



AXA Insurance response to the Legal Services Board consultation: Referral fees, referral arrangements and fee sharing

Introduction

AXA Insurance has long campaigned against referral fees and is unique amongst major insurers in declining to take referral fees for its main branded products, though referral fees are taken by our subsidiary direct motor insurance arm so as to maintain competitive advantage.

Our response is based on our experience as a major user of the civil justice system and is concerned with the use of referral fees in the personal injury arena only.

When using the term 'referral fee' it is used as a loose and generic term for all forms of formal and informal payment of fees, commission, profit share or remuneration in money or in kind. It is a term used when a lawyer purchases work or receives a 'kick back' or 'back hander' for ancillary services used or purchased.

The Legal Services Board Report and consultation focuses solely on situations where the lawyer is the paying party of referral fees. This is only part of the story. Consideration needs to be given to the extent to which law firms themselves seek referral fees or other remuneration whether in money or in kind from other agencies including:

- Medical reporting agency
- ATE insurer
- Independent vehicle examiner or engineer
- Rehabilitation provider

Although we are aware of rehabilitation providers having been approached to pay a referral fee in exchange for referring cases, we do not believe that referral fees are widespread in this particular area. However, they are rife in the other areas listed. Having paid out several hundred pounds to acquire a case, the law firm will look to recoup some of this outlay by themselves having referral fee or profit sharing type arrangements with other organisations in the claims process. This practice layers cost into the process which is ultimately paid for by the consumer. The whole approach is simply wrong.

Our fundamental starting point is that referral fees should be banned and that the consultation is too narrowly framed. In addition to looking at referral fees paid and received, the issue has to be considered in the context of the civil justice system. Our firm view is that referral fees act as a barrier to reform of the personal injury claims process, add cost into the system and act to consumer detriment by increasing costs which are ultimately passed onto consumers and businesses in the form of higher insurance premiums.



Consequently, we do not agree with the conclusions reached by the Legal Services Board; we believe that referral fees should be banned. Referral fees have been an increasing feature of the personal injury landscape over the last decade. They have supported the growth of claims management companies that feature regularly in television and newspaper adverts. They have also created the illusion of access to justice. We believe that contrary to promoting access to justice, referral fees pose a threat to the legal profession, a barrier to reform and ultimately will inhibit access to justice.

Although we believe that legal fees are disproportionately high, some law firms, particularly smaller high street firms providing a broad range of legal services have seen profits fall as referral fees have increased. As a consequence there is likely to be market consolidation which may not assist the consumer generally.

However, over the same period there has been a growth of accessing goods and services via the internet and there are noteworthy examples of how law firms are using this medium to attract clients and promote access to justice.

We strongly support Lord Justice Jackson Q.C. conclusions that referral fees have driven up costs without adding commensurate value. This consultation should be looked at in conjunction with the full breadth of Jackson LJ's interlocking proposals.

The consultation talks of consumers of the legal process and we appreciate that the client or claimant in a personal injury claim should be seen as the consumer. However, we would argue that in the current world of 'no win, no fee' that the client has little interest in the way his case is conducted (save for the level of damages received), and that the paying party is *de facto* the consumer of the personal injury process and has a vested interest in the process as a whole.

Responding specifically to the questions asked in the consultation paper:

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

No. Superficially it can be said that referral fees have not led to an increase in cost of legal fees. However, the fact is that referral fees of around £750 account for approximately half of what a lawyer will recover in a simple motor injury case. This is surely evidence enough that in the absence of referral fees, legal costs - even allowing for marketing costs - could be lower and more proportionate. This would reduce cost to the paying party and the price paid by motorists in general.

In fact, a Cardiff based claimant lawyer has recently advised that the amount sought by BTE insurers by way of referral fees 'is now pushing four figures.' He went on to explain that the only way to make money out of the MoJ fixed costs process for motor claims is to push cases into stage 3 at every opportunity. This negates the reasons why the process was introduced in the first place and is evidence as to how referral fees are a barrier to reform.



By definition referral fees mean that cases go to those who bid and often to the highest bidder and not to the most suitable law firm. For most consumers instructing a lawyer in a personal injury case is a 'once in a life time purchase.' We would welcome consumers being better informed as to how to select the best solicitor to meet their needs. Not all lawyers are the same. Some types of personal injury case are better dealt with by specialist solicitors. Referral fees inhibit this.

The operation of panels by BTE legal expense insurers and by Case Management Companies restrict, if not prevent, freedom of choice. Invariably it will result in a lawyer being retained on a case many miles from the client, which in some instances may not be in the client's best interests.

Charles River Associates conclude that 'the level of referral fees paid today is linked to the services provided by the introducer.....' While this may be so, often the type of service provided, such as initial investigation, is recoverable by the solicitor by way of fixed and predictive costs in road traffic accident cases or in chargeable hours claimed. The overall effect of this is to layer further costs into the process.

