Referral fees, referral arrangements and fee sharing

A Consultation Response by

THE OLDHAM LAW ASSOCIATION

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CONCLUSIONS – PERSONAL INJURY AND CONVEYANCING

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

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

These questions will be answered together.

We do not agree with the analysis set out in the paper. Particularly, we disagree with the final two bullet points at 4.28:

- *there was also no evidence that referral fees are causing consumer detriment through a reduction in the quality of services. It was observed that success rates had remained fairly constant and compensation levels were found to be rising*

- *consumer evidence has supported the link between marketing and making additional claims which would not otherwise have arisen. The increase in claims has probably led to higher insurance prices although it is difficult to describe this as causing consumer detriment where consumers have valid claims*

We do not accept that there is no evidence that referral fees cause a reduction in service quality. All quality marks suffer from the same flaw: none of them assess the correctness of advice given to a particular client. Instead they all (Lexcel, Investors in People, ISO 9000, LSC quality marks etc) assess the quality of administrative processes and training systems in place and not whether the client receives the proper advice for the problem that they were faced with. Concluding a personal injury case within six months or the client receiving a letter every week is not a measure of good service.

For example, a client would have no idea if his solicitor told him that his personal injury claim was worth only £1,500 and should settle for that sum, when it fact the true value was £20,000. Such ignorance cannot generate complaints or negligence claims except in very rare circumstances where a client is later able to compare his settlement with a friend/colleague or if the client receives advice from another solicitor on another matter and seeks informal advice.

The clients that are concerned about particular offers and thereby seek a second opinion often do so within the three year limitation period allowing for the proposals to be rejected and reconsidered. Such intervention removing the need for a professional negligence action and/or a complaint.

We suggest therefore that the evidence that you are looking at is invalid and instead you should be speaking to firms that handle volume claimant professional negligence claims for specific examples.

The clearest recent example of poor advice from solicitors was seen with the miners' compensation claims. A tiny minority of the miners realised that they had received a poor settlement because no-one told them what the true value of the claim should have been. Defendant insurers/solicitors must recognise where claims are grossly under settled but of course it is not in their interests to release that data.

Similarly, success rates are no marker for success. Admissions of liability often arrive swiftly and without any major work by the claimant's solicitor. This statistic does not deal with issues such as the appropriateness of any agreement as to contributory negligence.

Reliance on the fact that compensation payments are rising is also not a true guide to quality or appropriateness of advice. There are many factors that have caused damages to increase (e.g. JSB Guidelines, *Heil v Rankin*). Without a comparison of the relative seriousness of accidents over a given

period with the awards of damages over the same period, the data is of no statistical or persuasive value.

We agree that the disclosure arrangement (5.2) do not work effectively but will deal with this issue when dealing with questions 6-9.

As for the conclusions relating to quality at 5.4, we strongly believe that quality is reduced when referral fees are involved. A basic assessment of the number of files handled by qualified lawyers (rather than unqualified clerks, paralegals etc) will show a marked reduction in the proportion handled by specialist, regulated and qualified lawyers. The fact that a dozen paralegals may be supervised by one quailed person does not demonstrate quality.

[As an aside our group noted that the term “paralegal” is grossly misleading and is not understood by the public. The term seems to encapsulate anyone from an experienced secretary or recently promoted office junior through to a person that has a degree and has completed the post-graduate training but cannot gain a training contract. Clients are often under a false impression of ability as a result.]

Much consideration is given in this section to the referral fees paid by claimant personal injury lawyers but there are similar issues with the fees paid by law firms to insurers to take work from insurers’ panels (both claimant and defendant) and in all areas of work. The standard of service from these firms is often poor and the opportunities for conflicts of interest arising are enormous.

Example:
An Oldham practitioner has recent experience of a claim relating to a boundary dispute. The claimant was represented by a solicitor appointed under his Legal Expenses Insurance; the defendant was represented by a local solicitor on a private retainer. After several years of work a site meeting

was arranged with the parties and counsel. An agreement was reached that the disputed land be split in half (it was impossible to ascertain who owned which bits of land due to gaps in the Land Registry title). Both parties agreed that the land should be split in half with each party paying their own costs. The Claimant was then thrown into conflict with his own solicitors who refused to accept the settlement as they insisted that their fees were paid despite their being no winner. The matter was forced to a trial at which the Claimant lost the land which he would have kept had the case settled. In addition his insurers paid the whole costs of both parties which were in excess of £50,000. The Claimant client has neither brought a complaint against his solicitor nor brought a professional negligence action as he is utterly disillusioned by the whole process.

