

# Tunbridge Wells, Tonbridge & District Law Society Regulatory Committee

E: [martin.varley@ts-p.co.uk](mailto:martin.varley@ts-p.co.uk)

DD: 01892 701278

Michael Mackay  
Legal Services Board  
7th Floor  
Victoria House  
Southampton Row  
London WC1B 4AD

By email: [consultations@legalservicesboard.org.uk](mailto:consultations@legalservicesboard.org.uk)

22 December 2010

Dear Mr Mackay

## **Referral fees, referral arrangements and fee sharing Discussion document on the regulatory treatment of referral fees, referral arrangements and fee sharing**

1. **Response to Question 1 - Do you agree with [the LSB's] analysis of the operation of referral fees and arrangements?**
  - 1.1 We consider that the LSB's approach to transparency is correct. Furthermore, the general approach to referral fees and arrangements seems broadly correct.
  - 1.2 We are very concerned to see that there is a level playing field for all providers of legal services.
  - 1.3 We are not convinced that the evidence is as in-depth as the consultation paper suggests. In relation to other reports produced by Charles Rivers Associates we have seen assumptions based on vague hunches extrapolated and presented as unassailable fact. Nevertheless, we believe that the key to all consumer protection issues must be absolute transparency of referral fees and arrangements. This must be from the point of sale of an insurance product, for example, and there must be the opportunity for the consumer to have choice at all stages thereafter.
2. **Response to Question 2 - Do you have additional evidence about the operation of referral fees and arrangements that should be considered by the LSB?**
  - 2.1 We have had a good deal of anecdotal evidence that certain insurers are insisting upon their insured using panel solicitors in preference to other appropriately qualified firms. We consider there is a considerable danger that this is a trend which may be exacerbated with the introduction of Alternative Business Structures (**ABS**). This must be subject to close scrutiny by all approved regulators (**ARs**). Consumer choice ought to be

free and unfettered. We have heard that referral fees do distort the market and result in partial advice from referrers. This is the thrust of the argument in relation to financial services and products. We do not see why this argument is not also true in relation to legal services. It must be appreciated that those with the power to refer work (whether insurers, estate agents or others) have significant (and perhaps excessive) power over consumer choice in the legal market place.

- 2.2 We have heard that some legal expenses insurers appear to be wedded to certain firms, and when challenged do not provide information to allow the consumer to make a choice and to insist upon retaining their own solicitor. We believe that there is a strong likelihood that insurers will own ABSs and the inevitable consequence will be a reduction of choice to consumers.
- 2.3 We heard of cases where legal fees insurers have been less than transparent regarding arrangements in place with their 'panel firm' to whom clients are directed. We heard of instances where the insured requested the advice of a firm of solicitors with whom the client has had a long standing professional relationship and the insurer indicating that the policy would not cover such advice (contrary to its terms). In one case the insurer concerned has simply ignored all correspondence from such a firm.
- 2.4 We have received anecdotal evidence that certain firms handling personal injury and clinical negligence cases give a poor quality service to consumers and to the Courts. The reason often given for this poor quality is the cut-price basis for charging often demanded by insurers. One junior (often unqualified) employee is given the job of dealing with numerous cases being heard simultaneously. This inevitably leads to the insured feeling bereft of advice and support. Equally worrying, it leads to delays in the hearing of applications and trials. This results in other cases being delayed and the costs of litigation to rise to those litigants.
- 2.5 For the reasons given above, we are persuaded that costs cutting by some insurers leads to increased costs to other court users. It also leads to a poorer service to the consumer.
- 2.6 We received evidence that the position is much the same in the residential conveyancing market. Those firms offering the greatest referral fees seek to maximise their profit margin to pay such fees by employing under qualified staff. Further, staff in such organisations often do not have the ability or time to keep their clients adequately advised. The consequence is that clients of such firms become frustrated by the process. This has an adverse effect upon the perception of the legal profession generally.
- 2.7 It is evident that consumers are not made aware by insurers at the time of proposing a risk that in the event of litigation a cut-price service will be provided. We are of the view that the right of the insured to seek alternative suitably qualified advice should be communicated where requested by the insured or where relevant.
- 2.8 We are of the opinion that when selling the products insurers should be transparent as to the benefit of cover. As discussed above, it is said to be illusory in some cases and does not provide an indemnity in relation to solicitor/adviser of choice. Notification of any restrictions on consumer

choice must be notified prior to the contract being entered into by the consumer. Further, any such restrictions must be reasonable.

