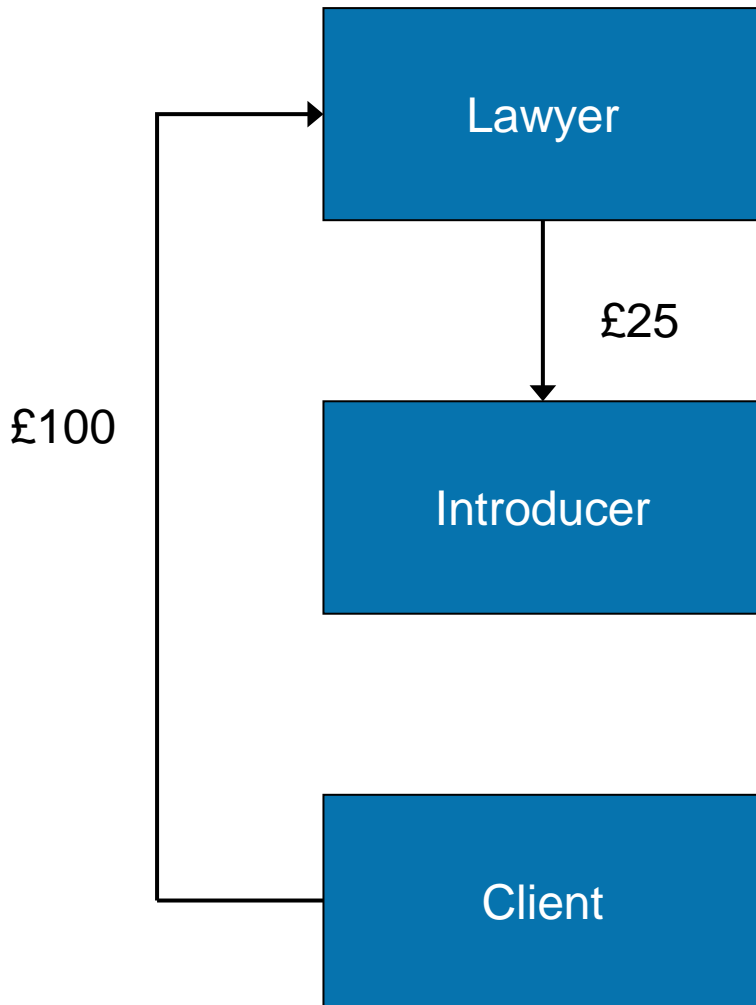
Current rules

- Referral fees allowed for solicitors since 2004 although they are not allowed for barristers
- Disclosure of referral fee arrangements must be made by:
 - Solicitors
 - Licensed conveyancers
 - Introducers to solicitors
 - Estate agents
 - Claims management companies (CMCs)
 - Insurance companies

Policy proposals

- No restrictions on referral fees
 - Barristers allowed to pay/receive
- Cap referral fees
- Disclosure of information to consumers
 - Agreed format
 - Monetary values
- Disclosure of information to Approved Regulators
- Ban referral fees

