

Referral fees, referral arrangements and fee sharing

This response to the consultation is prepared by the Association of Regulated Claims Management Companies (ARC). We act as an industry trade body for our members who are all small to medium Regulated Claims Management Companies (CMC's) covering both the personal injury sector and financial mis-selling. Our members have no involvement in conveyancing, wills/probate nor criminal advocacy and questions relating to these areas will not be answered as they are outside our sphere of influence.

Question 1: Do you agree with our analysis of the operation of referral fees and arrangements?

Utilising your own headings we respond more particularly below. However in general in relation to Personal injury we agree with the analysis and operation of these arrangements.

Quality

The introduction in referral fees has in our view significantly increased the quality of work carried out for the consumer among specialist practitioners of personal injury. Whereas the high street practice which focuses on a broad stream of work types and only "plays" at personal injury will be affected by increased referral fees, the specialist practitioner who has resourced up to deal with high volume personal injury work is an entirely different story. As mentioned in the consultation paper huge investment in case management programmes and IT in general have led to vastly increased service levels.

Different CMC's will have different standards that they hold their panel solicitors to. Larger CMC's will have formal, very tight service level agreements and Solicitors will be removed from panels for consistent breaches. Smaller CMC's are far more reliant on repeat business and are normally centred around a tight knit community grouping. Therefore if the Solicitor is unable to hold a high standard of work then this will affect the work flow of the CMC. Rather than therefore looking only for the highest referral fee, CMC's who have been in the industry for a reasonable period of time have realised the benefit of keeping their panel solicitors at as high a level of service as possible. Furthermore our members inform us that smaller firms of Solicitors tend to offer their clients a much more personal service and hence there is a real mix of panel members for CMC's.

Costs

One of the largest common misunderstandings in the personal injury world, admittedly mainly Media led, is that referral fees affect costs. Referral fees have never been recoverable against the losing party and cannot therefore by definition affect costs. In the vast majority of personal injury claims, namely road traffic accident cases under £10,000 in value, the amount of costs has been fixed since 2003 and has never been increased despite the increase in referral fee costs. Furthermore the New Claims Portal has further streamlined costs and the time for dealing with claims, without affecting referral fees and has clearly reduced in costs being lowered irrespective of referral fees.

Competition

Whereas it is true that a small number of very large CMC's have restricted panels, of which the larger firms are the main recipients, the vast majority of over 3000 CMC's are much smaller entities and like our members tend to find the service they get from smaller firms suits their business model much better, being more personal and the likelihood of having one fee-earner deal with the claim throughout its life is much higher (leading to better continuity of service). It is clear that with over 1500 firms registering for the RTA Claims Portal that there is significant choice for Consumers and that competition is as healthy as ever, despite over 6 years of referral fees being available as a methodology for obtaining work. We simply cannot see that there are any issues as to Competition inherent with the current Referral regulations.

Independence

We agree entirely that there is no evidence to suggest that Solicitor's who pay referral fees have any issues dealing with claims in their clients' best interests. Our members report that their best relationships are those where the Solicitors make it clear from the outset that the "Client is King" and his instructions will be followed whether to the detriment of the CMC or not. In any event the areas of conflict are minimal and we are yet to have raised this as an issue by any clients complaining about one of our members. Furthermore the SRA Rules of Conduct rule 9 and the Compensation Act regulations for the provision of Accident Management Services is entirely clear and is by the vast majority of Solicitors and CMC's being followed. Once these undertakings are given and are complied with, there are sufficient sanctions available under both regulatory regimes to deal with any breaches.

Choice

With regards to the issue of choice of Solicitor, whilst the CMC will usually make the choice for the client, this normally entails the client being matched up with a Solicitor that has the right experience for the nature of their work. Furthermore, should a client have a particular need, for example utilising a local Solicitor, then the majority of CMC's will meet the client's requirement by finding the closest panel solicitor or one who might be willing to travel to see the client. The smaller CMC would be averse to losing any customer and so they will do all possible to meet a client's requirements when it comes to choice of Solicitor. Further, in our members' experience, particularly of smaller CMC's, the majority have already tried a number of Solicitors and will have by a process of elimination settled on ones who can add value by understanding clients' needs. The CMC's have, through experience, found the best Solicitors and they will work with these rather than just selling a claim to the highest bidder. We accept that there are some CMC's who will refer clients only to those Solicitors that will pay the highest fee, however, they are in the minority and tends to be mainly new CMC's who have just set up and are contending with early cashflow issues.

However, in relation to before-the-event (BTE) legal expenses insurers, our members' panel solicitors inform us that they will simply appoint the firm of Solicitors on their panel and if the client has a particular requirement, for example they require a local Solicitor, this is unlikely to be met. Many clients are not aware that they already have legal expenses cover, or more likely are unaware of the exact terms of that cover and will approach a CMC or go direct to a Solicitor without first consulting their insurer. Once the client has been given advice upon the funding of their case, and the matter is referred to their BTE legal expenses

insurer, the insurer will then unreasonably refuse to appoint the client's choice of Solicitor unless court proceedings become necessary, even if there is very good reason for the client's choice, for example they have been personally recommended or used the Solicitor before.

We believe that if a client specifically requests that their legal expense insurers appoint the client's choice of Solicitor, then the insurer should be required to properly consider that request and not simply insist upon the appointment of their panel solicitors. Proper consideration of a client's choice could involve assessing whether the client's choice is sufficiently qualified to deal with the case under the terms of the policy and should look at whether or not those Solicitors have relevant expertise and practice standards evidenced by membership to the Motor Accident Solicitors Society (MASS) or Association of Personal Injury Lawyers (APIL) or Personal Injury Panel Membership.