2.9 We feel that the LSB should not lose sight of the bigger picture. The payment of referral fees inevitably increases the costs of providing legal services. For example, estate agents are paid for their services by the consumer twice over where they effect an introduction to a legal services provider. The consumer is not given impartial advice as to which firm is best suited to his/her needs or has the greatest expertise, even though, theoretically, the consumer can use any solicitor they wish to engage.

2.10 If the objective is to protect the interests of consumers, we believe that referral fees and inducements should not be allowed at all. Given that the LSB wishes there to be a continuation of paid referral practices, then the need for clarity fairness and transparency are paramount for the benefit of both the consumer and the regulated community.

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

We do not have any comment, as we have no experience of this area.

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

We do not have any comment, as we have no experience of this area.

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

We do not have any comment, as we have no experience of this area.

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

6.1 We entirely agree with Recommendation one - Improving transparency and disclosure for consumers.

6.2 The legal provider should disclose to their client at the earliest opportunity the key facts about referral fees:

6.2.1 Whom the referral fee is paid to and for what services;

6.2.2 The value of the referral fee in pounds (or relevant currency where the transaction is in another currency or fees are to be paid in such a currency); and

6.2.3 The consumer's right to shop around for an alternative legal services provider.

6.3 The point made at paragraph 7.17 is of particular significance.

“The aim should be for consumers to receive information at the point at which it can best aid their decision-making.”

6.4 This is right. To receive information at the relevant time will give the consumer the best use of the of information available and to be provided under Recommendation one. This relevant point may occur more often than once.

6.5 We agree with Recommendation two - Improving transparency and disclosure in the market.

6.6 We agree ARs should collect and publish **all** agreements between introducers and lawyers.

6.7 We believe it is essential for the purposes of regulation that all agreements in respect of referral arrangements must be in writing and in plain English.

7. **Response to Question 7 - Are there other options for disclosure that ARs should consider?**

As discussed above, it is essential that consumers are given relevant information concerning their representation in litigation and their right to instruct an alternative legal services provider. As discussed above, a relevant point may occur more often than once in any transaction or litigation.

8. **Response to 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 are of the opinion that all referral fees or discounts which equate to an inducement to use the services of a firm should be accounted for and disclosed to the AR. Failure to do so should be a disciplinary matter.

9. **Response to Question 9 - How should these issues be addressed?**

Failure to give a detailed account of all referral fees and inducements should be a disciplinary matter. Depending upon the severity of any transgression and whether there is a history of transgressions, the penalty should include the withdrawal of the license to practice.

10. **Response to Question 10 - Will the proposals [for delivering active regulation] assist in improving compliance and enforcement of referral fee rules?**

10.1 We agree with your Recommendation one - Delivering active regulation Approved regulators should set out their compliance strategy for referral fees and arrangements when setting out their regulatory arrangements.

10.2 We believe that not only should ARs publish information about the operation of referral fees amongst their regulated community but also to all other ARs. This will improve the transparency of the way in which referral fees and other inducements are paid or provided to referrers.

10.3 Where compliance with referral fee rules is low, approved regulators should have targets for improved compliance. We believe that making all ARs introduce accounts rules such as those we suggest in our Response to Question 9 would ensure maximum compliance.

10.4 ARs must have rules which are, where appropriate, consistent across areas of law with other ARs. In any other case there would be the possibility of market distortion.

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

Breaches of the Accounts rules of the relevant AR would be disclosed in the annual report of that AR. These should be divided between technical breaches where no action is taken and those where disciplinary action has been taken. We believe this is a simple and effective way of monitoring the effectiveness of each AR.

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

12.1 We are not persuaded that the consumer has been given the full range of options. These would include the right not to have to pay referral fees at all. We believe that all ARs should propose what they believe will be effective methods of assessing and measuring consumer confidence.

12.2 We were anticipating Recommendation two under this Chapter. Perhaps that was the LSB's suggested course of action. We would welcome seeing such a proposal.

We hope that the foregoing will be of assistance to you.

Yours sincerely

**Martin Varley**  
**Chairman**