Referral fees and fee sharing arrangements



Conveyancing

Conveyancing – demand and supply

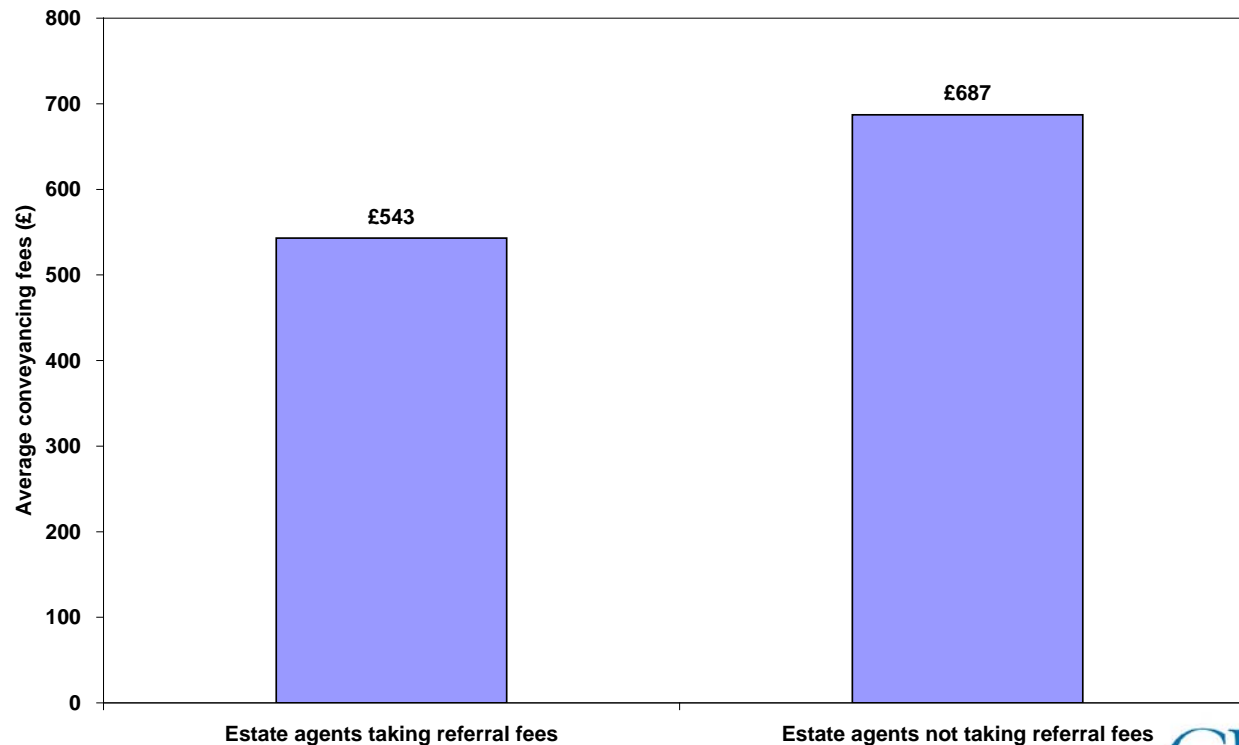
- Demand
 - 50% of consumers shop around
 - Price an important element of competition
- Supply
 - Solicitors and licensed conveyancers
 - Introducer model common primarily with estate agents (80% have panel or list of conveyancers)
 - Increased use of technology over time
 - Trend towards national conveyancers
- Conveyancing fee set through competitive market
 - Broadly constant since before 2004

Conveyancing – role of referral fees in competition

- Pre 2004
 - Complex arrangements to pay marketing/membership fees
 - Trend towards estate agent centralisation of panels
- Since 2004 competition has led to an increase in referral fees
 - Around £50-100 in 2004 to around £250-400 today
 - Referral fees part of panel selection process
- Choice of conveyancer determined by estate agents
 - Continued movement towards nationals with more explicit arrangements
 - Local firms have less formal arrangements e.g. reciprocity, hospitality
- No impact on the quantity of conveyancing
 - Based on housing transactions or re-mortgaging

Conveyancing – market failure and consumer detriment

- No evidence referral fees led to conveyancing fees increasing
 - Price today broadly in line with pre 2004
 - Price from those with referral fees is lower than those with no referral fees



Conveyancing – market failure and consumer detriment

- No evidence that referral fees have led to a decline in quality
 - No evidence of problems related to title
 - Automation and use of non-qualified staff leads to remote / non face-to-face service but no evidence this reduces quality on average
 - National conveyancers can access similar information to local conveyancers hence no local advantage
 - Transactions appear faster with those who pay referral fees (57% of estate agents say faster compared to 2% slower)
 - Complaints are low
 - Customer satisfaction is high among those who use referrals
 - 90%+ state performance better than others they have used before
 - Estate agents requiring customer survey indicates they care about quality whereas mortgage companies do not provide quality assurance

Conveyancing - policy proposals

- Ban
 - Return to complex (but centralised) arrangements as pre-2004 for large firms and Home Information Packs provide another way to “get around” a ban
 - If enforcement possible, would see alternative business structures develop
- Cap referral fee
 - No evidence of group of consumers facing very high conveyancing fees
 - Similar problems as ban with additional enforcement costs
- Disclosure to clients in standardised form
 - Disclosure already required and enforcement increased recently
 - No evidence of consumer response (10 from 25,000) as concerned about end fee
- Greater disclosure to regulator
 - Unclear how detriment would be measured based on information on referral fees
 - Little advantage to publishing as nationals pay more than locals due to competition (not lack of information)

Criminal advocacy

Criminal advocacy – demand and supply

- Demand

- Litigator – duty solicitor and repeat business / recommendation
- Advocate – client selection very minimal, mainly solicitor selection
- Clients in weak position to assess quality of advocacy

