



FOIL UPDATE

January 2010

Referral Fees – Consultation by the LSB Consumer Panel

A request for member input

Introduction

The thorny issue of referral fees has come to the fore again with a decision by the new Legal Services Board Consumer Panel to focus on the issue for its first major project.

The Legal Services Board Consumer Panel was created by the Legal Services Act 2007 and the members of its panel of eight, to represent the interests of individual and business consumers, were announced late last year. The aim of the Board is to ensure that consumers have a voice in the regulation of legal services. It aims to provide "high quality, evidenced-based advice to the Legal Services Board and others so that decisions about the regulation of legal services are shaped around the needs of users".

The Panel recognises that referral fees are a controversial issue, with many arguments made for and against. It is seeking input from a number of stakeholders on the issue and will also be commissioning new consumer research.

FOIL has an opportunity to have its voice heard on the issue through its Law Society Council Member, Michelle Penn. The detail of the consultation and background on the issue are set out below. If you have views and comments on referral fees in general or on the specific issues raised please contact Shirley Denyer on shirley.denyer@foil.org.uk, by 12 January please, to enable responses to be consolidated before submission to Michelle.

Scope of the Consultation

The Consumer Panel is defining referral arrangements as any arrangement under which business is received from, or referred to, a third party, such as another lawyer, a claims management company or an insurance company. The consultation will therefore cover the fees paid by claimants to receive instructions as well as, for example, the fees paid by experts to claimant lawyers to secure instructions. Arrangements not involving payment will also be included.

The Panel is specifically seeking views and evidence from stakeholders on the following topics:

- a) Demonstrable positive and negative outcomes for consumers due to referral arrangements, such as the impact on access to justice, consumer choice of lawyer, quality of legal advice and independence of legal advice
- b) Feasibility and effectiveness of possible consumer safeguards, such as consumer education, disclosure, consent, standardised referral arrangements or a cap on referral fees.
- c) The role of referral arrangements in driving or inhibiting competition in the legal services market.
- d) Degree to which referral fee size reflects equivalent marketing/other costs.
- e) Feasibility and effectiveness of alternatives to referral fees as a means of obtaining work, such as direct advertising by law firms, the establishment of

- legal firm marketing alliances, non-paid referral networks and/or quality assurance schemes.
- f) Risks and benefits for different stakeholders of a reintroduced ban on referral fees, including consumers, the legal profession, and non-legal stakeholders, such as claims management companies.
 - g) Relevant parallels with referral and commission arrangements used in other sectors in relation to consumer introduction.

Interestingly the impact upon legal costs is not included in the specific topics although the Panel indicates that information on areas not included is also welcome.

The Background *(drawn from information prepared by the Law Society as part of Lord Justice Jackson's consultation)*

Before 1988 it was not possible for solicitors to have referral arrangements with third parties to obtain new business. In 1988 the Solicitors Conduct Rules were amended to allow arrangements which complied with the Solicitors' Introduction and Referral Code, which aimed to ensure that clients' best interests were paramount. Two types of arrangement were permitted:

- a) simple arrangements under which the introducer referred the client to the solicitor and the client paid the costs
- b) 'contractual arrangements' where the solicitor was paid by the introducer to work for the solicitor's client.

It was not possible under this regime to make payment for referrals.

The rules relating to referral arrangements for conveyancing were relaxed in 1991. In relation to personal injury, the Blackwell Committee, established in 1999 by the Lord Chancellor to investigate the provision of legal services by claims assessors, recommended that the Law Society consider if any of the rules put solicitors in an unfair position as against unqualified advisors. The committee stated

"We consider that the public interest might well benefit from a system that encouraged unqualified persons to refer cases to qualified persons or less specialist solicitors to refer to more specialist ones. However, where such a relationship existed, this should be disclosed, and any charges made transparent".

In March 2001 the Director General of Fair Trading published his report on competition in professions. His remit was to identify restrictions that had a significant effect upon competition. The OFT argued that the rule preventing solicitors from making payment for work referred to them by a third party could hamper the development of an on-line market place, bringing clients and solicitors together.

Following further consultation the Law Society relaxed the rules concerning fee sharing and payments for referrals. The new rules allowing solicitors to pay referral fees, subject to various conditions and safeguards, came into force in March 2004. The current rule governing referral fees is Rule 9 of the Solicitors Code of Conduct.

A live issue

The profession is split on the issue of referral fees. The Law Society's position agreed in 2007 was that as referral fees existed in the field of legal services it would not be in the best interests of the profession for solicitors to be banned from paying them. It took the view that strict rules should be robustly enforced to protect clients, and considered that its role should be to make representations to the Government calling for further research on whether referral fees had a place in the market. That stated

policy was changed recently and the current policy of the Law Society is "to make recommendations to Government and the Legal Services Board that referral fees do not have a place in markets for legal services". The Law Society now believes that representations should be made to Government and the Legal Services Board to encourage the banning of referral fees by all providers of legal services, not just solicitors.

In his preliminary report (page 229) Lord Justice Jackson noted:

"there appears to be a general view amongst solicitors on both sides of the fence that these [referral fees] are an unwelcome addition to personal injury costs which bring little benefit to lawyers or to clients. The majority of solicitors do not accept the 'access to justice' argument. They maintain that even if referral fees were banned and there were no claims management companies, injured persons could easily contact solicitors of appropriate expertise".

In a presentation at one of the Jackson roadshows in Phase 2 of the Jackson consultation Desmond Browne QC, Chairman of the Bar commented:

"I ...welcome the discovery by Sir Rupert that there appears to be a general view amongst solicitors on both sides of the fence that these are an unwelcome addition to personal injury costs...I trust that the Solicitors Regulation Authority will now take note. In the past the Chairman, Peter Williamson, has said the Authority was determined to stamp the practice out, but earlier this year [2009] they changed tack and adopted the defeatist view that the practice is too endemic to be banned".

One of the most recent articles on referral fees appeared in the Solicitors Journal in February 2009, written by Craig Jones. The article heavily criticised referral fees, especially the levels to which they have risen. Six proposed reforms were listed:

- *"Capped referral fees (to reasonable levels)*
- *Proper enforcement by the Claims Management Regulator*
- *Joined-up and informed thinking between the regulatory bodies involved*
- *Template referral agreements, issued to claims management companies by their regulator*
- *A central and public register of referral fee arrangements – it is not commercially sensitive – that's the objective behind the referral fee code*
- *Someone, somewhere, ask the consumer what they think"*

With this new consultation it appears that the last proposal, at least, is about to be realised.

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