

Referral fees, referral arrangements and fee sharing

This response to the consultation is prepared by Carter Law LLP. Our experience spans the RTA/PI sector and as such, any criminal advocacy questions will not be answered as they are outside our sphere of experience.

Question 1

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

Broadly speaking, and particularly in respect of referral fees and arrangements in the personal injury field, we agree with the analysis of the operation of such arrangements.

The introduction of referral fees, has led solicitors to introduce more efficient methods of servicing clients' requirements, for example with case management systems and has also resulted in innovative ways of structuring how the work is undertaken, creating and increasing niche areas of specialism even further than before. For example, whereas firms previously employed fee earners conducting civil litigation including personal injury matters, there are now very separate departments conducting civil litigation and personal injury and within the personal injury field various niche areas dealing with personal injury, such as industrial disease, employers and public liability cases, or separate road traffic accident departments. Certainly in our practice we strongly believe that this has led to an all round better service for clients.

In our experience, Introducers have directly caused a better quality service for clients. Many of the larger introducers require membership of SRA panels or other quality marks as a minimum requirement to join their panel of solicitors. As a result, it is far less likely these days that a client will have a solicitor with a very limited experience of the particular area of practice required. The requirements for panel membership have created a quality policing service for clients.

Whilst larger Introducers may have service level agreements, and solicitor panel membership can be lost for failing to comply with the requirements thereof, smaller introducers have their own very compelling reasons to ensure quality of legal service provided. Many such smaller introducers provide a separate service to clients, for example car repairs or hire, and rely upon word of mouth and reputation for repeat business. If the solicitor to which their customers are referred is not up to the required standard, then the introducer may lose either repeat business or the customer will not recommend them in the future to other people in their community. Ultimately, the quality of the solicitor's service has a direct impact on the introducer and in this way, panel memberships are policed and do change. Smaller introducers also often have close working relationships with their customers, and if the customer has a problem with the legal service provided they are more likely to raise concerns with the introducer rather than the solicitor, thus creating a further level of policing of the standard of the solicitors' service.

We have found that some introducers specifically look for smaller solicitors' practices for their panels, which can provide a more personal service to their customers and as such, it is not just national firms of solicitors that end up on panels.

The ban upon referral fees also led many solicitors to develop their own marketing skills and source work without the payment of referral fees to outside introducers, for example solicitors came together to create and fund InjuryLawyers4U, and National Accident Helpline was born from one solicitors practice. Without the competition from non lawyer introducers, we feel it highly unlikely that such marketing schemes would have developed, or certainly they would have taken much longer to do so. In general terms, therefore, referral fees have opened up the marketplace and in turn increased access to justice as people who may have feared the costs of litigation hitherto, have felt more confident to pursue legal advice.

In relation to costs, at 2.13 in the discussion document, there is mention that insurers claim that the liability costs of referral fees exceeds the income derived from them. This seems to be a widely misunderstood point. A referral fee is a solicitors' practice overhead and not a disbursement that can be charged to the client or ultimately recovered from the insurer. In short, the insurer NEVER bears the cost of the referral fee. Costs payable by insurers are subject to the rules of the Court and hourly rates charged in line with local Court guidelines. Further, in relation to certain RTA cases, since 2003, costs payable are fixed by reference to the level of damages recovered (predictable fees), which the referral fee has absolutely no bearing upon. It is only if the insurer delays, or makes a low offer, and proceedings are subsequently issued that the amount of costs falls out of predictable fees. In these RTA cases it is the insurers own conduct that determines the level of fees that they are ultimately liable to pay. We feel it also worth mentioning that there have been no increases in the level of predictable fees paid in each case since 2003, indeed for accidents post April 2010 dealt with under the new RTA claims process, the post issue costs are now also fixed. These are significantly *lower* than costs payable in cases which fall outside of the process. It is also worthy of note that the costs of the new RTA claims process were fixed around the innovations that solicitors have made in the use of technology linked to knowledge and experience. As discussed above, referral fee arrangements have had a significant role to play in such increasing use of technology and level of knowledge and experience. Thus, the fixed and lower costs now payable per case by insurers are arguably due to referral arrangements.