As the majority of personal injury claims are dealt with on a 'no win, no fee' basis, the client has no financial stake in the process other than the outcome. They are not concerned that a referral fee has been paid and, as is accepted in the consultation, they are frequently not told of the existence of the various fee arrangements. If they were, and if they did have a direct financial stake they may be more discerning and scrutinise the services received for the price notionally paid. In the light of this, we do not see on what basis it can be asserted that there is no evidence that referral fees are causing consumer detriment through a reduction in service.

Finally, although we are in favour of a ban we do not believe that referral fees will hinder or restrict the creation and operation of Alternative Business Structures. In fact we anticipate that claims management companies and law firms will look to merge so as to leverage synergies, routes to market economies of scale and to maximise profit.

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

Our knowledge of the exact nature of referral fees is limited as there is no requirement to disclose their existence to the paying party. However, we would urge the LSB to consider all forms of referral fees, fee sharing arrangements and profit share arrangements both where the law firm is the receiving party as well as the paying party.

Anecdotal evidence from one well known Manchester based law firm, which does not pay referral fees, is that law firms can enjoy 40% profit share or commission on ATE legal expense insurance when using certain providers. This inflates cost and must call into doubt independence and the quality of best advice.

There is further anecdotal evidence that medical reporting agencies will pay £100 per case referred to them.



These examples alone are evidence of how referral fees increase the cost of personal injury claims. In addition, as evidenced above the fee paid by the lawyer to acquire the case in the first place acts as a barrier to reform and inflates the cost artificially.

Questions 3, 4, 5

As these relate to criminal law, we have no comment.

Question 6. Will the proposals assist in improving disclosure for consumer?

No. Disclosure rules do not work at present. There is already an obligation to disclose the existence of a referral fee and ample evidence of non compliance. The SRA ought to ensure compliance with the Law Society's own rules on disclosure and punish firms or individuals who fail to meet these rules, either by imposing a fine or striking off repeated offenders.

The use of the term 'referral fee' can confuse the consumer about the true nature of the fee paid. Even where consumers are aware of a referral fee, few will appreciate the effect they have on increasing the cost of personal injury claims and cost of insurance to consumers and businesses. Further, research has not highlighted the problem of referral fees, in the loosest sense of the term, paid to the lawyer. The recommendations within the consultation document focus on fees paid by the lawyer and totally overlook the growing trend of solicitors themselves receiving a fee. We would argue that if referral fees are to remain, there should be a requirement to use plain terms such as 'we have paid £xxx to buy your case from ABC Co. and we have received a 'kick back' of £yy from XYZ medical agency' etc.

If consumers knew that solicitors were buying cases and that they often went to the firm that paid the most, and if they also knew that lawyers were receiving 'kick backs', then we would have better informed and more discerning consumers. Such an approach might improve access to justice by having better informed consumers

Question 7. Are there other options for disclosure that Approved Regulators should consider?

We favour a complete ban of referral fees. In the absence of a complete ban there should be a cap at a modest level.

If referral fees in the widest sense of the word are to continue there should be full disclosure of the arrangements to all relevant parties by all relevant parties in the claims process. This extends beyond the client to the paying party and to the courts by all those involved in the claims process including but not limited to Claims Management Company, lawyer, medical agency, credit hire agency. Once details have been disclosed to the client there should be a 'cooling off' period and a requirement for the client to positively affirm that they understand and accept the referral fee arrangements that the solicitor has.



As referral fees, both paid and received, have a direct bearing on costs claimed full information regarding the arrangements should be laid before the courts and provided to the paying party in the claim.

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

Were referral fees to be banned as we propose, this question would not arise.

We see no issues of commercial confidentiality that would prevent information in respect of referral fees and other fee arrangements in money or in kind, formal or informal to be in the public domain. Lawyers are officers of the court. If they comply with the rules in full they should not be fearful of disclosing contractual and non-contractual referral and 'kick back' arrangements.

Question 9. How should these issues be addressed?

We see no issues and have no further comment to make.

Question 10. Will these proposals assist in improving compliance and enforcement of referral fee rules?

There is presently a lacuna in the regulation of referral arrangements in respect of BTE insurers. Regulation cannot be effective until this issue is addressed and there is a coordinated approach by all regulators.

Question 11. What measures should be the subject of key performance indicators or targets?

There should be a ban on referral fees making any answer superfluous. Pending any ban there should be a requirement to disclose to the approved regulators and to consumers (including the paying party) the amount received and paid in referral fees both in respect of the individual case and over a 12 month period by the law firm, other agency and referrer. Where there is non compliance the relevant regulator should be able to impose a fine, proportionate to the annual referral fees received and paid.

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

As above