

Submission by the Bar Council
of England and Wales to the
Legal Services Consumer
Panel's Call for Evidence on
Referral Arrangements

February 2010



Submission of the Bar Council of England and Wales to the Legal Services Consumer Panel's Call for Evidence on Referral Arrangements

February 2010

Background

- 1) In a letter dated 4 December 2009 sent by Dr. Dianne Hayter, Chair of the Legal Services Consumer Panel ("the Panel"), to David Hobart, Chief Executive of the Bar Council of England and Wales ("the Bar Council"), the Panel invited the Bar Council's input into its call for evidence on referral arrangements. Submissions were invited by 5pm on 26 February 2010.
- 2) In an email of 22 January 2010 sent to Mark Hatcher, Director of Representation and Policy at the Bar Council, by Alex Roy, Research Manager of the Legal Services Board, the LSB invited the Bar Council to meet Charles River Associates, on behalf of the Panel, to discuss referral fees.
- 3) On 4 February 2010, the following Bar Council representatives gave evidence to Charles River Associates:
 - a) Nicholas Bacon, member of the Bar Council's Remuneration Committee
 - b) Christopher Convey, member of the Bar Council's Professional Practice Committee
 - c) Adrian Vincent, Bar Council Head of Remuneration and Policy
- 4) This note supplements the evidence provided at that meeting.

The Bar Council's Fundamental Objection to Referral Fees

The Current Position

- 5) The *Solicitors' Practice (Payments for Referrals) Amendment Rules 2004* were signed by the Master of the Rolls on 9 March 2004.¹ By the insertion of a new Section 2A into the *Solicitors' Introduction and Referral Code 1990*, they permitted, for the first time, a solicitor – in specified circumstances – to make a payment to a third party for the introduction of clients.
- 6) The altered position of the Solicitors' Practice Rules stands in stark contrast to those of the Bar of England and Wales.
- 7) The Bar Council Code of Conduct states,

“307. A barrister must not:

...(e) make any payment (other than a payment for advertising or publicity permitted by this Code or in the case of a self-employed barrister remuneration paid to any clerk or other employee or staff of his chambers) to any person for the purpose of procuring professional instructions;”

- 8) Whilst the Bar Council is aware of pressure being brought upon members of the Bar to make referral payments, particularly in publicly-funded, criminal cases, the absolute bar upon such activity has, as far as the Bar Council is aware, prevented any such arrangements being entered into. However the differing solicitors' regulatory regime means that referral arrangements are occurring as between solicitors, particularly with regard to the instruction of Higher Court Advocates (“HCAs”) as defence advocates in publicly-funded criminal cases. These arrangements, and their effect upon the quality of legal services provided to consumers, are of particular concern to the Bar Council.

The Bar Council's View

- 9) There are two distinct legal market places in which referral arrangements take place: (i) the market in which solicitors compete with each other for instructions from lay clients and (ii) the market in which barristers compete with each other,

¹ With effect from the same day.

and other advocates, for instructions from solicitors.² The Bar Council is primarily concerned with referral arrangements and the payment of referral fees in the latter market. In seeking to assist the Panel, however, it will refer to information in relation to both markets.

10) The Bar Council's fundamental objection to referral fees is that they create a distortion of the market in which barrister and other advocates compete, in a way that is likely to have a negative impact upon the lay client. The vast majority of lay clients rely upon the solicitor to recommend an advocate who has all the right qualities, including sufficient expertise in the relevant field of law, to represent the client and argue his case. If the solicitor knows that he will be paid a referral fee by some counsel, but not by others who may be better suited to the case, the lay client may end up with counsel who has been selected on the basis of what is in the best financial interest of the solicitor, rather than on the basis of merit and the best interests of the client.

11) Sections 1(1) and (3) of the *Legal Services Act 2007*, set out the regulatory objectives and the professional principles behind the Act. They are

"1(1)

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2);
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles...

² There is additionally a limited market for barristers to be instructed directly.

- (3)
 - (a) that authorised persons should act with independence and integrity,
 - (b) that authorised persons should maintain proper standards of work,
 - (c) that authorised persons should act in the best interests of their clients,
 - (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
 - (e) that the affairs of clients should be kept confidential.”

12) The objectives and principles strongly support the view taken by the Bar Council by emphasising the importance of protecting and promoting the public interest and the interests of consumers, independence, integrity and acting in the best interests of the client. The permitting of payments, which undermine the statutory objectives, cannot be justified.

13) The Bar Council considers that the payment of a referral fee impacts negatively upon the independence and public perception of the integrity of the legal advisers who make such payments. It is difficult to see how the payment by a solicitor of a referral fee to secure him instructions is compatible with his duty to act independently in his client’s best interests and not to act in a manner that is likely to diminish public confidence in his profession. This is particularly so where the payment is made by a solicitor to a referrer who has a vested interest in the matter referred.

