

# Legal Services Board

## Referral fees, referral arrangements and fee sharing

### Response by Thompsons Solicitors

December 2010

#### About Thompsons

Thompsons is the UK's largest trade union and personal injury law firm. It has a network of 28 offices across the UK, including in the separate legal jurisdictions of Scotland and Northern Ireland.

Thompsons only acts for trade union members and the victims of injury, never for employers or insurance companies. At any one time, the firm will be running over 70,000 claims.

The firm participates regularly in consultations on legislative issues.

#### **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?**

We generally agree with the LSB's analysis of the operation of referral fees and arrangements. In our experience, lifting the restriction on referral fees with no appropriate safeguards led to a culture of excessive referral fees being charged by insurers and claims farmers.

A clear distinction should be drawn between referral fees generally charged for commercial gain by insurers and claims farmers and referral arrangements where they are operated by membership organisations, charities and not for profit bodies. For the commercial operator the objective is profit. For the not for profit provider the driver is the provision of services to members.

From cases we have taken over it is clear that commercial referral fees charged by insurers and claims farmers have not only driven down the quality of the service provided by the lawyers but encouraged a risk averse approach. The impact has been that consumers with meritorious but high risk claims are turned away and other claims are often undersettled.

If the aim is to ensure that referral fees and arrangements do not impact on consumer access to high quality justice improving transparency and disclosure for consumers is important but insufficient alone. On transparency the debate, we suggest, should be about how far disclosure needs to go to ensure best practice and the best deal for the consumer without an adverse impact on competition.

We welcome the LSB's acknowledgment of the distinction between referral fees and arrangements. However referral arrangements are not unique to trade union legal services, they benefit other membership organisations, charities and the not for profit sector generally.

We draw the LSB's attention to the formulation for referral fees that we suggested in our evidence to the Consumer Panel earlier this year (attached).

**3. Do you agree with our analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy?**

We accept the analysis of the operation of the fee sharing arrangements in criminal advocacy. We do not currently employ Higher Court Advocate's (HCAs) but this is an area that we are keen to develop in the future to ensure a complete and competitive service for our clients.

Quality of service to our clients is paramount and it should never be acceptable to place profit before service. We therefore welcome the implementation of regulation in this area in the form of Quality Assurance for Advocates.

As Criminal Law Practitioners will attest regulation and quality standards are imposed in all areas of Criminal Law with the exception of Advocacy. The introduction of such regulation for advocates will serve to ensure that standards remain high and that fee sharing arrangements do not impact on the service provided by firms.

**4. Do you have additional evidence about the operation of referral fees or fee sharing arrangements that should be considered by the LSB?**

No.

**5. In particular, do you have evidence about the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy?**

No.

**6. Will the proposals assist in improving disclosure to consumers?**

We support recommendation one on the basis that referral fees in this context are as defined at paragraph 2.3, ie payments to introducers as distinct from referral arrangements. However, we strongly disagree with recommendation two. We set out those concerns in answer to Q8/9 below.

On recommendation one, we are confused. The bullet point on page 10 in paragraph 1.18 *Improving transparency and disclosure for consumers* refers to "the value of the referral fee in pounds". The same words are used in the recommendations on page 59.

We assume that "pounds" is used to refer to referral fees and not referral arrangements. The definition of referral fees in the paper is as a payment and referral arrangements are "free or discounted services". Whilst the formulation of 1.18 and the recommendations on page 59 may imply otherwise, only referral fees would always be in pounds,.

Confirmation is needed as these sections appear to be blurring the distinction between referral fees and arrangements. Suggesting that the monetary value of referral arrangements be disclosed does not make sense as they will often not be measurable in strictly financial terms.

**7. Are there other options for disclosure that ARs should consider?**

Yes – see Q8/9 below.

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

### **9. How should these issues be addressed?**

Contracts for the referral of business are commercially sensitive documents. They contain precise details of the legal services arrangements between a law firm and the relevant body. Whether that body is a legal expense insurer or a road traffic insurer with a third party capture unit, a trade union providing a complete package of legal services to members or a not for profit body providing a very targeted service to its members, the precise arrangements vary substantially.