With regard quality of advice, another local practitioner sees regular proof of the failings of such firms. The practitioner handles many second opinion cases where legal expense insurance panel firms have acted negligently.

Clients have no basis for assessing the quality of advice. Referral fee firms are able to raise expectations in advertising but there is no control mechanism to ascertain whether they deliver.

It is accepted that any system that analysed the standards of advice would be very costly if it formed part of a compulsory quality standard. However, it would not be impossible to extend one of the quality marks (possibly Lexcel) to require a small sample of files, selected at random by the Lexcel accreditation office, to be reviewed independently or certificated by independent Counsel or Solicitor Advocate.

In relation to conveyancing (5.7) we agree with the argument that commoditisation has led to a reduction in quality. The reduction in fees has caused firms to employ increasing numbers of unqualified and scantly supervised staff. This is all part and parcel of commoditisation. The payment of referral fees only serves to exacerbate the problem as does the dictation by

the referrer to the conveyancer of what he is allowed to charge the referred client. We repeat the comments made above that the number of complaints is an erroneous statistic and that no conclusions can be drawn. This is particularly true with conveyancing where errors with the title are unlikely to be spotted until the client sells the property at some point in the future. Further, any problems with the title e.g. a failure to deal with a restrictive covenant or obtain correct planning consents are now dealt with by defective title insurance, the market for which has increased massively. It is possible to insure against any contingency, so long as the insured has an appropriate interest in the item to be covered by insurance. The policies commonly cover:

- third party rights affecting the property;
- lack of necessary rights required for the benefit of the property;
- lack of title to the property (in particular where a registered title is not title absolute);
- flying freehold (where there is a separately owned freehold title above or below the property, or part of it, so that there may be problems with repair or rights of support);
- absence of planning permission or other consents for works previously carried out to the property;
- restrictive covenants affecting the property;
- deeds or documents affecting the property which cannot be produced;
- absence of an official local authority search relating to the property, where contracts must be exchanged very quickly;
- the possibility that the property is liable for chancel repairs;

These policies can be funded by a law firm if they identify an issue without any complaint or professional negligence claim being brought.

At paragraph 5.10, we wonder whether more cases are now issued at court to avoid predictable costs applying to a case.

Although not the focus of this consultation, the Oldham Law Association has broad support for the recommendations in the report of Lord Justice Jackson.

We are concerned with issues surrounding competition. Factory style law firms that pay high referral fees must (for cash flow) conclude cases as quickly as possible even if that conclusion is not in the client's best interests. It is our perception that clients are often persuaded by firms to discontinue or settle early when that is not the correct result. To enable fast turn round of cases, these firms reject complicated or specialist cases. If the run of the mill cases (which are high volume) are progressively removed from the average specialist personal injury firm then there will be fewer and fewer specialist firms on the high street. This will create access to justice issues as has been seen by the removal of legal aid from many high street law firms, creating advice deserts, with clients having to travel long distances to obtain advice or, more commonly, choose not to pursue a valid claim.

As for independence, we repeat the example given above relating to the boundary dispute case. There are many instances of conflicts arising between the client and his own lawyers due to legal expense insurance and the impossible position that solicitors are put in. This is not satisfactory. As is seen from the example, clients can lose significant assets as a result of this problem.

Where a firm is heavily reliant on work from a particular legal expense insurer, they are hardly likely to take a hard (client focussed) line and insist that an insurer takes a hit on costs, in accordance with the terms of the insurance policy, as to do so could jeopardise the flow of future work from that insurer. It is our opinion that client selected solicitors without the worry of bulk contracts or a return on their referral fee, are better able to serve a client in such circumstances. The inequality of bargaining power between the client and the legal expense insurer is of great concern and one which must be remedied quickly.

We do not agree with 5.14 of the consultation document [quality has not reduced]. All the evidence, particularly the increase in negligence claims in conveyancing, suggests otherwise. Many solicitors have been forced into a

corner whereby to continue to provide a conveyancing service it has to pay referral fees to agents who already charge commission substantially higher than the fees charged by the conveyancer. Undertaking large volumes may create some financial certainty but not the capacity for more investment in systems and processes because the profit is not there.