- Supply

- Solicitor advocates increased from 1,160 in 2004 to 2,593 in 2009
- Independent barristers roughly constant or slight decline at 4,303
- Switch from independent bar to solicitor advocates
 - 37% solicitors seen increase in solicitor advocates (57% no change)
 - Reduction in number of criminal pupillages

Criminal advocacy – price

- Prices for Crown Court advocacy are regulated and paid through the Legal Services Commission (LSC)
- Advocate Graduated Fee Scheme (AGFS)
 - Setting fees for activities, advocate type, case type
 - Appointment of Instructed Advocate and ability to have substitute advocate aimed at improving case management and reducing administrative costs
 - Revisions in 2007 led to increase in fees of 16%
- Litigator Graduated Fee Scheme (LGFS)
 - Similar to AGFS in structure but revisions in 2008 led to lower prices changing the relativity between LGFS and AGFS
- Referral fees are banned under the LSC contract, but fee sharing can replicate the same economic effects
 - Independent barristers should follow the Bar Protocol
 - Other advocates can negotiate how fees are shared

Criminal advocacy – role of referral fees (or equivalent) in competition and market failure / consumer detriment (1)

- Increased use of solicitor advocates
 - Driven by AGFS
 - Can not conclude this reduces quality
- Increase in use of in-house advocates for part (e.g. guilty pleas) or all of advocacy
 - Driven by AGFS / LGFS but quantitative data not available
 - Concerns profitability focus leads to advocates appointed for cases beyond competency but no quality assurance scheme to prevent or assess detriment
- Use of “straw” in-house juniors
 - Driven by profitability concerns although some pre-date AGFS changes
 - Impact on clients mitigated by actions of leading advocate but resources wasted

Criminal advocacy – role of referral fees (or equivalent) in competition and market failure / consumer detriment (2)

- Appointment of external advocates on the basis of fee sharing
 - Prefer solicitor advocates to barristers to avoid the Bar Protocol
 - Prefer solicitor advocates who will accept non-Protocol fees
 - Common for non-Protocol fee sharing arrangements to be set at 80% of the fees that might otherwise have been expected.
 - No evidence that 80% fee-sharing is itself reducing quality
 - Bar Protocol can lead to examples of 80% of fees received in other cases
 - No immediate benefits to either client or LSC from non-Protocol arrangements
 - Concern profitability focus causes solicitor advocates to be appointed for cases beyond their competency
 - No quality assurance scheme to prevent or assess detriment
 - Greatest impact observed on less complex cases

Criminal advocacy – role of referral fees (or equivalent) in competition and market failure / consumer detriment (3)

- Concern that focus on profitability causes:
 - In-house advocates to be appointed for cases beyond their competency
 - Driven by AGFS
 - External advocates to be appointed for cases beyond their competency
 - Driven by fee sharing arrangements
- Current lack of quality assurance scheme means that
 - Little prevents a deterioration in quality from arising
 - Not possible to assess the extent of detriment that occurs

Criminal advocacy – policy proposals

- **Ban fee sharing arrangements**
 - Disproportionate given timetabling constraints require substitute advocates
- **Ban non-Protocol arrangements**
 - Does not address concerns re in-house advocates and may cause firms to employ additional in-house advocates
 - Level playing field for external advocates (although this could also be achieved by removing the Bar Protocol) and leaves choice to be made primarily on the basis of quality
 - Only holds in absence of Quality Assurance for Advocates; once this is in place to protect quality, price competition would be beneficial
- **Disclosure to client**
 - Not supported as client does not commonly pay
- **Disclosure to Approved Regulator / LSC**
 - Theoretically useful to identify where prices are out of line, but value reduced if move away from administratively set prices
 - Large number of complex payments also limits feasibility and usefulness