14) Referrers, necessarily acting in their own interests, will make recommendations to the lay consumer, based upon the fact and size of payment of referral fees to them. Those who are not experienced or sophisticated consumers of legal services (generally those most vulnerable to exploitation) are most likely to act upon that recommendation without the facility to question its merits. One impact of the payment of referral fees therefore, whether directly or indirectly, is to reduce the range of legal service providers to a section of consumers who, perhaps, require the most protection. The exploitation of first-time legal services consumers is not a theoretical risk. In its November 2006 report, a “Review of

Referral Fees”, in relation to referral fees paid to estate agents to conveyancing solicitors, the Hampshire Law Society stated:

“First time buyers in particular who are not aware of the conveyancing process are particularly vulnerable and are likely to accept without question an Estate Agent telling them that they must use a particular firm of solicitors. We have first hand evidence that confirms this.”³

- 15) With regard to non-publicly funded cases, the Bar Council is concerned as to the effect referral fees have upon costs. Any fee must be paid by the solicitor to the referrer and represents a cost to the practice. This in turn has an impact upon the fee structure of that solicitor. In the end, it is the solicitor’s client who is required to pay for the service.

Referral Fees in Practice

The Post 2004 Experience

- 16) The solicitors’ referral fee payment scheme introduced in 2004 contained a number of supposed safeguards. These were meant to ensure that only ‘reputable’ referrers participated in the solicitors’ scheme and that the consumer’s interest was protected.
- 17) Referrers were limited as to the ways in which they could make contact with a prospective client and were subject to the same restrictions as to advertising as solicitors; the ‘cold calling’ of private individuals was prohibited; the detail of the referral arrangement had to be disclosed to the prospective client prior to any referral being made; and the referrer was obliged to agree not to do anything that attempted to influence or constrain the solicitor’s independent professional judgment. The solicitor remained subject to his professional duty to act independently and serve the best interests of the client.

³ <http://www.hampshirelawsociety.co.uk/topics-referral.asp>

18) However it became apparent soon after the introduction of the scheme that these 'safeguards' were of limited use. With regard to compliance with the rules designed to safeguard the consumer, the Hampshire Law Society report stated:

"A recent report from The Law Society Practice Standards Unit also clearly shows that by far the majority of firms paying referral fees are not complying with the Rules, with 39% committing significant breaches and 55% minor breaches. Only 6% of firms visited by the Unit fully complied with the Rules.

It would appear the so-called safeguards introduced by the Law Society are not being adhered to. Clients are therefore unable to make an informed choice."

19) Such was the concern of the Solicitors' Regulatory Authority at the failure of the 'safeguards' that in February 2007 it was obliged to launch what it called the "SRA Crackdown on Improper Referrals"⁴. The 'Crackdown' was endorsed by the Law Society. It acknowledged that public confidence in the solicitors' profession had been damaged by the way in which referral fee schemes had operated in cases where solicitors had placed their own advantage above their clients' interests.

20) Commenting in the September 2007 edition of the "SRA Update", Peter Williamson, the then Chairman of the SRA commented:

"Our recent enforcement campaign has revealed some shocking examples of misconduct by some solicitors who have referral arrangements.

...

The solicitors who breach the rules are a minority. However, the actions of this minority can have a significant impact on clients and public confidence in the profession. This is a serious issue for the SRA, which has a duty to regulate in the public interest. It is also a concern for the majority of the profession, who are following the rules."

⁴ <http://www.lawgazette.co.uk/news/solicitors-get-referral-warning>; <http://www.sra.org.uk/referrals>.

21) The strength of the language used by the Chairman of the solicitors' regulatory body is all the more telling given that referral arrangements had been in place for less than 3 years by the time the SRA had been required to announce its 'Crackdown'.

22) The abuses of system, the flouting of the safeguards and the negative outcomes for consumers that arose are plainly matters of considerable public concern:

"A number of firms have been referred to the Solicitors Disciplinary Tribunal (SDT), and several more cases are in the pipeline. Various sanctions have been imposed on the solicitors involved, including fines and reprimands, and considerable costs have been awarded against them.

We have found that some solicitors are breaching the core duties set out in rule 1 of the Solicitors' Code of Conduct: justice and the rule of law, integrity, independence, best interests of clients, standards of service and public confidence. There have also been breaches of the detailed requirements of rule 9 (referrals of business) of the Solicitors' Code of Conduct and other rules such as rule 2 (client relations), rule 7 (publicity), rule 21 (separate businesses) and even the Solicitors' Accounts Rules.

...Some of these breaches arise from the terms of the agreements that solicitors have signed up to. Many of these specify how the solicitor must deal with clients' matters – for example, which experts or agencies can be instructed, when proceedings can be issued and even the extent to which the solicitor can discuss the case with the client. Solicitors who act on these terms will be breaching their duty to act independently and in the client's best interests.

Some solicitors have agreed to make payments to introducers out of clients' money, such as damages or the proceeds of sale or a loan taken out to fund the case. These payments can only be made with the client's consent.

...

Not all solicitors are giving clients sufficient information about their referral arrangements; some are even misleading clients about the nature of payments to the introducer...

...We have identified conflicts and potential conflicts between the interests of solicitors, clients and introducers. Introducers who are paid on conclusion of a claim want cases completed quickly, and this can compromise the quality of

advice given to clients, if the solicitor succumbs to pressure from the introducer...