Turning to competition, the very fact that there are over 1500 solicitor firms registered with the new RTA portal confirms that referral arrangements do not restrict competition in the personal injury field. These firms have all registered in an age where referral arrangements have existed for six years. If there was to be a reduction in competition due to referral fees, then it's safe to assume that this would already have happened.

On the subject of independence, our experience is that introducers would much rather the solicitor thoroughly comply with the solicitors conduct rules as this ensures that the client is, from their perspective, "looked after" and, as mentioned above, also ensures quality of service which reflects positively on the introducer. By the solicitor maintaining an attitude of best advice at all times, the ground rules for the referral arrangement are solid. If the client is given best advice then the client's view is that

the whole service, including that provided by the introducer, is excellent. That is the common goal of all parties involved in the arrangement. Detractors trying to persuade governing bodies differently must not deal with introducers otherwise they would understand the need to maintain this kind of stance.

With regards to the issue of choice of solicitor, whilst the introducer 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. Further, if a client has a particular requirement, for example requesting a local solicitor, then the majority of introducers will meet the client's requirement by finding the closet panel solicitor or one willing to travel to see the client. The last thing that the introducer wants is to lose a customer and so they will do all possible to meet a client's requirement when it comes to choice of solicitor. Further, in our experience, particularly of smaller introducers, most have already tried a number of solicitors and ultimately work only with ones who can add value by understanding clients' needs. In some ways, the introducer has, through experience, found the best solicitors and they will work with these rather than just selling a claim to the highest bidder. Whilst there may be some introducers who will refer clients only to those solicitors that will pay the highest fee, in our experience, they are in the minority and tends to apply to introducers who have just set up and are finding their feet.

However, in relation to before-the-event (BTE) legal expenses insurers, our experience is that they will simply appoint the firm of solicitors 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 are unaware of the exact terms of that cover and will approach an introducer 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 carte blanche 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. Our clients with BTE insurance advise us frequently that they were not aware when they purchased their legal expenses insurance that their choice would be restricted in this way.

In our view, 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 are in the Motor Accident Solicitors Society (MASS) or Association of Personal Injury Lawyers (APIL).

Question 2

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

We feel that the LSB should consider the state of the market prior to the introduction of referral fees. Specifically, they should research the decisions of the Solicitors

Disciplinary Tribunal who found against solicitors who were “dressing” up referral fees in some other guise. The likelihood is that there would be some practices who would try to exploit potential loop holes in any ban. The definition of what a referral fee constitutes would have to be given extremely careful consideration. Would it incorporate not just the obvious marketing fees or panel memberships, but also consider introducers being retained by solicitors as business development managers or consultants? Regulators may find such a ban very difficult to police.

Question 3 – 5 are not dealt with as advised above

Question 6

Will the proposals assist in improving disclosure to consumers?

Recommendation one is what should be happening now. Whilst there is old evidence to suggest that this was not happening enough, our belief is that this was because of uncertainties in, or complicated amendments, to the conduct rules. Over time, particularly with the amendments to rule 9 of the code of conduct over the last 12 months, the nature of the advice needed to be given has become clearer and we would suspect that if the same research was undertaken now then the number of solicitors complying with rule 9 will have dramatically increased. This should not be changed.

The notification of existence and amount of the referral fee, confirmed in writing, to the client, is ensuring that open disclosure is happening. We have found that our clients do not express any concerns when we advise them of the referral fee being paid. Some sound confused as to why they are being told, most are indifferent and some are happy to have been told but none have ever queried the effect it would have on our advice or service. Consistently clients simply want reassurance that they do not have to pay it.