The only common feature is the desire to deliver the greatest breadth of services at the best price to their customers, members or users and that, in order to do so, they will need to maintain confidentiality.

The organisation delivering the service will want the details of the package they receive from the provider of the service to be kept confidential from those with whom they are in direct competition. The provider of a service may also welcome confidentiality as their services may be offered on different terms to different clients for reasons related to volume or other variables. They will also want to keep the details from other potential legal service providers who may seek to bid against them on the renewal of or the competitive tendering of the work.

The service deliverer may charge in the form of an insurance premium, a membership subscription or a fixed charge or may charge nothing but be dependant on donations (including of legal services).

The only communality is that they are in competition with each other. Insurers compete with other insurers, unions compete to some extent against other unions for members and not for profit bodies are in competition for donations.

There are plenty of insurers offering similar packages but with nuanced differences. Membership of a union is a voluntary and conscious decision with the unions competing, at one level, with legal expense insurers. The study of why a donor donates to one charity as opposed to another is a small industry in itself.

To throw open the detail of the arrangements between an organisation and its supplier for all to see would be anti competitive and distort the market. We would question in fact whether it is lawful to compel open publication of supplier contracts in this way.

Each deliverer of services will seek to ensure that its terms of business are unique, innovative and specific to its needs. They will have honed it so as to be able to compete effectively with the package its competitors may have negotiated with their suppliers and to make a profit/attract new members/enhance the chances of a donation.

Each law firm and supplier of legal services will consider its overall package of services to a particular contracting body to be highly confidential, giving it the edge in competition with other suppliers. The package offered is, in effect, their intellectual property, built up over years of experience in the relevant market.

To suggest that consumers seeking legal assistance will wade through voluminous and complex contractual documentation to decide whether to take advantage of the services of bodies with whom they already have policies (in the case of insurers) or membership (in the case of a union) is unrealistic. They are even less likely to do so before taking out the policy or joining the membership body when an immediate need for legal services is not their motivation and they think would rather not think about the circumstances in which they might need the service in the future.

Transparency of the contractual details will not prevent the most significant risk in this area – the overblown claim of cover that is hedged with small print exceptions or the offer of cover that will never be used. One legal expenses package for public service workers offered legal cover for road traffic prosecutions as long as they were novel points of law (there are few such points left) and legal assistance for challenges to tax returns (when the worker will be on PAYE).

The only real interest in the detail will be from the competitors of the contracting body/law firm who will use the information gathered to finesse their alternative proposal so as to offer enough to get the business but not so much as to substantially benefit the organisation to whom they are providing services.

Clients should have the best information available in a clear format to enable them to make an informed decision about the legal services on offer under a referral arrangement. The model elsewhere is for consumers to be offered simple, standardised and easy to understand indicators: traffic light labelling of food products, energy efficiency charts for electrical appliances, or heat insulation tables for properties.

An extension of the proposal for complete disclosure would mean that a purchaser of a new car could expect to read the commercial contract between the manufacturer and its suppliers or a purchaser of a new build home should be able to read the voluminous contracts between the house builder and its various sub contractors. Suggesting that such highly commercially sensitive commercial contracts be made publicly available on a website would be open to ridicule in other markets. Sharing information as to process, products and commercial terms and conditions is generally regarded as unlawful, being the first step towards price fixing.

We would suggest that what matters to a consumer of legal services is the price and the quality of those services. Clearly the price must be stated where there is one – solicitors already have to set out hourly rates and costs estimates - but where, in the case of referral arrangements, the price to the policyholder or member is likely to be free the key issue is quality.

Providing standardised information on quality in legal services is not easy but there could be compulsory customer satisfaction surveys with a requirement to make the results of those available to clients in an accessible format. Similarly, figures on complaints or other dissatisfaction indicators could be standardised

Overall we regard the suggestion to require open publication of referral arrangements as a simplistic, impracticable, anti-competitive and potentially unlawful proposal. What is required is a more innovative approach focussed on the specific needs of the consumer receiving legal services under negotiated referral arrangements.

**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?**

Yes, we consider the proposals on compliance and enforcement will assist. KPIs and metrics to measure consumer confidence should focus on the quality of the service delivered based on consumer satisfaction, complaints, consumer comments and other similar indicators.

**Further information:**

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