...Some solicitors have failed to advise the client on the agreement the client has entered into with the introducer, where that agreement is clearly contrary to the client's interests.

...The payment of a referral fee was usually just one aspect of these arrangements. In several cases it was clear that the solicitors had put the interests of the introducer above their clients' interests, often because they were over-reliant on the introducer as a source of work.

Some of the worst arrangements have involved the generation of unmeritorious claims by introducers who are paid according to the number of cases referred. This is unfair to clients who are misled into thinking they have a valid claim and to defendants who have to deal with letters of claim.”⁵

23) Some of the abuses arose in cases where referral arrangements were put in place prior to the March 2004 solicitors' practice rule changes – what are referred to as the “miners' cases”. However the fact that a situation so unsatisfactory that it required a combined SRA and Law Society ‘Crackdown’ by February 2007 and the personal intervention by the Chair of the SRA later the same year to address the damage to “public confidence in the profession”, could arise in so short a space of time is strong evidence of the inadequacy of potential “consumer safeguards”.

The Jackson Report

24) In his recently published report, “*Civil Litigation Costs Review: Final Report by Lord Justice Jackson (21 December 2009)*”,⁶ Lord Justice Jackson highlighted the negative effects of referral fees upon personal injury cases and came to the conclusion that they should be prohibited. He found that referral fees were,

“...a regrettably common feature of civil litigation, in particular personal injuries litigation...Referral fees add to the costs of litigation, without adding any real value to it.”

⁵ <http://www.sra.org.uk/sra/news/sra-update/308.article>

⁶ http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf

- 25) Jackson LJ only considered referral fees in the context of personal injury cases. However in explaining his reasons for this he made clear that his findings were to be considered in a wider context,

“1.2 The wider question. There is a wider question than that addressed in the present chapter, namely whether referral fees should be banned or capped in respect of all litigation, not just personal injury cases. Because the most worrying impact of referral fees is felt in the area of personal injuries litigation, that has been the focus of debate and investigation during the Costs Review. Nevertheless if my recommendations concerning personal injury referral fees are accepted, serious consideration should be given to banning, alternatively capping, referral fees in other areas of litigation.”

(Chapter 20 Referral Fees)

- 26) Jackson LJ attended a number of meetings from April to July 2009 at which the issue of referral fees was debated. He found that there had been considerable hostility to the concept of solicitors paying fees for the referral of personal injury clients. He also received a number of written submissions. Those submissions varied from full support to firm opposition to the payment of referral fees.

Analysis of the Referral Fees: Competition Issues

- 27) Jackson LJ considered the competing arguments for and against referral fees. With regard to competition issues, he noted that the Office of Fair Trading’s view was that referral fees should not be prohibited.

- 28) The OFT gave a number of reasons for its view. Referrers could develop a better understanding about the legal services on offer and the service providers than the lay person and as a result they would be in a better position to identify high quality services providers for relative good value and to use their bargaining power in order to negotiate better services and better value. Referral arrangements could enhance competition as solicitors would have to compete with each other in order to obtain referral work. Solicitors who are involved in referral fee schemes also have an incentive to maintain a high standard of service

so as to get repeat custom from referred clients as well as the referrer.

- 29) The OFT considered that a total prohibition on solicitors from entering into referral fee arrangements with non-lawyers would unnecessarily impede competition.
- 30) Jackson LJ rejected the OFT's arguments. He noted that the evidence which he had received pointed strongly to the opposite conclusion to that reached by the OFT. In very many cases, though not all, referrers simply refer cases to the highest bidder. That was "in no sense matching case to solicitor" or remedying flaws in the market. On occasions it led to "clients being sent to the wrong solicitors with potentially damaging results".
- 31) He found that the effect of allowing referral fees was that clients now had less choice than they would if referral fees were prohibited.
- 32) The existence of Conditional Fee Arrangements further distorted the situation, as the clients generally do not pay costs. Jackson LJ found that,

"Under the present regime, solicitors are not competing to get business on price. Nor are they competing on quality of service. They are usually competing to see who can pay the highest referral fee. Such competition is not beneficial to claimants or indeed to anybody else, apart from the referrers. Where cases fall under the fast track fixed recoverable costs scheme in CPR Part 45, the amount of costs available is a fixed sum. The more of that sum is paid to the referrer, the less are the resources available to devote to the handling of the case. In the context of fixed costs the effect of referral fees is either to drive up the level of fixed costs or to drive down the quality of service or both."

(Chapter 20 Referral Fees, 4.3)

He concluded,

"In my view there is no benefit in competition terms to be gained from allowing referral fees."

Analysis of the Referral Fees: General Issues

33) Jackson LJ considered the wider submissions with regard to the payment of referral fees and made the following findings:

34) Whilst the lay client had the right to alter the representation selected for him by his insurers at the moment of commencing proceedings, by that stage the right was meaningless as, by then, it is usually impracticable to change solicitors. He commented that,

“I consider that BTE insurers and claims management companies charge referral fees without adding any commensurate value to the litigation process. On the contrary, referral fees have now escalated to such a level that some solicitors cut corners in order to (a) cover the referral fee and (b) make a profit on the case. In straightforward road traffic accident (“RTA”) cases often more than half the fees paid to the solicitors are paid out in referral fees. This is to the detriment of the client, the solicitors and the public interest.”