If solicitors are found not to be providing this to the client then they should be warned in no uncertain terms that they must change their practice immediately. If they do not then the punishment should be by way of a severe fine, we would suggest along the lines of the amount of the referral fee that has not been disclosed multiplied by the amount of clients that have not been provided with the information. If there is still none compliance then they should be struck off for a period of 12 months.

In relation to recommendation two, whilst we agree that a body should gather the information contained in all referral agreements in order to properly regulate them, to publicise details of the contracts is not at all practicable and any benefit to be derived there from would be completely disproportionate to the effort and expense that such a task would entail. Some referral contracts, which include service level agreements, are many pages long. In many cases a consumer would just not understand the complexity of why a certain solicitor reached that agreement. For instance, solicitors on the panel of a large introducer of work, such as a legal expenses insurer (LEI)

invariably pay the top of the market rate because of the number of claims that can be passed to the solicitor is vastly more than, for instance, a small hire company can refer. The LEI introducer will have already undertaken numerous aspects of the data gathering and is passing the information to the solicitor in such a way that the computer systems speak to each other like on the new RTA portal. This means that the solicitor can strip out some of the costs that would have to be incurred whereas say a small hire company who may require the solicitor to assist with the initial enquiries. If a solicitors practice has contracts with both type of introducer and both are published then the LEI client is going to question why the solicitor is paying so much more to their LEI than other introducers. The solicitor would then be required to spend time explaining this to a client, which in our view adds no value.

Further, the contracts contain commercially sensitive information. If an introducer or a solicitor has been able to negotiate a good deal then they should be entitled for that to remain confidential. The recommendation to publish these contracts is comparable to requiring Tesco's to publish how much they are paying for beef in the north of England as opposed to the south. Consumers would not expect them to do so.

Compliance with this recommendation would raise many issues. When would details of the contract be sent to the regulator, and when would it be published? Would this be as soon as the contract is signed or yearly at the same time as practice certificates or when the first case is received? What exactly would be disclosed, the full agreement? Will the regulator supply a draft agreement that all must comply with? Like with the previous ban on referral fees, there is a huge risk of leaving loopholes that some introducers or solicitors may find easy to exploit, leaving those of us who do not, at a commercial disadvantage.

Question 7

Are there other options for disclosure that ARs should consider?

This information should be gathered now as part of the firm practicing certificate with example letters or file notes to ensure that regulators can easily check that individual client's are being advised of the agreements.

At the moment, the SRA can ask for a copy of each and every referral agreement and in our opinion this, coupled with the information gathered with the practicing certificate, is more than sufficient.

Question 8

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

Please see question 6

Question 9

How should these issues be addressed?

The purpose of the disclosure of the referral fee is to ensure that the client is properly informed and can make an informed choice as to their legal provider. As long as the disclosure is enforced through regulation, with strong measures against solicitors and

introducers who persistently refuse to comply, as mentioned above, the recommendation one should be sufficient.

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 as a whole.

We do agree that the publishing of how regulating bodies will regulate is important and will help with consumer confidence. Particularly, if consumers are aware of an annual gathering of information coupled with confirmation that the solicitor can be visited at any time and be asked for copies of the contracts then this, we feel, would be more than sufficient. Consumers want to know what affects them personally and are concerned about market averages, which the regulator could publish, rather than the agreement between hundreds of solicitors and thousands of CMC or estate agents.

We agree that the regulator should have targets and these should be based around ensuring that solicitors are providing the information yearly and that on visits solicitors can show how many solicitors are complying with the referral code. We disagree that targets would not be required permanently as introducers and solicitors change regularly and if targets are not kept so as to ensure that the monitoring is done then the good work building confidence could be lost.

Question 11

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

The KPI should be built around disclosure to individual clients. As such, these should include evidence from visits that the referral code has been complied with. Further, evidence to show how many solicitors an introducer deals with and what percentage of these solicitors are complying with the referral code.

Question 12

What metrics should be used to measure consumer confidence?

We can't offer any assistance with this answer.