Access to Justice

We wholeheartedly agree that Access to Justice has been vastly improved by the efforts of properly regulated and well run CMC's. We can see no evidence that by banning referral fees this will have any effect other than to send the CMC's back under the radar, which will make it so much easier for those companies not doing things properly to operate. All the hard work by the MOJ and the CMC's themselves in attempting to enhance their reputation amongst consumers and lawyers alike will be immediately undone.

Question 2: Do you have additional evidence about the operation of referral fees and arrangements that should be considered by the LSB?

As mentioned above under Access to Justice, we strongly believe that any return to the "bad old days" would be detrimental to the Legal Market in its entirety. Too much good progress has been made and the spirit of co-operation which has begun between the SRA, IFB, Claimant and Defendant markets (including Lawyers, Insurers and CMC's) will take an all too big step backwards.

Questions 3 to 5 are not dealt with as advised above.

Question 6: Will the proposals assist in improving disclosure to consumers?

Since this research was carried out there have been significant campaigns by the MOJ, SRA and the Law Society to ensure that both Solicitors and CMC's are aware of their obligations to disclosure. It is our sincere view that recommendation 1, which is exactly as the rules now cater for is happening more often than not. Our members and those CMC's acting appropriately always utilise contracts with clients and solicitors alike that provide full disclosure in line with those rules. Should further research be carried out again we believe the number of cases showing breaches would be far fewer. Furthermore as described earlier the advent of the RTA Claims Portal and the proposed Jackson Reforms will further narrow the number of Solicitors dealing with personal injury claims due to the technical (both legal and IT) speciality and commitment required to deal with these claims and therefore those caught out due to "lack of knowledge" will further reduce.

The current rule structures contain sufficient sanction for breaches and therefore nothing more needs to be done in our view in respect of recommendation 1.

However recommendation 2 has much wider issues and is not something we can support in its entirety. Whereas we have no objection in principle to the regulators gathering information and/or the full terms of every contract. However the increase in manpower and the cost to the regulator of looking at the contracts for over 3000 CMC's plus non CMC referrers like the insurers and bearing in mind that each solicitor on the panel may have negotiated separate contractual terms. The administrative burden this will entail will be astronomical.

On the basis that the benefit of this publishing exercise is for the consumer, it seems highly unlikely that the long, complicated contracts even the most unsophisticated CMC's and Solicitors use will be of no value to the average consumer due to their difficulty to understand. A secondary question must come be addressed regarding translation. Where a significant section of Claimants is unable to read English, on whose shoulders will the burden and cost of translating the published documents fall? The most concerning aspect of the publication of these contracts to our members is in respect of the anti-competition element. Referral fees vary between different types of CMC, very large CMC's and LEI insurers are able to command a higher fee due to the large numbers of claims that they can guarantee to their panel members. The small community or hire/garage based CMC's will be on the opposite end of the scale and will therefore command a much lower referral fee. The difference between the prices may be several hundred pounds per claim, however it is entirely unclear as to what impact the difference will make to consumers, other than to simply confuse them as to why the amounts are different being paid from one Solicitor to a number of referrers. There is clearly an issue in relation to competition, if a CMC or Solicitor has managed to negotiate a favourable rate on referral fees, the consequences of other Solicitors or CMC's being made aware of this would take away any advantage to that business of a good piece of negotiation. Clearly competition would decrease, leaving only those firms able to pay the very highest fees still in the market, thus restricting consumer choice and affecting independence to a far greater extent than is currently the case. In no other market is commercially sensitive information forced to be revealed and there appears to be absolutely no evidence to support how releasing such information in this market will have any effect on consumer confidence or their experience of dealing with referral fees. Our members and their panel solicitors all report that the only issue the client has in relation to referral fees is whether or not it is something that they need to pay. Once that has been resolved they lose all interest in the issue.

Question 7: Are there other options for disclosure that AR's should consider?

When Solicitors renew their practising certificates and when CMC's renew their licence that is the perfect opportunity to obtain any relevant documentation or information as to the process for informing clients regarding relevant arrangements and referral fees. This does not need to be published in full, but there is no reason why statistical information cannot be publicised to give the size and vagaries of the market without going into specifics.

Question 8: What are the issues relating to the disclosure of referral contracts by firms to approved regulators and their publication by approved regulators?

We cannot materially add to our response to Question 6.

Question 9: How should these issues be addressed?

We have no doubt that with stricter enforcement the current regulations provide sufficient methodology and sanctions for dealing with those companies who fail to provide disclosure to the clients of the referral fee. Providing this is adequately dealt with Consumer confidence in the market should remain strong.

Question 10: Will the proposals assist in improving compliance and enforcement of referral fee rules?

We do not believe that the proposals will assist in improving compliance in general. It is of course vital that the methodology and process for regulation is published and publicised in order to ensure that Consumers are confident in the ability of the regulator to regulate. As long as Consumers are aware that the regulator annually obtains full information from the Solicitor and CMC and that they are aware of the regulator's power to inspect contracts and paperwork, then that should be more than sufficient. As the Client never pays the referral fee then their concerns are severely limited, particularly so if the "Jackson Reforms" occur then the Client may be far more focused on what is coming out of his damages by way of success fees and/or ATE premiums which we may no longer be recoverable from the opposing party.

Question 11: What measure should be the subject of key performance indicators or targets?

This should centre around how many solicitors or CMC's disclose appropriately to individual clients. Evidence could be included from visits and complaints where received. Also how many Solicitors deal with each referrer and how many referrers deal with each Solicitor can be potentially useful KPI's particularly showing percentages of how many comply versus non-compliance.

Question 12: What metrics should be used to measure consumer confidence?

We are unable to provide any useful response to this question.

Should there be any queries or further requests relating to this response, please address them to:

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