(Chapter 20 Referral Fees, 4.7)

35) There was “considerable force” in the arguments placed before him that referral fees have driven up normal marketing costs.

36) There was no evidence to show that access to justice was denied or restricted prior to 2004, when the ban on referral fees was lifted. People would be aware of their right to claim even if claims management companies did not exist; referral fees were not necessary for access to justice.

37) Satisfactory means of advertising the availability and identity of solicitors conducting personal injuries work already existed (e.g. the internet) and did not require the need for the payment of a referral fee. Insurers could easily and properly refer their insured to appropriate solicitors (local to the insured and possessing relevant expertise) without receiving a referral fee for every case. Insurers had confirmed to Jackson LJ that this is what they would do, if referral fees were banned.

- 38) It is offensive and wrong in principle for personal injury claimants to be treated as a commodity. Personal injury claims should neither be ‘auctioned off’ by insurers, nor bought in and then sold on at a profit by claims management companies.
- 39) The argument that a prohibition on payment of referral fees could not be enforced was fallacious. Solicitors, as members of an honourable profession, would respect such a prohibition, whether imposed by legislation or by rules of conduct. Jackson LJ invited the SRA to assist in formulating an appropriate definition of “referral fee” and in keeping that definition under review, so as to ensure that it was effective but did not ensnare proper marketing activity.
- 40) Whilst Jackson LJ accepted that the legal landscape was set to “change dramatically” with the introduction of Alternative Business Structures in or after 2011 he rejected the argument that the existence of a ban upon referral fees would be a serious fetter upon their operations. There would be no benefit to consumers in allowing ABSs to trade in personal injury claims either between themselves or with third parties.

“Both before and after 2011 the effect of referral fees can only be to drive up legal costs (since the referee must recoup its outlay) and/or to depress quality of service.”

- 41) The fact that referral fees are paid as a matter of routine is one of the factors that contribute to the high costs of personal injuries litigation. The lifting of the ban on referral fees in 2004 has not proved to be of benefit either to claimants or to the providers of legal services.

“The only winners are the recipients of referral fees.”

Referral Fees: Recommendations

- 42) Jackson LJ recommended that the payment of referral fees for personal injury claims be banned, either by way of primary legislation or by an amendment to the Solicitors’ Code of Conduct. He further recommended that if that proposal

were rejected, then referral fees should be capped at a “modest figure”, i.e. £200.

- 43) He asked that, if either of his recommendations were accepted, serious consideration be given to the question of whether referral fees should be banned or capped in other areas of litigation.

Consideration of Jackson LJ's Report

- 44) Lord Justice Jackson's findings have informed and support the Bar Council's opinion as the impact of referral fees upon the provision of legal services.

- 45) Referral fees may well lead, ultimately, to increased costs to the consumer of legal services. The Bar Council does not see how this is of benefit to the consumer – there is certainly no obvious case to be made that the increased costs operate in his favour.

- 46) Referral arrangements that include a referral fee result in a “negative outcome for consumers” of legal services. The Bar Council is of the view that any “positive...outcomes”, that are claimed are so substantially outweighed by the negative effects that they should be discounted. Referral fees are anti-competitive in their operation as they immediately favour those legal services provider who can best afford them. The market is then directed to the ability to pay rather than the provision of the best quality service. One outcome of this situation is the potential for the market to be stripped of service providers as the smaller and less well-financed firms are unable to compete on those terms. This in turn could impact upon the provision of legal services at a local and community level.

- 47) The Bar Council does not believe that there are sufficient feasible “consumer safeguards” available to ameliorate the risks to the consumer of the payment of referral fees. The exposure of the consumer protection failings in the referral system introduced for solicitors in 2004, as set out above, makes this clear.

Referral Fees for Publicly Funded Criminal Defence Work in the Crown Court

- 48) The Bar Council is concerned about the existence and effect of referral payments between solicitors' firms in the field of publicly funded criminal defence work. This most commonly manifests itself in the guise of a referring solicitor withholding a part of the payment made by the Legal Services Commission ("the LSC") as a referral fee when providing work to a Higher Court Advocate.
- 49) However a further, troubling manifestation involves the practice of a solicitor-HCA utilising the public funding "one-case one-fee" rules, Para.21, Pt.5, Schd.1 of the *Criminal Defence Service (Funding) Order (2007)*, to his own financial advantage. Under those rules, all fees in the case are paid by the LSC to the "Instructed Advocate" for him to distribute to other advocates who also appear to represent the defendant. The "Instructed Advocate" is supposed to be the advocate with primary responsibility for the case (see the definition of "instructed advocate" in Para.1(1), Schd. 1 of the Order). But some solicitor-HCAs seek to take improper advantage of the deeming provision (in Para. 20(2), Schd. 1 of the Order) which deems the advocate who attends the PCMH to be the instructed advocate. They appear at the PCMH in order to be deemed to be the instructed advocate and thereby to gain control over the distribution of the advocacy fee for the case, but with no intention of conducting the trial. Instead, they exploit their position as fund-holder to retain as much of the fee as possible, seeking to negotiate down the payments made to any advocate (typically counsel) from outside their firm who appears at the trial. This is an abuse and [usually] involves a breach of Para.20(10), Schd. 1 of the Order and section IV.41.8 of the *Consolidated Criminal Practice Direction (2007)*.
- 50) Most commonly, this system operates by the solicitor-HCA appearing for the defendant at the early stages of the case, with counsel being appointed at a late stage to undertake the trial. At the time of instructing the trial advocate, the solicitor-HCA will seek to agree the lowest possible fee for those services, thus