Personal injury

Personal injury – demand and supply

- Demand

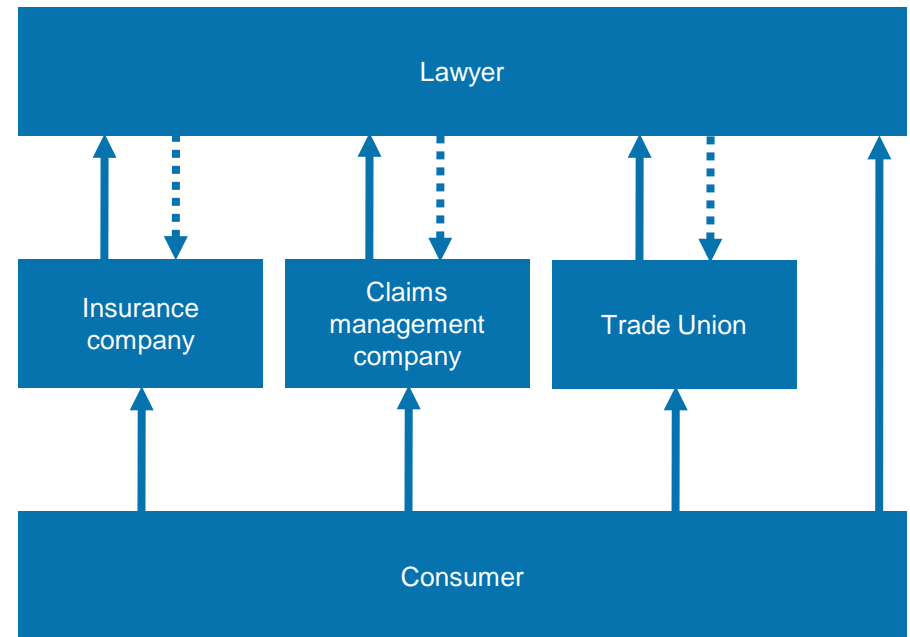
- Number of Road Traffic Accidents (RTAs) decreasing
- No-win-no-fee and insurance means price plays little role in selection process
- Marketing has important role

- Supply

- Introducer model is common

- Prices mainly set through prescribed legal costs

- Predictable costs regime
- Fast track trial costs regime
- Guideline hourly rates

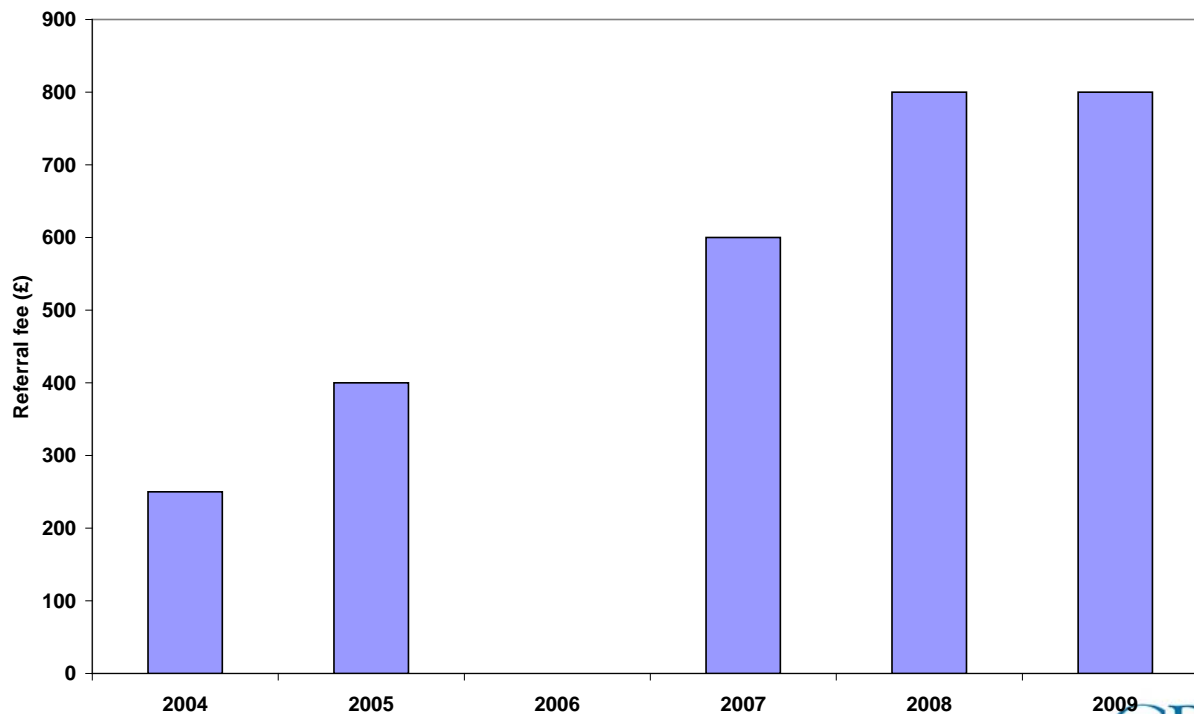


Personal injury – role of referral fees in competition (1)