At paragraph 5.28, we disagree with the first sentence. We have found that members of our own firms have been put under such pressure by insurers that the employee has allowed insurers to appoint a panel firm rather than allow the client to use their employer firm. In many of these cases the employee has been dissatisfied with the standard of service but has felt too embarrassed to transfer the file to their employer, even where the employer is a specialist personal injury firm.

We agree that the referral fee disclosure mechanisms which are currently in place do not protect consumers and that this as an area which needs to be addressed.

CONCLUSIONS – CRIMINAL ADVOCACY

3. **Do you agree with our analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy?**
4. **Do you have additional evidence about the operation of referral fees or fee sharing arrangements that should be considered by the LSB?**
5. **In particular, do you have evidence about the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy?**

This section has not been considered by us.

RECOMMENDATIONS FOR IMPROVING TRANSPARENCY AND DISCLOSURE

6. **Will the proposals assist in improving disclosure to consumers?**
7. **Are there other options for disclosure that Ars should consider?**
8. **What are the issues relating to the disclosure of referral contracts by firms to approved regulators and their publication by approved regulations?**
9. **How should these issues be addressed?**

These questions will be answered together.

We believe that a standard form template should be prepared for use in every instance that there is a referral fee. That template should be approved by the Plain English Campaign. The template should make it clear that:

a) In the case of Legal Expenses Insurers, that "Your insurer is selling your claim to Bloggs & Co for a fee of £XXX";
b) In the case of a claims manager, "The claims company is selling your claim to Bloggs & Co for a fee of £XXX";
c) The choice of solicitor is based on the payment of that fee and not any assessment of the standard of the advice or specialism.
d) A rating (possibly traffic light style) giving a indication of how the high the fee is ;
e) A clear statement that the client is entitled to take advice from an independent solicitor of their choosing instead;
f) That if the client indicates that they intend to choose their own solicitor that no further communication will be received from the claims company; and
g) A statement that the document is available in other formats (Braille/large print) or languages (if the template form is fixed then it would be a simple process to translate it into the major languages spoken in the UK)

There should also be a clear cooling off period after the receipt of that document in which the claim company or insurer are not allowed to contact the client.

We are worried that without a proper template that the existence of the referral fee will be buried within complex documents or impenetrable language.

It must be recognised that an increasing percentage of the population have literacy problems. For a large percentage English is not their first language. A fixed template document would help protect vulnerable groups.

We believe that such a form should be imposed on all lawyers and should apply wherever a case is referred from a claims management company or insurer to a lawyer for reward.

The inclusion of referrals from legal expense insurers (“LEI”) to their panel lawyers is crucial as most members of the public assume that the lawyers chosen is a specialist rather than a firm that was prepared to buy the case.

Legal expense insurers are very guarded about their arrangements with lawyers. One of our local practitioners, on receiving refusal of permission from an LEI to represent the client with the indemnity of the LEI, writes to them reminding them of the duties under the Solicitors' Code of Conduct 2007 and the Referral Code and then asking for confirmation of:

a) the amount that the panel solicitor will pay for the case
b) whether there are any constraints or limits imposed upon the panel solicitor and if so what those may be.

Copies of the terms and conditions between the insurer and solicitor and a copy of the referral agreement are also requested.

To date no insurer has answered that request. As a result clients are sold to solicitors without the client having any knowledge of the arrangement and under colossal pressure from the insurer to accept the solicitor of their choice. This cannot be acceptable.

RECOMMENDATIONS FOR DELIVERING ACTIVE REGULATION

10. **Will the proposals assist in improving compliance and enforcement of referral fee rules?**
11. **What measures should be the subject of key performance indicators or targets?**
12. **What metrics should be used to measure consumer confidence?**

Our answer to this section is limited as the themes have already been covered in the answers to the first section.

We remain of the view that until there is a qualitative assessment of the advice given by referral fee paying firms then the statistics have no value. Many of the miners compensation claims are evidence of this.

A clear template document is key. The failure of a lawyer/claim company/insurer to provide this is easy to monitor. That document will only be of benefit if clients can understand it and more importantly are not bullied or pressured into signing it.

Future evidence of clients choosing their own lawyers will be one indicator of success. It should be easy to assess the number of issued template documents with the number of new matter starts; this will identify the number of clients refusing to have their case sold to a law firm.