ensuring the greatest possible return to the solicitor-HCA himself. The fee paid to the trial advocate is set on the basis of the lowest possible bid and not with regard to the amount of work the advocate will have to undertake. The outcome is that the trial advocate is not selected on the basis of who is the best advocate to represent the interests of the solicitor-HCA's lay client, but on the basis of who is the advocate who best protects the solicitor-HCA's own financial interests.

51) In November 2008, the then Chairman of the Bar Council, Timothy Dutton QC, sent a 150-page dossier of evidence to the then Chair of the SRA and Director of the Bar Standards Board. Annex 2 of the dossier provided 37 examples of abuses compiled by the South Eastern Circuit from information supplied both by practitioners and the judiciary.

52) Mr. Dutton's covering letter set out a number of concerns the Bar Council had as to the effect referral fees were having upon the quality of the provision of legal services on behalf of defendants in the Crown Court. Because of the public importance of this, the Bar Council sets out the concerns then raised, and those later raised, in this document in support of its submissions to the Panel. Mr. Dutton stated:

"i. Advocates lacking the requisite experience are undertaking work in the Crown Court. This is contrary to the client's best interests and also contrary to the interests of the Court which, within our system, relies heavily upon advocates;

ii. Such advocates may name themselves as the Instructed Advocate in the case in order to have control of the money or be paid an advocacy fee – also without proper regard to the client's interests;

iii. In some instances payment has been demanded of barristers' chambers for work to be referred to the chambers or the barristers in it...I referred this matter to the BSB, and this led to a statement of advice issued this summer to the Bar by the BSB [Annex 6]. This does not seem to have prevented the request for referral payments, nor has it stopped what appears to be discussion between certain firms in the South of England to distribute advocacy work to each other under what appears to be a possible fixed payment arrangement. The client's need to have the most suitable advocate

appears not to feature in the correspondence at all [Annex 7]. The Institute of Barristers Clerks have also raised concerns that they are being asked to provide 20% of the fee to the instructing solicitor for a case to be referred [see e-mails at Annex 8].

...[T]he Bar Council accepts, indeed endorses, the principle of proper competition amongst advocates. However...[c]lients must be made aware that they have a choice as to who represents them in court, and the instructed advocate must possess the requisite skills and experience for the particular case...The public interest lies in ensuring that clients are given the best possible representation in court."

53) On 11 February 2009, The Law Gazette published an article written by Peter Williamson, then Chairman of the SRA. It included the statement:

"We noted the view, voiced vehemently by some, that referral payments are inherently pernicious and work against the interests of clients and the reputation of the profession. However, we felt that a ban was impracticable – the commercial imperative to use referral arrangements is too intense and their use too widespread."⁷

54) **The Bar Council invites the Panel to compare the serious problems encountered by the SRA when it investigated the operation of referral fees and their impact upon the provision of legal services to consumers, e.g. the "shocking examples of misconduct", as set out by Mr. Williamson in September 2007,⁸ and the stated reasons for permitting their existence, i.e. the perceived impracticality of prohibiting them.**

55) Contrary to Mr. Williamson's view, the Bar Council submits that the fact of 'widespread abuse' is a compelling reason for taking action against the permitted payment of referral fees.

⁷ <http://www.lawgazette.co.uk/opinion/by-the-book/banning-referral-payments-not-practical>

⁸ Above at paragraphs 18-21

56) On 10 June 2009, the then Chairman of the Bar Council, Desmond Browne QC, wrote to the SRA, LSC and LSB raising again the Bar Council's concern and providing three further specific examples of abuses. His letter stated:

"...In February, the Appeal Court in Edinburgh gave judgment in *Alexander Woodside v. HM Advocate*. In the course of his judgment (para.73), Lord Gill emphasized the difficulty of a solicitor giving disinterested advice to his client concerning his choice of advocate:

"It is difficult to see how a solicitor who has rights of audience, or whose partner or employee has such rights, can give his client disinterested advice on the question of representation. There may be an incentive for him not to advise the client of the option of instructing counsel, or a solicitor advocate, from outside his firm, in circumstances where either of those options might be in the client's best interests."

The difficulty is magnified where the decision is tainted by the solicitor's financial interest in the decision as to who to instruct.