- Pre 2004
 - Vast array of complex arrangements to pay marketing/membership fees
 - Reducing fees for other services e.g. “bent metal” for insurance companies or legal advice for trade unions
- Choice of lawyer determined by introducers on basis of referral fees
 - Solicitor run collectives – contribution to marketing budget
 - CMCs run pure referral fee model
 - Insurance companies with small panel
 - Trade unions with referral fees or with other services provided

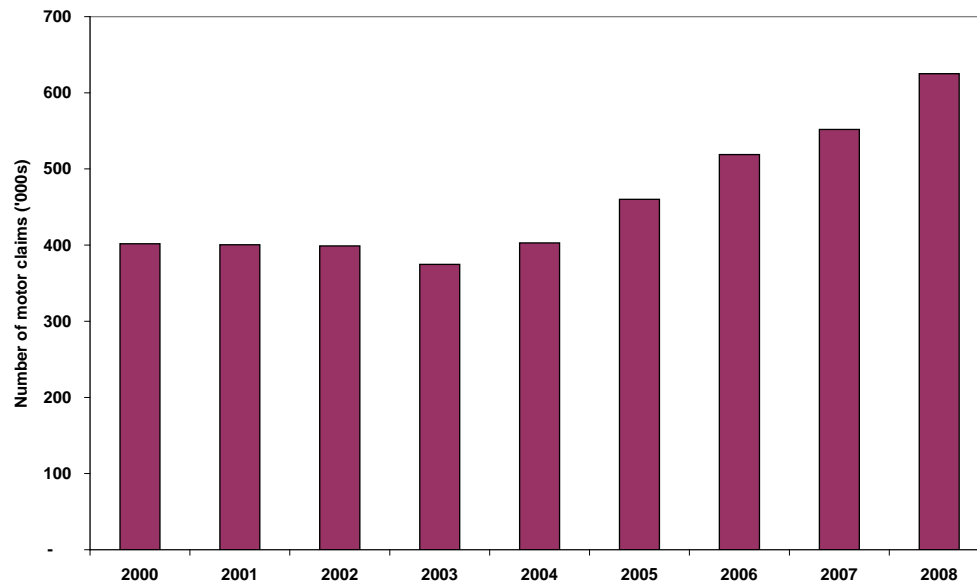
Personal injury – role of referral fees in competition (2)

- Competition has led to an increase in referral fees
 - As lawyers compete to access introducers for motor claims
 - Evidence that the referral fees also reflect services provided by introducers as well as bargaining power and economies of scale



Personal injury – role of referral fees in competition (3)

- Referral fees have helped to facilitate motor claims
 - Cost recovery and fixed costs schemes significant drivers
 - Ability to use referral fees “above board” encouraged investment in technology
 - Role of marketing in encouraging claims supported by consumer evidence



Personal injury – market failure and consumer detriment

- No evidence that increase in referral fees has increased price to consumers
 - Prevalence of no-win-no-fee and majority of motor claims through prescribed cost schemes
- No evidence that referral fees are reducing quality
 - Success rates for motor are constant over time at over 90%
 - Information readily available on value of standard claims and no evidence of under-settling
 - Service level agreements in place with 95% customer satisfaction
 - Probably increase in insurance prices
 - Partly offset by referral fee income
 - Difficult to describe as detriment where consumers have valid claims
 - Concerns about fraudulent claims caused by (non-)verifiable nature
 - No evidence that equivalent arrangements by trade unions reduce quality
 - Some benefits passed to consumers through free services

Personal injury - policy proposals

- Ban
 - Return to complex arrangements as pre-2004
 - Trade unions and insurance companies can receive services for low prices
 - Use alternative business structures
 - If enforced then detrimental as referral fees have increased claims
- Cap referral fee
 - Similar problems as ban with additional enforcement costs
 - If it could be enforced it would favour models with a “pure referral” (low referral fees) over introducers offering additional services (high referral fees)
- Disclosure to clients in standardised form
 - Disclosure already required and enforcement increased recently
 - No evidence of consumer response (2 from 50,000) as do not pay legal costs
- Greater disclosure to regulator
 - Could identify outliers, but if concerns are about quality better for regulatory attention to be on quality measures
 - Little appetite for published information

Conclusions

- Conveyancing
 - No evidence that referral fees have caused consumer detriment
- Criminal advocacy
 - Concern that focus on profitability causes advocates to be appointed for cases beyond their competency
 - In-house driven by AGFS
 - External driven by fee sharing arrangements
 - No quality assurance scheme to prevent or assess detriment
- Personal injury
 - No evidence that referral fees have caused consumer detriment

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