...[P]ractices which limit the client's choice because work will be given to advocates only if they pay money to receive it and as a pre-condition in order for an advocate to be instructed at all [are] unacceptable.

...Payments made by the advocate to the instructing solicitor as a reward for the work create a conflict between the solicitor's duty to instruct an advocate in accordance with what the best interests of his client require and the solicitor's own financial interest in the choice of advocate. This offends rule 3.01 of the *Solicitors' Code* 2007. Such payments also put the instructing solicitor in breach of his duties under the Code:

- (1) to act in the client's best interests – rule 1.04,
- (2) to act with integrity – rule 1.02, and
- (3) not to act in a way that is likely to diminish the trust the public places in the solicitor or the profession – rule 1.06.

...There can be no doubt that referral payments, and the resulting breaches of LSC terms and solicitors' professional obligations, are happening on a widespread scale. The rise of these practices is matched by a marked decline in the use of the Bar, whose Code of Conduct prohibits the payment of referral fees. Solicitors who in the past sent large volumes of work to barristers – which can only have been because they recognised that the Bar's services were in the best interest of their clients – are now not doing so, but instead sending it to third parties. The quality of service available from the Bar has not changed. The only change has been in the rate of litigators'

remuneration. It must follow that solicitors are acting in this way out of self-interest and not in their clients' interests.

...I have also recently received reports of disguised referral fees, whereby the solicitor conducting the case agrees with the advocate instructed to conduct the trial that the former will retain a disproportionate share of the advocacy fee for doing the PCMH. As you pointed out in your letter to Tim [Dutton QC] of 31 July 2008, there may be circumstances in which the sharing of the advocate's fee is appropriate. However, it is critical that the division of the fee must reflect the work undertaken by those who share it, and must not contain an element of reward for the instruction. A division of the fee that cannot be justified by reference to the amount of work undertaken must be presumed to contain an element of reward for the referral of the work.

...All involved in the administration of the criminal justice system recognise that there is a strong public interest in the continuance of an independent self-employed criminal Bar. But the criminal Bar cannot fairly compete with solicitors so long as the practice of paying unlawful referral fees continues. The unequal terms on which barristers and solicitors compete for work is now having the most serious repercussions for chambers up and down the country. It is no exaggeration to say that the survival of the criminal Bar is at stake.

My concern is not merely about the unequal terms upon which the two branches of the profession compete for advocacy work, real though that is. The paramount point is that the public interest requires a fair and transparent market in advocacy services, in which advocates obtain their work in the clients' best interest and solely on the grounds of their competence and suitability for the case. Improper payments threaten to undermine both the reality and the perception of the administration of justice in the Crown Courts. At the very least, they create a perception that financial advantage ranks above the quality of the service, when it comes to the choice of advocate. There is a very real danger that serious miscarriages of justice will result, unless vigorous action is now taken by those with responsibility for eradicating these abuses."

57) The problem has not been resolved. If anything it has recently been exacerbated by the November 2009 publication by the LSC of a discussion paper, "*Fee Sharing/Referral Fees*". This stated:

"The Bar Council have also indicated that there is a practice amongst some litigators to undertake an element of AGFS casework – for example, up to and including the PCMH – and then to seek to instruct a barrister to undertake the substantive trial (as a Substitute Advocate) in return for a fixed

percentage of the graduated fee. If the barrister disagrees, the litigator, it is reported, will seek to find an alternative barrister willing to undertake the work for the agreed split of the fees.

This scenario does not appear to be a breach of the contract terms relating to referrals.”⁹

58) The Bar Council’s experience is that this publication has led to an increase in the practice of solicitor-HCAs registering themselves as the “Instructed Advocate” for the case, but with no intention to undertake the trial, and then contacting a barristers’ chambers and seeking to sell the conduct of the trial for a reduction of the barrister’s trial fee, (typically 20%). Chambers are being told that if they refuse to pay the referral fee, the solicitor’s firm will find another advocate who will pay it.

59) It is surprising that the LSC should have published a statement which appears to regard an abuse of the system with equanimity. As explained below, the Bar Council’s view is that the LSC was wrong to say that this practice is not a breach of the terms of the Unified Contract. More importantly, however, the LSC failed to note that the practice involves a breach by the solicitor advocate of his obligations under Para.20(10), Schd. 1 of the Order and under section IV.41.8 of the *Consolidated Criminal Practice Direction* (2007).

60) Paras.20(9)&(10), Part 5, Schd.1 of the 2007 *Funding Order*, state:

“(9) An instructed advocate must remain as instructed advocate at all times, except where—

(a) a date for trial is fixed at or before the plea and case management hearing and the instructed advocate is unable to conduct the trial due to his other pre-existing commitments;

(10) Where, in accordance with sub-paragraph (9), an instructed advocate withdraws, he must—

9

http://www.legalservices.gov.uk/docs/criminal_contracting/Fee_sharing_and_referral_fees_crime_Nov_09.pdf

- (a) immediately notify the court of his withdrawal—
 - (i) in writing; or
 - (ii) where the withdrawal takes place at a plea and case management hearing, orally; and
- (b) within 7 days of the date of his withdrawal, notify the court in writing of the identity of a replacement instructed advocate, who must fulfill all the functions of an instructed advocate in accordance with this Order.”

61) This envisages that, if the “Instructed Advocate” is unable to undertake the trial he should withdraw as the “Instructed Advocate” and the trial advocate should become the “Instructed Advocate”. This is not being adhered to because it would mean that the solicitor-HCA who registered as the “Instructed Advocate” would no longer have control of the money for the case.

62) Whilst the LSC appear to view the “Instructed Advocate” practice with equanimity, the Bar Council views it as a breach of the *Consolidated Criminal Practice Direction* (2007)¹⁰, Section IV.41.8:

“Active case management at the PCMH is essential to reduce the number of ineffective and cracked trials and delays during the trial to resolve legal issues. The effectiveness of a PCMH hearing in a contested case depends in large measure upon preparation by all concerned and upon the presence of the trial advocate or an advocate who is able to make decisions and give the court the assistance which the trial advocate could be expected to give. Resident Judges in setting the listing policy should ensure that list officers fix cases as far as possible to enable the trial advocate to conduct the PCMH and the trial.”

63) The Bar Council also considers that the practice operates in breach of:

- a) The prohibition contained in paragraph 11 of the 2007 *Funding Order*, upon those acting under a public funding order, on the giving or receipt of additional fee payments without the prior authority of the LSC,

“11. Payments from other sources

¹⁰ Handed down by the Lord Chief Justice on 18 May 2004.

Where a representation order has been made in respect of any proceedings, the representative, whether acting under a representation order or otherwise, must not receive or be a party to the making of any payment for work done in connection with those proceedings..."

And,

- b) Clause 20 of the Legal Services Commission's "*Unified Contract Standard Terms 2007*",

"20 Referral fees

May you pay referral fees?

1. You must not:

- (a) make any payment, or provide any other benefit, to any other provider of publicly funded legal services for the referral or introduction (directly or indirectly) of any Client or potential Client to you;
- (b) make any payment, or provide any other benefit, to any third party specified by us in writing for the referral or introduction (directly or indirectly) of any Client or potential Client to you.

May you receive referral fees?

2. You must not receive any payment, or any other benefit, from any person or body for the referral or introduction (directly or indirectly) of any Client or potential Client by you unless the services to be provided pursuant to the referral or introduction are not services for which the Client or potential Client would be eligible under Access to Justice Act Legislation.

Does a payment raise a presumption?

3. Where you:

- (a) make any payment or provide any other benefit; or
- (b) receive any payment or any other benefit;

in circumstances that suggest a possible breach of Clauses 20.1 or 20.2, the presumption shall be that the payment or benefit was made, provided or received in breach of this Contract and the onus shall be on you to show that was not the case.

Is payment for Contract Work a financial benefit?

4. For the purpose of this Clause 20, payment for Contract Work is not a "payment" or "other benefit".

The Significance of PCMHs

- 64) The practice of a solicitor-HCA registering himself at the PCMH in order to control the advocacy fee, and then to 'sell' the trial to an advocate is an obvious and serious threat to the quality of the legal service provided to the defendant.
- 65) The practice also poses a further significant risk to the effectiveness of the representation of the defendant facing, often serious, criminal charges. The PCMH is an extremely important stage in the criminal trial process.
- 66) It is at this hearing that the defendant will enter his plea to the charges against him. The decision as to how a defendant will plead to those charges is vital to him. In a case of any seriousness or complexity it is rarely straightforward. In those cases the defendant will require informed and careful advice in advance of entering his plea. It is critical that a suitably experienced advocate provide this advice. The person best placed to give this advice will be the defendant's trial advocate.
- 67) Where a defendant pleads guilty, either to all of the charges against him or to a number that is acceptable to the Crown, sentencing will follow, either immediately or at a later date, and the defendant is entitled to expect a significant reduction in his sentence because of his early plea of guilty. Where a not guilty plea is entered to a single charge or an insufficient number of not guilty pleas are entered to multiple charges, a trial of the charges not accepted will be required, and the Court will issue directions for the management of the trial.
- 68) It is incumbent upon the advocate representing the defendant at the hearing to be sufficiently knowledgeable of the case and prepared for the hearing to assist the court in the giving of those directions. The advocate must be able to identify the real issues in the case, state whether legal argument will be required in relation to those issues, and specify which of the prosecution's witnesses will be required to

give evidence at trial, and in relation to which issue they will be required to give that evidence.

69) The advocate will be required to deal with a wide range of legal and case management issues including:

- a) the adequacy or otherwise of disclosure by the prosecution,
- b) the provision of a Defence Statement,
- c) the agreement of evidence and provision of evidential schedules,
- d) applications for third-party material,
- e) the provision and editing of transcripts of any under-caution interviews of the defendant,
- f) cross-examination of witnesses on their sexual history,
- g) the admission of bad character and hearsay evidence,
- h) submissions upon abuse of process,
- i) special measures for witnesses
- j) and the timetabling of the trial, including the estimated length of the witnesses' evidence.

70) The directions given at the PCMH will therefore set the course of the case until the commencement of the trial. The advocate instructed to attend the PCMH must therefore be 'trial-ready.' The legitimate expectation of the court is that the advocate has command of the case, has identified all of the relevant issues, and that the directions given at the hearing following his representations are sufficient and can, and will be, complied with. Inadequate representation at this stage of the criminal trial necessarily represents a threat to the quality of representation that a defendant receives at trial, particularly where the representation at trial is by a different advocate. The practice of representing defendants at the PCMH for the monetary-driven purpose of being identified as

the “Instructed Advocate”, and thus the controller of the pot of public funds, is as clear as an example of this as could be found.

Fast Track Trial Fees in Privately Funded Civil Cases

71) In January 2008, the Young Barristers’ Committee placed the following Notice in Counsel magazine:

“Fast track trial fees: The Young Barristers’ Committee has become aware of a practice whereby clients in fast track trial fees (typically insurers) pay counsel less than the prescribed fee under CPR Part 46, but still collect the full amount from the paying party. We are seeking evidence of this happening...”

72) A large number of examples were provided in response to this advertisement. Subsequently, the Bar Council’s Professional Practice Committee produced Guidance in respect of the different scenarios that were happening. The Guidance included:

“Situation 1: The brief fee for the fast track trial is fixed at less than the fee prescribed by CPR Part 46.

Counsel must ensure that the costs schedule (N260) put forward is correct at the time of filing, and states the amount actually being paid to the trial advocate, rather than the prescribed fee. Otherwise the statement of truth at the foot of Form N260 will be false.

If the Judge awards costs to a receiving party which includes the advocate’s fee prescribed in the rules then the barrister must be aware that any difference between the prescribed fee and the advocate’s fee stated on the costs schedule belongs to the lay client and, if appropriate, should advise the solicitor accordingly. Indeed there is a real danger that to allow the solicitor or funder to keep the difference would be considered to amount to giving a commission for a professional purpose contrary to the Code of Conduct at 307(d) thereby constituting professional misconduct.”¹¹

73) No evidence has been received of the difference between the advocate’s fixed fee set down in the Civil Procedure Rules and the money actually paid to the advocate being passed on to the benefit of the lay client. Indeed it would be

¹¹ <http://www.barcouncil.org.uk/guidance/Fast-TrackTrialFees>

surprising if there were, because the whole purpose of solicitors and insurance companies setting up these referral arrangements is in order to increase their own profits, not to increase the profit of their lay client.

74) The personal injury market is very much governed by a flow of work originating initially from claims management companies often referred to as “claims farmers”. It was as a result of the influence of claims farmers in the market place (for example Claims Direct) and their attempt to impose referral terms on the Bar, that the Bar Council produced the following specific guidance in relation to remuneration in such cases¹²:

“It appears that there may at present be members of the Bar giving advice on personal injury claims pursuant to arrangements which involve:

- (a) the barristers rendering fee notes for fees in excess of the fees agreed by them as part of the arrangements for their giving the advice; and
- (b) the excess, when recovered from the instructing solicitors, being paid to or retained by the organization operating the arrangements.

It goes without saying that it is obviously improper for any amount to be claimed in a fee note beyond the amount claimed to be due to the barrister. It is also contrary to Paragraph 307(e) of the Code of Conduct for a barrister to make any payment (other than for permitted advertising or where appropriate, to a clerk or to chambers’ staff or employees) to any person for the purposes of procuring professional instructions.”

Conclusion

75) Referral fees represent an unwarranted and unjustifiable threat to the public interest in the efficient and effective provision of legal services to consumers. Their authorised existence represents an ongoing threat to public confidence in the legal professions. They should be prohibited.

¹² Bar Handbook 2009/2010, [3.128]

76) The egregious failure of the solicitors' 2004 'safeguards' to protect the public from abusive behaviour by a number of solicitors operating a referral fee payment scheme demonstrates that attempts to provide a regulated system of referral fees have failed. Such 'safeguards' cannot adequately overcome the inherent risks and negative outcomes within such a scheme. Individuals will be represented on the basis of the financial interests of those party to the payment, the details of referral fees will remain unexposed, costs will almost certainly increase, any such increase will be passed on to the public, and the field of providers of legal services may well be reduced. All of this is likely to occur without any increase in the quality of representation.

77) For all of the reasons set out above the Bar Council submits that the payment of referral fees should be prohibited.

78) Finally, the Bar Council invites the LSB to make representations to the LSC to clarify the effect of the *Unified Contract Standard Terms 2007* and the *2007 Funding Order* so as to make it clear that both the payment and the receipt of any referral fee, and the practice of becoming "Instructed Advocate" in order to exploit the fund-holding position, are prohibited.

79) Whatever views the LSB might arrive at in relation to referral arrangements in privately funded work, the Bar Council submits in the strongest possible terms that there can be no half way house compromise in relation to advocacy, where the right of the consumer to the optimal choice of representative in court cannot be allowed to be prejudiced by referral fees.